
KEYNOTE ADDRESS*

“THE JUST, SPEEDY, AND INEXPENSIVE DETERMINATION OF EVERY ACTION?”

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On this seventy-fifth birthday of the Federal Rules of Civil Procedure, it is worth noting that the Rules are that rare public document that contains within its text the very metric for measuring its own success. Contrast, for example, the U.S. Constitution, which aims “to . . . secure the Blessings of Liberty to ourselves and our posterity”¹—an outcome not easily measured. But the Federal Rules say simply—in a phrase I first heard on my first day studying civil procedure—that they shall be construed and administered to achieve “the just, speedy, and inexpensive determination of every action.”²

I have puzzled over this phrase during more than thirty years of teaching procedure: I spent twenty representing human rights plaintiffs, ten years in the U.S. Government, usually representing defendants or amici in international and foreign relations disputes, and five years as a law school dean, considering how the legal academy should teach both procedure and globalization.

This anniversary raises three questions: First, after seventy-five years of these Rules, have the Rules satisfied their own standard? Second, if they

* This is a lightly footnoted adaptation of the Keynote Address that was delivered on November 16, 2013 for the *University of Pennsylvania Law Review*'s “Federal Rules at 75” Symposium at the University of Pennsylvania Law School. I am deeply grateful to the editors of the *Law Review* and to my friends, Professors Stephen Burbank, Tobias Wolff, Catherine Struve, and Dean Michael Fitts, for inviting me to Philadelphia, and to Judge Lee Rosenthal for her extraordinary introduction and friendship. I dedicate this keynote to my “Fathers-in-Procedure,” Arthur Miller and Geoffrey Hazard, who introduced me to the world of procedure at Harvard and Yale, respectively, and instilled in me a love of procedure that has stayed with me for more than three decades. *See generally* Harold Hongju Koh, Tribute, *Hazard*, 158 U. PA. L. REV. 1295 (2010).

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¹ U.S. CONST. pmbl.

² FED. R. CIV. P. 1.

have not, why not? And third, what does the future hold for the Rules, particularly as they face the challenge of globalization?

First, have the Rules in fact achieved the just, speedy, and inexpensive determination of every action? This Symposium presents a remarkable set of Articles commissioned to answer this very question. Do these rules promote “just” determinations or outcomes characterized by equality,³ participation, and fairness? Judith Resnik’s article on citizen access for private enforcement⁴ and Kevin Clermont and Theodore Eisenberg’s consideration of “plaintiphobia in the Supreme Court”⁵ express concern about whether the Rules actually promote equality. Alex Reinert’s article further explores whether the Rules still ensure a meaningful day in court before a jury of one’s peers.⁶ These articles make clear that the phenomenon of the “vanishing trial” is not easily squared with the Rules’ rhetorical commitment to resolution of disputes on the merits rather than on technicalities.

How speedy are these determinations? In 1951, the median time from filing to disposition for tried cases was 12.2 months. In 1962, that number was sixteen months. Since 1990, the median time to disposition for all terminated cases is only seven to eight months. But as of 2012, the median time from filing to disposition remains twenty-three months in those cases where there is a trial, which, of course, these days are only one percent of all cases.⁷

Are these determinations inexpensive? A recent Federal Judicial Center study suggests that, in fact, higher litigation costs have resulted from a number of factors, including higher litigation stakes, longer processing times, attorneys’ fees,⁸ e-discovery, large firm engagement, case complexity, and a series of nonmonetary collateral issues.⁹

Finally, what about reaching a final “determination” of every action? Even as we have more *terminations*, our current system seems to give us

³ See generally William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002).

⁴ Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793 (2014).

⁵ Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Supreme Court* (Dec. 26, 2013) (unpublished manuscript) (on file with author).

⁶ Alex Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014).

⁷ These statistics are from Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

⁸ See generally Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *Attorneys’ Fees in a Loser-Pays System*, 162 U. PA. L. REV. 1619 (2014).

⁹ See generally EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., *LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS* (2010).

fewer *determinations*. In 2013, only slightly over one percent of more than 250,000 civil terminations in the federal courts over the previous twelve consecutive months occurred after reaching trial.¹⁰ As Owen Fiss recognized three decades ago, such statistics call into question whether settlement is invariably a good thing, and whether, in too many cases, a fixation on achieving settlement has prioritized clearing dockets over doing justice.¹¹

In sum, even by the Rules’ own standard, the interim report card seems decidedly mixed: Is today’s civil process just? Sometimes no. Is it speedy? Relatively. Inexpensive? Not really. Are there determinations of every action? Terminations, yes, but not necessarily “determinations.”

Nearly eighty years ago, Charles Clark, my revered predecessor as Dean of Yale Law School, suggested three basic premises by which the Rules’ drafters intended the Rules to promote justice:¹² first, simplicity of plain, nontechnical language; second, trans-substantivity¹³—as expressed in the famous phrase, “[t]here shall be one form of action—the civil action”; and third, a liberal philosophy with regard to construction, amendment, joinder, discovery, and party control, all designed to lower barriers to trial and to promote adjudication on the merits, not on the pleadings.

Justice Hugo Black, in language that was later dropped from his landmark opinion in *Conley v. Gibson*, made plain that: “The Federal Rules . . . accept the principle that pleadings simply serve as a useful means to facilitate a proper decision on the merits. . . . Under [Federal Rule of Civil Procedure 8] the best cause, not the cleverest pleader, is to prevail.”¹⁴ Later, in *Surowitz v. Hilton Hotels Corp.*, Justice Black affirmed that “[t]he basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.”¹⁵

¹⁰ ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2013 tbl.C-4 (2013), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/Co4Mar13.pdf>.

¹¹ Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L. J. 1073 (1984).

¹² Compare Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1941–1943), with Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517 (1925).

¹³ This now-canonical term was coined in Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975). See generally Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155 (2006).

¹⁴ Hugo L. Black, First Draft Opinion in *Conley v. Gibson* 7 (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 332).

¹⁵ 383 U.S. 363, 373 (1966).

Given this high rhetoric and lofty aspiration, why do so *few* cases ever get to trial today? One might call it the “8-12-23-56 problem.”¹⁶ Fewer cases get to trial after *Twombly*¹⁷ and *Iqbal*,¹⁸ sometimes referred to jointly as *Twiqbal*, because they are dismissed on the pleadings under Federal Rules 8 and 12.¹⁹ *Twiqbal*’s new requirements of “plausibility pleading” impose severe information asymmetries upon civil rights and human rights plaintiffs who are expected at the outset of actions to offer nearly conclusive demonstrations of defendants’ intent.²⁰ As Tobias Wolff’s article discusses, after *Wal-Mart*, *Comcast*, *Concepcion*, and *American Express*, aggregate cases increasingly are not certified as classes under Rule 23 or are decertified after initial class action certification.²¹ Under Rule 56, as interpreted by the *Celotex* trilogy,²² cases are dismissed at summary judgment or managed to a single issue and settled. They are foreclosed because of judicial gatekeeping of expert evidence under the Supreme Court’s standard in *Daubert*.²³ More cases are diverted to arbitration under the Federal Arbitration Act;²⁴ and more cases are dismissed for a lack of jurisdiction—subject matter or personal—whether for a lack of specific jurisdiction after *McIntyre*²⁵ or for a lack of general jurisdiction after *Goodyear*.²⁶

¹⁶ This numerical formulation borrows from Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731 (2014).

¹⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁸ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁹ *Cf. Reinert*, *supra* note 6.

²⁰ *Cf. Rodger D. Citron, A Life in the Law: An Interview with Drew Days*, 30 TOURO L. REV. 153, 175 (2014) (“*Twombly* and *Iqbal* were transparently about limiting access to courts; [*Iqbal* has] shifted the focus from the summary judgment stage back to the pleading stage, the actual filing of the complaint I have no doubt that even if cases are still being heard that are fairly thin in terms of the allegations . . . the word is out that the federal courts are not hospitable to certain types of . . . claims. And so why go there? What is the point? And I think that has been very, very unfortunate. Both *Twombly* and *Iqbal* have done real damage.” (quoting Drew S. Days, III, former Solicitor General and Assistant Attorney General for the Civil Rights Division)). *See generally* Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663 (2014).

²¹ *See* Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PA. L. REV. 1897 (2014).

²² *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *See generally* Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006).

²³ *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 313 (2013).

²⁴ 9 U.S.C. § 1 (2012).

²⁵ *J. MacIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

²⁶ *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011).

Severally, none of these phenomena may be entirely new, but what are their collective consequences? In three quarters of a century, we have moved from a culture of trial to a culture of settlement and dismissal. Cases are terminated earlier based on less information about the claim, the evidence, or the merits. And the values of efficiency and cost reduction have been privileged over other systemic values, particularly the dignitary notion that every litigant deserves his or her day in court.

This tangled evolution is perhaps best synthesized in Arthur Miller’s magisterial New York University Professorship lecture, which I commend both because of the completeness of his analysis and the passion of his discussion.²⁷ His questions obviously were: Is this really our conception of due process?²⁸ Does this privilege Posner’s blunt notion of cost-minimization²⁹ over Michelman’s³⁰ and Mashaw’s³¹ emphasis on fraternal values like dignity and participation? Do we really want our system of procedure to privilege instrumental, Benthamite notions of due process based on cost–benefit analysis over intrinsic Kantian notions of dignitary fairness?

In such a world, who loses? Plaintiffs and under-resourced litigants lose, juries almost never sit to decide cases, and novel claims lose. Perhaps the greatest loss is that judges give up their traditional function as adjudicators and become “terminators.” As Judge William Young said at this Symposium, judges sit to close cases; they are increasingly seen and see themselves as gatekeepers, managers who administer techniques of settlement and dismissal. When you cannot measure what is important, you tend to make important what you can measure. And so like anyone else in the workplace, judges tend to do what is measured, and what is measured and valued in today’s courthouses is how many cases are closed, not how justly they are decided.

Obviously, 1938 was a simpler world, dominated by bipolar, adversarial, and private law adjudication, what Abram Chayes³² and Richard Marcus³³ called “our received tradition”—private claims, simple party structures, and

²⁷ Arthur R. Miller, University Professorship Lecture at New York University School of Law: Are They Closing the Courthouse Doors? (Mar. 19, 2012), available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_072088.pdf.

²⁸ Cf. Subrin & Main, *supra* note 7.

²⁹ Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

³⁰ Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights* (pts. 1 & 2), 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527.

³¹ See generally JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* (1985).

³² See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abram Chayes, *The Supreme Court, 1981 Term—Foreword, Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

³³ See generally Richard Marcus, “Looking Backward” to 1938, 162 U. PA. L. REV. 1691 (2014).

passive judicial decisionmakers dedicated to private dispute resolution based on a retrospective damages remedy.

But we all know that the rules have necessarily adapted to rapid changes in technology, the rise of interest group politics, regulation and the administrative state, the pervasiveness of Alternative Dispute Resolution, and the globalization of markets, rights, and communication: all of which have led to at least three types of complex litigation.

The first and most famous, now canonically inserted into all procedure courses, is the so-called “heroic model” that Richard Marcus writes about in today’s Symposium:³⁴ the “domestic public law litigation” that Abe Chayes celebrated and the institutional reform litigation described by Owen Fiss.³⁵ In contrast to private law adjudication, public law litigation is prospectively focused, characterized by complex claims and structures, and by inquiring active judges who use injunctive powers to fix wrongful systems, like prisons and hospitals, with their goal being as much enunciation of public norms as resolution of private disputes.

A second form of complex litigation, as Kenneth Feinberg reminded us at this Symposium, is “mass tort litigation.” Such litigation attempts to sort out large-scale disasters, toxic torts, and products liability imbroglios: ostensibly private lawsuits that are now increasingly infused with the public interest. While many of these cases are still resolved through tort litigation, just as often these days, some lead to the creation and distribution of mass tort compensation funds—like the 9/11 Fund, the BP Oil Spill Fund, and the Boston Marathon case—for each of which Kenneth Feinberg has become, quite literally, the master.

In the late 1980s and early 1990s, I pointed to the rise of a third kind of complex litigation—“transnational public law litigation”³⁶—in which transnational litigants bring a transnational party structure and a transnational claims structure into domestic court. By so doing, they help generate judgments that can be used as judicially created bargaining chips in other political fora, with their aim generally being norm enunciation and transportation of those norms to trigger institutional dialogue with political actors and to effect changes in public policy.

³⁴ *Id.*

³⁵ Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

³⁶ See Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT’L L.J. 169, 195 (1987); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348 (1991).

Increasingly, these transnational cases are playing a central role in our procedure curriculum. *Iqbal*,³⁷ for example, was at bottom a 9/11 case, while our Transnational Civil Procedure canon now routinely includes such international cases as *Daimler*,³⁸ *Goodyear*,³⁹ *McIntyre*,⁴⁰ *Helicopteros*,⁴¹ *Asahi*,⁴² *Volkswagenwerk*,⁴³ *Aerospatiale*,⁴⁴ *Bremen*,⁴⁵ and *Piper*.⁴⁶

Historically, the Federal Rules have shown remarkable flexibility in adapting to all three of these complex litigation paradigms: domestic and transnational public law litigation and mass torts. But these cases have also tested core architectural assumptions about whether trans-substantivity, uniformity, and simplicity are possible, and just as important, whether the just, speedy, and inexpensive determination of these very different types of cases is actually achievable by a single set of procedural rules. If procedure is in fact power, do the Federal Rules still have power to ensure due process in this complex twenty-first century world of mass torts and transnational public law litigation? Can a single set of Federal Rules still ensure the just, speedy, and inexpensive determination of every action? And in this—what Subrin and Main now call procedure’s “fourth era”⁴⁷—to what extent will procedure end up dictating substance?

In their contributions to this Symposium, Judith Resnik and Edward Purcell warn that procedural rules are increasingly used to divert important public law cases to settlement fora that refuse to enunciate public norms. Insensitive enforcement of procedural rules can foster unequal treatment among similarly situated parties and claims and thus discourage participation of the otherwise voiceless. Had *Iqbal* been the law, for example, the transnational public lawsuit that my Yale students and I undertook on behalf of Haitian refugees might never have made it into court.⁴⁸ And, as Stephen

³⁷ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

³⁸ *Daimler AG v. Bauman*, No. 11-965 (U.S. Jan. 14, 2014).

³⁹ *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011).

⁴⁰ *J. McIntyre Mach. Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

⁴¹ *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

⁴² *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987).

⁴³ *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

⁴⁴ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987).

⁴⁵ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

⁴⁶ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). For a review of many of these decisions, see generally HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* (2008).

⁴⁷ Subrin & Main, *supra* note 7.

⁴⁸ The story of that frenetic litigation, now the subject of a number of twentieth-anniversary symposia, is recounted in BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT AND WON* (2005); BRANDT GOLDSTEIN, RODGER CITRON & MOLLY BEUTZ LAND, *A DOCUMENTARY COMPANION TO STORMING THE*

Burbank and Sean Farhang show in their penetrating article, restrictive readings of the Federal Rules can significantly limit meaningful private enforcement of public policy.⁴⁹

If what I have identified are the emerging trends in twenty-first century civil procedure, then which institution is best positioned to adapt the 1938 Rules to the procedural demands of an era of globalization? Which institutions should do less and which should do more to address pressing questions of procedural reform? As is often the case, where you stand on this issue depends on where you sit as a scholar. Some at this Symposium, whom I call the “procedural proceduralists,”⁵⁰ tend to believe that procedural reform should be dictated primarily by the internal imperatives of the procedural system: that is, by measuring the procedural effects on particular cases that will be brought about by particular rule adjustments.

“Meta-proceduralists,”⁵¹ by contrast, tend to believe—at a structural, holistic level—that procedural modifications inevitably influence substantive macro-outcomes. Meta-proceduralists take a broader, systemic view, focusing on “the structures of procedure, a globally rationalist and reformist perspective, and liberal use of comparative and extra-legal materials” to understand the broader substantive impacts of procedural reform.⁵²

Despite these philosophical differences, the interests of these two schools converge when it comes to picking preferred authors of procedural reform. Neither would call for Congress to be the prime reformer of the Federal Rules, at least not in the first instance. Congress will not act in this area without interest group politics pushing it, and, unless its members have received detailed input from legal experts, the rules they will adopt will not likely be balanced with respect to opposing parties. While some legislative reform has been pro-plaintiff—for example, the Equal Access to Justice Act⁵³ and the Class Action Fairness Act⁵⁴—most of Congress’ contributions

COURT (2009); Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); Harold Hongju Koh, *YLS Sale Symposium: Sale’s Legacies*, OPINIO JURIS (Mar. 17, 2014, 11:54 AM), <http://opiniojuris.org/2014/03/17/yls-sale-symposium-sales-legacies/>.

⁴⁹ Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

⁵⁰ The Reporters of the Rules, Edward Cooper and Richard Marcus, for example, are sterling exemplars of this category.

⁵¹ See William Eskridge, *Metaprocedure*, 98 YALE L.J. 945, 954 (1989) (reviewing ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* (1988)). “Meta-proceduralists” include, for example, Edward Purcell and my Yale colleagues William Eskridge, Judith Resnik, Owen Fiss, and the late Robert Cover.

⁵² See *id.*

⁵³ 28 U.S.C. § 2412 (2012).

⁵⁴ Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C. (2012)).

in this area have been strikingly anti-plaintiff, particularly the “Contract with America” legislation, the Private Securities Litigation Reform Act,⁵⁵ and the Prison Litigation Reform Act.⁵⁶

Nor has the Supreme Court made a strong case for being designated the preferred agent for procedural reform. If anything, procedural rules in a broad range of areas have been made muddier, not clearer, by recent Supreme Court rulings. The Justices are accustomed to deciding individual cases and controversies, and thus they tend to adopt “I know it when I see it” tests, based more on particularistic concerns driven by the facts of particular cases than on a systemic overview of the procedural system.

In the latest iterations of the *Erie*⁵⁷ doctrine, for example, *Shady Grove*⁵⁸ held that Federal Rule 23 applies to displace any contrary state law, while *Gasperini*⁵⁹ confusingly held that a federal court could apply a state’s standard for excessive compensation awards without detriment to the Seventh Amendment, so long as the federal judge applies a state review standard and is reviewed under an appellate “abuse of discretion” standard. While defining the scope of subject matter jurisdiction against foreign corporations under the Alien Tort Claims Act in the recent *Kiobel* decision, Chief Justice Roberts suggested that dismissal should turn on the amorphous test of whether the claims “touch and concern” the United States.⁶⁰ In *Grable v. Darue*, Justice Souter used even more perplexing imagery to opine that a missing cause of action was not “a missing federal door key, always required, but . . . a missing welcome mat, required in the circumstances.”⁶¹ In *Iqbal*, Justice Kennedy suggested the judges could determine plausibility by “draw[ing] on its judicial experience and commonsense,” a perfect illustration of an “I know it when I see it” mentality.⁶² But given, as Alex Reinert has pointed out, that judges now have far fewer trials and therefore less trial

⁵⁵ Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C. (2012)).

⁵⁶ Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered titles and sections of the U.S.C.).

⁵⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁵⁸ *Shady Grove Orthopedics Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

⁵⁹ *Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996). See generally Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987 (2011) (discussing the two cases).

⁶⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013). But see Sarah H. Cleveland, *The Kiobel Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT’L L. 8 (2014).

⁶¹ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 318 (2005).

⁶² *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

experience, how exactly are they supposed to acquire this requisite judicial experience and common sense?⁶³

In *Goodyear*, Justice Ginsburg pronounced that general jurisdiction should turn on whether a corporation is “at home,” without clarifying exactly what that term means.⁶⁴ Yet during the recent oral argument in *Daimler AG v. Bauman*, Justice Ginsburg implied that *Goodyear*’s “home” was supposed to be limited to the corporation’s domicile or principal place of business.⁶⁵ To which one’s obvious retort was, “Then why didn’t you put that objective test into the *Goodyear* opinion, rather than using the subjective term ‘at home,’ to describe the orientation of an artificial corporation that surely has no subjective feelings about when it is or is not ‘at home?’”

What elevates this clutch of individual decisions into a broader culture of “plaintiphobia” is that the Justices have a set of concerns about a particular kind of case that they apply to whatever issue arises before them.⁶⁶ They thus tend to doubly and triply compensate for their concerns about disfavored lawsuits. Thus, when constitutional or human rights tort claims are brought against government officials, today’s judges tend first to question whether there is a legally cognizable right at issue. Citing *Iqbal*, they then suggest that whatever right exists was not pleaded with sufficient specificity. In a *Bivens* case,⁶⁷ they decline to imply a right of action, and if immunities are pleaded, they tend to find immunity. They question the plaintiff’s standing, and then, with respect to timing, they tend to conclude that it is not yet ripe, until it turns out that it has finally become moot. We see this most clearly in an Alien Tort case like *Daimler*, where different Justices suggested during oral argument that the case be dismissed for a lack of subject matter jurisdiction, personal jurisdiction, venue, and failure to state a claim upon which relief can be granted.⁶⁸ So are the Justices really ruling on the most valid ground for decision or do they just dislike these cases, so that whatever ground happens to be the most insistently raised by defendants will be the one the Court invokes to dismiss the case?⁶⁹

⁶³ See Reinert, *supra* note 6.

⁶⁴ *Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2851 (2011).

⁶⁵ Transcript of Oral Argument at 51-52, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-965_1647.pdf.

⁶⁶ See Clermont & Eisenberg, *supra* note 5.

⁶⁷ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

⁶⁸ Transcript of Oral Argument at 51-52, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (No. 11-965), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-965_1647.pdf.

⁶⁹ See, e.g., *Daimler AG v. Bauman*, No. 11-965, slip op. at 22 (U.S. Jan. 14, 2014) (citing *Kiobel* for the proposition that “[r]ecent decisions of this Court, however, have rendered plaintiffs’ [Alien

If Congress and the Court should do less, who should do more?

Let me suggest the professional "procedure community": those stakeholders in the formal federal rulemaking process, including such interested governmental entities as the Federal Judicial Center, private groups like academia, think tanks like the RAND Institute for Civil Justice, professional associations like the ABA, nongovernmental critics of the litigation process, and blue-ribbon legal organizations like the American Law Institute (ALI), which has done admirable work on aggregate litigation, transnational rules of civil procedure, and is now starting a long-term project to produce the *Restatement (Fourth) of the Foreign Relations Law of the United States*.

We need more formal federal rulemaking on these issues, not higher standards of procedure set by the Supreme Court on a case or controversy basis without having first vetted them through the federal rulemaking process. Ironically, the Supreme Court itself has repeatedly directed that the best way to amend the Federal Rules is by formally amending the Rules, not through judicial interpretation.⁷⁰ In 1993, the Court announced unanimously that a change to Rule 8 "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."⁷¹ Six years later, speaking of Rule 23, the Court declared that "we are bound to follow [the Rule] as we understood it upon its adoption," and "are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."⁷² Yet contrary to this directive, judicial interpretations spurred the heightened standards under Federal Rules 8, 23, and 56, without being the results of a careful formal, and inclusive federal rulemaking process.

Why is formal federal rulemaking preferable to ad hoc rulemaking by the Court or Congress? First, it would help depoliticize procedure, which has become increasingly politicized in recent years. Second, a more formal process checks market ideology and the "case or controversy driven" triple-counting orientation of the current Justices. Third, formal rulemaking has a quasi-administrative law feel, with the federal rulemaking committees being accorded a *Chevron*-style deference to their rulemaking expertise. Fourth, federal rulemaking is done in good measure by trial and appellate court judges, giving the judges who actually operate at the front lines of the trial process meaningful input into the evolution of the Federal Rules. Fifth, formal rulemaking permits interest-group politics but on a more constrained

Tort Statute] and [Torture Victim Protection Act] claims infirm," but proceeding nevertheless to hold that the case should be dismissed for lack of personal jurisdiction).

⁷⁰ See Edward A. Purcell, Jr., *supra* note 16, at 1737 (citing *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

⁷¹ *Leatherman*, 507 U.S. at 168.

⁷² *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999).

basis than the political free-for-all that now unfortunately infects our federal legislative process. Finally, precisely because formal rulemaking is slow and deliberate, it pushes towards consensus solutions. As Geoffrey Hazard's Transnational Civil Rules project for the ALI demonstrates, a process that invites and weighs diverse inputs also allows for thoughtful global comparisons and for learning from other procedural systems.⁷³

Over seventy-five years, the formal federal rulemaking process has undeniably been slow, but on the other hand, it has become more inclusive. Because the rulemaking process provides for Congress to delegate rulemaking responsibility downward to, in turn, the Supreme Court, the Judicial Conference of the United States, the Standing Committee on Rules of Practice and Procedure, and the Reporters and Advisory Committee on the Federal Civil Rules, the rule changes that subsequently flow back upward tend to be fully vetted—and thus more likely to reflect consensus and less likely to generate controversy than ad hoc judicial rule changes.

Take just one example: the “point-counterpoint proposal” for amending Federal Rule 56, which included testimony from experienced judges and empirical studies on differences in local rules and time-to-disposition.⁷⁴ After an exhaustive public comment process, the federal rulemakers concluded, “it became clear that imposing the point-counterpoint procedure as the default national standard would be viewed as favoring defendants at the expense of plaintiffs,” in a way that was not apparent when the rule change was first proposed.⁷⁵ And it is precisely because multiple decisionmakers must sign off on formal Federal Rule changes, as *Hanna v. Plumer* famously recognized nearly half a century ago, that formal Federal Rules have traditionally been given more deference than the “typical, relatively unguided *Erie* choice.”⁷⁶

None of this denies the need for tools enabling prudent judicial management. As Don Elliott pointed out some years ago, many of the managerial

⁷³ Professor Hazard's role in the ALI Transnational Civil Rules project is described in Koh, *supra* note 3, at 1298-99.

⁷⁴ See Mark R. Kravitz, David F. Levi, Lee H. Rosenthal & Anthony J. Scirica, *They Were Meant for Each Other: Professor Edward Cooper and the Rules Enabling Act*, 46 MICH. J.L. REF. 495, 521-24 (2013).

⁷⁵ See *id.* at 522-23 (“Judges in districts that had tried point-counterpoint and abandoned it came to ask the Civil Rules Committee not to recommend a change to Rule 56 that would impose the procedure on a national basis. Judges with experience both in districts with it and without it made similar pleas.”).

⁷⁶ 380 U.S. 460, 471 (1965) (recognizing that when “the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the [Rules] Enabling Act nor constitutional restrictions”).

judging tools that courts have evolved are akin to the "panda's thumb:"⁷⁷ ad hoc evolutionary devices developed to deal with particular systemic problems, such as delay and litigant misbehavior.⁷⁸ I have little doubt that increased attorney discretion led to the need to develop more tools of judicial discretion, many of which are now embodied in the Federal Rules. But as Subrin and Main note, those Rules originally celebrated equity and discretion.⁷⁹ So how can wiser and more equitable discretionary standards be embedded into a more formal set of federal rule amendments?

Here is where the legal academy, with its continuing deep engagement in the rulemaking discussion, can and should play a constructive role. Many rule revisions have been spurred by academic input. This Symposium's papers on procedural scholarship show that empirical academic work has been extraordinarily useful in measuring the impact of *Twiqbal*, for example, and in testing commonsense judicial assumptions against empirical fact.

But let me suggest that, going forward, the most important and useful scholarship may be neither domestic nor procedural. Other parts of the legal academy can bring to bear and integrate into procedure insights regarding the emerging law of transnationalism, cyberspace, and federalism. Law and society approaches to dispute resolution can call upon historical, comparative, and anthropological studies to explain better how dispute-settlement methods are changing in different societies to respond to an age of globalization. And there is clearly a pressing need for interactive dialogue among the judiciary, Congress, and academics about complex issues of transnational and foreign relations law. To take just one example, in the early 1980s, Judge Harry Edwards called for more academic scholarship on international norms when he and then-Judge Bork debated the meaning of the Alien Tort Claims Act in the *Tel-Oren* case.⁸⁰ His call triggered a robust, decades-long debate among academics, Congress, the judiciary, and lawyers on human rights, procedure, and federal jurisdiction that continues to this day, and that has not abated despite the Supreme Court's recent, confusing engagements with that statute in *Sosa v. Alvarez-Machain*⁸¹ and *Kiobel v. Royal Dutch Petroleum Co.*⁸²

⁷⁷ See generally STEPHEN JAY GOULD, *THE PANDA'S THUMB: MORE REFLECTIONS IN NATURAL HISTORY* (1980).

⁷⁸ E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986).

⁷⁹ Subrin & Main, *supra* note 7.

⁸⁰ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

⁸¹ 542 U.S. 692 (2004).

⁸² 133 S. Ct. 1659, 1669 (2013).

It is time to accept a bitter truth: many of the intellectual concepts traditionally applied to procedure have lost their meaning in an age of globalization. What, for example, do “minimum contacts” really mean in a world where commercial activity is increasingly accomplished by sending computer signals? What significance should be given to the “physical presence” test of *Burnham v. Superior Court*⁸³ when we are increasingly conducting personal and professional business in a virtual universe? What does it mean to talk about state courts intruding into the “territorial sovereignty” of sister states when modern international lawyers increasingly think of sovereignty not as simple defense of territory but as complex assertions of interest and influence within global regulatory fora?⁸⁴ Is a defendant “purposefully availing” herself of the legal protections of a state when she “contacts” that state only via the Internet? And what is the “notice reasonably calculated, under all the circumstances, to apprise an interested party of the pendency of the action”⁸⁵ in an age where even children can reliably send and receive text messages hundreds of times faster than a process server can accomplish in-hand service?

One particularly useful academic field could be “comparative internalization studies”: scholarly examination of the various legal techniques that different societies have employed to internalize and implement domestically the same international standards. In the trade area, for example, John Jackson and his colleagues have done an outstanding job showing how different nations internalized the international trade standards reached in the Tokyo and Uruguay Rounds of World Trade Organization negotiations.⁸⁶ During my time as Legal Adviser, Stephen Burbank and Linda Silberman worked assiduously with me on a parallel project to implement into U.S. law the Hague Convention on Choice of Courts, an important private international law treaty.⁸⁷ That exercise convinced me that the Supreme Court’s recent nationalist jurisprudence in *Medellin v. Texas*⁸⁸ has confused some parts of the procedure community, particularly the Uniform

⁸³ 495 U.S. 604, 618 (1990).

⁸⁴ See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing CHAYES, *supra*; THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

⁸⁵ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁸⁶ See JOHN H. JACKSON & ALAN SYKES, *IMPLEMENTING THE URUGUAY ROUND* (1997); JOHN H. JACKSON, JEAN-VICTOR LOUIS & MITSUO MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* (1984).

⁸⁷ See generally Stephen B. Burbank, *A Tea Party at the Hague?*, 18 SW. J. INT’L LAW 629 (2012); Stephen B. Burbank, *Whose Regulatory Interests? Outsourcing the Treaty Function*, 45 N.Y.U. J. INT’L L. & POL. 1037 (2013).

⁸⁸ 552 U.S. 491 (2008).

Law Commission, about exactly where current law requires the federal–state balance to be struck when implementing procedural treaty norms into U.S. domestic law.

Finally, a more inclusive process would help us to address the difficult question of which aspects of procedure should be treated as private or public. To take just one example, in the 1993 Haitian refugee litigation, where I was counsel to the Haitian class plaintiffs, we won a permanent injunction after a trial ruling that under certain circumstances, aliens involuntarily detained in Guantanamo have due process rights.⁸⁹ The U.S. government advised us that they would release more than 200 HIV-positive bona fide Haitian refugees being detained in Guantanamo, so long as we were willing to vacate that important precedential ruling by settlement. As public interest lawyers charged with zealous representation of our clients, we had no real choice. We had to secure the release of our Haitian clients, even if that meant a hard-won due process precedent that might be needed for future public interest cases would be vacated. And thus, fatefully, when the Bush administration decided in early 2003 to bring alleged Al Qaeda detainees to Guantanamo, there was no binding circuit precedent according them due process rights.⁹⁰

Today, however, that vacatur by settlement would be judicially scrutinized under the Supreme Court’s subsequent ruling in *U.S. Bancorp Mortgage v. Bonner Mall Partnership*,⁹¹ which raises the question of whether such lawsuits and the rulings they produce should be treated as a kind of public trust, as opposed to the private property of the litigants. Judge Young said at this Symposium that the lawsuit belongs to the litigants. But isn’t it equally true that when a litigation addresses important public norms—as do complex suits that fit the three complex paradigms that I have described—“domestic public law litigation,” “mass tort litigation,” and “transnational public law litigation”—we should also consider that case as the public’s lawsuit, which should not be pushed single-mindedly to settlement without fuller appreciation of the important public values it may articulate?

⁸⁹ *Haitian Ctrs. Council v. Sale*, 823 F. Supp. 1028, 1041-42 (E.D.N.Y. 1993), vacated by Stipulated Order Approving Class Action Settlement Agreement (Feb 22, 1994).

⁹⁰ This story is recounted in GOLDSTEIN, *supra* note 48, at 298-300, 309-11, 373-75; GOLDSTEIN, CITRON & LAND, *supra* note 48, at 220-33.

⁹¹ 513 U.S. 18, 26 (1994) (“[O]ur holding must also take account of the public interest. ‘Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.’” (citation omitted)).

It was precisely because of this notion of class actions as a quasi-public trust that Federal Rule 23 was revised to require that “[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”⁹² Surely, there are some cases where the need for speedy dispute resolution may be far greater than the need for norm enunciation, but there are just as clearly cases where the opposite is true. As we press to make procedural rules more efficient, we must also ensure that procedural rulemaking does not diminish our public judicial capacity to contest public norms openly and generate governing norms with substance on novel issues.⁹³ In short, we must constantly ask not just, “How can we settle more cases?” but also, “What if they had settled *Brown v. Board of Education*?”⁹⁴ Would the law, or the world, now really be in a better place?

To conclude, the Federal Rules have partially achieved—but only partially—their own self-stated goal of the just, speedy, and inexpensive determination of every action. That this goal remains partly unrealized is no one’s fault. In good measure, the Rules simply have not evolved fast enough to keep up with grand social change: stunning revolutions in technology, communication, globalization, and human rights. The steady march towards earlier dispositions has been understandable and acceptable, but only to a point. Going forward, we need to understand better how our procedural system writ large—not just individual rules—weighs the relative values of dispute resolution versus norm enunciation, and the relative concerns of the haves versus the have-nots. We need periodic systemic reform to keep the Rules relevant through a more inclusive process of federal rulemaking overseen by the professional procedure community, not through a welter of ad hoc judicial decisions and reactive legislation.

When I first began teaching law more than three decades ago, international law and procedure were considered a rare combination. But over the years, my fields have merged. Increasingly, procedure is power, procedure is global, and rules of procedure will allocate lawsuits and decisions not just within the United States, but among fora scattered around the world.⁹⁵ If litigants fail to get relief in U.S. courts, rest assured that they can and will go to other courts to get the legal interpretations they seek. They will use

⁹² FED. R. CIV. P. 23(e).

⁹³ See Resnik, *supra* note 4.

⁹⁴ 347 U.S. 483 (1954).

⁹⁵ See, for example, the doctrine of *forum non conveniens* after *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

these interpretations to generate political pressure to change the status quo, triggering what I long ago called “transnational legal process.”⁹⁶

At the end of the day, my message is simple: as U.S. law goes global, so too must its governing rules of procedure. And as procedure goes global, so too must go the procedure community that makes and revises these rules to make them fit a rapidly changing environment. That is how at least one internationalist invited to this seventy-fifth birthday party has come to think about these Rules we have all come to know so well. If we take the procedure community global over the next seventy-five years, it may still be possible, even in a time of breathtaking change, to achieve the enduring goals of the Federal Rules: justice, speed, inexpensiveness, equality, trans-substantivity, citizen access, and the private enforcement of public policy.

⁹⁶ See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).