Washington Law Review

Volume 61
Number 4 *Dedicated to Robert Meisenholder*

10-1-1986

The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure

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THE FEDERAL RULES IN STATE COURTS: A SURVEY OF STATE COURT SYSTEMS OF CIVIL PROCEDURE

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I. INTRODUCTION

In 1960 Professor Charles Alan Wright published a comprehensive survey[1] of the degree to which the Federal Rules of Civil Procedure[2] had been adopted as the model for practice in state courts. Professor Wright's survey confirmed Judge Charles E. Clark's[3] observation of an "accelerating trend in the states toward adoption of the federal rules."[4] Then barely two decades old, the Federal Rules appeared to be the harbinger of substantial uniformity in American civil procedure.[5]

In this article we present a new survey of the civil procedures of the fifty states and the District of Columbia. We seek to identify those jurisdictions that have systematically replicated the Federal Rules as the basis for practice before their civil courts. We also seek to identify states whose civil procedures are more loosely modeled on the Federal Rules, paying special attention to each state's procedural disparity from or conformity to the federal model for the pleading of a civil case.[6]

We share the interest of Judge Clark[7] and Professor Wright in the pace of

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The authors gratefully acknowledge the research assistance of Elizabeth Phillips of the Class of 1987, School of Law, University of California, Davis.

1. 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 9.1–9.53, at 46–80 (Wright ed. 1960) [hereinafter WRIGHT I].

2. The Federal Rules of Civil Procedure are hereinafter referred to interchangeably in the text as the "Federal Rules" or the "FRCP."

3. Judge Clark, the principal draftsman of the Federal Rules, held many distinguished titles in his remarkable career. *See generally* C. CLARK, PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK 1–2 (introduction by Wright & Reasoner eds. 1965). Professor Clark joined the Yale Law School faculty in 1919, became its Dean in 1929, and remained on its faculty throughout his service on the Second Circuit, on which he sat from 1939 until his death in 1963. We refer to him at all stages in his career as "Judge Clark."

4. WRIGHT I, *supra* note 1, *foreword* at iii.

5. *See generally id.* § 9, at 43–46 (uniformity "not an end in itself" but given "clearly superior" system of procedure under the FRCP "the proponents of uniform state rules of procedure patterned on the federal rules make a strong case").

6. *See infra* notes 27–31 and accompanying text.

7. Judge Clark enthusiastically documented the rapid progress of the "code pleading" system, which he championed as superior to the highly technical "issue pleading" system of the common law.

reform and the prospects for uniformity in American civil procedure. We undertook a nationwide survey to assess the degree to which state court civil procedure is now wrought in the image of the Federal Rules. Professor Wright has most recently written that "in more than half the states the [federal] rules have been adapted for state use virtually unchanged."[8] But more specific information has not been available,[9] and contemporary authors have had to make do with generalities in assessing the cross-currents of diversity and uniformity in modern American civil procedure.[10]

In the first edition of his great work on code pleading, published in 1928, Judge Clark noted that 28 states and 2 territories had adopted the Field Code and that none of the remaining 21 jurisdictions was purely a common law pleader. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 19–20 (1928) [hereinafter CLARK I]. While Judge Clark considered the exorcism of harsh common law technicalities from state pleading systems to be of preeminent importance in his first survey, *see id.* at 20, he also expressed hope that the flourishing spirit of procedural reform would lead to a uniform system of American civil procedure. *Id.* at 22. In arguing for vigorous implementation of the 1934 Federal Rules Enabling Act by the United States Supreme Court, Judge Clark and his Yale colleague, James William Moore, expressed the cognate hope that the yet-to-be-drafted federal rules might "properly be a model to all the states." Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387 (1935). As Reporter of the Advisory Committee charged with drafting the proposed federal rules, *see* C. CLARK, *supra* note 3, at 3, Judge Clark became the principal draftsman of this model and thereafter tracked its progress with paternal pride. In 1947, he updated his state-by-state survey in the second edition of his code pleading treatise, and classified those jurisdictions modeling their procedural systems upon the Federal Rules of Civil Procedure as members of the progressive group of "code jurisdictions." C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 24–25 (2d ed. 1947) [hereinafter CLARK II]. At this time, Judge Clark counted 29 states, the District of Columbia, and the entire system of federal trial courts as "code jurisdictions." *Id.* at 24–30. Of Judge Clark's original roster of states with codified systems of civil procedure, Arizona, Colorado, and New Mexico had converted to systems replicating the Federal Rules within three years of the rules' adoption, *see id.* § 10, at 50, and other states had adopted parts of the rules. *Id.* at 50–52. This flurry of activity following the rules' adoption prompted Judge Clark to conclude that national uniformity in systems of civil procedure was becoming a reality. *Id.* § 8, at 30–31.

8. C. WRIGHT, THE LAW OF FEDERAL COURTS § 62, at 406 (4th ed. 1983).

9. An interim revision of Professor Wright's 1960 survey was distributed in 1977. C. WRIGHT & F. ELLIOT, FEDERAL PRACTICE AND PROCEDURE: INTERIM PAMPHLET TO JURISDICTION AND RELATED MATTERS §§ 9–9.53, at 32–69 (1977) [hereinafter WRIGHT II]. Although it was originally contemplated that a revision of the 1960 survey would be included in the volumes on Jurisdiction and Related Matters, *see* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1008, at 66 n.41; *id.*, § 1012, at 73 n.23, no version of the survey appears in the final, hardbound volumes published as 13–19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS (1977–82 & 2d ed. 1984–86). Meanwhile the 1977 survey has been superseded by the bound volumes, and is no longer in general circulation. *But see* Rowe, *A Comment on the Federalism of the Federal Rules*, 1979 DUKE L.J. 843, 843 n.1 (citing Professor Wright's 1977 survey). Professor Wright kindly furnished us with a photocopy of his 1977 survey, but we have assumed that the bound volume containing the 1960 survey is more readily available to our readers. We have accordingly cited to the 1960 survey (WRIGHT I) in all instances where the cited material appeared in both the 1960 and 1977 versions.

10. *See, e.g.*, F. JAMES & G. HAZARD, CIVIL PROCEDURE § 1.7, at 21 ("well over half the states have adopted [the Federal Rules of Civil Procedure] in their entirety or in large part"); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 5.1, at 238–39 nn.14–15 (problematic list, without elaboration, of 32 ostensibly notice-pleading states and 3 examples of states with fact-pleading statutes).

We found the classification of current state systems of civil procedure to be unexpectedly complicated, primarily because of the pervasive influence of the Federal Rules on at least some part of every state's civil procedure.[11] But by fashioning a strict test for federal "replica" status[12] and by focusing on the pleading policy[13] of jurisdictions that fail this test, we were able to develop a reasonably sharp picture of state court conformity to the model of the Federal Rules.

We were surprised to find that only a minority of states have embraced the system and philosophy of the Federal Rules wholeheartedly enough to permit classification as true federal replicas.[14] Even more surprising was our discovery that when a looser test than replication was applied to classify states as generally following the model of the Federal Rules, the resulting tally embraced a majority of states but a minority of our national population.[15] This was also true if the criterion for affinity to the federal model of procedure was relaxed to the point of including any "notice pleading" jurisdiction.[16] Only if the standard of classification is simply a rules-based system of procedure rather than a procedural code can it be said that American civil procedure has predominately been made over in the image of the Federal Rules.[17] Moreover, the pace of state court conversion to replicas or close analogues of the federal model has slowed to a creep.[18]

II. SURVEY OBJECTIVES AND CLASSIFICATORY CRITERIA

A. Survey Objectives and Relationship to Previous Surveys

Both Professor Wright and Judge Clark have published previous nationwide surveys of American civil procedure. Each survey was revised and

11. *See* C. WRIGHT, *supra* note 8, § 62, at 406 ("The excellence of the rules is such that in more than half the states the rules have been adapted for state use virtually unchanged, and there is not a jurisdiction that has not revised its procedure in some way that reflects the influence of the federal rules.").

12. *See infra* notes 37–39 and accompanying text.

13. *See infra* notes 31 & 39–40 and accompanying text.

14. *See infra* Chart I in appendix.

15. *See infra* Charts II & VI in appendix.

16. *See infra* Charts III & VII in appendix.

There are other important features of the Federal Rules, such as liberal joinder policy, penetrating rights of discovery and effective summary judgment procedures, that are now close to universal in state practice. Our survey does not attempt to pick up every federal thread in the fabric of state civil procedure. Notice pleading seems the loosest classification that is in any strong sense constitutive of federal practice. Moreover, joinder, discovery and summary judgment rules are all satellites to liberal pleading policies in the overall system of procedure conceived by Judge Clark and embodied in the Federal Rules.

17. *See infra* Charts IV & VIII in appendix.

18. *See infra* Charts IX–XI in appendix.

reissued after nearly two intervening decades. The ambitions of these surveys, and the procedural reform they encouraged, have produced a new mold for our research.

Judge Clark's 1928 survey[19] eschewed exaggeration of the distinctions between the "code" and "common law" genres.[20] Judge Clark recognized that systems with different labels often differed in degree rather than in kind. Nonetheless, he cautiously sorted the states into three major groups: the code pleaders, the common-law pleaders, and the hybrids.[21] In so doing, Judge Clark looked to pleading rules and the merger of law and equity as "the most important characteristics" of codified systems of procedure.[22] When he revised his survey in 1947, Judge Clark did not revise his classificatory scheme; he treated the federal courts and the states that had modeled their civil procedure on the Federal Rules merely as a subset of the code pleading category.[23]

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19. CLARK I, *supra* note 7, § 8, at 19–22.

20. *Id.* § 8, at 20.

21. DISTRIBUTION OF PROCEDURAL SYSTEMS IN 1928:

CODE PLEADING JURISDICTIONS				
Alaska	Indiana	Missouri	North Carolina	South Carolina
Arizona	Iowa	Montana	North Dakota	South Dakota
Arkansas	Idaho	Nebraska	Ohio	Utah
California	Kansas	Nevada	Oklahoma	Washington
Colorado	Kentucky	New Mexico	Oregon	Wisconsin
Connecticut	Minnesota	New York	Puerto Rico	Wyoming
COMMON LAW PLEADING JURISDICTIONS				
Delaware	Florida	Maine	New Jersey	Vermont
District of Columbia	Illinois	New Hampshire	Rhode Island	Virginia
				West Virginia
HYBRID JURISDICTIONS				
Alabama	Maryland	Massachusetts	Mississippi	Tennessee
Georgia		Michigan		Texas
UNIQUE JURISDICTIONS				
Louisiana	Pennsylvania			

Source: CLARK I, *supra* note 7, § 8, at 19–22.

22. *Id.* § 7, at 18. Also important, but secondarily so in Judge Clark's view, were liberal rules of joinder of parties and "of rendering judgments in part for or against the various parties as the justice of the case may require (the *split judgment* of equity)." *Id.* at 19 (italics in original). The "split judgment" idea is the precursor of the modern partial summary judgment permitted by FRCP 56(d) and analogous state rules. *See* CLARK II, *supra* note 7, § 88, at 562 ("provision for partial summary judgment" is a "fundamental part of any effective . . . summary procedure").

23. DISTRIBUTION OF PROCEDURAL SYSTEMS IN 1947:

NON-FRCP CODIFIED STATES OR QUASI-CODIFIED STATES				
Alabama	Indiana	Minnesota	North Carolina	Texas
Alaska	Iowa	Missouri	North Dakota	Utah
Arkansas	Kansas	Montana	Ohio	Virginia
California	Kentucky	Nebraska	Oklahoma	Washington
Connecticut	Louisiana	Nevada	Oregon	Wisconsin
Georgia	Maryland	New Jersey	Pennsylvania	Wyoming
Idaho	Massachusetts	New Mexico	South Carolina	
Illinois	Michigan	New York	South Dakota	

In his 1947 survey Judge Clark recognized that the force of his codified/non-codified procedural classification was waning. "Classification of the states not listed" in his group of codified jurisdictions, he wrote, "is difficult, since all have departed substantially from the common-law system and all tend to approach, in quite varying degrees, the system embodied in the codes."[24] By the time of Professor Wright's 1960 survey, the important classification had become not the fact but the type of what Judge Clark considered codification. The procedural dichotomy apparent in Professor Wright's survey was between procedural systems retaining important features of "code pleading" and those systems modeled explicitly on the Federal Rules.[25] There were, wrote Professor Wright, "19 jurisdictions in addition to the federal courts" in which "rules substantially similar to the federal rules are in effect" to the degree that there is "but one procedure for state and federal courts."[26]

There was obvious difficulty in making a comparable statement in 1977, but only because the pervasive nationwide influence of the Federal Rules made classification difficult in that all states had adopted federal procedure to some degree.[27] To paraphrase Judge Clark, all states tend to approach, in

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FRCP JURISDICTIONS				
Arizona	Colorado	District of Columbia		
COMMON-LAW STATES				
Delaware	Maine	New Hampshire	Tennessee	West Virginia
Florida	Mississippi	Rhode Island	Vermont	

Source: CLARK II, *supra* note 7, § 8, at 23–31.

24. *Id.* at 26–27.

25. DISTRIBUTION OF PROCEDURAL SYSTEMS IN 1960:

MODELED ON FRCP				
Alaska	District of Columbia	Kentucky	New Jersey	Utah
Arizona	Hawaii	Maine	New Mexico	Washington
Colorado	Idaho	Minnesota	North Dakota	West Virginia
Delaware		Nevada	Puerto Rico	Wyoming
COMMON LAW				
Alabama	Georgia	Mississippi	Pennsylvania	Vermont
Florida	Maryland	New Hampshire	Rhode Island	Virginia
	Massachusetts		Tennessee	
CODE				
Arkansas	Indiana	Michigan	North Carolina	South Carolina
California	Iowa	Missouri	Ohio	South Dakota
Connecticut	Kansas	Montana	Oklahoma	Texas
Illinois	Louisiana	Nebraska	Oregon	Wisconsin
		New York		

Source: WRIGHT I, *supra* note 1, §§ 9.1–9.53, at 46–80.

26. *Id.* § 9, at 44, 45.

27. In the 1977 revision of his survey, Professor Wright did not offer a revised figure for the number of jurisdictions in which there was "but one procedure for state and federal courts." In summarizing the degree to which states had modeled their procedures on the Federal Rules, he declared only that "rules substantially similar to the federal rules are in effect in many states." WRIGHT II, *supra* note 9, § 9,

quite varying degrees, the system embodied in the Federal Rules. Despite the difficulty of classification, it is accepted as common knowledge that the Federal Rules are the dominant system of procedure in American law, not merely by merit but by headcount.[28] Is it really true that in most American jurisdictions there is "but one procedure for state and federal courts?"[29] If so, does it follow that most American litigation outside of the federal court system nonetheless follows a parallel procedural path?

B. Explanation of Classifications

1. Methodology

The system of classification we developed to answer these questions follows the methodology of Judge Clark in three important respects. First, we have classified the civil procedures of the states according to their characteristics as *systems* of procedures. Second, we do not exaggerate the precision of our classification scheme: at the margins of our categories, the differences are surely of degree rather than of kind. And third, we identify the criteria of classification to which we paid special attention in doubtful cases.

To anchor our attempt to classify state systems of civil procedure according to their degree of affinity to the federal model we devised the status of "Federal Rules replica." In the states to which we accord "replica status" it is true without significant qualification that there is "but one procedure for state and federal courts."[30] Using these jurisdictions as our

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at 32. In our view this is strong evidence of the difficulty of the question, and of the necessity for the new system of classification introduced by our survey. Employing the weaker test of classifying as within the federal camp those jurisdictions having rules "substantially similar to the federal rules," the array of states in 1977 as classified by Professor Wright was as follows.

MODELED ON FRCP				
Alabama	Georgia	Maine	North Carolina	Tennessee
Alaska	Hawaii	Massachusetts	North Dakota	Utah
Arizona	Idaho	Minnesota	Ohio	Vermont
Colorado	Indiana	Montana	Puerto Rico	Washington
Delaware	Kansas	Nevada	Rhode Island	West Virginia
District of Columbia	Kentucky	New Jersey New Mexico	South Dakota	Wisconsin Wyoming
COMMON LAW				
Maryland	Mississippi	New Hampshire	Pennsylvania	Virginia
CODE				
Arkansas	Florida	Louisiana	Nebraska	Oregon
California	Illinois	Michigan	New York	South Carolina
Connecticut	Iowa	Missouri	Oklahoma	Texas

28. *See supra* notes 8–10 and accompanying text.
29. WRIGHT I, *supra* note 1, § 9, at 45.
30. *Id.*

reference we classified all other states according to the kind and degree of their variation from replica status.

Simple side-by-side comparison of state rules of civil procedure and the Federal Rules, while useful for identifying potential federal replica jurisdictions, was only the threshold step in our identification of true federal replicas. After extensive scrutiny of ostensible state court adoptions of the Federal Rules, we determined that a nine point test was needed to distinguish systematic replication of the Federal Rules from state court rules of procedure that were merely aggregations of look-alike counterparts to particular Federal Rules.

In developing our criteria for replica status, we did not weight all procedural provisions equally. Following Judge Clark's lead, we treated those provisions governing pleadings and motions directed to pleadings as especially important, along with the merger of law and equity into one form of civil action.[31] Liberality in this general area assures that meritorious claims will not fail for poor pleading.[32] Fact-pleading language and motions like the demurrer promote form over substance and thwart Judge Clark's "procedure as the handmaid of justice" ideal.[33]

Liberal joinder and discovery rules and provision for summary judgments were also given special classificatory importance. For example, progressive third party practice rules[34] and compulsory counterclaims[35] decrease litigation and increase efficiency by disposing of related claims in

31. *See generally* CLARK I, *supra* note 7, *Preface to the First Edition.* Clark noted that: "[p]robably the most important characteristics of the code were the one form of action and the system of pleading the facts." CLARK II, *supra* note 7, at 22. He thought the anachronistic failure to merge law and equity was particularly unfortunate in view of the evils which had prompted merger in progressive jurisdictions:

> The division of remedial justice into two systems, with two courts entirely distinct from each other, intensified the defects inherent in each system. A litigant not infrequently would have to be sent out of court to bring his action in another tribunal simply because he had chosen the wrong one. Since the rules governing the choice of tribunal were not always clear and easy of application, the harm to innocent seekers for justice was great.

Id. at 17 (footnote omitted).

32. Accepting the cardinal code principle of the union of law and equity procedures and emphasizing simple and direct allegation of facts as the basis of pleading, [modern non-code procedure] adds many details and devices of extensive joinder of parties and of claims, of discovery and pre-trial investigations of broad issues, and of summary adjudication, to achieve an expeditious and nontechnical adjudication of disputes.

Clark II, *supra* note 7, § 1, at 4.

33. *See id.* § 11, at 54 (pleading "is a means to an end, not an end in itself—the 'handmaid rather than the mistress' of justice") (footnote omitted). *See generally* C. Clark, *supra* note 3.

Less obviously, we attached significance to whether a jurisdiction's practice was to have attorneys rather than parties sign pleadings, thus dispensing with the verification of pleadings by the parties, *see* FRCP 11, since this is indicative of conformity to the Federal Rules' treatment of pleading as a vehicle for the assembly of facts through discovery rather than the statement of facts already uncovered extrajudicially.

34. *See* FED. R. CIV. P. 14.

35. *See* FED. R. CIV. P. 13(a).

a single main action. Liberal pleading requires liberal discovery in order to narrow issues for trial,[36] and procedures for summary adjudication of all or part of a claim or defense to prevent liberality of pleading from clogging the trial docket.[37]

2. *Criteria for Classification as a Federal Rules Replica*

All jurisdictions we identify as replicating the Federal Rules meet each of these nine criteria:

(1) state civil procedure is specified in judicially promulgated rules rather than a statutory code;

(2) these rules are organized and enumerated in general conformity to the scheme of the FRCP;

(3) there has been a merger of law and equity into one form of civil action;

(4) the substance of the state rules of civil procedure conform generally to the federal joinder rules as amended in 1966;

(5) the substance of the state rules of civil procedure conform generally to the federal discovery rules as amended in 1970;

(6) the state rules provide for summary judgment according to the model of the Federal Rules;

(7) the rules as written and interpreted provide without qualification for the liberal conception of "notice pleading" practiced in federal courts under the aegis of *Conley v. Gibson;*[38]

(8) to the extent the terms of the state rules or their interpretations are otherwise idiosyncratic or unconventional by federal standards, such variation in practice is not at bottom inconsistent with the Federal Rules' philosophy of "procedure as the handmaiden of justice";[39] and

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36. *See infra* note 76 (unsuccessful California experiment sought to simplify civil procedure by simultaneously relaxing standards for pleading specificity and restricting discovery).

37. *See* CLARK II, *supra* note 7, § 88, at 556–63.

38. 355 U.S. 41 (1957). Although there have been occasional rebellions against the *Conley v. Gibson* conception of notice pleading in the lower federal courts, especially in civil rights cases, *see, e.g.*, United States v. City of Philadelphia, 644 F.2d 187, 203–06 (3d Cir. 1980); Koch v. Yunich, 533 F.2d 80, 85–86 (2d Cir. 1976), the United States Supreme Court has yet to sound the bugle of retreat. *See generally* F. JAMES & G. HAZARD, *supra* note 10, § 3.11, at 152–56 & n.13 (1983 amendment of FRCP 11 may foreshadow future convergence of notice pleading and fact pleading in federal practice, but the *Conley v. Gibson* conception of notice pleading remains the keystone of "federal pleading rules . . . and in this respect they represent a major departure from the codes") (footnote omitted). *Cf.* Marus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedures*, 86 COLUM. L. REV. 433 (1986).

39. *See generally* C. CLARK, *supra* note 3. Judge Clark's ideal is the theme of the Federal Rules: the FRCP were designed to promote the "just, speedy, and inexpensive determination" of all civil actions. *See* FED. R. CIV. P. 1.

(9) the state courts regard precedent and commentary construing counterpart provisions of the Federal Rules as persuasive authority in the construction of the state rules.

3. *Methodology for Classifying Variation From the Norm of Federal Rules Replica*

In classifying jurisdictions with reference to their variation from the procedural model of the Federal Rules, we found our task complicated by the need to account for two distinct kinds of variation. In a sense, the Federal Rules are not one model but two.

On the one hand the Federal Rules are a model of "notice pleading," and jurisdictions that depart from the model of the Federal Rules do so because of differences in the degree of factual specificity demanded in the pleading of a claim or defense. The principal alternative pleading practice is the "fact pleading" called for by systems descended from New York's Field Code of 1848, but the variations in pleading practices among the remaining code pleading jurisdictions are extensive, and idiosyncrasy abounds.

The range of variation in pleading practices is thus roughly triangular, as shown in Figure 1. The notice pleading championed by the Federal Rules and required for classification as a Federal Rules Replica places a jurisdiction at one point of this triangle. Jurisdictions varying from the Federal Rules will vary along two dimensions within this range. One dimension measures affinity to the fact pleading epitomized by code systems of procedure; the other dimension measures the degree to which a jurisdiction's pleading practices tend toward the idiosyncratic, and are thus foreign to both the classic code systems and the Federal Rules. [40]

On the other hand, the Federal Rules are also a model for the structure of a procedural system. Again, variation proceeds along two dimensions, so that the range of variation lies within three points as depicted in Figure 2. At one point of this triangle of variation is the structural type epitomized by the

40. Although Figure 1 illustrates conceptually how variation from the federal paradigm may run in two directions, toward fact pleading or toward idiosyncratic pleading, we have not further complicated the classifications deployed in our survey by seeking to account for the kind and degree of variation from the *Conley v. Gibson* conception of notice pleading characteristic of practice under the Federal Rules. *See supra* note 38. We have classified all jurisdictions which fail the *Conley* test of wholehearted commitment to notice pleading as fact pleading jurisdictions, without attempt further to specify how close or how far from federal practice lies the pleading system in question. No doubt this has achieved simplicity at the cost of arbitrariness, and has confused within our "fact pleading" classification jurisdictions that verge on notice pleading with both classic fact pleading jurisdictions and jurisdictions whose pleading practices might better be termed idiosyncratic (as suggested by the conceptual model of Figure 1). We readily acknowledge that much work remains to be done in the study of variation among the states concerning standards of specificity in pleading and other aspects of pleading practice.

Federal Rules, a rules-based system of procedure in which the operative rules of civil procedure are judicially promulgated. The most common contrary structure for a procedural system is a legislative code. One state's procedural system is so idiosyncratic in structure, however, that a second dimension of variation must be acknowledged.

Juxtaposition of the types and ranges of variation described in Figures 1 and 2 place the Federal Rules and state procedural systems replicating them in the central position illustrated by Figure 3. Since classification of variation from federal replica status is our goal, the ranges of variation in pleading and structure are presented in Figure 3 as contiguous at the point within each range occupied by federal replica jurisdictions—a point defined by notice pleading and a rules-based system of procedure.

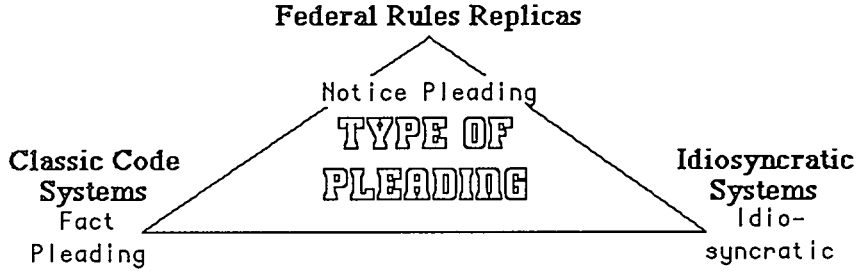

Figure 1: Variation in procedural systems according to type of pleading

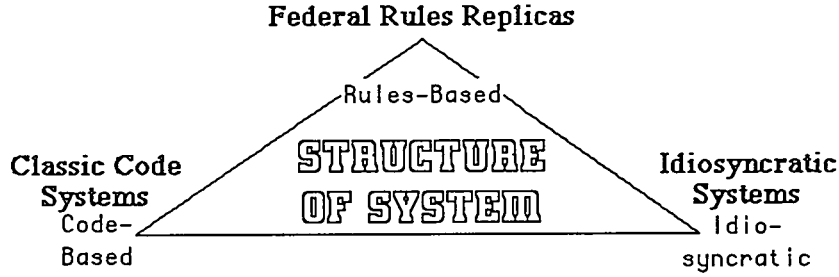

Figure 2: Variation in procedural systems according to structure of system

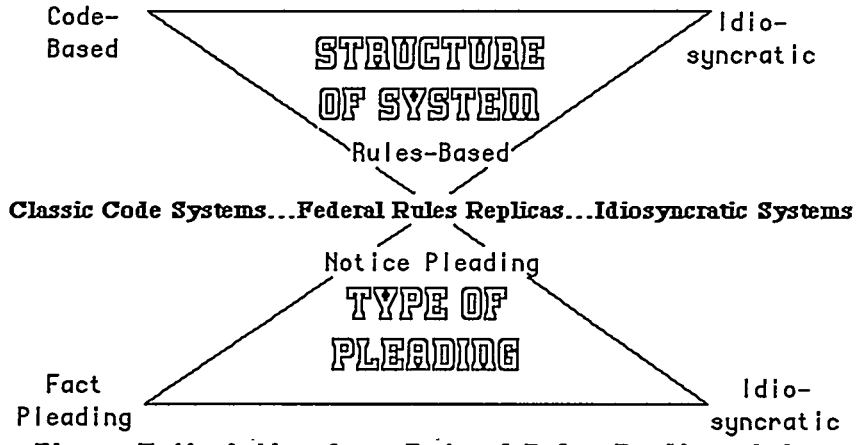

Figure 3: Variation from Federal Rules Replica status according to independent variables of pleading and structure

C. Summary of Classifications of Procedural Systems

The variation we encountered in our survey led us to develop a total of eight classifications.

(1) *Federal Rules Replica.* As discussed above, this is our cardinal classification. These jurisdictions meet all nine of our criteria for systematic replication of the Federal Rules.

These jurisdictions are:

ALABAMA	MAINE	SOUTH DAKOTA
ALASKA	MASSACHUSETTS	TENNESSEE
ARIZONA	MINNESOTA	UTAH
COLORADO	MONTANA	VERMONT
DISTRICT OF COLUMBIA	NEW MEXICO	WASHINGTON
HAWAII	NORTH DAKOTA	WEST VIRGINIA
INDIANA	OHIO	WYOMING
KENTUCKY	RHODE ISLAND	

(2) *Notice Pleading/Federal-Rules-Model Procedural System.* These jurisdictions show strong affinity to the content and organization of the Federal Rules, including notice pleading, but for the reasons we recite do not meet some of the other criteria for federal replica status.

These jurisdictions are:

IDAHO	MISSISSIPPI	NEVADA

(3) *Notice Pleading/Idiosyncratic Rules-Based Procedural System.* These are systems of procedure based on judicially promulgated rules but otherwise not systematically similar to the Federal Rules.

These jurisdictions are:

IOWA	MICHIGAN	WISCONSIN

(4) *Notice Pleading/Idiosyncratic Procedural System.* This was our classification for one notice-pleading jurisdiction, NEW HAMPSHIRE, whose procedural system defied classification as either code-based or rules-based.

(5) *Notice Pleading/Federal Code Procedural System.* These jurisdictions operate under statutorily adopted versions of the Federal Rules. Because their procedural systems are code-based rather than rules-based, they are not classified as federal replicas.

These jurisdictions are:

GEORGIA	KANSAS	OKLAHOMA
	NORTH CAROLINA	

(6) *Fact Pleading/Federal-Rules-Model Procedural System.* These procedural systems replicate the Federal Rules in most respects but substitute some higher standard of factual specificity in pleading.

These jurisdictions are:

ARKANSAS	DELAWARE	SOUTH CAROLINA

(7) *Fact Pleading/Idioynscratic Rules-Based Procedural System.* These systems demand factual specificity in pleading and operate according to rules-based systems of procedure that are not substantially similar to the Federal Rules in their content or organization.

These jurisdictions are:

FLORIDA	NEW JERSEY	PENNSYLVANIA
MARYLAND	OREGON	TEXAS
MISSOURI		VIRGINIA

(8) *Fact Pleading/Code-Based Procedural System.* This classification covers the remainder of states, which have neither notice pleading nor a rules-based procedural system in common with the Federal Rules.

These jurisdictions are:

CALIFORNIA	ILLINOIS	NEBRASKA
CONNECTICUT	LOUISIANA	NEW YORK

III. CLASSIFICATION AND DESCRIPTION OF STATE COURT SYSTEMS OF CIVIL PROCEDURE

ALABAMA

Federal Rules Replica

Alabama abandoned its "modified system of common law pleading"[41] when the Alabama Supreme Court[42] promulgated the Alabama Rules of

41. WRIGHT I, *supra* note 1, § 9.1, at 46.

42. For background on the campaign leading to statutory conferral in 1971 of rule-making power on the Alabama Supreme Court, see *id.*; Heflin, *Remarks of the Chief Justice*, in *Symposium, The Alabama Rules of Civil Procedure*, 25 ALA. L. REV. 663, 663 (1973). The Alabama Supreme Court's rule-making power is currently codified as ALA. CODE § 12-2-7(4) (1975).

Civil Procedure.[43] These rules replicate the Federal Rules and abolish the "harsh rules of pleading" previously followed.[44] "The purpose of the Alabama Rules of Civil Procedure is to effect justice upon the merits of the claim and to renounce the technicality of procedure."[45] The Alabama Rules are based "virtually verbatim" on the Federal Rules and cases interpreting the FRCP are presumptively authoritative in construing their Alabama counterparts.[46]

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43. The Alabama Rules of Civil Procedure were promulgated on January 3, 1973, to take effect on July 3, 1973. For the text of the rules, see 23 ALA. CODE (1984).

44. Williams v. Kasal, 429 So. 2d 1008, 1010 (Ala. 1983) (citing B & M Homes, Inc. v. Hogan, 376 So. 2d 667 (Ala. 1979)).

45. Crawford v. Crawford, 349 So. 2d 65, 66 (Ala. Civ. App. 1977).

46. *Ex parte* Duncan Constr. Co., 460 So. 2d 852, 854 n.1 (Ala. 1984) (quoting Assured Investors Life Ins. Co. v. National Union Associates, Inc., 362 So. 2d 228, 231 (Ala. 1978)); *see also Ex parte* Scott, 414 So. 2d 939, 941 (Ala. 1982); Bracy v. Sippial Elec. Co., 379 So. 2d 582, 584 (Ala. 1980). *See generally* Committee Comments to ALA. R. CIV. P. 1, 23 ALA. CODE, at 11 ("It has long been settled in this state that when the legislature adopts a federal statute or the statute of another state, it adopts also the construction which the courts of such jurisdiction have placed on the statute. [Citations omitted.] These rules represent an adaptation to the Alabama practice of rules of civil procedure already adopted for the federal courts and by many states.").

Alabama has expressly adopted the federal conception of notice pleading set forth in Conley v. Gibson, 355 U.S. 41, 45–46 (1957), which held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Dunson v. Friedlander Realty Co., 369 So. 2d 792, 796 (Ala. 1979). In Simpson v. Jones, 460 So. 2d 1282, 1283, 1285 (Ala. 1984), the Alabama Supreme Court was careful to cite with approval both *Friedlander Realty* and Crawford v. Crawford, 349 So. 2d 65, 66 (Ala. Civ. App. 1977) (purpose of Alabama Rules is to renounce technicality of procedure), before holding that "a document entitled 'Contest of Will'" was not a complaint sufficient to commence an action under the special provisions of the Alabama statute of wills and its limitations period.

For comparison of Alabama's joinder and discovery provisions to the Federal Rules, see Futrell, *The New Rules and Federal Discovery Practice*, 25 ALA. L. REV. 759 (1973) (noting "close similarity to the corresponding federal discovery rules"); Hoff, *Joinder of Claims and Parties Under the Alabama Rules of Civil Procedure*, 25 ALA. L. REV. 667 (1973). Among other minor discrepancies, Alabama's joinder rules differ from their federal counterparts in that counterclaims are not compulsory if the defense of the original claim is controlled by a liability insurer, Alabama Civil Rule 13(a)(3), and in making compulsory a plaintiff's claim against an impleaded third-party defendant under Alabama Civil Rule 14(a). *See* Hoff, *supra*, at 673, 693; *see also* 4 CUM.-SAM. L. REV. 207 (1973); *cf. infra* note 316 (similar qualifications of compulsory counterclaim rule in Rhode Island).

Alabama's summary judgment practice is subject to a quirk of as yet indefinite importance. Although Alabama Civil Rule 56 tracks FRCP 56 virtually word for word, the Committee Comments noted that it was subject to the preservation of Alabama's "scintilla evidence rule" by Alabama Civil Rule 50(e). Committee Comments, Rules 50 and 56, 23 ALA. CODE, at 262–64, 310–11. Thus far, it is an unanswered question whether "'a scintilla of evidence' is really different from 'substantial evidence.'" Hoffman, *Pretrial Motion Practice Under the Alabama Rules of Civil Procedure*, 25 ALA. L. REV. 709, 731 n.88 (1973). For an interesting illustration of what the Supreme Court of Alabama does and does not consider to be a "scintilla" of evidence in the context of an alleged spider bite, see Wilbanks v. Hartselle Hospital, Inc., 334 So. 2d 870, 872–73 (Ala. 1976) (affirming the granting of summary judgment in favor of defendant after plaintiff's jury verdict in an earlier trial on the same evidence had been set aside by the granting of a motion for new trial).

ALASKA

Federal Rules Replica

Alaska's Rules of Civil Procedure have replicated the FRCP since1963.[47] Before attaining statehood in 1959, Alaska had an idiosyncratic system of civil procedure.[48] A drafting error in the Alaska Statehood Act[49] accelerated the transition period from a territorial court system to the new state court system.[50] When a Federal District Court was established for Alaska on February 20, 1960,[51] Alaska's new state court system became fully responsible for matters that territorial and interim courts had formerly handled.[52]

Three years of confusion ensued as the state courts operated under an amalgam of traditional territorial practice and the incomplete set of interim rules of procedure promulgated in great haste to meet the February 20, 1960, deadline.[53] The confusion ended in 1963 when the Alaska Supreme Court[54] promulgated the Alaska Rules of Court Procedure and Administration, including Rules of Civil Procedure that follow the FRCP "in their entirety including most of the numbering systems, except for minor changes made to adapt them to the Alaska state situation."[55] Federal decisional law is persuasive authority in the interpretation of Alaska's analogues to the Federal Rules.[56]

47. The Alaska Rules of Civil Procedure may be found in 2 ALASKA RULES OF COURT, at CR 3–CR 283.

48. *See* Compiled Laws of Alaska containing the General Laws of the Territory of Alaska, §§ 55-1-1 to 55-11-86 (1949) (superseded—"Civil Actions Generally"). Under this antecedent system of procedure, demurrers were used and pleading was a highly technical enterprise. *See id.* §§ 55-5-1 to 55-5-19 (general pleading provisions). The Federal Rules of Civil Procedure and the Alaska code coexisted in a confused state of affairs that was not conclusively resolved until after statehood when the Supreme Court of Alaska adopted the current replica of the Federal Rules. *See generally* Nesbett, Dimond & Arend, *Foreword* to ALASKA RULES OF COURT PROCEDURE AND ADMINISTRATION (1963).

49. Pub. L. No. 85-508, § 12(b)(e), 72 Stat. 339, 348 (1958).

50. *See* Nesbett, Dimond & Arend, *supra* note 48. *See generally* Hobbs v. State, 359 P.2d 956 (Alaska 1961).

51. Exec. Order No. 10,867, 3 C.F.R. 401 (1959–1963).

52. Alaska Administrative Director of Courts, *Alaska Court System Reports 1–2, 1960–63*, at 45–47 (1963).

53. *See* Nesbett, Dimond & Arend, *supra* note 48.

54. The Alaska Supreme Court has constitutional rule-making power, subject to legislative override by two-thirds vote. ALASKA CONST. art IV, §15.

55. Nesbett, Dimond & Arend, *supra* note 48. Alaska's joinder and discovery rules have been revised to conform closely to the Federal Rules as amended through 1970.

56. *See* Drickersen v. Drickersen, 546 P.2d 162, 167 n.9 (Alaska 1976); Fenner v. Basset, 412 P.2d 318, 321 (Alaska 1966).

Alaska has enthusiastically embraced the federal philosophy of notice pleading. *See* Martin v. Mears, 602 P.2d 421, 427 (Alaska 1979); Schaible v. Fairbanks Medical & Surgical Clinic, Inc., 531 P.2d 1252, 1255–57 (Alaska 1975) (following Conley v. Gibson, 355 U.S. 41 (1957)); Dworkin v. First Nat'l Bank, 444 P.2d 777, 778–79 (Alaska 1968).

ARIZONA

Federal Rules Replica

Arizona, previously a code pleading state,[57] became the first FRCP convert when, in 1940, the Arizona Supreme Court promulgated a pro cedural system replicating the Federal Rules.[58] The current Rules of Civil Procedure for the Superior Courts of Arizona took effect January 1, 1956.[59] They continue to replicate the Federal Rules.[60] In construing their own rules, Arizona courts give great weight to federal construction of the FRCP.[61]

ARKANSAS

Fact Pleading/Federal-Rules-Model Procedural System

Arkansas has a federally modelled procedural system with two non-standard features that bar it from federal replica status. The Arkansas Rules of Civil Procedure took effect in 1979 by order of the Arkansas Supreme Court,[62] replacing a predominantly code-pleading system[63] which in-

57. *See* ARIZ. REV. CODE § 3746 (1928) (superseded codification compiled by F.C. Struckmeyer, Code Commissioner; cited section required "concise statement of the cause of action" in complaint).

58. The Arizona Supreme Court had statutory authority to promulgate the rules. 1939 ARIZ. CODE ANN. §§ 19-202 to 19-204 (Bobbs-Merrill 1940) (superseded). From the start the Arizona Rules were essentially the Federal Rules changed in a few instances to suit local conditions. They bore section numbers in the 1939 Code, but were also identified by rule number in brackets at the end of each provision. *See, e.g.*, 1939 ARIZ. CODE ANN. § 21-404 (Bobbs-Merrill 1940) (requiring complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief"); § 21-201 (stating that the "rules shall be construed to secure the just, speedy, and inexpensive determination of every action"). *See also* 1939 ARIZ. CODE ANN. § 21-201 (Bobbs-Merrill 1940) (compiler's note stating codified rules are in substance the FRCP and that they supersede conflicting code provisions). *See generally* Sunderland, *Arizona's New Rules of Civil Procedure Effect Conformity with Federal Rules*, 23 J. AM. JUD. SOC'Y 215 (1940).

The Arizona Supreme Court's rule-making power is currently codified as ARIZ. REV. STAT. ANN. § 12-109 (1982).

59. *See* ARIZONA RULES OF COURT, 3–61 (West 1985) (text of Arizona's Rules of Civil Procedure for the Superior Courts of Arizona).

60. *See generally* Hink, *Judicial Reform in Arizona—Administration of the Courts*, 6 ARIZ. L. REV. 13, 22 (1964) (author contending that adoption of FRCP based rules was one of many elements of judicial reform that helped Arizona keep pace with increased litigation accompanying its change from rural to well populated state).

Arizona's joinder and discovery rules have not only kept pace with the Federal Rules amendments of 1966 and 1970, but conform unusually closely to the 1980 and 1983 amendments as well.

"Arizona is a notice pleading state." Arizona Dep't of Revenue v. Transamerica Title Ins. Co., 124 Ariz. 417, 604 P.2d 1128, 1134 (1979). Arizona's test for the sufficiency of a complaint expressly follows Conley v. Gibson, 355 U.S. 41 (1957). Long v. Arizona Portland Cement Co., 89 Ariz. 366, 362 P.2d 741, 742 (1961); Folk v. City of Phoenix, 27 Ariz. App. 146, 551 P.2d 595, 600 (1976).

61. *See* Edwards v. Young, 107 Ariz. 283, 486 P.2d 181 (1971).

62. The Arkansas Supreme Court adopted the Arkansas Rules of Civil Procedure on December 18,

cluded some of the reforms pioneered by the Federal Rules.[64] The Arkansas Rules of Civil Procedure generally follow the FRCP[65] except in two important respects. Arkansas has preserved its separate systems of law and equity courts,[66] and has "deliberately rejected" notice pleading.[67]

1978, pursuant to Act 38 of 1973 and to the court's constitutional authority to regulate court procedure. The rules took effect on July 1, 1979, and superseded prior conflicting code sections. *See* ARK. REV. STAT. ANN., Rules of Court (Bobbs-Merrill 1979 Replacement) (containing Arkansas Rules of Civil Procedure). For scholarly comment on the change, see Cox & Newbern, *New Civil Procedure: The Court That Came in From the Code*, 33 ARK. L. REV. 1, 9 (1979) (rule-by-rule comparison of FRCP and new Arkansas Rules).

63. *See, e.g.*, May v. Edwards, 258 Ark. 871, 529 S.W.2d 647, 650 (1975) (pre-rules Arkansas decision holding that "[a]lthough a complaint must state facts constituting a cause of action as something more than mere conclusions, when considered on demurrer, it is sufficient if they are stated according to their legal effect, without stating the evidence of facts alleged.").

64. *See* WRIGHT I, *supra* note 1, § 9.4, at 48.

65. For examples of Arkansas courts construing the Arkansas rules in light of federal precedent, see Joey Brown Interest, Inc. v. Merchants Nat'l Bank, 284 Ark. 418, 683 S.W.2d 601, 604 (1985) (Rule 56); Bailey v. Matthews, 279 Ark. 117, 649 S.W.2d 175, 176 (1983) (Rule 15(b)).

The Arkansas counterpart to FRCP 23 is considerably abbreviated, and has no requirement of mandatory notice. The Arkansas condensation of FRCP 23 does not otherwise seem to differ substantively from the federal template. *See* Cox & Newbern, *supra* note 62, at 37–38.

66. *See* ARK. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action'. Actions in equity shall be brought in the Chancery Court and actions at law shall be brought in the Circuit Court."); *id.* reporter's notes ("As in the Federal Rules and code pleading, the intent here is to obviate the 'forms of action'. . . . The second sentence makes clear the intent to preserve the distinction between law and equity cases."); *see also* Cox & Newbern, *supra* note 62, at 9 (attributing continued distinction between law and equity to fact that important substantive differences, such as the right to jury trial, exist between law and equity).

67. Harvey v. Eastman Kodak Co., 261 Ark. 783, 610 S.W.2d 582, 584 (1981).

Although the Arkansas Rules of Civil Procedure do not refer to the pleading of a "cause of action"and replace the demurrer with the motion to dismiss, ARK. R. CIV. P. 7(c), 12(b)(6), they require the pleading of a claim for relief to consist of a statement "in ordinary and concise language of facts showing that the pleader is entitled to relief." ARK. R. CIV. P. 8(a)(2). The counterpart language of FRCP 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," and avoids any reference to stating "facts."

The reference to "facts" in Arkansas Civil Rule 8(a)(1) is important in light of the significance of "fact" pleading to the code scheme, *see supra* notes 31–33 and accompanying text, and the Federal Rules' conspicuous omission of any reference to the pleading of "facts" as opposed to a "claim for relief." *See* FED. R. CIV. P. 8(a)(2). *See also* Cox & Newbern, *supra* note 62, at 20 (noting that the Arkansas Supreme Court substituted the word "facts" for the Committee's "the claim" and that "[o]nly time will tell how crucial that change may be."); *id.* at 25 (noting the corresponding difference between the FRCP 12(b)(6) and the Arkansas Civil Rules 12(b)(6) motions).

In 1981 the Arkansas Supreme Court declared that it had "deliberately rejected" the language of FRCP 8(a)(2) and "what is commonly known as 'notice pleading'." Harvey v. Eastman Kodak Co., 261 Ark. 783, 610 S.W.2d 582, 584 (1981) (affirming dismissal under Arkansas Civil Rule 12(b)(6) of complaint that alleged "negligence" of defendant without alleging the facts alleged to constitute negligent conduct). Although the *Harvey* opinion seemingly "resurrects code pleading" it provides no elaboration of the standard of factual specificity Arkansas courts demand of a civil pleading. Brill, Harvey v. Eastman Kodak Company: *Faculty Note*, 34 ARK. L. REV. 722, 725 (1981). Until further case law accumulates construing Arkansas Civil Rule 8(a)(1), Arkansas' procedural system defies more precise classification.

CALIFORNIA

Fact Pleading/Code-Based Procedural System

California pioneered code pleading in the western states,[68] and, although it has imported many features of the Federal Rules,[69] California remains committed to code pleading. California practice follows its own terminology even when the devices and procedures in question mimic practice under the Federal Rules.[70] In the crucial area of standards for pleading the differences are not merely semantic.[71] In California, a properly pleaded civil complaint must contain "[a] statement of the facts constituting the cause of action, in ordinary and concise language."[72] Although modern decisions tend to espouse notice pleading,[73] demurrers addressed to the style of pleading[74] and precedents that squint for ultimate facts[75] continue to characterize California procedure.[76]

68. *See* WRIGHT I, *supra* note 1, § 9.5, at 48 (California's version of Field Code adopted 1851).

69. *See, e.g.*, CAL. CIV. PROC. CODE § 387(b) (West Supp. 1986) (providing for intervention as of right modeled on FRCP 24(a)); CAL. CIV. PROC. CODE §§ 2016–2034 (West 1983) (discovery provisions modeled on FRCP 5, 26–37 & 45); CAL. CIV. CODE § 1781 (West 1985) (consumer class action provisions modeled on FRCP 23).

70. "The pleadings allowed in [California] civil actions are complaints, demurrers, answers, and cross-complaints." CAL. CIV. PROC. CODE § 422.10 (West 1973). Note the absence of the term "counterclaim," use of which was abolished in 1972. Claims by a defendant against a plaintiff are now officially denominated "cross-complaints." *Id.* § 428.80. California's compulsory cross-complaint rule features a transactional relationship test drawn virtually verbatim from FRCP 13(a). *See id.* §§ 426.10(c), 426.30(a).

71. In traditional code-pleading fashion California authorizes a demurrer when "[t]he pleading does not state facts sufficient to constitute a cause of action," CAL. CIV. PROC. CODE § 430.10(e) (West Supp. 1986), and California's general demurrer is by no means toothless. *See, e.g.*, Logan v. Southern Cal. Rapid Transit Dist., 136 Cal. App. 3d 125, 127, 185 Cal. Rptr. 878, 884 (1982) (fired municipal bus driver's allegation that termination hearing violated due process was a demurrable legal conclusion; "complaint must allege ultimate facts, not evidentiary facts or conclusions of law"). *See generally* Note, *Fact Pleading vs. Notice Pleading: The Eternal Debate*, 22 LOY. L. REV. 47, 58–61 (1976) (discussing the distinction between the code pleading concept of a "cause of action" and the Federal Rules' concept of a "claim for relief").

72. CAL. CIV. PROC. CODE § 425.10(a) (West Supp. 1986).

73. The California Court of Appeal has held that "the actionable facts relied on [must be stated] with sufficient precision to inform the defendant of what plaintiff is complaining about. . . ." Signal Hill Aviation Co., Inc. v. Stroppe, 96 Cal. App. 3d 627, 636, 158 Cal. Rptr. 178, 183 (1979); *see also* Perkins v. Superior Court, 117 Cal. App. 3d 1, 172 Cal. Rptr. 427 (1981) (trial court abused discretion by granting motion to strike certain phrases in complaint on ground they left "ultimate facts" to speculation; complaint was sufficient because it provided notice to defendants of "precise" claims against them). *But cf.* Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 212, 673 P.2d 660, 669, 197 Cal. Rptr. 783, 792 (1983) ("[T]he complaint should set forth the ultimate facts constituting the cause of action, not the evidence by which the plaintiff proposes to prove those facts").

In Dino, Inc. v. Boreta Enters., 226 Cal. App.2d 336, 340, 38 Cal. Rptr. 167, 169 (1964), it sufficed that "the pleading adequately gives notice" of a cause of action for unfair competition despite plaintiff's pleading of the conclusion of law that its name had acquired a secondary meaning.

74. *See, e.g.*, Drake v. Morris Plan Co., 53 Cal. App. 3d 208, 125 Cal. Rptr. 667 (1975) (pleading

COLORADO

Federal Rules Replica

Colorado was one of the more progressive code pleading jurisdictions when the Federal Rules went into effect.[77] True to this heritage, the Colorado Supreme Court adopted in 1941 the Colorado Rules of Civil Procedure.[78] These rules replicated the numbering and substance of the

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in the alternative is demurrable "and it is no answer to an objection to say that, if either of the averments [of fact] is true, a cause of action is stated") (dicta). *See generally* 49 CAL. JUR. 3D., PLEADING, § 51 (Bancroft-Whitney 1979) (pleading in alternative not permitted and subject to special demurrer as opponent is entitled to distinct statement of facts claimed by pleader to exist).

75. The "ultimate fact" precedents, *see supra* notes 71 and 73, stand curiously intact despite California's century-old statutory directive to construe pleadings liberally "with a view to substantial justice between the parties." CAL. CIV. PROC. CODE § 452 (West 1973) (originally enacted in 1872).

76. California experimented with federal-style pleading rules in selected trial courts pursuant to a pilot project of "procedural innovations to reduce the cost of civil litigation" through experimental "pleading, pretrial and trial procedures." CAL. CIV. PROC. CODE § 1823 (West 1983). The pilot project was in effect from January 1, 1978, until July 1, 1983, when it expired of its own force and was superseded by permanent amendments to California's code respecting actions in California's trial courts of inferior jurisdiction. *See* CAL. CIV. PROC. CODE §§ 90–100 (West. 1982). *See generally* Stevens, *The Economical Litigation Rules: The Municipal Courts Enter a New Era,* SAN FRANCISCO ATT'Y, June-July 1983, at 17.

Along with constraints on discovery and numerous other experimental innovations the pilot project sought to simplify pleading by requiring the pleading of "a claim for relief" to "contain a short and plain statement of the occurrence or transaction upon which it is based showing that the pleader is entitled to relief," CAL. CIV. PROC. CODE § 1824.1(b) (West 1983), and by abolishing demurrers except "on the ground of a jurisdictional defect or on the ground that the complaint does not give notice of a claim upon which relief can be granted." *Id* § 1825.5.

In its final report on the Economical Litigation Project, the California Judicial Council declared: "This simplified pleading aspect of the project did not attain the desired goals of simplicity or economy." JUDICIAL COUNCIL OF CALIFORNIA, 1983 ANNUAL REPORT 15. Among other problems, "attorneys were confused and frustrated by the need to follow a different set of rules in ELP courts; as a result, adherence to the project rules was often poor." *Id.* at 16. In addition, it was inconsistent with the federal model of civil procedure, taken as a whole, to combine the oil of notice pleading with the water of diluted rights to discovery. *See* Note, *California's Pilot Project in Economical Litigation,* 53 SO. CAL. L. REV. 1497, 1510 n.84 (1980). The pilot project's restrictions on the normal scope of discovery were a major grievance of defense counsel. "Defense attorneys believed that lack of discovery had impeded their efforts to defend their clients and led to their perception of a lower quality of justice under ELP." JUDICIAL COUNCIL OF CALIFORNIA, 1983 ANNUAL REPORT 16. The legislative response in California was to abandon the experiment with notice pleading and to retain restrictions on discovery, albeit in less "heavy-handed" form. *Id.; see* CAL. CIV. PROC. CODE §§ 92, 94 (West Cum. Supp. 1986).

77. "The [federal] rules in general provide for simplified and concise pleadings, and permit service of process by individuals, all very much in conformity with our [Colorado] code." Moore, *Shall Colorado Procedure Conform With the Proposed Federal Rules of Civil Procedure?,* 15 DICTA 5, 7 (1938).

78. *See generally* WRIGHT I, *supra* note 1, § 9.6, at 49 (inherent rule-making power of Colorado Supreme Court confirmed by statute). *See also* Chamberlain v. Chamberlain, 108 Colo. 538, 120 P.2d 641 (1941) (former code of civil procedure effective until April 6, 1941).

FRCP,[79] as do the current rules adopted in 1970.[80] Construction of the FRCP by federal courts is persuasive authority for the interpretation of the state rules.[81]

CONNECTICUT

Fact Pleading/Code-Based Procedural System

Connecticut has been a code pleading state since 1879.[82] Pleading has been simplified by the Connecticut Practice Book,[83] which contains "a multitude of simple forms and has contributed largely to a lack of technicality of pleading in that state."[84] However, Connecticut pleading still requires a complaint to contain a statement of "the facts constituting the cause of action,"[85] and demurrers remain codified,[86] if not judicially

79. *See* Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959) (Colorado Rules patterned after Federal Rules); Van Cise, *The Colorado Rules of Civil Procedure*, 23 ROCKY MTN. L. REV. 527, 541 (1951) ("[Colorado] Rules 1 to 84 in the main follow the Federal Rules").

The Colorado Rules were popular with bench and bar from their inception. *See* DeSouchet, *Pleadings and Motions: Rules 7–16*, 23 ROCKY MTN. L. REV. 542, 551 (1951). The author concluded his ten year review of cases applying the new rules with this comment:

> From the foregoing cases decided during the first ten years of our Rules, it is apparent that the Supreme Court, with few exceptions, has construed the rules with the liberality expected. The experiment, if such it was, has proven successful. The merit of the Rules has been amply demonstrated to warrant their retention. To rescind them would be unthinkable.

Id.

80. *See* 7A COLO. REV. STAT. Rules of Civil Procedure (1977 & Cum. Supp. 1985). Colorado's Rules of Civil Procedure contain additional rules covering matters of local practice. In other respects, the Colorado rules conform to the Federal Rules as amended in 1966 and 1970 but most subsequent federal amendments have not been adopted. *See, e.g.*, COLO. REV. STAT. §§ 11, 16, 26, 30, 33, 34, 37, 52 (unrevised to reflect 1980 and 1983 amendments to Federal Rules). *But cf.* COLO. REV. STAT. § 5 (tracking in substance 1980 amendment to FRCP 5); COLO. REV. STAT. § 26.1 (creating alternative procedures for limited and simplified discovery upon motion of a party).

Colorado has embraced the federal concept of notice pleading. Davidson v. Dill, 503 P.2d 157, 162 (Colo. 1972); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103, 105 (Colo. App. 1981).

81. *See* United Bank of Denver Nat'l Ass'n v. Shavlik, 541 P.2d 317, 318 (Colo. 1975); Duran v. Lamm, 701 P.2d 609, 613 (Colo. App. 1984).

82. *See* WRIGHT I, *supra* note 1, § 9.7, at 50; *see also* State v. Clemente, 166 Conn. 501, 353 A.2d 723, 742 (1974) (Cbogdanski, J., dissenting) (discussing Practice Act of 1879). For the current Connecticut statutory provisions regulating civil practice and procedure, see CONN. GEN. STAT. ANN. §§ 52-1 to 52-608 (West 1960).

83. CONNECTICUT PRACTICE BOOK (1983). *See generally* Costas, Book Review, 54 CONN. B.J. 80 (1980) (reviewing CONNECTICUT PRACTICE: PRACTICE BOOK ANNOTATED (W. Moller, W. Horton, J. Kaye & W. Effron eds., 2d ed. 1979)); Jennings, *The New Practice Book*, 25 CONN. B.J. 117, 117–22 (1951).

84. D. LOUISELL, G. HAZARD & C. TAIT, CASES AND MATERIALS ON PLEADING AND PROCEDURE, STATE AND FEDERAL 92 (1983).

85. CONN. GEN. STAT. ANN. § 52-91 (West 1960, 1986 Cum. Supp.). A prior provision, section 52-98, repealed in 1978 by 1978 Conn. Pub. Acts 379, provided that "[e]ach pleading shall contain a plain and concise statement of the material facts . . . but not of the evidence by which they are to be proved." *Id.* § 52-98. The modern provision retains fact pleading terminology, as does Connecticut Practice Book section 108. *See* Mitchell v. Mitchell, 194 Conn. 312, 481 A.2d 31, 36 & n.13 (1984)

recognized.[87] The Connecticut legislature has repealed many outmoded code pleading provisions,[88] but the extent of its authority to prescribe procedural rules for Connecticut courts is limited, to an as yet undefined degree, by the separation of powers principles of the state constitution.[89]

DELAWARE

Fact Pleading/Federal-Rules-Model Procedural System

Delaware retains its separate systems of common law and equity courts. In 1948, Delaware abandoned an essentially common law procedural system[90] in favor of rules for each court system generally modeled on the FRCP.[91] Federal precedent construing the Federal Rules is "very per-

(Practice Book section 108 and "the spirit of our rules" require "full disclosure of all material facts"); Rodriguez v. Mallory Battery Co., 188 Conn. 145, 448 A.2d 829, 830 n.1 (1982) (quoting Practice Book section 108 in full). Another recent case collects extensive Connecticut authority for the proposition that the "plaintiff's right to recover . . . is limited by the allegations of his complaint and a plaintiff, therefore, cannot recover for a cause of action which has not been properly pleaded." Selby v. Pelletier, 1 Conn. App. 320, 472 A.2d 1285, 1287 n.2 (1984) (citations omitted). The Connecticut Supreme Court has emphatically refused to

> make the filing of a complaint in our procedure serve merely as notice of an intent to investigate the cause of an injury rather than as 'a plain and concise statement of the material facts on which the pleader relies' to invoke the court's jurisdiction. Practice Book §§ 108, 131. Such a result would extend the effect of our liberal pleading rules far beyond the policy supporting them.

Dreier v. Upjohn Co., 196 Conn. 242, 492 A.2d 164, 168 (1985).

86. *See* CONN. GEN. STAT. ANN. § 52-92 (West 1960) (providing that "[e]ach demurrer shall distinctly specify the reason or reasons why the pleading demurred to is insufficient").

87. Alarm Applications Co. v. Simsbury Volunteer, 179 Conn. 541, 427 A.2d 822, 825 (1980) ("[t]he motion to strike . . . replaced the demurrer in our practice."); *accord* Mingachos v. CBS, Inc., 196 Conn. 91, 491 A.2d 368, 379 (1985).

88. *See* Public Act No. 78-379, 1978 Conn. Pub. Acts 837 (Reg. Sess.) (effective July 1, 1978) (repealing CONN. GEN. STAT. ANN. §§ 52-93 through 52-96, 52-100, 52-113, 52-124, and 52-125).

89. *See* State v. Clemente, 166 Conn. 501, 353 A.2d 723, 729 (1974) (statutory discovery provision giving criminal accused right to obtain from prosecution statements by prosecution witnesses related to the subject matter of the testimony of those witnesses violative of separation of powers mandated by CONN. CONST. art. II under following test: "To be unconstitutional in this context, a statute must not only deal with subject matter which is within the judicial power, but it must operate in an area which lies exclusively under the control of the courts."); *see also* Note, *Court Rule-Making in Connecticut Revisited—Three Recent Decisions:* State v. King, Steadwell v. Warden *and* State v. Canady, 16 CONN. L. REV. 121 (1983) (post-*Clemente* cases' failure to delineate the boundaries of the Connecticut judiciary's power to regulate procedure has led to the implicit overruling of statutes conflicting with Practice Book provisions even in procedural areas impacting upon substantive rights and has threatened a violation of separation of powers via the judiciary's encroachment upon the legislature's authority).

90. *See generally* 1935 REVISED CODE OF DELAWARE §§ 4643–4708 (1936) (superseded).

91. WRIGHT I, *supra* note 1, § 9.8, at 51. The Rules of the Court of Chancery are printed in Volume 16 of the Delaware Code Annotated (Revised 1974) (1981 Replacement Volume & 1984 Cum. Supp.). In the same volume are the Civil Rules Governing the Court of Common Pleas, which took effect in 1971, *see* DEL. CT. C.P. CIV. R. 86, and govern proceedings in the Delaware common law courts of inferior jurisdiction. The Rules of Civil Procedure for the Superior Court are printed in Volume 17 of the Delaware Code Annotated (1975). All three sets of civil rules follow the numbering scheme and in general the substance of the Federal Rules. The most significant differences are the inclusion of

suasive" to Delaware courts' construction of their own rules.[92] Nonetheless, Delaware has not truly replicated the system of procedure embodied by the Federal Rules. Like Arkansas,[93] Delaware's retention of separate systems of common law and equity courts has been accompanied by rejection of a general philosophy of notice pleading.[94]

DISTRICT OF COLUMBIA

Federal Rules Replica

The local court system of the District of Columbia is a creature of federal law. In creating and governing the District's local courts, Congress exercised the "powers of a state"[95] pursuant to its "dual authority over the District"[96] that it governs as both local and national sovereign.[97]

Until 1970, Congress provided the District with a dual system of courts for the adjudication of local civil matters.[98] Sharing jurisdiction were

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negligence in the matters to be pleaded with particularity under Delaware Superior Court Civil Rule 9(b) and Delaware Court of Common Pleas Civil Rule 9(b), *see* WRIGHT I, *supra* note 1, § 9.8, at 51, and the omission of either a rule analogous to FRCP 23 or any other provision for class actions in the rules governing the common law courts. Delaware Chancery Court Rules 23, 23.1 & 23.2 are virtually identical to the analogous Federal Rules, however.

92. Allder v. Hudson, 48 Del. 489, 106 A.2d 769 (Super. Ct. 1954).

93. *See supra* notes 66–67 and accompanying text.

94. Unlike Arkansas, Delaware has adopted without change the language of FRCP 8(a)(2) making "a short and plain statement of the claim" the standard of pleading specificity. *See, e.g.*, DEL. SUPER. CT. CIV. R. 8(a)(1). But in giving effect to the inclusion of negligence among the matters to be pleaded with particularity under Rule 9(b) of the rules governing proceedings in both the Superior Court and the Court of Common Pleas, *see supra* note 91, Delaware courts have made clear that adoption of language identical to Federal Rule 8(a) has not committed Delaware to notice pleading.

In Chesapeake & Potomac Tel. Co. v. Chesapeake Util. Corp., 436 A.2d 314, 338 (Del. 1981), the Delaware Supreme Court declared that the purpose of Delaware Superior Court Civil Rule 9(b) "is to apprise the adversary of the acts or omissions by which it is alleged that a duty has been violated" and struck from a complaint allegations of parental negligence because the complaint failed "to allege facts as to how the defendant parents failed to exercise proper power of control" and was "devoid of facts to indicate a prior mischievous and reckless disposition of the defendant child and the parents' knowledge thereof."

In the same case the Delaware Supreme Court also held that "the object of pleading is to reduce the controversy to certain and precise issues of law or fact, on which, as containing the pretensions or claims of the parties, the opinion of the court or jury may be taken." *Id.* Thus it is hardly surprising to find the Delaware Superior Court granting a Rule 12(b)(6) motion to dismiss a third-party complaint seeking indemnification on a breach of contract theory. American Ins. Co. v. Material Transit, Inc., 446 A.2d 1101, 1104 (Del. Super. 1982). Even where Rule 9(b) does not specifically apply, the court held that "[t]o show entitlement to relief as required in Rule 8(a), the complaint must aver either the necessary elements of a cause of action or facts which would entitle the plaintiff to relief under the theory alleged." *Id.*

95. O'Donoghue v. United States, 289 U.S. 516, 545 (1933).

96. Keller v. Potomac Elec. Co., 261 U.S. 428, 443 (1923).

97. *See* U.S. CONST. art. I, § 8, cl. 17.

98. *See* Andrade v. Jackson, 401 A.2d 990, 992–93 (D.C. 1979) (discussing abolition of dual court system by enactment of District of Columbia Court Reorganization Act of 1970).

"Article III" federal courts clothed with supplementary local jurisdiction of a general nature[99] and wholly local "Article I" courts of inferior jurisdiction.[100] The District of Columbia Court Reform and Criminal Procedure Act of 1970[101] established a unified local court system and divested the District's "Article III" federal courts of their previously-enjoyed jurisdiction over purely local matters.[102]

Despite the confusing genealogy of the District's local court system, it is clear that the adjudication of local civil matters has long proceeded according to the Federal Rules themselves or a local replica.[103] The Rules of the

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99. "The judgments of the [District's intermediate] appellate court, the District of Columbia Court of Appeals, were subject to review by the United States Court of Appeals for the District of Columbia Circuit" and

> [t]he United States District Court for the District had concurrent jurisdiction with the Court of General Sessions over most of the criminal and civil matters handled by that court . . . and had exclusive jurisdiction over felony offenses, even though committed in violation of locally applicable laws . . . . Thus, the District Court was filling the role of both a local and federal court.

Palmore v. United States, 411 U.S. 389, 392 n.2 (1972) (citations omitted).
For an analysis of the distinction between the "constitutional" federal courts authorized by Article III of the Constitution and the "legislative" federal courts Congress may create pursuant to its powers under Article I (and Article IV), see C. WRIGHT, *supra* note 8, § 11, at 39–52.

100. Before passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, the local court system consisted of one appellate court and three trial courts, two of which, the juvenile court and the tax court, were courts of special jurisdiction. The third trial court, the District of Columbia Court of General Sessions, was one of quite limited jurisdiction, its criminal jurisdiction consisting solely of that exercised concurrently with the United States District Court over misdemeanors and petty offenses. The court's civil jurisdiction was restricted to cases where the amount in controversy did not exceed $10,000, and it had jurisdiction over cases involving title to real property only as part of a divorce action. *Id.* (citations omitted).

101. Pub. L. No. 91-358, 84 Stat. 473 (1971).

102. *See* Andrade v. Jackson, 401 A.2d 990, 992 (D.C. Cir. 1979); 13 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 9, § 3508, at 30–31 (1984).

103. In 1928 Judge Clark classified the District of Columbia as a jurisdiction with a common law system of civil procedure. CLARK I, *supra* note 7, § 8, at 21. The 1942 act creating the Municipal Court for the District of Columbia provided that the court's rules of civil procedure "shall conform as nearly as may be practicable to the forms, practice, and procedure now obtaining under the Federal Rules of Civil Procedure." D.C. CODE § 11-756(b) (Supp. 1943) (superseded), Act of April 1, 1942, 56 Stat. 193, ch. 207. *See generally* Klepinger v. Rhodes, 140 F.2d 697, 698 (D.C. Cir. 1944). Though the name of the Municipal Court for the District of Columbia was changed to the District of Columbia Court of General Sessions by D.C. CODE § 11-751(a) (1961), this court of limited local jurisdiction continued to operate under rules "conform[ing] as nearly as may be practicable to the forms, practice, and procedure prescribed by the Federal Rules of Civil Procedure . . . ." D.C. CODE ENYCL. § 13-101(a) (West 1966). *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 9, § 1012, at 69–70 (1969).

When the United States District Court for the District of Columbia formerly exercised local jurisdiction, *see supra* note 99 and accompanying text, the Federal Rules of Civil Procedure applied to all such cases, FED. R. CIV. P. 81(d) (1938), except probate, adoption, and lunacy proceedings. FED. R. CIV. P. 81(a) (1938). The 1938 text of the original Federal Rules of Civil Procedure appears in 308 U.S. 765. FRCP 81(a) was amended in 1966 to exclude only "mental health proceedings in the United States District Court for the District of Columbia," *see* 4 C. WRIGHT & A. MILLER, *supra* note 9, § 1022, at 105–06, and this exclusion has become moot with the abrogation of the local jurisdiction of the United States District Court for the District of Columbia, *see supra* note 102 and accompanying text.

Superior Court of the District of Columbia, the District's present day court of general jurisdiction, replicate the FRCP in virtually all respects.[104] Federal case law is persuasive authority in interpreting the counterpart District of Columbia rules.[105]

FLORIDA

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Florida is procedurally idiosyncratic.[106] The Florida Rules of Civil Procedure[107] abolish the distinction between actions at law and suits in equity[108] and generally follow the order of their FRCP counterparts, but differ in numbering scheme. A Florida pleading must contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief,"[109] and thus notice pleading is not authorized.[110] Florida has long

104. The February 1, 1971, Introductory Note to the Superior Court Rules of Civil Procedure, D. C. COURT RULES ANN. 191 (1985), declares that the rules seek "to provide an integral and convenient rules structure modeled closely on that of the Federal Rules of Civil Procedure." The Comments of the Advisory Committee indicate precisely where variation from the language of the Federal Rules occurs in the "federally-derived Superior Court Rules." *Id.*

105. *See* Goldkind v. Snider Bros., Inc., 467 A.2d 468, 472 (D.C. 1983) ("when a local rule and a federal rule are identical, . . . federal court decisions interpreting the federal rule are persuasive authority in interpreting [the local rule]") (quoting Vale Properties, Ltd. v. Canterbury Tales, Inc., 431 A.2d 11, 13 n.3 (1981); *see also* Wallace v. Warehouse Employees Union No. 730, 482 A.2d 801, 807 (D.C. 1984) (advisory committee note determines meaning of a federal rule and hence of counterpart District of Columbia rule).

The District of Columbia follows the federal construction of Rule 8, *In re* Tyree, 493 A.2d 314, 317 (D.C. 1985), and the general philosophy of notice pleading. Scott v. District of Columbia, 493 A.2d 319, 323 (D.C. 1985).

106. For the "unusually checkered history" of procedural reform in Florida, see WRIGHT I, *supra* note 1, § 9.10, at 52; WRIGHT II, *supra* note 9, § 9.10, at 40.

107. The Florida Rules of Civil Procedure, 1967 Revision, were promulgated by the Supreme Court of Florida on June 15, 1966, effective at year's end. *In re* Florida Rules of Civil Procedure, 1967 Revision, 187 So. 2d 598 (Fla. 1966). As currently compiled, they may be found in FLORIDA RULES OF COURT (West 1986).

The Supreme Court of Florida has had plenary constitutional rule-making power since 1956. WRIGHT I, *supra* note 1, § 9.13, at 53. A 1972 amendment re-enacted that power but made it subject to legislative override by two-thirds vote of each house. FLA. CONST. art. 5, § 2. *See In re* Clarification of Fla. Rules of Practice & Procedure, 281 So. 2d 204 (Fla. 1973). *See generally* Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442 (1980) (arguing that Florida Supreme Court has erroneously held legislature lacks concurrent rule-making power under Florida constitution). *But see* Parness, *The Legislative Roles in Florida's Judicial Rulemaking*, 33 U. FLA. L. REV. 359 (1981) (criticizing on other grounds Florida Supreme Court's method of exercising its rule-making power).

108. *See* FLA. R. CIV. P. 1.040. Professor Wright considers the merger of law and equity the "principal achievement" of the 1967 Florida Rules. WRIGHT II, *supra* note 9, § 9.10, at 40.

109. FLA. R. CIV. P. 1.110(b)(2).

110. Some decisions of the Florida District Courts of Appeal have construed the "ultimate facts" language of Florida Rule 1.110(b)(2) as if it were just a gloss on the notice pleading standard of FRCP

abjured "demurrers,"[111] but the motion to dismiss for "failure to state a cause of action"[112] remains as a functional equivalent. Florida's rules for

8(a)(2). In Brown v. Gardens by the Sea S. Condominium Ass'n, 424 So. 2d 181 (Fla. Dist. Ct. App. 1983), the court stated:

> Florida uses what is commonly considered as a notice pleading concept and it is a fundamental rule that the claims and ultimate facts supporting same must be alleged. The reason for the rule is to appraise [sic] the other party of the nature of the contentions that he will be called upon to meet, and to enable the court to decide whether same are sufficient.

Id. at 183. This statement seems contradictory in that it calls for pleading of "ultimate facts," as the rule does, yet labels the process one of "notice pleading." *Cf.* River Road Constr. Co. v. Ring Power Corp., 454 So. 2d 38, 41, 43 (Fla. Dist. Ct. App. 1984) (per curiam) (complaint seeking attorney's fees in ad damnum insufficient to authorize admission of unpleaded attorney's fees agreement "where the complaint had failed to state any basis for entitlement to such fees").

Similar confusion is shown by Martin v. Highway Equip. Supply Co., 172 So. 2d 246, 247 (Fla. Dist. Ct. App. 1965), in which the court compared the Florida rule authorizing dismissal for failure to state a cause of action to its federal counterpart. The court stated that the "language of the federal rule is nothing more or less than the definition of a cause of action. Both rules mean the same." In fact, FRCP 12(b)(6) refers to "failure to state a claim upon which relief may be granted," while Florida Rule 1.140, like its predecessor, Florida Rule 1.11 (repealed), refers to "failure to state a cause of action."

Another case endorsing a strange reading of the seemingly plain language of the Florida Rules is Vantage View, Inc. v. Bali E. Dev. Corp., 421 So. 2d 728, 730–733 & n.3 (Fla. Dist. Ct. App. 1982), in which the court criticizes the Florida "Bench and Bar" for construing the "ultimate facts" requirement as requiring greater detail in pleading than the standard of Conley v. Gibson. But the Fourth District has also held in an easement case "that the easement is not sufficiently identified and that the complaint in its present form fails to state a cause of action" despite the "careful delineation of the route and termini of the claimed easement" because "width is an essential part of their description." Deseret Ranches of Fla., Inc. v. Bowman, 340 So. 2d 1232, 1233 (Fla. Dist. Ct. App. 1976), *cert. denied*, 349 So. 2d 155 (Fla. 1977) (interlocutory appeal on other grounds).

A panel of the First District Court of Appeal recently stated, in dicta, that the pleadings "stretch[ed] 'notice pleading' to its extreme limits." United States Fidelity & Guar. Co. v. J.D. Johnson Co., 438 So. 2d 917, 919 n.2 (Fla. Dist. Ct. App. 1983). Since the court also declared the pleadings to be "clearly insufficient" and subject to dismissal had the appropriate motion been made, *id.*, it apparently meant that pleadings barely sufficient by notice pleading standards were obviously insufficient under the stricter regime of Florida procedural law. More recently, the First District has demanded that a complaint alleging "bare facts sufficient to withstand a motion to dismiss without leave to amend" may still be dismissed with leave to amend for failure to allege "sufficient ultimate facts." Frugoli v. Winn-Dixie Stores, Inc., 464 So. 2d 1292, 1293 (Fla. Dist. Ct. App. 1985).

The Florida Supreme Court has neither advocated notice pleading nor exercised its powers to delete the reference to "ultimate facts" from the Florida Rules. While Florida pleading policy has the liberal ambition "to eliminate technicalities and simplify the procedures involved in the administration of justice[,]" Fontainebleau Hotel Corp. v. Walters, 246 So. 2d 563, 565 (Fla. 1971), Florida must be regarded as a procedural system in transition that has not yet officially and systematically embraced notice pleading.

111. 1954 Rule of Civil Procedure 1.7 (e) provided: "Demurrers, pleas, replication, rejoinder, surrejoinder, rebutter, surrebutter, and other technical defensive pleadings . . . are abolished." This rule was derived from 1950 Common Law Rule 8; its deletion from the modern rules "was a matter of housecleaning" because such defensive pleadings were already abolished by former Rule 1.7(a)'s phrase "No other pleading shall be allowed," which was incorporated into Florida Rule 1.100. In Florida, demurrers are considered defensive pleadings. Barns & Mattis, *1962 Amendments to the Florida Rules of Civil Procedure*, 17 U. MIAMI L. REV. 276, 277–79 (1963).

112. *See* FLA. R. CIV. P. 1.140(b)(6). Note the semantic asymmetry inherent in a motion to dismiss for "failure to state a cause of action" when Florida Rule 1.110 requires a pleading to contain ultimate facts showing entitlement to relief, not a "cause of action."

joinder generally follow the model of the Federal Rules,[113] and the Florida rules relating to discovery[114] and summary judgment[115] are even more closely patterned after the FRCP.[116]

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113. *Compare* FLA. R. CIV. P. 1.220 (class action rule virtually identical in structure and nearly identical in text to FRCP 23) *with* FLA. R. CIV. P. 1.230 (intervention rule entirely permissive, without provision for intervention as of right similar to FRCP 24(a)).

Florida third-party practice varies from the federal model, but the degree is uncertain in light of the 1984 amendment of Florida Rule 1.180(a), Florida's analogue to FRCP 14(a). The thrust of the amendment appears to be to rectify partially Florida's lack of a broad joinder of claims provision analogous to FRCP 18(a).

Florida Rule 1.180(a) was amended by the Florida Supreme Court to "overrule" two decisions and to "permit the defendant to have the same right to assert claims arising out of the transaction or occurrence that all the other parties to the action have." *See In re* Amendments to Rules of Civil Procedure, 458 So. 2d 245, 248 (Fla. 1984). The text of the rule was changed to read:

> At any time after commencement of the action a defendant may *have* a summons and complaint served on a person not a party to the action who is or may be liable to *the defendant* for all or part of the plaintiff's claim against *the defendant and may also assert any other claim that arises out of the transaction or occurrence that is the subject matter of the plaintiff's* claim.

Id. (emphasis added).

In one of the decisions prompting this reform, a Florida appellate court held that defendant condominium owners could not join "third party defendants" to their warranty counterclaims in an action in which they had been sued by the condominium developer for purely injunctive relief. Miramar Constr., Inc. v. El Conquistador Condominium, 303 So. 2d 81, 81–82 (Fla. Dist. Ct. App. 1974). It is unclear whether the purported "overruling" of *Miramar* was meant to effect an incorporation of FRCP 13(h)'s liberal rule regarding the joinder of additional parties to existing cross- and counterclaims, or whether subsequent interpretation will disclose that *Miramar* was overruled only to the extent that the parties sought to be joined were necessary to accord complete relief in accordance with Florida Rule 1.170(h).

The other catalyst to the third-party practice reform was Richard's Paint Mfg. Co. v. Onyx Paints, Inc., 363 So. 2d 596 (Fla. Dist. Ct. App. 1978). The court there held that, absent a joinder of claims rule similar to FRCP 18(a), former rule 1.180(a) prevented a wholesale paint dealer, as counter-defendant/third-party complainant, from obtaining a greater monetary recovery from the third-party defendant paint manufacturer than was sought in the counterclaim against it. *Id.* In overruling this case by amendment, the Florida Supreme Court has authorized joinder of additional transactionally related claims to indemnity claims by the original defendant against a third party defendant, even where the aggregate amount of the relief sought against the third party defendant exceeds the amount sought from the original defendant by the original plaintiff.

This result shows some convergence of Florida joinder policy with that of the Federal Rules. *See* FED R. CIV. P. 18(a) (free joinder of claims against those who are already opposing parties). Whether Florida has also moved toward the Federal position on permissive joinder of *parties, see* FED. R. CIV. P. 13(h), 20, is unclear pending interpretation of Florida Rule 1.180(a) as amended.

114. *See* FLA. R. CIV. P. 1.280–1.380 (patterned closely on Federal Rules' discovery provisions as amended in 1970). Florida's analogue to FRCP 32(a)(3)—Florida Rule 1.330(a)(3)—is subject to the idiosyncratic provision of Florida Rule 1.390, permitting expert witness testimony to be adduced at trial by deposition regardless of where the expert witness resides. With the exception of a provision permitting telephonic depositions—Florida Rule 1.310(b)(7)—the Florida Rules have not been conformed to the federal discovery amendments of 1980 and 1983.

115. *See* FLA. R. CIV. P. 1.510. Florida departs from practice under FRCP 56 by requiring a motion for summary judgment to "state with particularity the grounds upon which it is based and the substantial matters of law to be argued."

116. Florida courts frequently look to federal precedent and commentary as aids in interpretation

GEORGIA

Notice Pleading/Federal Code Procedural System

The Georgia Civil Practice Act of 1966 extensively modernized Georgia's civil procedure.[117] Although not identical in content to the Federal Rules, Georgia's new code of procedure largely follows the FRCP.[118] The Georgia courts have relied on federal precedent when construing Georgia's codified analogues to the Federal Rules.[119] The new code completely abandoned Georgia's amalgam of code and common law pleading[120] in favor of the federal style of notice pleading.[121]

HAWAII

Federal Rules Replica

Since statehood in 1959, the Hawaii Supreme Court's Rules of Civil Procedure have been replicas of the Federal Rules.[122] Their numbering is identical and key rules follow the FRCP with only slight grammatical

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of Florida's counterpart rules. *See, e.g.*, Brown v. Brown, 432 So. 2d 704, 706–07 (Fla. Dist. Ct. App. 1983); Wilson v. Clark, 414 So. 2d 526, 530 n.3 (Fla. Dist. Ct. App. 1982).

117. Georgia Civil Practice Act, No. 588, 1966 Ga. Laws 609 (codified at GA. CODE ANN., tit. 81A, §§ 81A-101–81A-185 (1984)) ("An Act to comprehensively and exhaustively revise, supersede, and modernize pretrial, trial and certain post-trial procedures in civil cases . . . .").

118. The sections of the Act were numbered to correspond to the Federal Rules. The following list illustrates the degree and nature of Georgia's variation from federal practice. Although Georgia has conformed its rules to the 1966 amendments to Federal Rules 19 and 24, it has not adopted the 1966 amendment to Federal Rule 23. *See* GA. CODE ANN. §§ 81A-119, 81A-123, 81A-124. Georgia's version of Rule 8 prevents a prayer for a sum certain in excess of $10,000 in a medical malpractice action. GA. CODE ANN. § 81A-108(a)(2)(B). *See generally* Keese v. Brown, 250 Ga. 383, 297 S.E.2d 487 (1982). Georgia's version of Rule 8(c) originally followed the Federal Rules in requiring the pleading of assumption of risk and "comparative negligence" as affirmative defenses, 1966 Ga. Laws 609, 619, but these defenses were removed from GA. CODE ANN. § 81A-108(c) by 1967 Ga. Laws 226, 230.

119. *See* Georgia Int'l Life Ins. Co. v. Boney, 139 Ga. App. 575, 228 S.E.2d 731, 737 (1976) (acknowledging "persuasive rule of federal decisions"); Poole v. City of Atlanta, 117 Ga. App. 432, 160 S.E.2d 874, 875 (1968).

120. *See* WRIGHT I, *supra* note 1, § 9.11, at 53.

121. *See* GA. CODE ANN. 81A-108(a)(2)(A) ("short and plain statement of the claims showing that the pleader is entitled to relief"); Sprewell v. Farmer, 230 Ga. 297, 196 S.E. 2d 866, 868 (1973) (policy of "notice pleadings now in force"); Byrd v. Ford Motor Co., 118 Ga. App. 333, 163 S.E.2d 327, 327 (1968) (new procedure "does away with 'issue pleading' and substitutes 'notice pleading'").

122. *See generally* HAWAII R. CIV. P. 1–85 (rev. ed. 1980, with further amendments through June, 1985), in 1 Rules of Court, The Judiciary of Hawaii (1968).

variations.[123] Case law interpreting the federal counterparts to the Hawaii Rules has been held to be "highly persuasive" authority in construing the Hawaii Rules.[124]

IDAHO

Notice Pleading/Federal-Rules-Model Procedural System

The 1958 Idaho Rules of Civil Procedure reorganized Idaho's procedural system in the general form of the FRCP.[125] At that time, Idaho's Rules and its statutory procedural law coexisted in uneasy conflict; the indecisiveness of both the Supreme Court and legislature as to whether the 1958 rules had the effect of statutes led to the necessity of specific repeal[126] of many of the conflicting statutory provisions[127] in 1975. Until then, several Idaho Code sections addressed the use, grounds and form of demurrers.[128] The 1975 repeal of the vestiges of code pleading was accompanied by the Supreme Court of Idaho's comprehensive amendment of the Idaho Rules of Civil Procedure,[129] which are now closely modeled on the Federal Rules[130] and

123. Hawaii Civil Rule 14(a) does contain an interesting addition to the text of its federal counterpart: its first sentence permits a defendant to implead a party who may be liable "to him *or to the plaintiff* for all or part of the plaintiff's claim against him." *Id.* (emphasis supplied).

124. Ellis v. Crockett, 51 Hawaii 45, 451 P.2d 814, 824 (1969); *see also* Kalauli v. Lum, 57 Hawaii 168, 552 P.2d 355, 356 (1976) ("useful precedents"). In particular, Hawaii has embraced the federal philosophy of "simplified notice pleading." Perry v. Planning Comm'n, 62 Hawaii 666, 619 P.2d 95, 108 (1980).

125. *See* IDAHO CODE, Idaho Rules of Civil Procedure (Bobbs-Merrill 1958) (superseded). These rules took effect November 1, 1958, and were amended comprehensively effective January 1, 1975. The 1958 rules followed the FRCP "as far as seemed practicable to the end of uniformity but not at the expense of existing procedural statutory rules that seem to be better for state practice." *Id.* at iii (publisher's note).

126. See, *e.g.*, provisions in IDAHO CODE § 5-601–5-619 (1979), concerning the repeal of demurrer provisions.

127. *See, e.g.*, 1958 IDAHO R. CIV. P. 7(c) annotation (conflicting prior code sections were "probably abrogate[d]" in areas addressed by rule abolishing demurrers, pleas, and exceptions).

128. *See, e.g.*, IDAHO CODE §§ 5-603, 5-607, 5-608 (1948).

129. For the text of the current Idaho Rules, see IDAHO CODE, Idaho Court Rules (Bobbs-Merrill 1980 & 1984 Cum. Supp.).

130. The 1980 Idaho Court Rules volume of the Idaho Code, *see supra* note 129, contains annotations comparing each rule to its federal counterpart.

A 1984 amendment to Idaho Rule 9(b) added "violation of civil or constitutional rights" to fraud and mistake as matters to be pleaded with particularity. While this is consistent with the way some federal courts have pretended the Federal Rules read, *see infra* note 38, it is a departure from the Federal Rules as written.

As amended in 1984, Idaho Rule 4(i) contains an unusual provision for consent to personal jurisdiction by "voluntary appearance," which seems to preclude the assertion of defenses under Idaho Rule 12(b)(3), (4), or (5) by an answer amended as of right. For a similar example of idiosyncratic state practice that we consider incompatible with federal replica status, see *infra* note 252 and accompanying text (Nevada's special appearance rule). While Idaho's idiosyncrasy is explicit in the text of Idaho Rule

are generally construed to like effect.[131]

ILLINOIS

Fact Pleading/Code-Based Procedural System

Illinois resembles California in its retention of code pleading despite the similarity of its code to the Federal Rules.[132] The new Illinois Code of Civil Procedure[133] reorganized Illinois procedural law, but otherwise made only stylistic rather than substantive changes.[134] "While notice pleading prevails under the Federal rules," the Illinois Supreme Court has recently observed, "a civil complaint in Illinois is required to plead the ultimate facts which give rise to the cause of action."[135] An Illinois complaint must contain a "plain and concise statement of the pleader's cause of action."[136] Bills of particulars have not been abolished[137] and although Illinois has

4(i), the lack of any cross-reference to Rule 4(i) in the text of Rule 12(h) creates the likelihood of waiver by unwary assertion of the defense of lack of personal jurisdiction in an answer rather than by preliminary motion.

Although the matter is hardly free from doubt, these departures from the text and principles of the Federal Rules seem sufficiently significant to tilt the balance against classification of Idaho's civil procedural system as a federal replica.

131. *See* M.K. Transp. v. Grover, 101 Idaho 345, 612 P.2d 1192, 1196 n.4 (1980); *see also* Lawrence Warehouse Co. v. Rudio Lumber Co., 89 Idaho 389, 405 P.2d 634, 637 (1965) (1958 Idaho Rules to be construed to like effect as parallel Federal Rules "if such construction is reasonable"). For Idaho's federal-style interpretation of notice pleading, see Service Employees Int'l Union, Local 6 v. Idaho Dep't of Health & Welfare, 106 Idaho 756, 683 P.2d 404, 406 (1984). *See also* Kolp v. Board of Trustees, 102 Idaho 320, 629 P.2d 1153, 1161 (1981) ("[f]or over 20 years now we have had notice pleadings") (Bistline, J., concurring and dissenting).

132. *See supra* note 69 and accompanying text.

133. Act of Aug. 19, 1981, Public Act No. 82-280, 1982 Ill. Laws 1381. The rules became effective July 1, 1982. *See* ILL. ANN. STAT. 110, §§ 2-101 to 2-1601 (Smith-Hurd 1983). These rules re-enacted the former Civil Practice Act as Article II of the code, to be cited as the Civil Practice Law. *Id.*

134. Jenner, Tone & Martin, *History, Source and Effect of the Civil Practice Law,* ILL. ANN. STAT. 110 (volume containing §§ 1-101 to 2-502, at XI, XXXIII) (Smith-Hurd 1983).

135. People *ex rel.* Scott v. College Hills Corp., 91 Ill.2d 138, 435 N.E.2d 463, 466–67 (1982). The court also stated that pleadings were to be liberally construed and that federal notice pleading precedent was relevant to determine the adequacy of a civil complaint. *Id.* at 466, 467. But as the court had said a few months previously:

> Notice pleading, as known in some jurisdictions, is not sufficient under our practice act . . . . [P]rovisions concerning liberal construction . . . do not remedy the failure of a complaint to state a cause of action . . . . This court has repeatedly held that a complaint which does not allege *facts*, the existence of which are necessary to enable a plaintiff to recover does not state a cause of action and that *such deficiency may not be cured by liberal construction* or argument.'

Knox College v. Celotex Corp., 88 Ill. 2d 407, 430 N.E.2d 976, 985–86 (1981) (citation omitted) (emphasis added by court). For an illustration of the continued application of these principles after the enactment of the Illinois Code of Civil Procedure in 1982, see Spiegel v. Sharp Elec. Corp., 125 Ill. App. 3d 897, 466 N.E.2d 1040, 1042 (1984).

136. ILL. ANN. STAT. ch. 110, § 2-603(a) (Smith-Hurd 1983).

137. *Id.* § 2-607.

borrowed many of the Federal Rules' joinder provisions[138] there is no compulsory counterclaim rule in Illinois.[139]

INDIANA

Federal Rules Replica

Indiana's use of code pleading[140] ceased when the Indiana Rules of Trial Procedure became effective on January 1, 1970.[141] These rules are modeled on the Federal Rules, contain many common provisions and generally conform to the numbering and organization of their federal counterparts. Indiana has wholeheartedly embraced notice pleading.[142] Although the Indiana Rules of Trial Procedure contain lengthy provisions unique to state practice, they are not inconsistent with the philosophy of the Federal Rules.[143] Interpretation of the Federal Rules guides construction of the Indiana Rules.[144]

IOWA

Notice Pleading/Idiosyncratic Rules-Based Procedural System

138. *See, e.g., id.* §§ 2-404, 2-405 (Smith-Hurd 1983) (joinder of parties); § 2-406(b) (third-party complaint for indemnity); § 2-408(a) (intervention as of right); § 2-408(b) (permissive intervention); § 2-409 (interpleader), §§ 2-801 to 2-806 (class actions).

139. *Id.* § 2-608(a) (Smith-Hurd 1983) (providing only for permissive counterclaims).

140. *See* WRIGHT I, *supra* note 1, § 9.15, at 56.

141. The Indiana Rules of Trial Procedure may be found in the Court Rules (Civil) volume, 34 IND. CODE ANN. App. (West 1981 & Supp. 1986). The adoption of comprehensive rules of civil procedure in Indiana had a curious history. The Supreme Court of Indiana had both statutory and constitutional authority to prescribe rules of procedure, but had failed to promulgate a complete set of rules. *See* WRIGHT I, *supra* note 1, § 9.15, at 56. The Indiana Legislature enacted the Indiana Rules of Civil Procedure on March 13, 1969, to be effective on January 1, 1970. *See* 34 IND. CODE ANN. App. at III (West 1981) (publisher's preface). The Indiana Supreme Court then adopted a similar but not identical set of rules on July 29, 1969, also effective January 1, 1970.

The Indiana Supreme Court has since held that its procedural rules take precedence over conflicting statutes, State *ex rel.* Gaston v. Gibson Circuit Court, 462 N.E.2d 1049, 1051 (Ind. 1984); Augustine v. First Fed. Sav. & L. Ass'n, 384 N.E.2d 1018, 1020 (Ind. 1979), and indeed this was confirmed by the very statute by which the Legislature enacted its rules of procedure. *See* IND. CODE ANN. § 34-5-1-1 (enacting Indiana Rules of Civil Procedure) (repealed 1984) (West 1983 & 1986 Supp.); IND. CODE ANN. § 34-5-1-2 (West 1983) (reaffirming power of Indiana Supreme Court to "adopt, amend and rescind rules of court affecting matters of procedure").

The Indiana Rules of Trial Procedure were formally adopted by the Legislature and incorporated into the Indiana Code in 1984 by what appears to be wholly superfluous legislation. IND. CODE ANN. § 34-5-1-6 (West Supp. 1986). *See Legislative Wrap-up,* 27 RES GESTAE 472, 474 (1984).

142. IND. R. TRIAL P. 8(A)(1). *See* Parker v. State, 400 N.E.2d 796, 798 (Ind. App. 1980); Farm Bureau Ins. Co. v. Clinton, 149 Ind. App. 36, 269 N.E.2d 780, 783 (1971).

143. *See, e.g.,* IND. R. TRIAL P. 13(J)–(M); 17(D)–(F); 19(C)–(F). *But cf.* IND. R. TRIAL P. 23 (class action rule follows verbatim FRCP 23).

144. *See, e.g.,* Gumz v. Starke County Farm Bureau Coop. Ass'n, Inc., 271 Ind. 694, 395 N.E.2d 257, 261, (1979); Penwell v. Western & So. Life Ins. Co., 474 N.E.2d 1042 (Ind. App. 1985).

Iowa's civil procedure is unusually difficult to classify, and has been for years.[145] The Iowa Rules of Civil Procedure, although adopted five years after the Federal Rules, are organized and numbered quite differently. Primarily because these rules continued to require "fact pleading," Professor Wright declared that the Iowa Rules of Civil Procedure were "really very different" from the FRCP. That is not the case today, although differences do remain to distinguish Iowa's civil procedure from that of the federal courts.

Some of Iowa's rules have always resembled the Federal Rules,[146] and recent amendments have increased the overall similarity.[147] Iowa's counterpart to the Federal Rule 12(e) motion for more definite statement is grudgingly worded,[148] but Iowa has abolished common counts, fictions, demurrers, general issues, and other technical forms of pleading.[149] Most important, however, is Iowa's 1976 adoption of notice pleading by requiring only a "short and plain statement of the claim."[150] In our view, the unconventional organization and enumeration of Iowa's Rules of Civil Procedure pale in significance when compared to these functional similarities to the federal system. The idiosyncratic format of the Iowa Rules

145. *See* WRIGHT I, *supra* note 1, § 9.16, at 56–57 (brief history of how the Iowa Rules of Civil Procedure came to be engrafted upon the Field-type Code that Iowa had adopted in 1851, and a description of their idiosyncrasy as of 1960).

146. *See, e.g.*, IOWA R. CIV. P. 22–24 (joinder of claims and parties analogous to FRCP 18 & 20); IOWA R. CIV. P. 29–30 (compulsory and permissive counterclaims analogous to FRCP 13(a) and 13(b)).

147. *See, e.g.*, IOWA R. CIV. P. 33 (as amended 1976) (crossclaims authorized in terms virtually identical to FRCP 13(g)); IOWA R. CIV. P. 34 (adopted 1973) (third-party practice similar to FRCP 14); IOWA R. CIV. P. 88–90 (as amended 1976) (standards for amending complaints, the relation back of an amended complaint, and standards for supplemental complaints, all patterned on FRCP 15); *see also* IOWA R. CIV. P. 42.1–.20 (adopted 1980) (Iowa's version of Uniform Class Action Rules, generally consistent with, although more comprehensive in scope, than FRCP 23).

148. Iowa Rule 112 provides that a party "may move for a more specific statement of any matter not pleaded with sufficient definiteness to enable him to plead to it and for *no other purpose*." (emphasis added).

149. *See* IOWA R. CIV. P. 67.

150. *See* IOWA R. CIV. P. 69(a). Oddly, Iowa did not adopt the provisions of FRCP 8 regarding the pleading of defenses. *See* IOWA R. CIV. P. 72 (answer "must state any additional facts deemed to show a defense"). However, Iowa case law makes clear that the 1976 amendment to Iowa Rule 69 adopted the notice pleading philosophy of Federal Rule 8(a). *See, e.g.*, Northrup v. Farmland Indus., Inc., 372 N.W.2d 193, 197 (Iowa 1985) ("The standard by which the sufficiency of a pleading is measured is whether it provides 'fair notice' of the claim asserted so as to allow the adverse party an opportunity to make an adequate response."). *See generally* Lamantia v. Sojka, 298 N.W.2d 245, 247–49 (Iowa 1980) ("the concept of notice pleading" and use of summary judgment is "a necessary adjunct to notice pleading, to eliminate sham claims *and defenses*") (emphasis added); Christensen v. Shelby County, 287 N.W.2d 560, 563 (Iowa 1980) (FRCP 8(a) is "persuasive in interpreting our rules"); Citizens for Washington Square v. City of Davenport, 277 N.W.2d 882, 883–84 (Iowa 1979) (notice pleading explicated in connection with Iowa Rule 104(b), analogous to FRCP 12(b)(6)); Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 192–93 (Iowa App. 1984) (rejecting "narrow view of notice pleading concepts" and holding that notice pleading does not require that specific theories be pled and "does not require the pleading of ultimate facts").

bar their classification as a *Federal-Rules-Model Procedural System*, but in content, Iowa's Rules and the Federal Rules have much in common.[151]

KANSAS

Notice Pleading/Federal Code Procedural System

Shortly after Professor Wright's caustic appraisal of its nineteenth-century procedural system in his 1960 survey,[152] Kansas adopted a new Code of Civil Procedure in 1963[153] that included a complete set of rules of civil procedure "patterned in significant measure after the Federal Rules of Civil Procedure."[154] Kansas courts have embraced notice pleading enthusiastically.[155] In enumeration and organization the codified Kansas rules of civil procedure generally follow the Federal Rules,[156] with the insertion of

151. The functional similarity between Iowa's idiosyncratic procedural system and systems organized more obviously according to the model of the Federal Rules is due, in part, to Iowa's liberalization of its rules regarding discovery. *See* IOWA R. CIV. P. 121–134. These rules, most of which were adopted in 1973, follow closely the organization and terminology of FRCP 26–37 as amended in 1970. This was a major change which foreshadowed and facilitated Iowa's conversion to notice pleading three years later. *Cf.* WRIGHT I, *supra* note 1, § 9.16, at 57 ("The [Iowa] discovery rules, even as recently revised [in 1957], are still substantially less liberal than the corresponding provisions of the federal rules.").

152. "Kansas procedure has not substantially changed since the adoption, in 1859, of a civil practice act based on the Field Code. Federal Rule 16, providing for pre-trial conferences, has been adopted by statute in Kansas, but this is virtually the only instance of incorporation there of modern procedural ideas." WRIGHT I, *supra* note 1, § 9.17, at 57 (footnotes omitted).

The Kansas Judicial Council began studying the revision of the Kansas civil procedural system in 1959, before the publication of Professor Wright's survey in 1960, but the report of its advisory committee was not completed until late in 1962. Gard, *Highlights of the Kansas Code of Civil Procedure*, 2 WASHBURN L.J. 199, 199 (1963) (author was chair of advisory committee). Kansas' adoption of the federal civil procedure model was encouraged by the "general feeling of satisfaction with the practice under the federal rules" as "evidenced by the extensive adoption of federal procedure in many of the states" and by the fact that "after twenty-five years of experience" there had accumulated a "large volume of federal case precedent" to make "adaptation to the state practice much less difficult than in the beginning." *Id.* at 204.

153. *See* KAN. STAT. ANN. §§ 60-201–269 (1983). The new code's effective date was January 1, 1964. For text of the rules immediately following the change, see KAN. STAT. ANN. §§ 60-201–269 (1976) (superseded). For a brief history of code pleading in Kansas, see Gard, *Procedure by Court Rules: Recapturing by the Courts of a Surrendered Authority*, 5 U. KAN. L. REV. 42, 43 (1956).

154. For over one hundred years the Field Code and its patchwork amendments dominated Kansas practice. Then with the enactment of Kan. Sess. Laws 1963, ch. 303, which became effective Jan. 1, 1964, the legislature of Kansas laid down a completely new practice code patterned in significant measure after the Federal Rules of Civil Procedure. Shurtz, *Civil Practice*, 14 KAN. L. REV. 171, 171 (1965).

155. "The need for technical pleading has vanished. We now require only a barebones pleading which outlines the nature of the claim. Since discovery in its broadest scope is available under the code of civil procedure, there is no need for technical pleadings." Oller v. Kincheloe's, Inc., 235 Kan. 440, 681 P.2d 630, 636 (1984). "With the advent of present notice-type pleading more illiberal construction should not be the order of the day. . . ." Monroe v. Daar, 520 P.2d 1197, 1201 (Kan. 1974) (opinion of Commissioner) (citing federal authority as applicable to determine sufficiency of pleadings under new Kansas procedure).

156. The Kansas rules of civil procedure, so spelled in the lower case by designation of KAN. STAT.

non-standard rules governing matters of local practice or aspects of Kansas practice that continue to vary from the standard of the Federal Rules.[157] Most of the 1966 and 1970 amendments to the Federal Rules have been incorporated into the Kansas rules.[158] Although the Kansas procedural system thus has much in common with the Federal Rules, the number and content of non-standard Kansas rules[159] and the lack of judicial rule-making power[160] keep Kansas from being classified as a federal replica jurisdiction.

KENTUCKY

Federal Rules Replica

Under the Kentucky Rules of Civil Procedure, Kentucky's procedural system has replicated the FRCP since 1953.[161] Popular demand,[162] as well

ANN. § 60-269 (1983), are the second article of Chapter 60 of the Kansas Statutes Annotated. *See* KAN. STAT. ANN. § 60-101 (1983) (1963 Act adding Chapter 60 to be known as Code of Civil Procedure); KAN. STAT. ANN. § 60-201 (1983) (scope of application of Article 2's rules of civil procedure). The Kansas rules of civil procedure follow the enumeration of the Federal Rules except for the prefix designating the chapter and article of the Kansas Statutes Annotated. Hence KAN. STAT. ANN. § 60-208(a) (1983) is the Kansas rule of civil procedure counterpart to Federal Rule 8(a). Kansas courts look to federal precedent as relevant to construction of the Kansas rules. *See, e.g.*, Fredricks v. Foltz, 221 Kan. 28, 557 P.2d 1252, 1255 (1976); Jones v. Smith, 5 Kan. App. 2d 352, 616 P.2d 300, 302 (1980).

157. *See, e.g.*, KAN. STAT. ANN. § 60-203 (1983) (commencement of action requires service of process); 60-209(h)–(j) (1983) (expanded categories of matters to be specially pleaded); 60-211 (1983) (liability of attorneys for frivolous pleadings); 60-258(a) (1983) (comparative negligence replaces contributory negligence). With respect to the Kansas rule regarding when a civil action commences, see Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949).

158. *See, e.g.*, KAN. STAT. ANN. §§ 60-219, 60-223, 60-224 (1983) (tracking 1966 joinder amendments to Federal Rules); KAN. STAT. ANN. §§ 60-226 to -237 (1983) (tracking 1970 discovery amendments to Federal Rules). *But cf.* KAN. STAT. ANN. § 60-217(a) (1983) (tracks Federal Rule 17(a) without anti-dismissal language added to Federal Rule 17(a) in 1966). Kansas amended its version of Federal Rule 11 in 1982, KAN. STAT. ANN. § 60-211 (1983), adding more forceful language about sanctions for sham pleading a year before the federal counterpart was amended to like effect. *See* FED. R. CIV. P. 11 (as amended 1983). *See generally* Schroeder, *Recent Development in Kansas Civil Procedure*, 32 KAN. L. REV. 515, 531 (1984).

The 1982 amendment to the Kansas version of Rule 11 was by statute. 1982 Kan. Sess. Laws, ch. 241. Although the 1963 Code of Civil Procedure included a provision vesting in the Supreme Court of Kansas the power to amend the statutory rules of civil procedure, *see* KAN. STAT. ANN. § 60-2607 (1976) (superseded); Schoof v. Byrd, 197 Kan. 38, 47, 415 P.2d 384, 391 (1966); Gard, *supra* note 153, at 217, this power has since been repealed. 1981 Kan. Sess. Laws, ch. 237. This may well impair the flexibility of the Kansas rules and detract in the future from their similarity to the Federal Rules. *See* Gard, *supra* note 153, at 216–18. *See generally* WRIGHT I, *supra* note 1, § 10, at 81 (legislative intervention in the rule-making process "is productive only of woe"); Gard, *supra* note 153, at 216 (rule-making power is inherent to judicial power).

159. *See supra* note 157 and accompanying text.

160. *See supra* note 158.

161. For text of Kentucky's rules, see KY. REV. STAT. "Rules" (1983 replacement), or KY. REV. STAT. ANN. "Civil Rules" (Baldwin 1978).

162. After soliciting advice from the entire Kentucky bench and bar, Kentucky's Civil Code

as the perceived impact of the FRCP,[163] spurred on Kentucky's transformation. Although the Kentucky Rules differ from the FRCP in the numbering of their subdivisions[164] and by the insertion of minor details reflecting local practice,[165] they are faithful to the fundamental principles of the Federal Rules[166] and have incorporated their most important amendments.[167]

LOUISIANA

Fact Pleading/Code-Based Procedural System

The Louisiana Code of Civil Procedure is a civil law code[168] with a unique and colorful history of French and Spanish influence.[169] Louisiana employs fact pleading[170] which has recently been "tempered" considerably by liberal rules of amendment.[171] Fact pleading in Louisiana was first

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Committee discovered that "a surprising proportion of the letters received recommended that the Committee should attempt to follow, as closely as possible, the Federal Rules of Civil Procedure." Fowler & Catlett, *Report of the Civil Code Committee,* 16 KY. ST. B.J. 23 (1951).

163. In adopting the FRCP model system, Kentucky's Civil Code Committee noted that many of Kentucky's sister states had adopted the FRCP. It found that:

> every state in the Union had felt the influence of the federal rules—some only to the extent of an adoption of pre-trial procedure—except six, and in that number was Kentucky. The Committee was impressed with the extent, and apparent success, of the use of the federal rules in state courts, and was surprised that a procedural tidal wave, which promise[d] to exceed that produced by the Field Code, was so quietly at work in America.

Fowler & Catlett, *supra* note 162, at 23–24.

164. For example, FED. R. CIV. P. 8(a) (concerning claims for relief) finds its Kentucky counterpart in Kentucky Rule 8.01.

165. *See, e.g.,* KY. R. CIV. P. 13.04, 14.03, 17.04, 59.01.

166. Kentucky has enthusiastically embraced notice pleading. *See, e.g.,* Upton v. Knuckles, 470 S.W. 2d 822, 825–27 (Ky. 1971); Shreve v. Taylor County Pub. Library Bd., 419 S. W. 2d 779, 782 (Ky. 1967). Precedent construing parallel Federal Rules is frequently used to aid in the interpretation of their Kentucky counterparts. *See, e.g.,* Perry v. Kessinger, 652 S.W.2d 655, 658 (Ky. Ct. App. 1983); Davis v. Dever, 617 S.W.2d 56, 57 (Ky. Ct. App. 1981).

167. *See* Clay, *Significant 1969 Amendments to the Kentucky Rules of Civil Procedure,* 58 KY. L.J. 7 (1969) ("It has been our policy since 1953 to have our procedure conform as closely as possible to that in the federal courts . . . ."). Kentucky's discovery rules were comprehensively revised in 1971 to conform to the 1970 amendments to the Federal Rules, but, except for the 1983 amendment to Rule 11, Kentucky has not generally conformed its rules to the Federal Rules as amended in 1980 and 1983.

168. McMahon, *The Louisiana Code of Civil Procedure,* 21 LA. L. REV. 1, 18 (1960).

169. *See generally* Batiza, *The Actual Sources of the Louisiana* Projet *of 1823: A General Analytical Survey,* 47 TUL. L. REV. 1 (1972); Dart, *Discussion of the Early Sources of Louisiana Law,* 2 LOYOLA L.J. 1 (1921); 3 LOYOLA L.J. 1 (1922); McMahon, *The Background, Structure, and Composition of the Louisiana Code of Civil Procedure,* 7 LA. B.J. 246 (1960); Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762–1828,* 42 LA. L. REV. 1485 (1982).

170. *See* LA. CODE CIV. PROC. ANN. art. 854 (Official Revision Comments) (West 1984) ("This article preserves the Louisiana system of pleading facts as being preferable to the notice pleading of the Federal Rules . . . or to any other modified system of notice pleading."); art. 891 ("petition . . . shall contain a short, clear and concise statement of the object of the demand and of the material facts upon which the cause of action is based"); art. 1003 (requiring answer to state "material facts" of defenses).

171. *See* McMahon, *supra* note 168, at 29.

codified in the Practice Act of 1912, superseding the prior simple notice pleading system and constituting a procedural step backwards for Louisiana.[172] Louisiana's permissible pleadings have changed little since this time and still include "petitions [complaints], exceptions [demurrers], written motions [considered pleadings], and answers."[173] Louisiana's preemptory exception of no cause of action[174] is essentially a common law demurrer[175] and thus admits well-pleaded facts while testing a petition's legal sufficiency.[176] The petition must plead ultimate facts; conclusions of law and evidentiary facts cannot state a cause of action.[177] Rule-making power in Louisiana is vested in the legislature and has not been granted to the Louisiana Supreme Court.[178]

MAINE

Federal Rules Replica

The Maine Rules of Civil Procedure took effect in 1959,[179] transforming Maine's civil procedure from a code pleading system into one patterned closely after the Federal Rules.[180] The Maine Rules have innovative features[181] and address the details of local practice.[182] While they have incor-

172. *See* McMahon, *The Case Against Fact Pleading in Louisiana,* 13 LA. L. REV. 369, 386–90 (1953) (Louisiana Supreme Court's sudden employment of fact pleading criteria in scrutinizing pleadings around turn of century was precipitated by exposure to monograph on subject by Michigan law professor in legal treatise; 1912 Practice Act codified need for "material facts"). Prior to 1912, Louisiana pleading was similar to France's under the French Civil Ordinance of 1670: Louisiana's Superior Council's clerk summarized in a concise and sufficient statement (probably taken from counsel's oral pleading) the litigant's presentation of the cause. Flory & McMahon, *The New Federal Rules and Louisiana Practice,* 1 LA. L. REV. 45, 46 n.3, 51 (1938); *see also* McMahon, *supra* note 168. *Cf.* Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs,* 13 LA. L. REV. 395, 401, 424 (1953) (because Louisiana pleading never required an attorney to bring his claims within the rigid common law forms of action and there had never been a law/equity bifurcation, the concept of a "cause of action" in Louisiana had never been encrusted with the difficulties of that of the common law).

173. LA. CODE CIV. PROC. ANN. art. 852 (West 1984) (pleadings allowed). *Cf.* FED. R. CIV. P. 7(a) (simpler scheme and terminology); FED. R. CIV. P. 7(c) (abolishing exceptions).

174. LA. CODE CIV. PROC. ANN. art. 927(4) (West 1984).

175. *See* Young v. Thompson, 189 So. 487, 489 (La. Ct. App. 1939).

176. *See* Darville v. Texaco, Inc. 447 So. 2d 473 (La. 1984).

177. *See* McMahon, *supra* note 172 at 388–89 (citing Louisiana's seminal fact pleading case of State v. Hackley, 124 La. 854, 863–64, 50 So. 772, 775–76 (1909)).

178. *See* WRIGHT II, *supra* note 9, § 9.19, at 58.

179. For the title of the Maine Rules and their original effective date, see ME. R. CIV. P. 85, 86(a). The Maine Rules of Civil Procedure may be found in MAINE RULES OF COURT (West 1985).

180. For the history of Maine's civil procedural system and its conversion to a federal replica, see WRIGHT I, *supra* note 1, § 9.20, at 59.

181. Maine's compulsory counterclaim rule applies to the claims of a plaintiff against an impleaded third-party defendant, ME. R. CIV. P. 14(a), but not when the potential counterclaimant is defending against a claim "for damage arising out of the ownership, maintenance or control of a motor

porated most of the important amendments to the FRCP,[183] some recent amendments to the Maine Rules have introduced differences of detail vis-a-vis the Federal Rules.[184] In enumeration, organization, and philosophy, however, the Maine Rules remain a replica of their federal counterparts.[185]

MARYLAND

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Until 1984, Maryland retained the division of law and equity as part of its idiosyncratic procedural system.[186] In a sweeping reform, the Maryland Court of Appeals adopted new rules[187] that moved Maryland procedure much closer to the federal model. Demurrers, pleas, and replications were abolished.[188] The motion for bill of particulars, permitted under the previous rules,[189] was replaced with the motion for more definite statement.[190] Maryland's new discovery[191] and joinder[192] rules have much in common with the FRCP, although significant differences remain[193] along with more trivial variations of detail.[194] Maryland has made no effort to emulate the

vehicle." ME. R. CIV. P. 13(a).

182. *See, e.g.*, ME. R. CIV. P. 80–80K (special rules for various types of proceedings common in courts of local jurisdiction); ME. R. CIV. P. app. form 34 (Order for Protection from Abuse).

183. The Maine Rules conform to the federal joinder amendments of 1966 and discovery amendments of 1967.

184. Maine stiffened its version of Rule 11 and expanded the powers of the trial court under Rule 16 prior to the similar federal amendments of 1983. There is some variation in detail, but little in effect, between the amended Maine and Federal Rules. Absent court order for good cause, Maine limits a party to serving only one set of interrogatories on each opposing party. ME. R. CIV. P. 33(a).

185. *See* Travelers Indem. Co. v. Dingwell, 414 A.2d 220, 225 (Me. 1980) (discussing Maine's policy of notice pleading). For Maine's construction of its rules in light of federal precedent, see Durgin v. Robertson, 428 A.2d 65 (1981); Maine Central R.R. v. Bangor & Aroostook R.R., 395 A.2d 1107 (1978).

186. *See* 9B MD. CODE ANN., MD. R.P. 1, § d (Mitchie 1977) (superseded): "These Rules shall not be interpreted to affect the existing distinction between law and equity." *Cf.* MD. CODE ANN., 1 MD. RULES, Rule 2–301 (Mitchie 1985) (abolishing the procedural distinction between law and equity in favor of "one form of action known as 'civil action.'"). On the tradition of idiosyncrasy in Maryland procedure, see WRIGHT I, *supra* note 1, § 9.21, at 59–60.

187. The order adopting the new rules is reprinted in MD. CODE ANN., 1 MD. RULES, at 15–17 (Mitchie 1985). The Rules were adopted in 1984.

188. MD. R.P. 2-302. Under the superseded Maryland Rules of Procedure, demurrers at law and in equity were still employed. 9B MD. CODE ANN., MD. R.P. 345, 371 (Mitchie 1971) (superseded).

189. *See* 9B MD. CODE ANN., MD. R.P. 346 (Mitchie 1971) (superseded).

190. *See* MD. R.P. 2-322(d).

191. *See* MD. R.P. 2-401 to -434.

192. *See* MD. R.P. 2-211 to -231; 2-203(c); 2-331 to -332.

193. All conventional counterclaims are permissive in Maryland, *see* MD. R.P. 2-331, but under Maryland third-party practice a plaintiff's claims against an impleaded third party defendant are compulsory. MD. R.P. 2-332(c).

194. *See, e.g.*, MD. R.P. 2-302 (providing that any response to a counterclaim, cross-claim or third-party complaint shall be termed an "answer"). *Cf.* FED. R. CIV. P. 7(a) (providing for replies, answers and third-party answers).

enumeration or organizational structure of the Federal Rules, and more significantly, Maryland retains fact-pleading.[195] Its procedural system thus remains idiosyncratic, but with a pronounced federal flavor.

MASSACHUSETTS

Federal Rules Replica

The Massachusetts Rules of Civil Procedure[196] are a replica of the FRCP. The rules established a uniform civil procedure for Massachusetts' trial courts, which had previously operated under different sets of rules.[197] Prior to the promulgation of the Massachusetts Rules by the Supreme Judicial Court,[198] Massachusetts operated under a Practice Act requiring essentially code pleading.[199] Notice pleading is now firmly entrenched in Massachusetts,[200] and precedent construing the Federal Rules is given great weight in interpreting the state rules.[201]

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195. MD. R.P. 2-305 requires a pleading to set forth "a clear statement of the facts necessary to constitute a cause of action." Despite the 1984 substitution of the motion to dismiss for failure to state a claim upon which relief can be granted, *see* MD. R.P. 2-322(b), the Maryland Court of Appeals continues to recite the litany of the general demurrer: "[W]e are required to assume the truth of all material and relevant facts that are well pleaded . . . ." Salvatore v. Cunningham, 505 A.2d 102, 103 (Md. 1986). The degree of specificity required of a pleading in Maryland has on occasion been cast in a functional rather than a formalistic sense. *See* Kres v. Maryland Auto. Ins. Fund, 329 A.2d 44, 46 (Md. App. 1974) (cause of action is shown by "facts disclosing that the claimant has *justification* for filing a declaration able to withstand a demurrer") (emphasis added). But this spirit is not universal among Maryland courts. *See* Whaley v. Maryland State Bank, 473 A.2d 1351, 1357 (Md. App. 1984) (claim of negligent misrepresentation must "allege the existence of each of the five elements of the tort").

196. The Massachusetts Rules of Civil Procedure may be found in MASSACHUSETTS RULES OF COURT 5-115 (West 1985).

197. *See* 43A MASS. GEN. LAWS ANN. XLV–XLIX (West 1978) (superseded); *see also* MASSACHUSETTS RULES OF COURT 3 (West 1985) (letter to Chief Justice and Justices of the Supreme Judicial Court of Massachusetts from Chief Justices of Massachusetts District Courts and Municipal Court of the City of Boston noting issuance of joint order adopting Massachusetts Rules for those systems and expressing pleasure "that there is now a unified approach to rules in the the trial courts of the Commonwealth").

198. The order promulgating the Massachusetts Rules of Civil Procedure is reprinted in MASSACHUSETTS RULES OF COURT at 2 (West 1985). These Rules became effective July 1, 1975.

199. *See* Leventhal v. Dockser, 361 Mass. 894, 282 N.E.2d 680 (1972); Saraceno v. City of Peabody, 361 Mass. 696, 282 N.E.2d 389 (1972). *See generally* WRIGHT I, *supra* note 1, § 9.22, at 60.

200. *See, e.g.*, Terrio v. McDonough, 16 Mass. App. Ct. 163, 450 N.E.2d 190, 194 (1983).

201. *See* Rollins Envtl. Servs., Inc. v. Superior Court, 368 Mass. 174, 330 N.E.2d 814, 818 (1975) ("This court having adopted comprehensive rules of civil procedure in substantially the same form as the earlier Federal Rules of Civil Procedure, the adjudged construction heretofore given to the Federal rules is to be given to our rules, absent compelling reasons to the contrary or significant differences in content."). *See also* University Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 396 Mass. 533, 487 N.E.2d 506, 509 (1986); Burger Chef Sys., Inc. v. Servfast of Brockton, Inc., 393 Mass. 287, 471 N.E.2d 77, 79 (1984).

MICHIGAN

Notice Pleading/Idiosyncratic Rules-Based Procedural System

The Michigan Supreme Court continued Michigan's evolution toward federally modeled civil procedure with the Michigan Court Rules of 1985.[202] Traditional code pleading devices such as demurrers and pleas in abatement have long been absent from Michigan practice.[203] Though the 1985 rules literally prescribe fact pleading,[204] this language was carried over from a former rule[205] that was liberally construed to require no more specificity than notice pleading.[206] Michigan recognizes only one form of action[207] but has no compulsory counterclaim rule similar to FRCP 13(a).[208] Michigan and federal third-party practice[209] are similar except for differences in counterclaim practice.[210] The Michigan Court Rules do not follow the organization or enumeration of the Federal Rules.[211]

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202. *See* 1 MICH. CT. R. OF 1985, Rule 1.102 (Callaghan 1984) [hereinafter MICH. CT. R.]. On the history of the Michigan Supreme Court's rule-making power, see WRIGHT II, *supra* note 9, § 9.23, at 49.

203. *See* MICH. STAT. ANN. 1963 GEN. CT. R. 110.3 (Callaghan 1976) [hereinafter 1963 GEN. CT. R.].

204. Michigan Court Rule 2.111(B)(1) requires a "statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend."

205. 1963 GEN. CT. R. 111.

206. Fenton Country House, Inc. v. Auto-Owners Ins. Co., 63 Mich. App. 445, 234 N.W.2d 559 (1975); City of Auburn v. Brown, 60 Mich. App. 258, 230 N.W.2d 385 (1975).

207. MICH. CT. R. 2.101(A), formerly 1963 GEN. CT. R. 12.

208. Michigan's idiosyncratic, conditionally compulsory counterclaim practice is a side effect of its rule that a pleader must join to a claim every other transactionally related claim, MICH. CT. R. 2.203(A)(1), subject to waiver for lack of objection by the opposing party of the pleader's failure to join such claims. MICH. CT. R. 2.203(A)(2). Michigan's counterclaim rule is otherwise permissive, MICH. CT. R. 2.203(B), but the compulsory joinder rules require compulsory joinder of all other counterclaims a defendant has against a party if a defendant asserts any counterclaim that arises out of the same transaction or occurrence as is the subject matter of the original action. For an example of the non-preclusive operation of Michigan's permissive counterclaim rule in circumstances in which the federal compulsory counterclaim rule would have barred the second action, see Rinaldi v. Rinaldi, 122 Mich. App. 391, 333 N.W.2d 61, 64–66 (1983).

209. *See* MICH. CT. R. 2.204.

210. *See supra* note 208.

211. The rules on civil procedure, constituting Chapter Two of the Michigan Court Rules of 1985, are numbered 2.001 through 2.630. As an example of differences in organization, compare Michigan Court Rule 2.116 ("Summary Disposition" rule) with FRCP 12(b) (motions to dismiss) and FRCP 56 (summary judgment).

MINNESOTA

Federal Rules Replica

Minnesota's Rules of Civil Procedure for the District Courts[212] are a replica of the FRCP. When they went into effect in 1952 by order of the Minnesota Supreme Court,[213] they substituted a system "virtually identical" to the Federal Rules for one of the nation's most progressive systems of code pleading.[214] Most intervening amendments to the Federal Rules have become part of Minnesota practice.[215] Federal precedent guides construction of the state rules,[216] and notice pleading flourishes in Minnesota.[217]

MISSISSIPPI

Notice Pleading/Federal-Rules-Model Procedural System

Despite legislative hostility, the Mississippi Supreme Court has led its state away from the idiosyncratic amalgam of common law and code pleading procedures that long governed civil litigation in Mississippi.[218] Invoking its inherent constitutional authority, the Supreme Court enacted state rules modeled on the FRCP.[219] The Mississippi Rules of Civil Pro-

212. The Minnesota Rules of Civil Procedure may be found in MINNESOTA RULES OF COURT 9–59 (West 1986).

213. The Minnesota Rules took effect January 1, 1952. MINN. R. CIV. P. 86.01. The rule-making authority of the Minnesota Supreme Court is discussed in WRIGHT I, *supra* note 1, § 9.24, at 62.

214. WRIGHT I, *supra* note 1, § 9.24, at 62.

215. *See, e.g.*, MINN. R. CIV. P. 19.01 (as amended effective 1968); *id.* 26.01 (as amended effective 1975 and 1985).

216. *See, e.g.*, Everson v. Kapperman, 343 N.W.2d 19, 21 (Minn. 1984); Engelrup v. Potter, 302 Minn. 157, 224 N.W.2d 484, 486 (1974).

217. *See* Lines v. Ryan, 272 N.W.2d 896, 901 n.3 (Minn. 1978); Hutton v. Bosiger, 366 N.W.2d 358, 360 (Minn. Ct. App. 1985).

218. For Mississippi practice prior to 1982, see Aetna Ins. Co. v. Commander, 169 Miss. 847, 153 So. 877 (1934) (only defect in pleading rendering it insufficient on demurrer is that it fails to state a cause of action or defense); MISS. CODE ANN. §§ 11-7-33, 11-7-35 (1972) (action commenced by filing of a "declaration" setting forth "a statement of the facts constituting the cause of action, in ordinary and concise language"); MISS. CODE ANN. §§ 11-7-79, 11-7-81, 11-7-83, 11-7-85, 11-7-87 (1972 & Cum. Supp. 1985) (dealing with demurrers); *id.* § 11-7-93 (1972 & Cum. Supp. 1985) (abolishing special demurrers); *See generally* WRIGHT I, *supra* note 1, § 9.25, at 62–63. In supporting the proposed Mississippi Rules of Civil Procedure, Professor Abbott noted "eighty-five years [of] dismay and concern" among bench and bar "over the antiquated and confusing morass of legislatively created court rules." Abbott, *The Proposed Mississippi Rules of Civil Procedure—An Argument for Adoption*, 49 MISS. L.J. 285, 286 (1978).

219. After conferring general rule-making power on the Mississippi Supreme Court in 1975, *see* MISS. CODE ANN. §§ 9-3-61 to 73 (1972 & Cum. Supp. 1985), the Mississippi Legislature vetoed the supreme court's proposal of the Mississippi Rules of Civil Procedure. Relying on its inherent authority under the state constitution, the supreme court adopted the proposed rules on May 26, 1981, effective January 1, 1982. *See* Foreword, *Symposium on Mississippi Rules of Civil Procedure*, 52 MISS. L.J. 1, 1–2 (1982) [hereinafter *Symposium*]. The legislature's expressed disapproval of some of the rules has

cedure generally follow the FRCP in enumeration and organization.[220] Notice pleading is permitted in effect if not in name,[221] and federal precedent is regarded as authoritative in construing the state rules.[222] Mississippi's constitution, however, preserves bifurcated systems of law and equity trial courts.[223] In light of this factor and the conflict between the Supreme Court and the legislature over rule-making power, we classify Mississippi's procedural system as modeled on the Federal Rules but not a replica of them.

MISSOURI

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Missouri is an idiosyncratic jurisdiction that has been considerably influenced by the Federal Rules, but clings to the fact pleading heritage of its Field-type Code.[224] Pursuant to constitutional authorization, its Supreme Court has promulgated an elaborate set of rules of civil procedure that cover the same subjects as their federal counterparts but in much different sequence and often to different effect.[225] Although there is agreement in substance as to some important topics,[226] Missouri differs from

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been ineffective, and the legislature has taken no further action. *See 1982 Mississippi Supreme Court Review*, 53 MISS. L.J. 113, 129–30 (1983). It is presently unclear whether an amendment to the Mississippi Constitution purporting to limit the jurisdiction of the supreme court to matters "specifically provided by this Constitution," will curtail the Mississippi Supreme Court's rule-making power. *See* MISS. CONST art. 6, § 146.

The Mississippi Rules of Civil Procedure are not included in any volume or appendix of the Mississippi Code Annotated, but may be found in MISSISSIPPI RULES OF COURT (West 1985).

220. In an apparent effort to defuse some of the legislative opposition to the Mississippi Rules, the Mississippi Supreme Court deleted the provisions for third-party practice borrowed from Federal Rule 14 and also returned to prior state practice regarding service of process. *See Symposium, supra* note 219, at 2.

221. *See* Smith v. City of West Point, 475 So. 2d 816, 818 (Miss. 1985) (complaint alleging defendant was "liable for its officer's negligence on a respondeat superior basis" held sufficient because "[i]t does not appear beyond doubt that plaintiff can prove no facts that would entitle her to relief"); Stanton & Associates, Inc. v. Bryant Constr. Co., 464 So. 2d 499, 505–06 & n.6 (Miss. 1985) (Federal Rule 8(a)(2) and Mississippi Rule 8(a)(1) are identically worded and should be construed alike; court need not address whether "the theory of 'notice pleadings'" has been adopted in Mississippi, but observes that "[t]he most important thing to remember about pleadings under the Mississippi Rules of Civil Procedure is that they simply are not very important anymore"). *See generally 1982 Mississippi Supreme Court Review, supra* note 219, at 138–39 (notice pleading standard introduced to Mississippi practice by Mississippi Rule 8(a)).

222. Stanton & Associates, Inc., 464 So. 2d at 505 & n.5 (Miss. 1985)

223. MISS. CONST. art. 6, §§ 156, 159. A judgment from the wrong court is not void for lack of jurisdiction. MISS. CONST. art. 6, § 147.

224. The Missouri Rules of Civil Procedure may be found in MISSOURI RULES OF COURT 189–315 (West 1985); their official designation is as Rules 41–102 of the MISSOURI RULES OF COURT.

225. *See generally* WRIGHT I, *supra* note 1, § 9.26, at 63–64.

226. *See, e.g.*, MO. R. 55.27 (providing for defenses, objections and motions substantially the

federal policy in the crucial area of pleading. A Missouri "petition"[227] must contain "a short and plain statement of the facts showing that the pleader is entitled to relief,"[228] and although pleading technicality is discouraged by Missouri courts, fact rather than notice pleading prevails.[229]

MONTANA

Federal Rules Replica

Montana abandoned code pleading[230] when its legislature adopted federally modeled rules in 1962.[231] Conferral of rule-making power on the Supreme Court[232] and conformity to federal summary judgment practice[233] have made Montana's procedural system a replica of the Federal Rules.[234]

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same as Federal Rule 12(b) to 12(h)); MO. R. 55.27 (a)(6) (Federal Rule 12(b)(6) counterpart motion attacking "failure to state a claim upon which relief can be granted").

227. Missouri Rule 55.01 requires a complaint to be called a "petition."

228. MO. R. 55.05.

229. Robbins v. Jewish Hosp., 663 S.W.2d 341, 349 (Mo. Ct. App. 1983) ("While Missouri, despite its broadened discovery rules, has not yet seen fit to adopt the 'notice pleading' of federal procedure, we are not about to revert to the hypertechnical intricacies of common law pleading."); Bremson v. Kinder-Care Learning Centers, Inc., 651 S.W.2d 159, 160 (Mo. Ct. App. 1983) ("Rule 55.05 commits Missouri to 'fact' pleading, as opposed to the notice pleading permitted in the federal courts under Rule 8(a)(2) of the Federal Rules of Civil Procedure.").

230. *See, e.g.*, Miller v. Schrock, 135 Mont. 409, 340 P.2d 154 (1959). *See generally* WRIGHT I, *supra* note 1, § 9.27, at 64–65.

231. Pursuant to MONT. CODE ANN. §§ 93-221 to 93-233 (1947) (superseded), the Montana Supreme Court appointed a Civil Rules Commission and thereafter submitted this Commission's proposed draft of civil rules to the Montana legislature. The legislature then enacted these rules to become effective January 1, 1962. 1961 Mont. Laws 13. "Basically the Rules follow the pattern of the Federal Rules of Civil Procedure but with some modifications to adapt the Rules to state practice and to Montana law and customs." 7 MONT. CODE ANN. tit. 93 (preface) (1964) (superseded). The Montana Rules of Civil Procedure repealed or superseded over 150 procedural provisions of the code. *See* 7 MONT. CODE ANN. tit. 93 preface (1964) (superseded).

232. As Professor Wright has pointed out, Montana was a rarity in converting to federally styled rules of procedure by legislative enactment. WRIGHT II, *supra* note 9, § 9.27, at 52 & n.64. This anomaly, at odds with replica status, has been rectified both by statute, MONT. CODE ANN. § 3-2-701, and in the new state constitution of 1972. MONT. CONST. art. 7, § 2(3) (procedural rule-making power conferred on supreme court "subject to disapproval by the legislature in either of the two sessions following promulgation").

233. Montana's bizarre conception of summary judgment without affidavits, *see* WRIGHT II, *supra* note 9, § 9.27, at 52–53 & n.66, was replaced in 1976 with a conventional replication of Federal Rule 56. *See* MONT. R. CIV. P. 56 (as amended).

234. The Montana Rules of Civil Procedure may be found in 4 MONT. CODE ANN. tit. 25, Rules 1–86 (1984). On notice pleading in Montana, see R. H. Schwartz Constr. Specialties, Inc., v. Hanrahan, 672 P.2d 1116, 1117, 1119 (Mont. 1983); Kinion v. Design Sys., Inc., 197 Mont. 177, 641 P.2d 472, 474 (1982); Brothers v. Surplus Tractor Parts Corp., 161 Mont. 412, 506 P.2d 1362, 1364 (1973). On the persuasive stature of precedent and commentary construing the Federal Rules, see White v. Lobdell, 678 P.2d 637, 641 (1984); Wheat v. Safeway Stores, Inc., 146 Mont. 105, 404 P.2d 317 (1965).

NEBRASKA

Fact Pleading/Code-Based Procedural System

Nebraska retains a code-based procedural system[235] despite an early bid to become an FRCP model. One year after the Federal Rules' adoption, the Nebraska legislature authorized and directed the Nebraska Supreme Court to promulgate general rules of practice and procedure for all courts.[236] The court was specifically authorized to abolish the distinction between law and equity actions.[237] The new rules were to supersede old code provisions by their own force,[238] but the legislature reserved authority to change, amend, or repeal any of the rules.[239] Unfortunately, opposition to FRCP adoption by a vocal and influential minority of older Nebraska bar members[240] led to the legislature's rejection[241] of the FRCP-based rules promulgated by the Nebraska Supreme Court.[242] This rejection ended Nebraska's efforts at FRCP adoption.

Nebraska's contemporary procedure employs typical code pleading terminology. Demurrers are still used,[243] and a Nebraska "petition" must state "facts constituting the cause of action."[244] Only transactionally or factually related counterclaims may be asserted,[245] but the only sanction imposed on a defendant for failure to assert a counterclaim is an inability to recover costs against the plaintiff in a subsequent action on the counterclaim.[246]

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235. *See* NEB. REV. STAT. §§ 25-101–25-2506 (1979) for all rules pertaining to civil procedure in Nebraska's trial courts of general jurisdiction. Section 25-101 merges law and equity.

236. 1939 Neb. Laws 172.

237. *Id.*

238. *Id.*

239. *Id.*

240. *See* Shackelford, *Why Adopt New Rules of Pleading and Practice?*, 21 NEB. L. REV. 94 (1942). *Contra* Bongardt, *The Final Draft Report, Nebraska Rules of Civil Procedure: "Pro"*, 21 NEB. L. REV. 76 (1942); Simmons, *Why New Rules of Procedure Now?*, 26 J. AM. JUDICATURE SOC. 170, 175 (1943) ("[O]pposition to these rules comes largely from men past military age and . . . the younger men of the profession have generally been favorable to the rules. They are the ones now in the military service.").

241. 1943 Neb. Laws 145. The bill also withdrew the rule-making power of the Nebraska Supreme Court.

242. *See generally* Simmons, *supra* note 240 (Chief Justice Robert G. Simmons' plea to the legislature in support of the FRCP system).

243. *See* NEB. REV. STAT. §§ 25-806-25-810 (concerning the use of demurrers); *see also id.* § 25-806(6) (demurrer for failure to state facts sufficient to constitute a cause of action); § 25-807 (general demurrer presumed unless grounds for special demurrer are specified). *Cf.* FED. R. CIV. P. 7(c) (abolishing demurrers).

244. *See* NEB. REV. STAT. § 25-804(2) (1979).

245. *Id.* § 25-813.

246. *Id.* § 25–814.

NEVADA

Notice Pleading/Federal-Rules-Model Procedural System

The Nevada Supreme Court adopted the Nevada Rules of Civil Procedure in 1952.[247] Prior to these rules,[248] Nevada was a code-pleading jurisdiction.[249] The Nevada Rules of Civil Procedure[250] are modeled on the FRCP, but contain at least one trap for the unwary attorney who assumes that the Nevada Rules are a replica of their federal counterparts. Nevada, like Idaho,[251] conceals within its rules a special appearance rule incompatible with replica status.[252] Cases and commentary interpreting the Federal Rules are instructive in construing the Nevada Rules,[253] and Nevada courts have long accepted that their federally modeled rules commit them to notice pleading.[254]

247. The Nevada Supreme Court adopted the rules pursuant to 1951 Nev. Stat. 44, codified at NEV. REV. STAT. § 2.120 (1981) (Supreme Court of Nevada may and shall promulgate rules of civil procedure from time to time for purpose of "promoting the speedy determination of litigation upon its merits"). *See also* Nevada Rules of Civil Procedure, 2 NEV. REV. STAT. 1171 (1981) (foreword) (adoption of FRCP-based rules "constitutes perhaps the state's most important advancement of the administration of justice in civil cases," and vesting rule-making power in Supreme Court "was well-advised and forward-looking legislation").

248. *See* 2 NEV. REV. STAT. 1169 (1979) (Order Adopting Rules of Civil Procedure). These rules were effective on January 1, 1953.

249. *See* 4 NEV. COMP. LAWS §§ 8591–8642 (Bender-Moss 1930) (superseded) (old code pleading provisions).

250. *See* 2 NEV. REV. STAT. tits. 2–3 (1983).

251. *See supra* note 130 and accompanying text.

252. Nevada's versions of Rule 12(b) and Rule 12(h) have been construed as perpetuating a special appearance rule. Unlike the federal courts, Nevada considers a motion raising a lack of personal jurisdiction defense under Rule 12(b)(2) to be merely a motion to quash service of process. The seemingly innocuous request for dismissal of an action in which a motion to quash has been granted has been held sufficient to constitute a "general appearance" rendering the lack of jurisdiction moot. Consolidated Casinos Corp. v. L.A. Caunter & Co., 89 Nev. 501, 515 P.2d 1025, 1026–27 (1973); Barnato v. Second Judicial District Court, 76 Nev. 335, 353 P.2d 1103, 1104–05 (1960). The subtle discrepancy between the text of the Nevada and federal versions of Rules 12(b) and 12(h) makes this an especially treacherous rule for the attorney unfamiliar with the idiosyncrasy of Nevada practice, and thus compels classification of Nevada's procedural system as something other than a replica of federal civil procedure.

253. A "State and Federal Rules Table" appears as a preface to the Nevada Rules of Civil Procedure, setting forth the comparable federal rule for each Nevada rule and the section in "Wright and Miller, Federal Practice and Procedure" in which "each rule is explained and construed, and where authorities as to the meaning of the language of the rules may be found." 2 NEV. REV. STAT. 1173 (1979). But no warning is given of the anachronistic content attributed by the Nevada Supreme Court to Nevada Rule 12(b)(2). *Cf. supra* note 252 (general appearance rule survives Nevada's adoption of federally modeled rules of civil procedure).

254. Branda v. Sanford, 97 Nev. 643, 637 P.2d 1223, 1227 (1981); Crucil v. Carson City, 95 Nev. 583, 600 P.2d 216, 217 (1979); Taylor v. State, 73 Nev. 151, 311 P.2d 733, 734 (1957) (dicta).

NEW HAMPSHIRE

Notice Pleading/Idiosyncratic Procedural System

New Hampshire has an idiosyncratic procedural system that defies classification as either code-based or rules-based. Its codified pleading provisions are few and express a liberal philosophy toward pleading.[255] The rather circumscribed rule-making power statutorily delegated to New Hampshire's courts[256] has been exercised in a "fairly substantial" manner to create rules supplementing procedural statutes.[257] In New Hampshire, complaints are liberally construed according to notice pleading standards so that "if counsel can understand the dispute and the court can decide the controversy on its merits, the pleadings are adequate."[258]

NEW JERSEY

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Although Judge Clark characterized New Jersey as an adherent of the Federal Rules,[259] in our view modern New Jersey practice is too idiosyncratic to be classified as modeled on the FRCP. The New Jersey Superior Court is bifurcated into law and equity sides and a claim brought on the wrong side is subject to objection and transfer.[260] The numbering

255. *See* N.H. REV. STAT. ANN. §§ 515:3 to 515:6 (1974) (four pleading provisions under heading of "Pleadings"). The liberal nature of the codified provisions is typified by N.H. REV. STAT. ANN. § 514:8, which states:

> No writ, declaration, return, process, judgment or other proceeding in the courts or course of justice shall be abated, quashed or reversed for any error or mistake, where the person or case may be rightly understood by the court, nor through defect or want of form or addition only; and courts and justices may, on motion, order amendment in any such case.

256. *See* N.H. REV. STAT. ANN. § 491:10 (1983) (allowing Superior Court, "acting as a body" to promulgate rules "consistent with the laws"); *see also* N.H. REV. STAT. ANN. § 490:4 (supreme court's authority to "approve" rules of court with respect to all courts of inferior jurisdiction); § 490-A:3 (providing that chief justices of the supreme and superior courts may collaborate to "issue" rules not inconsistent with any rules adopted pursuant to sections 490:4 and 491:10).

257. *See* WRIGHT I, *supra* note 1, § 9.30, at 66.

258. Robbins v. Seekamp, 122 N.H. 318, 444 A.2d 537, 539 (1982). Though this notice pleading classification is not completely free from doubt, *cf.* Porter v. Dziura, 104 N.H. 89, 179 A.2d 281, 282 (1962) (requiring pleading to disclose "the theory on which the plaintiff is proceeding"), we feel that it is warranted by the more recent cases. *See* Robbins v. Seekamp, 122 N.H. 318, 444 A.2d 537, 539 (1982); Sexton Motors, Inc. v. Renault Northeast, Inc., 121 N.H. 460, 431 A.2d 116, 119 (1981).

The reforms of the mid-nineteenth century accomplished an all-but-nominal merger of law and equity and relaxed the rigidity of the common law procedure to which New Hampshire's courts had adhered. *See generally* Reid, *From Common Sense to Common Law to Charles Doe—The Evolution of Pleading in New Hampshire*, N.H.B.J., Apr. 1959, at 27 (procedural reforms championed by Chief Justice Charles Doe anticipated those of the Federal Rules and "saved" New Hampshire from becoming a code state by judicially achieving the great reforms that other states needed extensive codified systems to accomplish).

259. Clark, *Pleading Under The Federal Rules*, 12 WYO. L.J. 177, 178 (1958).

260. *See* N.J. CIV. PRAC. R. 4:3-1.

and sequence of its rules do not conform to those of the FRCP. New Jersey's rules provide that a pleading "shall contain a statement of the facts on which the claim is based"[261] rather than merely a "short and plain statement of the . . . claim."[262] The provisions governing permissive and mandatory counterclaims[263] differ considerably from those of federal replica states and are inconveniently separated in the New Jersey rules' text.

If not a satellite of the FRCP, New Jersey's civil procedure is certainly in a similar orbit. New Jersey courts consider Federal Rules decisions to be persuasive authority in interpreting their counterpart rules.[264] Rule-making power in New Jersey is constitutionally vested in the New Jersey Supreme Court[265] and the court has held that legislation is ineffective to override judicially prescribed procedure.[266]

NEW MEXICO

Federal Rules Replica

The Rules of Civil Procedure for the District Courts of New Mexico[267] have replicated the FRCP for over four decades.[268] The New Mexico Supreme Court adopted these rules pursuant to an enabling statute.[269] The rules share identical numbering with the FRCP,[270] and federal decisions are persuasive authority for New Mexico courts' interpretation of the state rules.[271]

261. N.J. CIV. PRAC. R. 4:5-2.

262. FED. R. CIV. P. 8(a).

263. *See* N.J. CIV. PRAC. R. 4:7, 4:27-1(b). Compulsory counterclaims are called "mandatory" in New Jersey.

264. *See, e.g.*, Freeman v. Lincoln Beach Motel, 182 N.J. Super. 483, 442 A.2d 650, 651 (1981) ("Since our court rules are based on the Federal Rules of Civil Procedure, it is appropriate to turn to federal case law for guidance" when construing discovery rules.); Baumann v. Marinaro, 95 N.J. 380, 471 A.2d 395, 401 (1984) ("It is therefore proper to draw on the experience of the federal courts with . . . rule [59] to aid in the solution of comparable problems that arise under . . . rule [4:49]."); Quick Chek Food Stores v. Township of Springfield, 83 N.J. 438, 416 A.2d 840, 844 (1980) ("R.4:49-1 was modeled after Federal Rule of Civil Procedure 59 and it is therefore appropriate for us to consider as a guide the interpretation of the federal rule.").

265. N.J. CONST. art. 6, § 2, para. 3.

266. *See* WRIGHT II, *supra* note 1, § 9.31, at 55, 56 (citing Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950)).

267. *See* 1 N.M. STAT. ANN. Court Rules, Procedure and Evidence (1980).

268. The New Mexico rules became effective August 1, 1942. *See* N.M. STAT. ANN. § 21-1-1 (compiler's notes) (1970) (superseded). New Mexico was one of the first federal replica jurisdictions.

269. Act Relating to Rules of Pleading, Practice and Procedure in the Courts of the State of New Mexico, ch. 84, 1933 N.M. Laws 147.

270. *See* N.M. STAT. ANN. § 21-1-1 (compiler's notes) (1970) (superseded).

271. *See* State Collection Bureau, Inc. v. Roybal, 64 N.M. 275, 327 P.2d 337, 338 (1958). *But cf.* Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 652 P.2d 240 (1982) (dicta recognizing defense of election of remedies, apparently in conflict with the policy of New Mexico Rule 8(e)(2) and 54(c)). *See*

NEW YORK

Fact Pleading/Code-Based Procedural System

New York procedure shows Federal influence, but the New York Civil Practice Law and Rules (CPLR) remain based on the code model.[272] Given New York's historical preeminence as the birthplace of the Field Code, this is not surprising. The numbering formats of the CPLR and the FRCP differ completely.[273] New York procedure lacks a compulsory counterclaim rule.[274] The bill of particulars is still employed.[275] The CPLR does not contain demurrers, as did its predecessors;[276] instead it employs an analogous motion to dismiss for failure to state a cause of action.[277] In New York, a complaint must contain statements of fact "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action."[278] This language effected a procedural improvement since "[p]rior to the enactment of the CPLR, a party was required to frame the allegations in his pleading in the form of 'ultimate facts' as opposed to the twin evils of 'evidentiary facts' on the one hand and 'conclusions of law' on the other."[279] New York's ties to the Field Code remain strong and its flirtation with notice pleading has not yet ripened into commitment.[280]

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generally Occhialino, *Survey of New Mexico Law: Civil Procedure*, 14 N.M.L. REV. 17, 25–26 (1984). On New Mexico's practice of notice pleading, see Foundation Reserve Ins. Co. v. Mullenix, 97 N.M. 618, 642 P.2d 604, 606 (1982).

272. N.Y. CIV. PRAC. L. & R. § 10,005 (McKinney 1981). The rules were enacted September 1, 1963.

273. The CPLR contains 100 articles broken into sections. *See* CAHILL-PARSONS NEW YORK CIVIL PRACTICE (1977) (annotated text of the rules).

274. *See* N.Y. CIV. PRAC. L. & R. § 3019 (McKinney 1974).

275. *See id.* § 3041.

276. The pre-CPLR New York Rules of Civil Practice employed demurrers via Rule 107. *See* Halucha v. Jockey Club, 220 N.Y.S. 2d 567, 571, 31 Misc. 2d 186 (1961) (expressly recognizing validity of "demurrer" in connection with the rule).

277. *See* N.Y. CIV. PRAC. L. & R. § 3211 (McKinney 1970).

278. *See* N.Y. CIV. PRAC. L. & R. § 3013 (McKinney 1974).

279. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 110 (1970). *See supra* note 278 and accompanying text (provision purporting to require notice pleading, but containing code phrase "cause of action").

280. Although the court of appeals has declared notice to be the "primary purpose" of pleadings under CPLR 3013, Rapoport v. Schneider, 29 N.Y.2d 396, 328 N.Y.S.2d 431, 438 (1972), the appellate department has repeatedly demanded specificity as to the particular elements of the cause of action being pleaded. *See* DiMauro v. Metropolitan Suburban Bus Auth., 105 A.D.2d 236, 483 N.Y.S.2d 383, 387 (1984) ("essential facts"); Spallina v. Giannoccaro, 98 A.D.2d 103, 469 N.Y.S.2d 824, 827 (1983); Melito v. Interboro Mut. Indemn. Ins. Co., 73 A.D.2d 819, 423 N.Y.S.2d 742, 744 (1979).

NORTH CAROLINA

Notice Pleading/Federal Code Procedural System

North Carolina switched from a conventional fact pleading code of procedure when its legislature enacted the North Carolina Rules of Civil Procedure.[281] These codified rules follow very closely the numbering and content of the Federal Rules,[282] abolishing demurrers[283] and, most significantly, adopting the notice pleading requirement of stating a "claim sufficiently particular to give the court and the parties notice of the transactions . . . showing that the pleader is entitled to relief."[284]

NORTH DAKOTA

Federal Rules Replica

North Dakota's Rules of Civil Procedure have replicated the FRCP since 1957,[285] replacing a code-based system.[286] Notably, procedural progress in North Dakota accompanied court rule-making in that state.[287] North Dakota's Supreme Court and legislature share equal footing in creating procedural law.[288]

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281. 1967 N.C. Sess. Laws 954 (effective July 1, 1969, codified at N.C. GEN. STAT. ch. 1A-1 (Supp. 1967)). For text of modern rules, see N.C. GEN. STAT. ch. 1A. (1983). This loose-leaf volume contains the rules of civil procedure.

282. For a detailed examination of the North Carolina Rules of Civil Procedure, see Sizemore, *General Scope and Philosophy of the New Rules*, 5 WAKE FOREST INTRAMURAL L. REV. 1 (1969).

283. *See* N.C. R. CIV. P. 7(c). Demurrers were treated as 12(b)(6) motions following Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161, 168 (1970).

284. N.C. R. CIV. P. 8(a)(1). *See* Sutton, 176 S.E.2d at 164–65 (seminal case interpreting North Carolina Rule 8(a), discussing shift from code to notice pleading in North Carolina, discussing influence of New York's civil procedure on North Carolina's and noting practical differences between fact and notice pleading); *see also* Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326, 333 (1984); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

On North Carolina's adherence to precedent construing the FRCP, see Lewis v. Salem Academy & College, 23 N.C. App. 122, 208 S.E.2d 404, 406, *cert. denied*, 286 N.C. 335, 210 S.E.2d 58 (1974); Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420, 421 (1972).

285. *See* 5B N.D. CENT. CODE (1974 & Supp. 1985) (replacement volume containing civil, criminal, and appellate procedural rules). The North Dakota Rules of Civil Procedure took effect on July 1, 1957. N.D. R. CIV. P. 86(a). On the authoritative stature of the Federal Rules in construing their North Dakota counterparts, see Byron v. Gerring Indus., Inc., 328 N.W.2d 819 (N.D. 1982); Gerhardt v. D.L.K., 327 N.W.2d 113 (N.D. 1982); Phillips-Van Heusen Corp. v. Shark Bros., 289 N.W.2d 216 (N.D. 1980). On notice pleading in North Dakota courts, see Production Credit Ass'n v. Olson, 280 N.W.2d 920, 924 (N.D. 1979). *See also* WRIGHT I, *supra* note 1, § 9.35, at 70.

286. *See* WRIGHT I, *supra* note 1, § 9.34, at 70.

287. *See* 1919 N.D. Laws § 6 ("The Supreme Court . . . shall adopt uniform rules of procedure for all of the district courts in each of the several judicial districts within the state."); 1941 N.D. Laws 238 (recognizing rule-making powers of North Dakota Supreme Court).

288. *See* N.D. CENT. CODE §§ 27-02-09, 27-02-11, 27-02-13 (1974 & 1985 Supp.) (statutes prescribing the supreme court's power to promulgate rules that supersede legislation); *see also id.* at § 27-0209, which provides:

All statutes relating to pleadings, practice, and procedure in civil or criminal actions, remedies, or

OHIO

Federal Rules Replica

Ohio became an FRCP replica in 1970.[289] Its rules were promulgated pursuant to the Ohio Supreme Court's constitutional rule-making power.[290] These rules supersede conflicting procedural statutes,[291] apparently even subsequently enacted statutes, though the latter is unsettled.[292]

OKLAHOMA

Notice Pleading/Federal Code Procedural System

Despite substantial federal influence on its procedure,[293] Oklahoma retained an essentially fact pleading system[294] until its legislature enacted the Oklahoma Pleading Code,[295] which brought Oklahoma into the notice

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proceedings, enacted by the legislative assembly, shall have force and effect only as rules of court and shall remain in effect unless and until amended or otherwise altered by rules promulgated by the supreme court.

289. "The new Ohio Civil Rules effective July 1, 1970 are patterned upon the Federal Rules of Civil Procedure. Ohio thus joins the many other states that have adopted civil rules patterned upon the Federal Rules of Civil Procedure." 8 WEST'S OHIO PRACTICE (publisher's preface) (containing annotated civil rules 1–16); *see also* OHIO REV. CODE ANN. (Page 1982) (1982 replacement volume containing text of Ohio Rules of Civil Procedure).

On notice pleading in Ohio, see Wilson V. Riverside Hosp., 18 Ohio St. 3d 8, 479 N.E.2d 275, 277 (1985); City of Willoughby Hills v. Cincinnati Ins. Co., 9 Ohio St. 3d 177, 459 N.E.2d 555, 558 (1984). The persuasive effect of federal precedent on Ohio's construction of its rules is discussed in Schmidt v. Avco Corp., 15 Ohio App. 3d 81, 472 N.E.2d 721, 724 (1984); *see also* Gilmore v. General Motors Corp., 35 Ohio Misc. 36, 300 N.E.2d 259, 262 (1973).

290. *See* 8 WEST'S OHIO PRACTICE at v (editor's preface).

291. *Id.* at vi.

292. *Id.* at vi–vii (citing Graley v. Satayaham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976); Jacobs v. Shelly & Sands, Inc., 51 Ohio App. 2d 44, 5 Ohio Op. 3d 165, 365 N.E.2d 1259 (1976)); *see also* Browne, *Civil Rule 1 and the Principle of Primacy—A Guide to the Resolution of Conflicts Between Statutes and the Civil Rules*, 5 OHIO N.U.L. REV. 363, 396–410 (1978); Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 CASE W. RES. 16, 27–33 (1978).

293. See Hamilton, *Pleading: Fact Pleading in Oklahoma—Time for a Change?*, 30 OKLA. L. REV. 699 (1977), in which it is stated:

> Oklahoma included many of the Field Code provisions as part of the original territorial rules of civil procedure adopted in 1893, but a gradual incorporation of the Federal Rules of Civil Procedure has taken place. One important provision, however, has remained unchanged: Section 264(2) of Title 12 of the Oklahoma Statutes (1971) still reflects the fact pleading approach adopted in the Field Code.

294. *See* Note, *Pleading and Procedure*, 6 OKLA. CITY U.L. REV. 251, 254, 257 (1981) (analysis of case law emphasizing importance of pleading facts, not legal conclusions under then-existing Oklahoma procedure); *see also* Note, *Pleading: Abolishing Fact Pleading*, 34 OKLA. L. REV. 203 (1981) (assailing Oklahoma's then fact pleading system for the intractability of its metaphysical distinctions between "ultimate facts," "evidentiary facts," and "conclusions of law").

295. OKLA. STAT. ANN. tit. 12, §§ 2001–2027 (West Supp. 1984). "This code is based on Federal Rules 1 through 25, although there are some differences between the Federal Rules and the Oklahoma provisions." Fraser, *The Petition Under the New Pleading Code*, 38 OKLA. L. REV. 245 (1985).

pleading group.[296] At that time, Oklahoma's legislature, while yet to relinquish rule-making power to the judiciary, placed into effect rules of pleading[297] and joinder[298] substantially identical to Federal Rules 1 through 25.[299] Decisions interpreting these FRCP counterparts will be considered persuasive authority by Oklahoma courts in interpreting its new code.[300]

OREGON

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Oregon's Council on Court Procedures promulgated the 1981 Oregon Rules of Civil Procedure,[301] an idiosyncratic set of procedural rules. These rules abolished demurrers and pleas[302] and modeled Oregon third-party practice after federal practice.[303] Oregon's numbering system differs greatly from the FRCP system, and more significantly, so do Oregon's rules for stating claims for relief and making motions to attack a claim's sufficiency. Any Oregon pleading asserting a claim for relief must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition."[304] Many Oregon provisions are,

296. *See* OKLA. STAT. ANN. tit. 12, § 2008.A.1. (West Supp. 1984) ("short and plain statement of the claim"). *See also id.* § 2007.C. (abolishing demurrers and pleas).

297. *See id.* §§ 2008–2011.

298. *See, e.g., id.* §§ 2013.H; 2018.A-.B; 2019.A-.D; 2020.A-.C; 2021.

299. *See supra* note 295. Discovery provisions modeled on the Federal Rules were already in place by the time of the 1984 reform. *See* OKLA. STAT. ANN. tit. 12, §§ 3201–3214 (West 1982).

300. *See* Fraser, *supra* note 295, in which it is stated:

> Provisions in the new code that are the same as a federal rule must be interpreted in the same manner as the federal courts have interpreted the federal rule because the Oklahoma Supreme Court has held that a statute that is copied from another jurisdiction must be interpreted the same as it was interpreted by the highest court of the jurisdiction from which it was copied.

Id. at 245 (footnote omitted; citing Atlantic Richfield Co. v. State, 659 P.2d 930, 934 n.7 (Okla. 1983)).

301. The Council on Court Procedures acted pursuant to 1 OR. REV. STAT. § 1.735 (1977) (providing that promulgated rules of procedure submitted to legislative assembly at beginning of each regular session shall become effective 90 days after session's closing, subject to legislative right to amend, repeal, or supplement any of the rules by statute). For present text of the Oregon Rules of Civil Procedure, see 1A OR. REV. STAT. ANN. (1984).

302. *See* OR. R. CIV. P. 13C.

303. *See* OR. R. CIV. P. 22C. The period in which a third-party complaint may be filed as of right differs in Oregon and federal practice. The Oregon period is within ninety, as opposed to ten, days of service on the third-party plaintiff of the original plaintiff's summons and complaint. *Compare* OR. R. CIV. P. 22C(1). *with* FED. R. CIV. P. 14(a).

304. OR. R. CIV. P. 18A; *see also* OR. R. CIV. P. 21A(8) (motion to remedy "failure to state ultimate facts sufficient to constitute a claim"). "ORCP 18 A. continued Oregon as a 'fact pleading' rather than a 'notice pleading' jurisdiction." Scovell v. TRK Trans., Inc. 299 Or. 679, 705 P.2d 1144, 1146 (1985).

"Oregon has been a code pleader since statehood. The general rule has been that a pleading must contain factual allegations which, if proven, establish the right to relief sought." Davis v. Tyee Indus., Inc., 295 Or. 467, 668 P.2d 1186, 1191 (1982).

nevertheless, substantially the same as their FRCP counterparts.[305] However, Oregon's "ultimate fact" pleading separates it from the FRCP jurisdictions.

PENNSYLVANIA

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Pennsylvania, though its Supreme Court has long been vested with rulemaking power,[306] has evinced a slow and piecemeal pattern of procedural reform.[307] It retains a fact pleading system of procedure,[308] a general division of law and equity,[309] and different procedural rules for the discrete common law "forms of action."[310] It has, however, abolished the sharply criticized[311] practice of forbidding the joinder of claims under the forms of assumpsit and trespass in the same action.[312] All counterclaims are permissive,[313] although only transactionally related counterclaims are permitted in equity actions.[314]

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305. *See, e.g.*, OR. R. CIV. P. 32 (class actions); OR. R. CIV. P. 29 (joinder of necessary and indispensable parties); OR. R. CIV. P. 31 (interpleader). Oregon Rule 1B states that "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every action." OR. R. CIV. P. 1B.

306. "In 1937 general rulemaking power in civil actions was given [by the Pennsylvania General Assembly] to the Pennsylvania Supreme Court, and a Procedural Rules Committee, appointed by the court, began work in 1939." WRIGHT I, *supra* note 1, § 9.39, at 72 (footnotes omitted). In 1968, the power of the court to promulgate rules that would not modify substantive rights and that would "suspend" inconsistent "laws" was written into Pennsylvania's constitution. *See* PA. CONST. art. V, § 10(c).

307. Of the states undertaking major procedural reform since the advent of the Federal Rules, "Pennsylvania has been influenced the least by the new concepts and improved techniques first suggested in the Federal Rules." Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909, 910 (1953).

308. *See* PA. R. CIV. P. 1019(a) ("material facts . . . shall be stated"); *see also* Alpha Tau Omega Fraternity v. University of Pennsylvania, 464 A.2d 1349, 1352 (1983) ("Pennsylvania is a fact pleading state. *Pa.R.C.P. 1019(a).* A complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but it must also formulate the issues by summarizing those facts essential to support the claim."); Smith v. Brown, 283 Pa. Super. Ct. 116, 423 A.2d 743, 745 (1980).

Extensive statements of fact are evidently required. *See* Philadelphia v. Kane, 63 Pa. Commw. Ct. 643, 438 A.2d 1051, 1052 (1982) ("The Pennsylvania system of fact pleading requires that the pleading must define the issues, and every act or performance essential to that end must be set forth in the complaint.").

309. *See generally* PA. R. CIV. P. 1001–1292 ("Actions at Law"); 1501–1591 ("Action in Equity").

310. *See, e.g.*, PA. R. CIV. P. 1051–1058 (special procedural rules for ejectment actions); 1061–1067 (quiet title actions); 1071–1087 (replevin actions); 1091–1099 (mandamus actions).

311. *See* Wright, *supra* note 307, at 923 (anomalous results of rule disallowing joinder of transactionally-related assumpsit and trespass claims).

312. *See* PA. R. CIV. P. 1001.

313. *See* PA. R. CIV. P. 1031, 1510.

314. PA. R. CIV. P. 1510(a).

RHODE ISLAND

Federal Rules Replica

The Rhode Island Rules of Civil Procedure[315] became effective January 10, 1966. With few exceptions,[316] these rules replicate the FRCP. They abolish demurrers,[317] replace the general demurrer with the 12(b)(6) motion,[318] employ modern impleader,[319] and abandon fact pleading in favor of the federal "short and plain statement of the claim."[320] Federal precedents construing the Federal Rules are persuasive authority to Rhode Island courts construing their own rules.[321]

SOUTH CAROLINA

Fact Pleading/Federal-Rules-Model Procedural System

Pursuant to a recent constitutional grant of limited rule-making power[322] and an even more recently enacted statute[323] regulating the use of this

315. 2B R.I. GEN. LAWS, (1970) (appendix) (containing "Rules of Civil Procedure"). The Rules were adopted on June 9, 1965. *Id.* at 563.

Rule-making power is vested in Rhode Island's courts by statute. *See* R.I. GEN. LAWS § 8-6-2 (1985) (supreme court, superior court, family court, and district court have power to make their own procedural rules and such rules, when valid, will supersede conflicting statutory provisions).

316. One interesting exception is in the last clause of Rhode Island Rule 13(a), the compulsory counterclaim rule. This clause exempts from its scope counterclaims in motor vehicle tort cases that would be handled by insurance company subrogees. *See* R.I. R. CIV. P. 13(a), (reporter's notes explaining this rule's origin). *Cf. supra* note 46 (similar qualification of compulsory counterclaim rule in Alabama).

317. *See* R.I. R. CIV. P. 7(c).

318. *See* R.I. R. CIV. P. 12(b)(6).

319. *See* R.I. R. CIV. P. 14.

320. *See* R.I. R. CIV. P. 8(a)(1); Placido v. Mello, 492 A.2d 1226, 1227 (R.I. 1985) (notice pleading).

321. *See* Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985) ("This court has stated previously that where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our rule."); Nocero v. Lembo, 111 R.I. 17, 298 A.2d 800, 803 (1973) ("In construing the Superior Court Rules it has been a practice to look for guidance in the precedents of the federal courts, upon whose rules those of the Superior Court are closely patterned.").

322. S.C. CONST. art. V, § 4 (supreme court's procedural rule-making power "[s]ubject to the statutory law"). This power is thus "limited" in the sense that the legislature preserves a concurrent and paramount authority to regulate both substantive and procedural law. *See* Comment, *Practice and Procedure—The Procedural Rule-Making Power of the South Carolina Supreme Court*, 30 S.C.L. REV. 625, 629–632 (1979) (analysis of constitutional source and scope of court's rule-making power).

323. No. 4, 1979 S.C. Acts (R11) (codified in relevant part at S.C. CODE ANN. §§ 14-3-940, 14-3-950) (Law. Co-op. Supp. 1985). These statutes provide that court-promulgated rules of practice and procedure, while subject to the legislature's veto power, will automatically take effect within 90 days of their submission to the legislature unless the legislature disapproves them by three-fifths vote in a concurrent resolution. The legislature has subsequently recognized that such rules, when not disapproved, "shall control" in the event of a statute/rule conflict in the area of practice and procedure. 1985 S.C. Acts No. 100, § 3. For text of this act, see S.C. CODE ANN. § 15-1-10 (repealed) (Law. Co-op. Supp. 1985) (editor's note).

power, the South Carolina Supreme Court has promulgated federally-modeled rules of civil procedure.[324] Although in many respects a replica of the Federal Rules, the new South Carolina Rules expressly continue the fact pleading[325] of South Carolina's previous code-based procedural system.[326]

SOUTH DAKOTA

Federal Rules Replica

The South Dakota Rules of Civil Procedure[327] were adopted by the South Dakota Supreme Court pursuant to a statutory grant of rule-making authority concurrent and arguably coextensive with that of the legislature.[328] These rules, despite the apparent oddity of their split-numbered scheme,[329] replicate the Federal Rules, including their notice pleading language.[330] Federal authorities interpreting the FRCP are persuasive in their interpretation.[331]

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324. S.C.R. CIV. P. 86.

325. *See* S.C.R. CIV. P. 8(a) ("short and plain statement of the facts showing that the pleader is entitled to relief"); 10(b) ("cause of action"); 12(b)(6) ("failure to state facts sufficient to constitute a cause of action"). The reporter's note adds: "Rule 8(a) is in the same general language as the Federal Rule with the important distinction that the State practice requiring pleading of the facts (rather than a 'statement of the claim') is retained." 22 S.C. CODE ANN. 403 (Court Rules) (Law. Co-op Cum. Supp. 1985).

For cases on fact pleading in South Carolina, see Crowley v. Bob Jones University, 268 S.C. 492, 234 S.E.2d 879, 881 (1977) ("Furthermore, a litigant is required to plead 'ultimate facts', that is, the facts which evidence upon trial will prove, and not the evidence necessary to prove those facts." (citing Stroud v. Riddle, 260 S.C. 99, 194 S.E.2d 235 (1973))); Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157, 160 (S.C. Ct. App. 1985) ("In our State, the complaint is sufficient if it informs the defendant of the ultimate facts supporting each element of the cause of action; there is no necessity that the complaint state all the evidence to be presented upon the trial of the case.").

326. South Carolina's civil procedure prior to the new rules dated back to the adoption of a Field-type code in 1870. *See* WRIGHT I, *supra* note 1, § 9.42, at 74.

327. *See* S.D. CODIFIED LAWS ANN. §§ 15-6-1 to 15-6-86 (1984).

328. *See* Comment, *An Inevitable Clash of Power? Determining the Proper Role of the Legislature in the Administration of Justice*, 22 S.D.L. REV. 387, 396 & n.67 (1977).

329. Because the rules may, even today, be at least partly products of legislative action, *see* S.D. CONST. art. 5, § 12, perhaps it is appropriate that they are codified in statutory form. At any rate, the split-numbered system merely adds, as prefixes, the title and volume number to a rule number that is otherwise identical to its federal counterpart (*e.g.*, S.D. CODIFIED LAWS ANN. § 15-6-12(b) corresponds to FED. R. CIV. P. 12(b)).

330. *See* S.D. CODIFIED LAWS ANN. § 15-6-8(a)(1) ("short and plain statement of the claim").

331. *See, e.g.*, National Surety Corp. v. Shoemaker, 86 S.D. 302, 195 N.W. 134, 139 (1972) ("While we are not bound by the construction given by the federal courts to language taken from their rules and incorporated into ours, we do accept it as a guide in determining the meaning of that which we have adopted."); Wilson v. Great N. Ry. Co., 83 S.D. 198, 157 N.W. 19, 21 (1968) ("Summary judgment is a comparatively new procedure in this state and became a part of our practice when we adopted the federal rules of civil procedure. Consequently we turn to the federal court decisions for guidance in their application and interpretation.").

TENNESSEE

Federal Rules Replica

Tennessee, an FRCP replica, adopted the Tennessee Rules of Civil Procedure on January 26, 1970.[332] It has abandoned fact pleading and adopted FRCP 8(a)'s notice pleading language.[333] The Tennessee Supreme Court is statutorily empowered to make rules "consistent with statutes."[334] Federal Rules' precedents are persuasive authority to Tennessee courts construing their own replicas.[335]

TEXAS

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Texas is an idiosyncratic jurisdiction heavily influenced by both the common law and the FRCP. In organization and enumeration the Texas Rules of Civil Procedure[336] show little similarity to the FRCP.[337] A Texas original pleading must contain "a short statement of the cause of action sufficient to give fair notice of the claim involved,"[338] a strange requirement mixing regressive code terminology with progressive notice pleading language.[339] Demurrers have been expressly abolished.[340] The special

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332. *See* TENN. R. CIV. P. 1 (compiler's notes). *Cf.* WRIGHT II, *supra* note 9, § 9.44, at 63 ("February 20, 1970"). A supreme court order of October 12, 1970, provided that the rules would take effect after January 1, 1971. *Id.* A subsequent supreme court order dated April 24, 1973, provided that the rules should apply retrospectively to all civil actions commencing before January 1, 1971, to the extent that such application was necessary to fill a procedural gap left by the legislative repeal of certain code sections. *Id.* (explaining repeal of code section 5 by 1972 Tenn. Pub. Acts 565).

333. *See* TENN. R. CIV. P. 8.01; *see also* Sobieski, Jr., *A Survey of Civil Procedure in Tennessee—1977*, 46 TENN. L. REV. 300, 308–18 (1979) (suggesting that pleading rules may vary with the cause of action and indicating tremendous role judicial interpretation of Rule 8's "short and plain statement of the claim" plays in determining whether or not particular pleadings will be dismissed).

334. WRIGHT II, *supra* note 9, § 9.44, at 63.

335. *See* Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337, 338 (Tenn. 1976) (relying on federal decisions to interpret Rule 14, identical to FRCP 14); Jerkins v. McKinney, 533 S.W.2d 275, 281 (Tenn. 1976) ("In the absence of Tennessee authority we are forced to look to treatises and cases construing the similar federal rule.").

336. *See* TEXAS RULES OF COURT (West 1983). The Texas Supreme Court promulgated these rules pursuant to 1939 Tex. Gen. Laws 108.

337. *See generally* WRIGHT II, *supra* note 9, § 9.45, at 63. The Texas Supreme Court has had virtually unfettered statutory rule-making power for nearly half a century. *Id.*

338. TEX. R. CIV. P. 47(a).

339. Rule 47(a)'s requirement of stating a "cause of action" undercuts its liberal language about "fair notice" with an apparent requirement of pleading facts beyond those required for mere notice of claim. Most Texas decisions agree with the proposition that "[a] petition is sufficient if it gives fair and adequate notice of the *facts* upon which the pleader bases his claim." Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982) (emphasis added); *see also* Murray v. O & A Express, Inc., 630 S.W.2d 633, 636 (Tex. 1982) ("The office of pleadings is to define the issues at trial. Pleadings should give fair and adequate notice of the facts upon which the pleader relies".) In Stoner v. Thompson, 578 S.W.2d 679, (Tex.

exception is used to point out defects in pleading,[341] including a demand for more particularity.[342] Texas' Rules of Court governing compulsory and permissive counterclaims are identical in substance to their FRCP counterparts,[343] as are many of the rules governing parties and discovery.[344] Rule 1 provides for a liberal construction of the rules themselves,[345] but Texas' procedural quirks mark it as an idiosyncratic jurisdiction rather than a Federal Rule model.

1979), the court, reviewing a summary judgment ruling, stated that a cause of action must be pled and that:

> [i]n determining whether a cause of action was pled, plaintiff's pleadings must be adequate for the court to be able, from an examination of the plaintiff's pleadings alone, to ascertain with reasonable certainty and without resorting to information aliunde the elements of plaintiff's cause of action and the relief sought with sufficient information upon which to base a judgment.

Id. at 683. At least one commentator has noted that the strange mixed terminology of Texas Rule 47 "make[s] it extremely difficult to classify the present system of pleading in that state." McMahon, *supra* note 172, at 375–76.

340. Texas Rule 90 begins with the statement: "General demurrers shall not be used." All defects not excepted to under Rule 91 are waived.

341. TEX. R. CIV. P. 91 states:

> Special Exceptions: A special exception shall not only point to the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to.

342. *See* Johnson v. Willis, 596 S.W.2d 256, 260 (Tex. Ct. App. 1980) ("The special exception is properly used to demand particularity in pleadings if pleadings do not properly apprise a party of his opponent's intentions."). Courts have distinguished the special exception from the general demurrer. The latter cannot be used to assert that the petitioner has failed to state a cause of action. McKamey v. Kinnear, 554 S.W.2d 150 (Tex. Ct. App. 1972), Huff v. Fidelity Union Life Ins., 158 Tex. 433, 312 S.W.2d 493, 499 (1958).

343. *See* TEX. R. CIV. P. 97.

344. Texas Rules governing parties to a suit which are similar or identical to the Federal Rules include: Texas Rule 38, "Third Party Practice" (Federal Rule 14); Texas Rule 39, "Joinder of Persons Needed for Just Adjudication" (Federal Rule 19); Texas Rule 40, "Permissive Joinder of Parties" (Federal Rule 20); Texas Rule 41, "Misjoinder and Non-Joinder of Parties" (Federal Rule 21); Texas Rule 42, "Class Actions" (Federal Rule 23); Texas Rule 43, "Interpleader" (Federal Rule 22(1)). The discovery rules are substantially the same, and are contained in the Pre-Trial Procedure Section, which also includes Texas Rule 166, "Pre-trial Procedure: Formulating Issues" (modeled on Federal Rule 16), and Texas Rule 166-A "Summary Judgment" (adopted from Federal Rule 56). Texas Rule 167 is the counterpart to Federal Rule 34, Texas Rule 167(a) to Federal Rule 35, Texas Rule 168 to Federal Rule 33, and Texas Rule 169 to Federal Rule 36.

345. TEX. R. CIV. P. 1 states:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

UTAH

Federal Rules Replica

Utah became an FRCP jurisdiction when the Utah Rules of Civil Procedure took effect on January 1, 1950[346] and superseded all conflicting laws. The Utah Supreme Court promulgated these Federal replications using its plenary rule-making power.[347] Utah's rules embrace the philosophy of notice pleading[348] and its courts consider Federal Rules' precedents persuasive in interpreting the corresponding Utah rules.[349]

VERMONT

Federal Rules Replica

Vermont became a "Federal Rules Replica" in 1971 when the Supreme Court exercised its rule-making power to adopt the Vermont Rules of Civil Procedure.[350] The Vermont Rules are perhaps the most expertly crafted of all the FRCP replicas,[351] and are accompanied by unusually informative annotations comparing them to the federal template.[352] Vermont's transition from an idiosyncratic procedural system combining elements of both common-law and quasi-code pleading was smoothed by legislative adoption of much of the substance of the Federal Rules in 1959.[353] But replica status was not attained until the 1971 Vermont Rules accomplished both the

346. *See* UTAH R. CIV. P. 1(b); *see also* WRIGHT II, § 9.46, at 64.

347. *See* UTAH CODE ANN. § 78-2-4 (1953) (superseded) (authorizing supreme court to make rules).

348. *See* Sears v. Riemersma, 655 P.2d 1105, 1110 (Utah 1982); Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975).

349. *See In re* Estate of Cassity, 656 P.2d 1023, 1024 (Utah 1982) (citing federal cases construing Rule 63(a)); Sanpete County Water Conservancy Dist. v. Price River Water Users Ass'n, 652 P.2d 1302, 1306 n.5 (Utah 1982) (citing federal cases interpreting FRCP 19(a) when applying Utah rule).

350. These rules appear in VT. STAT. ANN. "Rules of Civil and Appellate Procedure" (1971 & 1983 Cum. Supp.). *See* 1949 Vt. Acts 56, § 1 (amendment of Vermont Code to allow Vermont judges and justices to make pleading and procedure rules). The Rules Enabling Act makes rules promulgated pursuant to the Vermont Supreme Court's procedural rule-making power subject to legislative repeal, revision and modification. VT. STAT. ANN. tit. 12, § 1 (1973 & Supp. 1984).

351. *See* WRIGHT II, *supra* note 9, § 9.47, at 64 (Vermont rules "in essence the federal rules expertly adapted for state practice").

352. "The rules are based on the Federal Rules of Civil Procedure. Federal cases interpreting the Federal rules are an authoritative source for the interpretation of identical provisions of the Vermont Rules." VT. STAT. ANN. "Rules of Civil and Appellate Procedure," VT. R. CIV. P. 1, at 8 (reporter's notes) (1971); *see also* Margison v. Spriggs, 499 A.2d 756, 758 (Vt. 1985) (applying Vermont Rule 56 and citing reporter's note to Vermont Rule 1).

353. "The rules, which in essence are the Federal Rules of Civil and Appellate Procedure adapted for state practice, do not represent a major change for Vermont. Since 1959, our statutes have contained many of the specific provisions of the Federal Rules, such as simplified pleading, discovery, and appeal procedure." VT. STAT. ANN. Rules of Civil and Appellate Procedure at xiii (foreword) (1971 & 1983 Cum. Supp.).

merger of law and equity and conformity to the amended Federal Rules respecting joinder and discovery.[354]

VIRGINIA

Fact Pleading/Idiosyncratic Rules-Based Procedural System

Virginia's idiosyncratic procedural system has statutory underpinnings[355] that maintain a "law-equity" bifurcation under judicially promulgated rules of practice.[356] Counterclaims are not compulsory in Virginia at law[357] or in equity.[358] In Virginia, attorneys may demur to pleadings.[359] One of Virginia procedure's most modern aspects is a third-party practice provision similar to the Federal Rule.[360] Virginia's pleading rule[361] calls for facts as if they were but means to notice: "Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense."[362] Although Virginia has been called a notice pleading state,[363] recent cases are to the contrary.[364] Despite its antiquated wording and disjointed structure, Virginia's procedural system shares common ground with the FRCP,[365] but not enough to justify classification as substantially a model of the Federal Rules.

354. *See* VT. R. CIV. P. 2 (merger); VT. R. CIV. P. 19 (joinder); VT. R. CIV. P. 26–37 (discovery); Lemnah v. American Breeders Service, Inc., 144 Vt. 568, 482 A.2d 700, 705 (1984) (notice pleading).

355. *See* VA. CODE §§ 8.01-1 to 8.01-688 (1984) ("Civil Remedies and Procedure").

356. *See* VA. CODE § 8.01-270 (1984) (case brought on "wrong side of court" will not be dismissed but shall be transferred to the correct side); *see also* 11 VA. CODE (1985 Rules of Virginia Supreme Court); VA. CODE § 8.01-271 (1984). The Supreme Court's rules deal with the differences between law and equity procedure. Virginia Rules 2:1–2:20 concern equity practice and procedure; Rules 3:1–3:18 deal with practice and procedure in actions at law. Though equitable defenses long have been available in legal actions, Virginia's procedural differences between the two kinds of legal action persist. *See* Greer, *Virginia and the Federal Rules*, 47 VA. L. REV. 906, 908 (1961).

357. VA. R. 3:8.

358. VA. R. 2:13. The noncompulsory equitable counterclaiming device is denominated a "cross-bill" in Virginia practice.

359. VA. R. 3:7.

360. VA. R. 3:10.

361. *See* VA. R. 1:4.

362. VA. R. 1:4(d).

363. Greer, *supra* note 356, at 909.

364. *See* Board of Supervisors v. Market Inns, Inc., 228 Va. 82, 319 S.E.2d 737, 740 n.2 (1984) ("[N]o court can base its judgment on facts not alleged or upon a right which has not been pleaded and claimed.") (citing Ted Lansing Supply v. Royal Aluminum, 221 Va. 1139, 1141, 277 S.E.2d 228, 229 (1981)).

365. *See* Greer, *supra* note 356, at 922–23.

WASHINGTON

Federal Rules Replica

Since 1960, Washington's civil procedure has been modeled on the Federal Rules.[366] Washington's Superior Court Civil Rules completed Washington's conversion to full-fledged federal replica status.[367] Washington looks to decisions construing the counterpart Federal Rules for persuasive authority in its own constructions.[368] Like Vermont, Washington took an unusual route to FRCP uniformity: a gradual rather than an abrupt change.[369]

WEST VIRGINIA

Federal Rules Replica

The West Virginia Supreme Court of Appeals, pursuant to its plenary statutory rule-making power,[370] adopted West Virginia's Rules of Civil Procedure[371] on October 13, 1959. Replicated from the Federal Rules, the

366. *See* WRIGHT II, *supra* note 9, § 9.50, at 66 ("In 1960, when rules based on Federal Rules 7 to 25, covering the important subjects of pleading and joinder, became effective, Washington procedure conformed in all its most important aspects to procedure in the federal courts.") (footnote omitted). Before 1967, the Washington Rules of Pleading, Practice and Procedure contained the civil as well as criminal rules for Washington's Superior Courts. These rules followed the FRCP in substance but their numbering system corresponded to a lesser degree than that of Washington's modern rules. The Rules of Pleading, Practice and Procedure (RPPP) merged with the General Rules of the Superior Courts (GRSC) in 1960 to remedy the inconvenience of having two sets of procedural rules. At this time, the Rules were renumbered to correspond more closely to the FRCP. *See* 3 ORLAND'S WASHINGTON PRACTICE 131 (West 1960) (superseded). Text of the revised and renumbered RPPP are in this volume; the modern rules' numbering system corresponds to the FRCP more closely.

367. *See* WASHINGTON COURT RULES, at 417 (West 1985).

368. *In re* Green, 14 Wn. App. 939, 546 P.2d 1230, 1232 (1976) ("When a federal court rule has been adopted as the state rule, the construction of the federal rule is pertinent."); *see also* Eberle v. Sutor, 3 Wn. App. 387, 475 P.2d 564 (1970) ("Where a federal rule has been adopted as the state rule, the construction of the former should be applied to the latter." (citing 71 Wn. 2d xvii–xxiv)).

369. *See generally,* Meisenholder, *Piecemeal Adoption of the Federal Rules of Civil Procedure in Washington,* 26 F.R.D. 123 (1960); Green, *Procedural Progress in Washington,* 26 WASH. L. REV. 87 (1951).

370. W. VA. CODE § 51-1-4 (1982) (court rules supersede conflicting statutes). The reform brought about by the adoption of a set of federal replications was extensive. *See* W. VA. CODE Preface (1966) ("The West Virginia Rules of Civil Procedure, adopted in 1959, affect many sections of the Code, especially those dealing with procedure, which have been neither amended nor repealed since the adoption of the Rules.").

371. 1A W. VA. CODE (1982) (entitled "Court Rules" and containing "Rules of Civil Procedure for Trial Courts of Record") [hereinafter W. VA. R. CIV. P.]. These Rules were effective July 1, 1960. *See* WRIGHT II, *supra* note 9, § 9.51, at 67.

West Virginia Rules instituted notice pleading,[372] abolished demurrers,[373] and ended pleas in abatement.[374] West Virginia courts utilize Federal Rules' precedents in construing their own similar rules.[375]

WISCONSIN

Notice Pleading/Idiosyncratic Rules-Based Procedural System

Wisconsin's procedural system[376] is idiosyncratic but shows substantial FRCP influence. The numbering and organization of Wisconsin's procedural provisions differ greatly from the federal scheme.[377] Wisconsin extensively revised its procedure in 1975[378] by breaking with a system that bore a greater resemblance to the original Field Code than any other up to that year.[379] The new system abolished demurrers and pleas[380] and abandoned the former pleading requirement of a "plain and concise statement of the ultimate facts constituting each cause of action, without unnecessary repetition."[381] Instead, the new system requires a "short and plain statement of the claim identifying the transaction, occurrence or event . . . and showing that the pleader is entitled to relief."[382] The motion to dismiss for "failure to state a claim upon which relief can be granted" was added[383] and the new provisions were to be construed to secure the just, speedy and inexpensive determination of every action and proceeding.[384] Wisconsin's new procedure does not recognize compulsory counterclaims.[385]

372. *See, e.g.*, W. VA. R. CIV. P. 8(a), 12(b)(6).

373. W. VA. R. CIV. P. 7(c).

374. *Id.*

375. *See* Peneschi v. National Steel Corp., 295 S.E.2d 1, 13 n.12 (W. Va. 1982) ("Federal decisions interpreting Rule 15(c) have precedential value in West Virginia.") (citing Plum v. Mitter, 157 W. Va. 773, 204 S.E.2d 8 (1974)); *see also* Nellas v. Loucas, 156 W. Va. 77, 191 S.E.2d 160,163 (1972) (citing federal cases in application of Rule 8(c)).

376. *See generally* WISCONSIN COURT RULES AND PROCEDURE §§ 801.01–807.11 (West 1984) (general procedural provisions).

377. *Id.* The Wisconsin provisions are identified as sections, in the manner of a code, and are organized by chapter.

378. The revision took place through orders of the Wisconsin Supreme Court on February 17, 1975, September 30, 1975, and October 6, 1976. WIS. STAT. ANN. §§ 801–802 (West Supp. 1984).

379. *See* WIS. STAT. ANN. § 260.01 (West 1975) (interpretive commentary stating that Wisconsin Civil Procedure "is based largely on the Field Code").

380. *See* WIS. CT. R.P. 802.01(3) (abolishing demurrers and pleas). *Cf.* WIS. STAT. ANN. §§ 263.01–263.47 (West 1957) (provisions governing use of demurrers).

381. WIS. STAT. ANN. § 263.03(2) (West 1957).

382. WIS CT. R.P. § 802.02(1)(a).

383. *See* WIS CT. R.P. § 802.06(2)(f).

384. *See* WIS. CT. R.P. § 801.01(2).

385. *See* WIS. CT. R.P. § 802.07.

WYOMING

Federal Rules Replica

In 1957, the Wyoming Rules of Civil Procedure[386] transformed Wyoming's civil procedure from code pleading[387] into a notice pleading replica of the Federal Rules.[388] Amendments effective in 1971 conformed the Wyoming rules to the joinder[389] and discovery[390] provisions of the amended FRCP, preserving Wyoming's replica status. The Wyoming Supreme Court considers federal rules decisions persuasive authority in interpreting its own similar rules.[391] The Court has enjoyed "complete rule-making power" by statute since 1947.[392]

IV. SUMMARY AND ANALYSIS OF SURVEY DATA ON DISTRIBUTION OF AMERICAN STATE COURT SYSTEMS OF CIVIL PROCEDURE

We have appended an extensive series of tables and charts to assist in the difficult task of assimilating data concerning 51 separate systems of civil procedure and comparing those 51 systems to the system of civil procedure deployed in the federal courts. Table I groups all the jurisdictions included in the survey according to the classification of their procedural system. Where the date of key procedural reform was disclosed in the survey, it is included in the far right column of Table I. Within each classification the jurisdictions are listed in order of the date of reform;[393] when no date is

386. *See* WYO. STAT., "Court Rules" (1979 and 1986 Supp.) (containing text of Wyoming Rules of Civil Procedure). These Rules took effect December 1, 1957. *See* WYO. R. CIV. P. 86.

387. *See* WYO. REV. STAT. ANN. § 89-1006 to 89-1013 (1931) (superseded) (various rules governing demurrers); *see id.* § 89-1004 (petition to contain "statement of the facts constituting the cause of action in ordinary and concise language"). *See generally* WRIGHT II, *supra* note 9, § 9.53, at 69 (Wyoming code adopted in 1869 and remained in effect until federal replicas became effective December 1, 1957).

388. *See* Clark, *supra* note 259 (Judge Clark's 1958 speech before the Wyoming bar applauding Wyoming's replication of the Federal Rules). *See also* WRIGHT II, *supra* note 9, § 9.53, at 69. On notice pleading in Wyoming, see Guggenmos v. Tom Searl-Frank McCue, Inc., 481 P.2d 48 (Wyo. 1971) (permissible to plead facts or legal conclusions as long as fair notice is given to parties); Watts v. Holmes, 386 P.2d 718 (Wyo. 1963) (pleadings should give notice of what adverse party may expect).

389. *See, e.g.*, WYO. R. CIV. P. 19 (as amended October 21, 1970, effective February 11, 1971) (virtually identical to Federal Rule 19(a), as amended 1966; substantially equivalent to Federal Rule 19(b)–(c), as amended 1966).

390. *See, e.g.*, WYO. R. CIV. P. 26 (as amended October 21, 1970, effective February 11, 1971) (virtually identical to Federal Rule 26, as amended 1970).

391. *See, e.g.*, Whitefoot v. Hanover Ins. Co., 561 P.2d 717, 720 (Wyo. 1977) ("As there is no Wyoming case law specifically discussing [Rule 52(a)], we will turn to the federal case law interpreting the similar federal rule . . . .").

392. WRIGHT II, *supra* note 9, § 9.53, at 69 & n.15 (citing WYO. STAT. § 1-116 (1957)).

393. For those categories of procedural systems that are based in large part on the Federal Rules, the date indicated is the effective date of the jurisdiction's reformed system of procedure. The date of

given the jurisdictions are listed alphabetically. Included as the left hand column of Table I is the population of each jurisdiction (in thousands of people) according to the 1980 federal census.[394]

Listed first are the 23 federal replica jurisdictions. The group of three jurisdictions that have rules-based procedural systems falling short of replica status but are nonetheless closely patterned on the Federal Rules are listed next. The next group of four jurisdictions are those with procedural codes that, despite the important systematic difference between rules-based and code-based procedural systems, set forth rules of state civil procedure substantially the same as the Federal Rules. The following group of three jurisdictions operate under idiosyncratic rules of procedure but follow the Federal Rules' conception of notice pleading, as does the *sui generis* jurisdiction of New Hampshire. The next group of three jurisdictions operate under rules-based systems of procedure patterned on the Federal Rules except in the crucial aspect of pleading policy.

Listed next are eight jurisdictions that feature idiosyncratic systems of judicially promulgated procedural rules which demand factual specificity in pleading. Listed last are the six jurisdictions that combine fact pleading and code-based systems of procedure.

As this summary makes obvious, replicas of the Federal Rules are by far the most common procedural system among the state courts. But for the various reasons documented in the survey, it cannot be said that a majority of states follow the Federal Rules without important qualifications. Nonetheless, a significant plurality of jurisdictions are Federal Rules replicas, as graphically displayed in Chart I.

The succeeding charts show how the Federal Rules' predominance as the model of state court civil procedure becomes especially dramatic if looser tests for affinity to the Federal Rules are used. Chart II uses substantial similarity in the enumeration and organization of state court rules of

1942 given for the District of Columbia is the date of replication of the Federal Rules by the newly created Municipal Court of that jurisdiction. *See supra* note 103. Two of the replica jurisdictions, Montana and Washington, reformed their procedures in a two step process culminating in replica status after an earlier conversion to a looser model of the federal system of procedure. *See supra* notes 230–34, 366–69 and accompanying text. For these two jurisdictions, the latter date of conversion to replica status is the date listed. The dates given for notice pleading jurisdictions with idiosyncratic rules-based systems of procedure are, for Iowa and Wisconsin, the dates of conversion to notice pleading by amended rule. *See supra* notes 150, 378, and accompanying text. For Michigan, the listed date is 1985, the effective date of the new Michigan rules. *See supra* note 202 and accompanying text.

394. The source of the population data is STATISTICAL ABSTRACT OF THE UNITED STATES 12–13 (Table 12) (1985). The figures given for each state by the Census Bureau are rounded, and the sum they yield in our Table III and accompanying charts is accordingly not identical to the rounded sum of the actual figures for state-by-state population. *See id.* at xv. In the interest of consistency we have ignored the discrepancy caused by rounding, and use as the total population of the United States in 1980 the sum of the Census Bureau's rounded figures for each state (226,549,000). The rounded sum of the unrounded state-by-state populations is 226,546,000. *Id.* at 12 (Table 12).

procedure as the test for affinity to the Federal Rules, without disqualification according to the strict criteria of federal replica status. Thus, all the rules-based procedural systems patterned generally after the Federal Rules are included, whether or not notice pleading is permitted, as well as the systems based on codified analogues to the Federal Rules.

Chart III is based on pleading policy alone. Like Chart II, it shows that a loosening of criteria for affinity to the Federal Rules reveals important similarity to the Federal Rules in two-thirds of the states.

Chart IV carries this process of looking for systematic affinity to the Federal Rules to its logical extreme, with rules-based systems of procedure the only criterion. By this measure the ascendancy of the Federal Rules over the Field Codes of the last century becomes quite evident.

But this is not the whole story. As we compiled our survey we noted that the distribution of replica status among the states was not random according to the populations of the various states. States with large populations seemed to be less likely to have systematically modeled their civil procedures on the Federal Rules than less populous states. To test this hypothesis we added the population data appearing in Table I.

Table II presents the same data as Table I, omitting dates, but is sorted in descending order of state population. It is apparent that systematic state court affinity for the Federal Rules is heavily concentrated among the less populous states.

The Federal Rules' dominance as a model of state court civil procedure is dramatically reduced when viewed as a function of the populations served by the various state court systems. Charts V through VIII make this point by recasting the data displayed in Charts I through IV in terms of state populations. Table III explains the derivation of the population data displayed in Charts V through VIII.

Chart IX collects the data on date of federal replication from Table I, and shows that trend to have stalled a decade ago. Chart X shows, however, that procedural reform continues to creep ahead if all systematic adaptations of the Federal Rules to state practice are counted, and Chart XI shows a similar rate of creeping but steady reform in terms of the introduction of notice pleading.[395]

395. For purposes of Chart XI, New Hampshire is treated as having instituted notice pleading in 1982, the date of the leading decision we quote as establishing New Hampshire as a notice pleading jurisdiction, *see supra* note 258 and accompanying text, and Michigan is treated as having become a notice pleading jurisdiction in 1985, the date of its new procedural rules. *See supra* note 202 and accompanying text.

V. CONCLUSION

By a strict test of replication, in fewer than half the states is it true that there is "but one procedure for state and federal courts."[396] But it is no small testament to the genius of Judge Clark that this statement is unqualifiedly true in 23 out of 51 local American jurisdictions. Moreover, the Federal Rules dominate the procedural systems of a substantial majority of state court civil procedural systems if the test for affinity to the Federal Rules is relaxed somewhat from the strict standard we devised in our search for unqualified federal replicas.

Two factors caution, however, against exaggeration of the dominance of the Federal Rules in modern American state courts. First, populous states have proven unusually inert to procedural reform. Second, the era of an "accelerating trend"[397] of state court reform of civil procedure in the image of the Federal Rules has ended. The trend continues, albeit slowly, but with ratchet-like effect. Perhaps the best memorial to Judge Clark is the stark fact implicit in our survey that no jurisdiction, having adopted the Federal Rules in substantial part, has seen fit to return to its old ways.

But our survey warns that the old ways persist in more than a few jurisdictions, and that a majority of our national population lives in these jurisdictions. Now that the momentum of the Federal Rules as a model for state court reform has subsided, there remains much work to be done. For the Federal Rules to continue to win converts among the states it is more important than ever that the system of procedure embodied by those rules be shown to be not just the newest or most commonplace, but the best.

396. *See supra* note 26 and accompanying text.
397. *See supra* note 4 and accompanying text.

APPENDIX

TABLE I

	Population in 000's	Type of procedural system	Name of State	Date of replication or other reform
1	2718	REPLICA	ARIZONA	1940
2	2890	REPLICA	COLORADO	1941
3	1303	REPLICA	NEW MEXICO	1942
4	638	REPLICA	DISTRICT OF COLUMBIA	1942
5	1461	REPLICA	UTAH	1950
6	4076	REPLICA	MINNESOTA	1952
7	3661	REPLICA	KENTUCKY	1953
8	653	REPLICA	NORTH DAKOTA	1957
9	470	REPLICA	WYOMING	1957
10	1125	REPLICA	MAINE	1959
11	965	REPLICA	HAWAII	1959
12	1950	REPLICA	WEST VIRGINIA	1960
13	402	REPLICA	ALASKA	1963
14	947	REPLICA	RHODE ISLAND	1966
15	691	REPLICA	SOUTH DAKOTA	1966
16	4132	REPLICA	WASHINGTON	1967
17	10798	REPLICA	OHIO	1970
18	5490	REPLICA	INDIANA	1970
19	4591	REPLICA	TENNESSEE	1971
20	511	REPLICA	VERMONT	1971
21	787	REPLICA	MONTANA	1972
22	3894	REPLICA	ALABAMA	1973
23	5737	REPLICA	MASSACHUSETTS	1975
24	800	NOTICE/FED RULES	NEVADA	1953
25	944	NOTICE/FED RULES	IDAHO	1958
26	2521	NOTICE/FED RULES	MISSISSIPPI	1982
27	2364	NOTICE/FED CODE	KANSAS	1963
28	5463	NOTICE/FED CODE	GEORGIA	1966
29	5882	NOTICE/FED CODE	NORTH CAROLINA	1969
30	3025	NOTICE/FED CODE	OKLAHOMA	1984
31	4706	NOTICE/IDIO RULES	WISCONSIN	1975
32	2914	NOTICE/IDIO RULES	IOWA	1976
33	9262	NOTICE/IDIO RULES	MICHIGAN	1985
34	921	NOTICE/IDIOSYN	NEW HAMPSHIRE	
35	594	FACT/FED RULES	DELAWARE	1948
36	2286	FACT/FED RULES	ARKANSAS	1979
37	3122	FACT/FED RULES	SOUTH CAROLINA	1985
38	9746	FACT/IDIO RULES	FLORIDA	
39	4217	FACT/IDIO RULES	MARYLAND	
40	4917	FACT/IDIO RULES	MISSOURI	
41	7365	FACT/IDIO RULES	NEW JERSEY	
42	2633	FACT/IDIO RULES	OREGON	
43	11864	FACT/IDIO RULES	PENNSYLVANIA	
44	14229	FACT/IDIO RULES	TEXAS	
45	5347	FACT/IDIO RULES	VIRGINIA	
46	23668	FACT/CODE	CALIFORNIA	
47	3108	FACT/CODE	CONNECTICUT	
48	11427	FACT/CODE	ILLINOIS	
49	4206	FACT/CODE	LOUISIANA	
50	1570	FACT/CODE	NEBRASKA	
51	17558	FACT/CODE	NEW YORK	

TABLE II

	Population in 000's	Type of procedural system	Name of State
1	23668	FACT/CODE	CALIFORNIA
2	17558	FACT/CODE	NEW YORK
3	14229	FACT/IDIO RULES	TEXAS
4	11864	FACT/IDIO RULES	PENNSYLVANIA
5	11427	FACT/CODE	ILLINOIS
6	10798	REPLICA	OHIO
7	9746	FACT/IDIO RULES	FLORIDA
8	9262	NOTICE/IDIO RULES	MICHIGAN
9	7365	FACT/IDIO RULES	NEW JERSEY
10	5882	NOTICE/FED CODE	NORTH CAROLINA
11	5737	REPLICA	MASSACHUSETTS
12	5490	REPLICA	INDIANA
13	5463	NOTICE/FED CODE	GEORGIA
14	5347	FACT/IDIO RULES	VIRGINIA
15	4917	FACT/IDIO RULES	MISSOURI
16	4706	NOTICE/IDIO RULES	WISCONSIN
17	4591	REPLICA	TENNESSEE
18	4217	FACT/IDIO RULES	MARYLAND
19	4206	FACT/CODE	LOUISIANA
20	4132	REPLICA	WASHINGTON
21	4076	REPLICA	MINNESOTA
22	3894	REPLICA	ALABAMA
23	3661	REPLICA	KENTUCKY
24	3122	FACT/FED RULES	SOUTH CAROLINA
25	3108	FACT/CODE	CONNECTICUT
26	3025	NOTICE/FED CODE	OKLAHOMA
27	2914	NOTICE/IDIO RULES	IOWA
28	2890	REPLICA	COLORADO
29	2718	REPLICA	ARIZONA
30	2633	FACT/IDIO RULES	OREGON
31	2521	NOTICE/FED RULES	MISSISSIPPI
32	2364	NOTICE/FED CODE	KANSAS
33	2286	FACT/FED RULES	ARKANSAS
34	1950	REPLICA	WEST VIRGINIA
35	1570	FACT/CODE	NEBRASKA
36	1461	REPLICA	UTAH
37	1303	REPLICA	NEW MEXICO
38	1125	REPLICA	MAINE
39	965	REPLICA	HAWAII
40	947	REPLICA	RHODE ISLAND
41	944	NOTICE/FED RULES	IDAHO
42	921	NOTICE/IDIOSYN	NEW HAMPSHIRE
43	800	NOTICE/FED RULES	NEVADA
44	787	REPLICA	MONTANA
45	691	REPLICA	SOUTH DAKOTA
46	653	REPLICA	NORTH DAKOTA
47	638	REPLICA	DISTRICT OF COLUMBIA
48	594	FACT/FED RULES	DELAWARE
49	511	REPLICA	VERMONT
50	470	REPLICA	WYOMING
51	402	REPLICA	ALASKA

CHART I:
DISTRIBUTION OF STATE COURT PROCEDURAL SYSTEMS
BY COUNT OF JURISDICTIONS

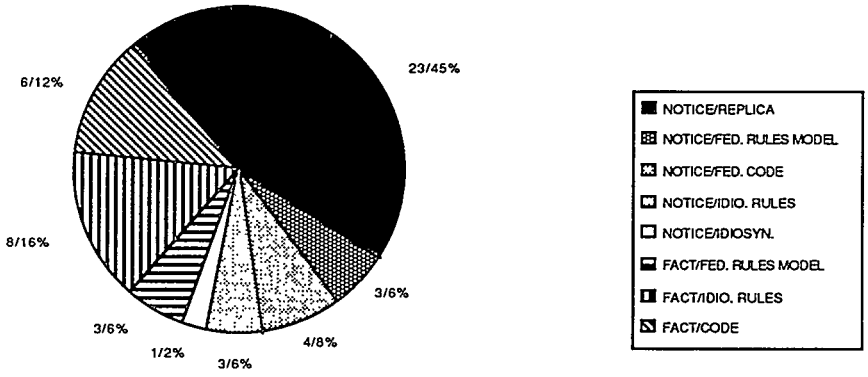

CHART II:
DISTRIBUTION OF SUBSTANTIALLY FEDERAL AND NON-FEDERAL STATE COURT
PROCEDURAL SYSTEMS BY COUNT OF JURISDICTIONS

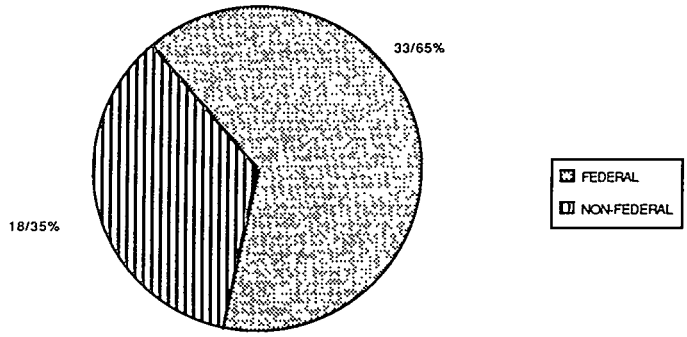

CHART III:
DISTRIBUTION OF PLEADING POLICY
BY COUNT OF JURISDICTIONS

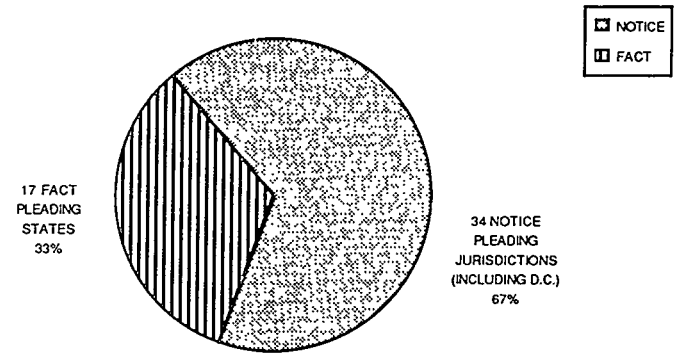

CHART IV:
DISTRIBUTION OF RULES-BASED AND CODE-BASED
PROCEDURAL SYSTEMS BY COUNT OF JURISDICTIONS

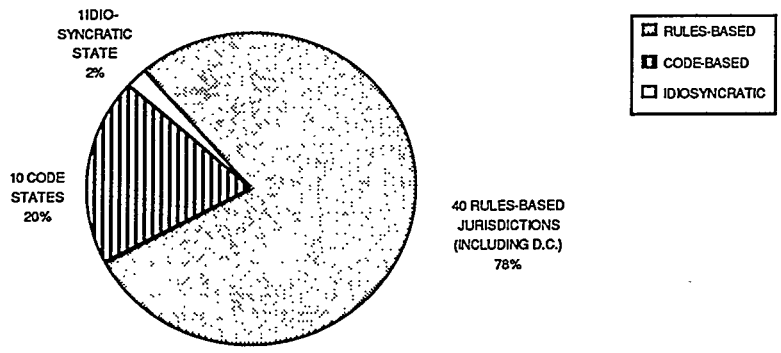

CHART V:
DISTRIBUTION OF STATE COURT PROCEDURAL SYSTEMS
BY POPULATIONS SERVED IN 000'S

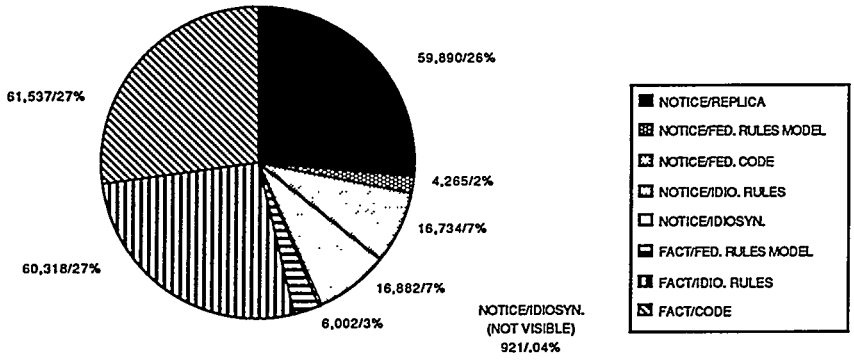

CHART VI:
DISTRIBUTION OF SUBSTANTIALLY FEDERAL AND NON-FEDERAL STATE COURT
PROCEDURAL SYSTEMS BY POPULATIONS SERVED IN 000'S

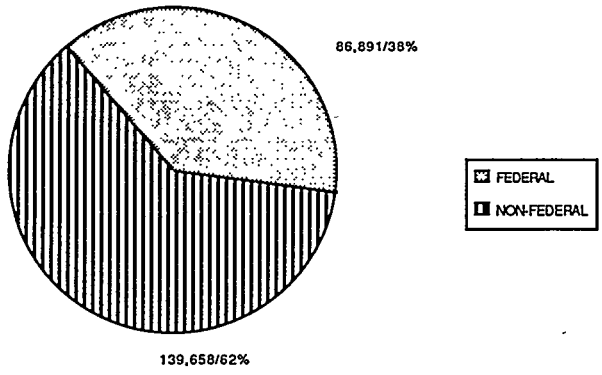

CHART VII:
DISTRIBUTION OF PLEADING POLICY
BY POPULATIONS SERVED IN 000'S

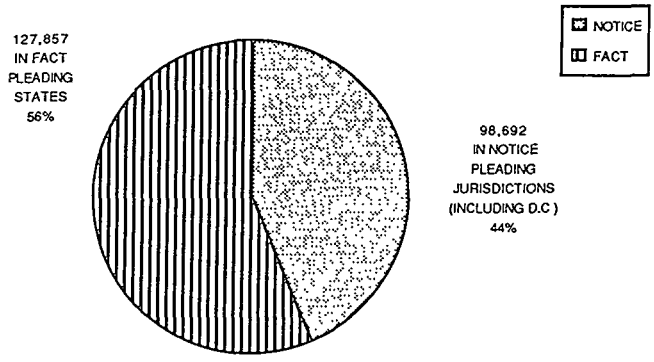

CHART VIII:
DISTRIBUTION OF RULES-BASED AND CODE-BASED
PROCEDURAL SYSTEMS BY POPULATIONS SERVED IN 000'S

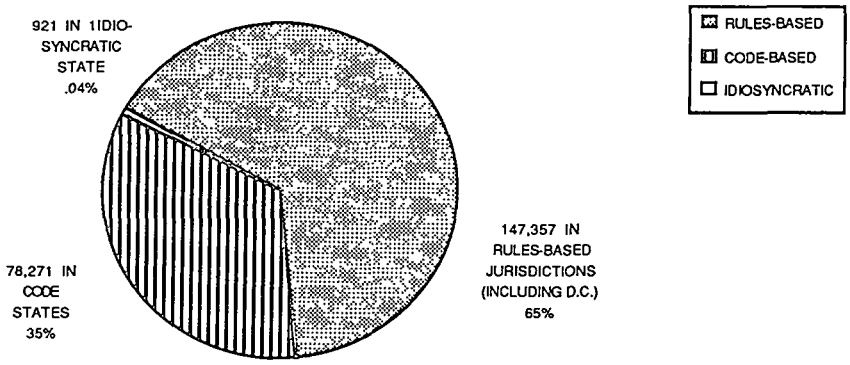

TABLE III

DERIVATION OF CHART V
(subtotals derived from Table I)

59890	SUBTOTAL OF REPLICA POPULATION
4265	SUBTOTAL OF NOTICE/FED RULES POPULATION
16734	SUBTOTAL OF NOTICE/FED CODE POPULATION
16882	SUBTOTAL OF NOTICE/IDIO RULES POPULATION
921	SUBTOTAL OF NOTICE/IDIOSYN POPULATION
6002	SUBTOTAL OF FACT/FED RULES POPULATION
60318	SUBTOTAL OF FACT/IDIO RULES POPULATION
61537	SUBTOTAL OF FACT/CODE POPULATION
226549	Total population (1980 census) in 000's

DERIVATION OF CHART VI

59890	SUBTOTAL OF REPLICA POPULATION
4265	SUBTOTAL OF NOTICE/FED RULES POPULATION
16734	SUBTOTAL OF NOTICE/FED CODE POPULATION
6002	SUBTOTAL OF FACT/FED RULES POPULATION
86891	Total population of state court procedural systems that conform substantially to the federal model
16882	SUBTOTAL OF NOTICE/IDIO RULES POPULATION
921	SUBTOTAL OF NOTICE/IDIOSYN POPULATION
60318	SUBTOTAL OF FACT/IDIO RULES POPULATION
61537	SUBTOTAL OF FACT/CODE POPULATION
139658	Total population of state court procedural systems substantially dissimilar from the federal model

DERIVATION OF CHART VII

59890	SUBTOTAL OF REPLICA POPULATION
4265	SUBTOTAL OF NOTICE/FED RULES POPULATION
16734	SUBTOTAL OF NOTICE/FED CODE POPULATION
16882	SUBTOTAL OF NOTICE/IDIO RULES POPULATION
921	SUBTOTAL OF NOTICE/IDIOSYN POPULATION
98692	Total population of notice pleading jurisdictions
6002	SUBTOTAL OF FACT/FED RULES POPULATION
60318	SUBTOTAL OF FACT/IDIO RULES POPULATION
61537	SUBTOTAL OF FACT/CODE POPULATION
127857	Total population of fact pleading jurisdictions

DERIVATION OF CHART VIII

59890	SUBTOTAL OF REPLICA POPULATION
4265	SUBTOTAL OF NOTICE/FED RULES POPULATION
16882	SUBTOTAL OF NOTICE/IDIO RULES POPULATION
6002	SUBTOTAL OF FACT/FED RULES POPULATION
60318	SUBTOTAL OF FACT/IDIO RULES POPULATION
147357	Total population of jurisdictions with rules-based systems of civil procedure
16734	SUBTOTAL OF NOTICE/FED CODE POPULATION
61537	SUBTOTAL OF FACT/CODE POPULATION
78271	Total population of jurisdictions with code-based systems of civil procedure
921	SUBTOTAL OF NOTICE/IDIOSYN POPULATION
921	Population of single jurisdiction (New Hampshire) with idiosyncratic system of civil procedure

CHART IX:
PACE OF STATE COURT REPLICATION OF FRCP

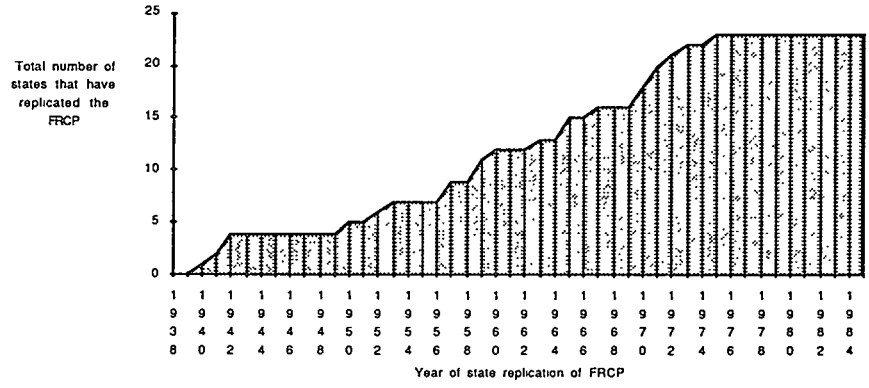

CHART X:
PACE OF FEDERAL RULES REPLICATION AND OTHER FEDERALLY INFLUENCED REFORM OF STATE COURT PROCEDURAL SYSTEMS

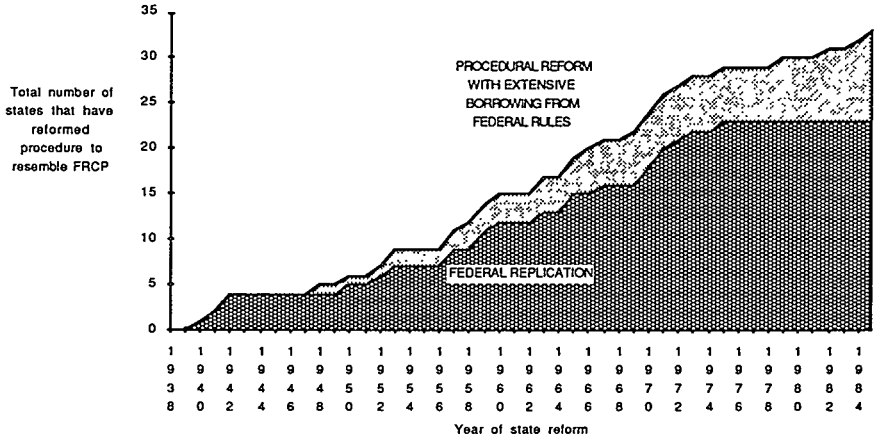

CHART XI:
PACE OF ADVENT OF NOTICE PLEADING
BY FEDERAL RULES REPLICATION AND OTHERWISE