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The Handmaid of Justice: Power and Procedure in the Inferior Courts

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Power and Procedure in the Federal Courts

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Summing up the history of procedure from the codification movement of the nineteenth century to the Federal Rules practice of today, Robert Bone observed, "Each generation of procedure reformers, it seems, diagnoses the malady and proposes a cure only to have the succeeding generation's diagnosis treat the cure as a cause of the malady."[1] While playfully highlighting the contingencies and unexpected consequences of procedural history, Professor Bone was not advocating a cyclical view of history, in which "cost and delay" continually recur as the bugaboos of procedural reformers who can't quite figure out how to solve the problem. Instead, Bone called on proceduralists to recognize that history mattered and moved in procedure. The cost and delay that the codifiers complained of were not the same costs and delays that mattered to the pragmatists of a later era, whether those costs involved the source of procedural law, the uniformity of rules across the national courts, or the fusion of legal and equitable remedies. Legal norms in these and other respects evolved, and Professor Bone counseled that "[t]he hope for the future lies in recognizing that procedural decisions require complex value choices no less controversial than those underlying substantive law and that those value choices in turn require the proceduralist to have thought through deeper jurisprudential questions concerning the nature of law and its relation to social life."[2]

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1. Robert G. Bone, "Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules," *Columbia Law Review* 89, no. 1 (1989): 4.

2. Ibid., 118.

Since the time Professor Bone published those lines in the *Columbia Law Review*, a history-laden "Part II" has become a staple of law review articles, and law review discussions of procedural doctrines have been no exception. But few have heeded Professor Bone's call to examine in depth the values animating procedural regimes or to consider why those regimes give way over time. A couple of notable exceptions have been Edward Purcell's *Litigation and Inequality*, a transformative study examining the moral, political, and racial stakes of seemingly mundane rules of removal and diversity jurisdiction, and Amalia D. Kessler's recent *Origins of American Exceptionalism*, a wide-ranging cultural history of the rise of adversarialism as America's dominant mode of legal procedure.[3] But while both works engage with problems of federalism and focus on federal institutions—particularly the Reconstruction Era Freedman's Bureau—works examining federal procedure in federal courts remain scarce, especially covering any extended time period or sites outside landmark Supreme Court cases.[4]

This essay provides one possible sketch of the story of federal procedure writ large: how federal procedure morphed from being the essence of federal power to being a mere instrument of power, from the instantiation of Justice itself in the Marshall Court's telling to the mere handmaid of Justice as Charles Clark described it. Along the way, I hope to do three things: 1) point out a few tantalizing gaps in our knowledge, should other researchers wish to pursue them, 2) provide a guide to the often puzzling sources of procedural law, especially across the nineteenth century, and 3) wrestle with the question of what federal jurists have thought procedure actually *is*. Despite its threshold importance to any litigation, the definition of procedure (or not-procedure) has never had a rigorous coherence. Even today, the *cause of action*—the fundamental unit of litigation—remains undefined as a matter of both rule and scholarship. And it is in that lack of definition that the politics and history of procedure have had such a wide field of play.

3. Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in America, 1870–1958* (New York: Oxford University Press, 1992); Amalia D. Kessler, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877* (New Haven, CT: Yale University Press, 2017). For article-length treatments of the history of various procedural doctrines and devices, see James Pfander, "Standing to Sue: Lessons from Scotland's *Actio Popularis*," *Duke Law Journal* 66, no. 7 (2017): 1493–563; Stephen Sachs, "*Pennoyer* Was Right," *Texas Law Review* 95, no. 6 (2017): 1249–327.

4. For a magisterial collection of Supreme Court case studies, see Kevin Clermont, ed., *Civil Procedure Stories*, 2nd ed. (New York: Foundation Press, 2008); Vicki Jackson and Judith Resnik, eds., *Federal Courts Stories* (New York: Foundation Press, 2009).

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A few days after erecting the federal court system in the Judiciary Act of 1789, the First Congress passed what was intended to be a temporary measure "to regulate Processes in the Courts of the United States." *Processes* went undefined, but the statute listed what appeared to be several synonyms of the term. It included "[a]ll writs . . . issuing from" federal courts, thus meaning, in a basic sense, all the written paperwork and decrees of a court. Section 2 provided that unless another federal statute controlled (the Judiciary Act, for instance, required equitable examinations to be orally taken in open court, as at common law), "the modes of process and rates of fees" in suits at common law should be the same as those used by the supreme court of the state in which the federal court sat. By contrast, "the forms and modes of proceedings" in equity and admiralty "shall be according to the civil law." In this sense, *process* was a "mode" of litigating that included established forms.[5]

In 1793, Congress showed again what all could be included in *process* by empowering each federal court to make its own rules "directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default, and . . . to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice, and especially to that end to prevent delays in proceedings."[6] The "taking of rules" was a reference to the thirty-fourth section of the Judiciary Act, later known as the Rules Decision Act. It required that "the laws of the several states" were to be "regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[7] In sum, the nascent federal courts did not distinguish between substance and procedure, but between *rules* and *process*, including the processes for discerning the rules. And more fundamental than either of these distinctions was the entrenched distinction between law and equity, because only in common-law cases did state rules or state practices matter. Like many southern and mid-Atlantic states, the federal system distinguished between common-law and equitable jurisprudence, but unlike these states, federal law and equity were institutionally merged—the same judge presided over both systems, but maintained separate trial calendars for each "side" of the court.[8]

5. Process Act of 1789, 1 Stat. 93–94 (1789). For the Judiciary Act's regulation of equitable examinations, see 1 Stat. 73, 88–89.

6. 1 Stat. 335 (1793).

7. Ibid. The Rules of Decision Act was originally enacted at 1 Stat. 92 (1789) and is now codified at 28 U.S.C. § 1652 (1948).

8. For a recent exploration of the history of the "fusion" of law and equity around the common-law world, see John C. Goldberg, Henry E. Smith, and P.G. Turner, eds., *Equity and Law: Fusion and Fission* (New York: Cambridge University Press, 2019).

The Process Act was supposed to be a temporary measure until Congress could fill out the details of federal practice, but Congress would not take up that task for another century and a half. Instead, legislators were content to stick with the convenience of defining federal common-law process by reference to local state practice. Three years later, in the Process Act of 1792, Congress reaffirmed the principle, but with an important qualifier: "subject however to such alterations and additions as the [federal] courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe." That is, Congress delegated the power of rulemaking to each individual court, or to the general rulemaking of the Supreme Court. Tautologically, the Act required that the forms of proceeding used "in [courts] of equity and in those of admiralty" would be the "rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law." District courts were not bound to apply local rules of equitable practice as they were in common-law cases, but here too they were free to make their own rules, subject to the Supreme Court's override.[9]

It was not until 1822 that the Supreme Court promulgated Rules of Practice in Courts of Equity. Although later editions were considered a model for federal codification, in no sense could the first twelve-page collection of equity rules have been considered a code. The thirty-three rules followed no logical sequence, and indeed, most of the practices of equity were assumed rather than stated in the rules. Rule V permitted a plaintiff to amend "his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby." The distinction between attorneys and solicitors, the process for taking out a copy, the payment of costs, and the boundary between "small matters" and "material points"—none of this was elsewhere defined in the rules. Instead of any systematic elaboration of *process*, the equity rules were ad hoc policies directed to seasoned practitioners and meant to clear up disputes that had arisen over the finer points of federal equity.[10]

9. Process Act of 1792, 1 Stat. 275–79 (1792). For more detailed histories of the Process Acts, see Julius Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 542–51. But see Peter C. Hoffer et al., *The Federal Courts: An Essential History* (New York: Oxford University Press, 2016), 64–65 (noting the tendency of early federal courts to follow state procedures in equity and criminal law).

10. *Rules of Practice for the Courts of Equity of the United States* (1822). A more accessible version is available at Wheaton vol. 7 (1822), https://www.loc.gov/item/usrep020rules.

On the common-law side, neither the Supreme Court nor the inferior courts made serious efforts to promulgate rules before the appearance of state procedure codes in the late 1840s. That was not to say that federal practice perfectly converged with state practice in common-law cases. Rather, there were two main sources of divergence. First—and most bizarrely—the original Process Act required federal conformity with state common-law practices "as are now used or allowed." The revised Process Act clarified that "now" meant not the literary present, but September 1789.[11] Even as states amended their court processes through legislation or court decree, the federal courts adhered to Founding Era practices. Second, court "rules" could be something other than a quasi-legislative promulgation of enumerated regulations. A general pronouncement in a litigated case that, henceforth, a court would follow a certain practice became a "rule" for purposes of the Process Act. Indeed, because the Process Acts applied by terms only to the original thirteen states, district courts in newly admitted states usually received state practices by rule in their first common-law cases. But like the Process Acts, these adoptions of state practices usually remained statically defined by practice as it was on the date of admission or reception, not practices as they evolved over time.[12]

That disparity led to one of the great crises of federal institutions under the watch of the Marshall Court. The dispute over the Process Acts in the case of *Wayman v. Southard* has long been overshadowed by the fight over the First National Bank, decided six years earlier in *McCulloch v. Maryland*. But the two controversies had a similar impetus and progress, and they were decided by the same logic of Chief Justice John Marshall.[13]

Like the battle over the National Bank, *Wayman* arose out of resentment against the federal government's ability to bully wildcat banks and control monetary values by regulating the flow of notes backed by specie. Kentucky, the westernmost state at the time and the one hit hardest by the Panic of 1819, enacted numerous relief measures for debtors, along the way becoming the first state to abolish imprisonment for debt. It reformed its civil execution statutes to forbid the foreclosure and sale of property at less than three-fourths of appraised value, effectively keeping bankrupt farmers in their mortgaged homes during bust cycles. Faced with un-imprisonable debtors and un-forecloseable land, creditors were left with two options under Kentucky law: they could either accept

11. Process Act of 1792, 1 Stat. 275–79 (1792).

12. See Charles Warren, "Federal Process and State Legislation," pts. I & II, *Virginia Law Review* 16, no. 5 (1930): 435–37. Even a federal court's ignorance of a state practice could become a "rule" that the federal court adopted. See, for instance, *Palmer v. Allen*, 7 Cranch 556 (1813).

13. *Wayman v. Southard*, 23 U.S. 1 (1825); *McCulloch v. Maryland*, 17 U.S. 316 (1819).

the value of their loans in the (near worthless) currency of state banks and collect immediately, or they could accept a bond to collect on more valuable security (whether land or specie) only after a two-year stay period had elapsed.[14]

The Kentucky system would have afforded significant protection to indebted agrarians unlucky enough to get caught up in western land speculation just before the bottom fell out of the economy—if not for the system of federal courts and federal remedies. The federal district court in Kentucky recognized none of these new state inventions, and when a federal marshal proceeded to enforce Kentucky's currency-or-stay provision, a motion to quash was swiftly certified to the Supreme Court.

The opinion in *Wayman* bears Marshall's signature mix of enthusiasm and pedantry. The first question to confront was whether the case was covered by the Process Acts. Was enforcement of a judgment part of *process*? The striking feature of Marshall's answer is that the term appeared novel to him. Congress's use of *process* was no term of art. There being no practical definition to rely on, Marshall paid close attention to the wording. "Processes" used synonymously with "writs" in Section 1 implied that process meant papers. But the singular "process" in Section 2 therefore "seems to indicate that the word was used in its more extensive sense, as denoting progressive action." Based on this, Marshall decided *process* was an expansive term meaning "the progress of a suit from its commencement to its close," and therefore included enforcement of the judgment, the final termination of a suit's progress.[15]

Alternatively, Marshall reasoned, even if process meant only the paper writs, in this case, it was the paper writs that were at issue. Execution consisted "of the language of the writ, which specifies precisely what the officer is to do. His duty is prescribed in the writ, and he has only to obey its mandate." So counsel's argument that *process* was confined to *form* was thus futile, because when it came to writs of execution, "form, in this particular . . . has much of substance in it."[16]

The next question, then, was whether Congress could legitimately delegate its power to make rules of process to the federal courts. If that delegation was unconstitutional, Kentucky's lawyers argued, federal process had no valid source, and only state law remained to fill the void. Marshall turned the delegation argument against the lawyers. If, as they contended, Congress could not delegate federal court rulemaking to the federal courts, it certainly could not empower

14. For the background to *Wayman*, see Warren, "Federal Process and State Legislation," 437–46.

15. *Wayman*, 23 U.S. at 27–29.

16. Ibid. at 27.

"the State assemblies [to] constitute a legislative body for the Union."[17] As he had in *McCulloch*, Marshall relied on the Necessary and Proper Clause to uphold Congress's delegation of rulemaking power to the federal courts. But even if that delegation were unlawful, federal courts would be confined to the barebones provisions of the Judiciary Act, not to the practices of the states. Otherwise, it would be "extravagant to maintain that the practice of the Federal Courts, and the conduct of their officers, can be indirectly regulated by the State legislatures by an act professing to regulate the proceedings of the State Courts and the conduct of the officers who execute the process of those Courts. It is a general rule that what cannot be done directly from defect of power cannot be done indirectly."[18] Here the logic of *McCulloch* shone through: Like the power to tax, the power of process was the power to destroy. If federal courts were bound to follow state law in the execution of federal remedies, federal remedies would cease to exist whenever state regulations of state court practices abrogated their enforcement. Whatever else *process* meant, it had to mean federal power over federal remedies.

The unanimous Court ruling notwithstanding, Kentucky was not done with the fight. At the time, its brightest stars were the future leaders of both national parties—Secretary of State Henry Clay of the Whigs and Senator Richard Mentor Johnson of the Van Burenite Democrats. Together, Clay, Johnson, and the rest of the state's congressional delegation marshalled a bill through Congress that reversed Marshall in *Wayman*. The revised Process Act of 1828 substantially repeated the former Process Acts, including the requirement to use 1789 practices if no federal court rule provided otherwise, but Section 3 required that "writs of execution and other final process" were to be the same "as are now used in the courts of [each] state," unless by rule the federal courts chose "to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts." That is, when it came to executions, Congress essentially took Marshall up on the offer to delegate rulemaking power to the states. Henceforth, federal courts could choose either to use the execution practices states had in place in 1828 or those later adopted by the states in which they sat. No other options were permitted.[19]

The battle over the Process Acts showed that by the 1830s, *process* in the federal courts was yet undefined in its particulars. The one thing that the Marshall Court had made clear—that process included the enforcement of remedies—the states acting in Congress had worked to obscure. The compromise worked out in 1828 was an odd one. Very few states had adopted Kentucky's full

17. Ibid. at 47–48.

18. Ibid. at 49–50 (extraneous punctuation omitted).

19. Process Act of 1828, 4 Stat. 281 (1828).

range of debtor relief, so pegging enforcement practices to 1828 really helped only the one state advocating for change. (Almost all other states still allowed imprisonment for debt in 1828, for instance.) Federal courts were not bound to keep up with future changes, but neither were they free to roll the procedural clock back to the eighteenth century. Unlike later conceptions of procedure, the Marshall Court understood process as distinct from "rules" but not from "substance." As in common-law practice generally, process inhered in writs, and writs were the fundamental unit of judicial power. Without them, the rules of property became unrecognizable and unenforceable. In that sense, nothing was more quintessentially substantive than process. But although process was power, and power over property, it was not a power the federal Congress was eager to regulate in detail or the federal courts eager to reform. As later decisions would illustrate, this reluctance may have stemmed in part from the fact that after 1820, questions of power and property were often, and also, questions of slavery.

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One of only two justices whose tenure spanned the Mexican War, the Civil War, and the onset of Reconstruction, Robert Cooper Grier has nevertheless remained an obscure figure. An old Pennsylvania Democrat when he joined the Court, Grier loathed both secession and abolition with equal furor. One key to his jurisprudence appeared in an early Court opinion, when he upheld the rights of New York creditors against an insolvent Marylander, trenchantly ruling that Maryland could not "inflict her bankrupt laws on contracts and persons not within her limits." Jurisdictional lines were paramount to Grier. It was those lines that both the secessionist and the abolitionist transgressed, each trying to inflict its view of the law on the other. It was that reasoning that spurred Grier to become a pivotal Northernist vote for Chief Justice Taney's majority in *Dred Scott*. Scott owed his civil existence to Missouri, and no amount of line-crossing would change that jurisdictional fact for Grier.[20]

This jurisdictional purity summoned Grier on a crusade against reformed procedure codes increasingly adopted by states before and after the Civil War. It was not just that codes continued to spread where they did not belong, sprouting inferior civilian-style practice in formerly common-law systems where there had been no need to repeal the "wisdom of ages." The codes' purported fusion of law and equity and the abolition of the forms of action were their greatest jurisdictional sins. Reviewing his jurisprudence on code procedure in an 1857 opinion, Grier wrote

20. Frank Otto Gatell, "Robert C. Grier," in *The Justices of the Supreme Court*, eds. Leon Friedman and Fred L. Israel (New York: Chelsea House Publishing, 1997), 2:435–45; *Cook v. Moffat*, 46 U.S. 295, 308 (1847). In this regard, Grier was at odds with both sides of the constitutional conflict James Oakes describes in *Freedom National: The Destruction of Slavery in the United States, 1861–1865* (New York: W.W. Norton, 2014).

for the Court that "this attempt to abolish all species" of pleading "and establish a single genus" known as the cause of action "is found to be beyond the power of legislative omnipotence. They cannot compel the human mind not to distinguish between things that differ. The distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things."[21] To Grier, as to a host of common-law lawyers in his time, common-law practice was fundamentally about drawing jurisdictional lines and holding to them. The lines between law and equity, trover and assumpsit,[22] were what constrained judicial discretion over powerful remedies in a republic that refused ultimate power to any one branch. Grier's review cited two cases as perfect illustrations of the principle.

Grier's model cases were the first two opinions the Supreme Court issued dealing with state procedure codes, one written by Grier and one by Taney. They were both peculiar in that they did not arise in an actual code state. Both came up on appeal from Texas and were decided in 1850—meaning they were both originally litigated before New York's Field Code began its remarkable journey around the nation. Formerly a civil-law jurisdiction like Louisiana, Texas had almost immediately abandoned civil-law codes for American common law after annexation. The one exception was in pleading and practice. While the Texas bar did not adhere to a procedure code, it also did not import a distinction between law and equity or a requirement to plead to single issue under the common-law formulary system. The effect (and the timing of development) was more or less close to that achieved in the Field Code, albeit without a systematic set of writing rules. Pleaders stated their cases briefly and factually, and courts enjoyed broad discretion to fashion the remedy to the harm identified, drawing on a jurisprudence that derived substantive rules and rights from the case law.[23]

The other peculiar feature is that both cases involved transactions over slavery. *Randon v. Toby* was a routine debt-collection case on a promissory note issued to purchase slaves. The defendant argued that the debt was void because the slaves it

21. *McFaul v. Ramsey*, 61 U.S. 523, 525 (1857).

22. Trover was an action to recover damages for lost, stolen, damaged, or undelivered chattels (in contrast to replevin, an action to recover the chattel itself). As a leading treatise explained, "the declaration states that the plaintiff was possessed of the goods, &c. in question, that he casually lost them, that the defendant found them, and converted them to his own use. The conversion is the gist of the action, the remainder being a mere fiction." John Archbold, *A Digest of the Law Relative to Pleading and Evidence in Civil Actions*, 2nd ed. (London: Saunders and Benning, 1837), 94. Assumpsit was by the 1830s something of a catchall action for damages arising from breach of contract, either for failure to pay (in most cases) or to perform. See ibid. at 16–18.

23. See William Dorsaneo, "The History of Texas Civil Procedure," *Baylor Law Review* 65, no. 3 (2013): 713–823; for the outlines of practice under the Field Code and the political story of its spread, see Kellen Funk and Lincoln A. Mullen, "The Spine of American Law: Digital Text Analysis and U.S. Legal Practice," *American Historical Review* 123, no. 1 (2018): 132–64.

purchased had been imported from Africa in 1835, in violation of the laws banning the Atlantic slave trade. To Grier, as to any contract lawyer at the time, the defense was obviously meritless. Toby was a downstream good-faith purchaser of the slaves. Even if the original contracts importing the slaves were void, Toby's own title was protected and he therefore received valuable consideration for his debt.[24]

What concerned Grier was that under common-law pleading, the case would have ended quickly and merited no attention. The plaintiff would have pleaded assumpsit for the debt; the defendant would have answered non assumpsit and quickly lost at trial. "But unfortunately," Grier reasoned anachronistically, "the district court has adopted [in 1847!] the system of pleading and code of practice of the State courts; and the record before us exhibits a most astonishing congeries of petitions and answers, amendments, demurrers, and exceptions—a wrangle of writing extending over more than twenty pages." What was so perplexing about a case that Grier resolved easily on the record? What may have been most troubling is that the twenty pages focused on the illegality of the slaves' importation and subsequent sales. This focus was irrelevant to Grier, because "[t]he buying and selling of negroes, in a State where slavery is tolerated, and where color is prima facie evidence that such is the status of the person, cannot be said to be an illegal contract, and void on that account." But without the disciplined constraints of common-law pleading, the defendant could keep arguing that it was.[25]

In *Bennett v. Butterworth*, a Texas slaveholder actually employed the common-law forms of action, but put them to the wrong use. Bennett pleaded in trover for the loss of four slaves. All the classic elements were in the petition: he casually lost the slaves (as if they were inanimate objects dropped from his pocket), the defendant found them but refused to return them, and so forth.[26] The problem was that the jury evaluated the worth of the slaves and calculated damages for the plaintiff at $1,200—a remedy that should have come in part through an equitable action for account after the jury limited itself to deciding which party had the superior claim to title. Taney ruled that the district court's adoption of state practice could not entirely "govern the proceedings in the courts of the United States . . . as authorizing legal and equitable claims to be blended together in one suit." The Court had issued rules for equity, and they did not include jury opinions on the value of slaves, while "if any thing is settled in proceedings at law where a jury is impanelled to try the facts, it is, that the verdict must find the matter in issue between the parties"—in this case: title, not value.[27]

24. *Randon v. Toby*, 52 U.S. 493 (1850).

25. Ibid. at 517, 520.

26. See note 22 supra.

27. *Bennett v. Butterworth*, 52 U.S. 669, 674–75 (1850).

The significance of *Randon* and *Bennett* was that in the first two cases of reformed procedure to reach the Supreme Court, juries had been asked to weigh the equities of slavery, from broad equitable questions about slavery's very legality down to the particular remedies that sustained the system. In both, the future architects of *Dred Scott* held firm to the line separating law from equity. District courts might modify their common-law practices, but they could not so modify them that juries were given equitable discretion. On his own, Grier could do nothing to keep the district courts from blending or abolishing the common-law forms of action, but he could remind them of the stakes: by lessening the strictures of pleading, the Texas court had invited the parties to argue broadly about the very underpinnings of their social system. Process, that is, still had much of substance to it.

Grier was powerless over district court procedures because the Process Acts vested rulemaking authority at the district level, subject only to rules promulgated legislatively by the Supreme Court. The Court had re-issued slightly expanded Rules of Equity in 1842 along with its first set of Admiralty Rules, but although Grier got the other justices to sign on to his trenchant opinions attacking code procedure, the Court never promulgated a set of common-law practice rules contravening the state codes.[28]

Without Supreme Court rules to bind them in common-law cases, each district court exercised its own discretion under the Practice Acts. Many sided with Justice Grier, more from a shared outlook on legal practice than from any force of reasoning in his Court opinions. But as district courts published their rules in the late 1850s and again after the Civil War, examples of every imaginable arrangement could be found. In antebellum Florida, a common-law jurisdiction, the Northern District Court by rule succinctly adopted "the modes of proceeding and rules of practice which are now in use, and prevail in the State courts of Florida in common law cases." The District of Iowa, a code state, enumerated in one long rule all the sections of the state practice code in force in the federal courts, essentially adopting the Field Code in most particulars. The Northern District of Ohio, another code state, refused to implement that state's code and instead promulgated fifty-two rules establishing a modified common-law practice that retained forms for replevin and ejectment but otherwise required factual pleadings verified by oath. The Eastern District of Wisconsin likewise ignored the state's code and advised pleaders to "consider the practice of the Courts of King's Bench, and of Chancery, in England, as affording outlines for the practice of this

28. For more of Grier's grousing opinions, see *Green v. Custard*, 64 U.S. 484 (1859); *Farni v. Tesson*, 66 U.S. 309 (1861).

court." (The district courts of Michigan, a common-law state, also adopted the "English rules prior to 1840"—this, in 1871.)[29]

No practitioner or scholar has yet attempted a complete collection, much less analysis, of federal court rules before 1872, when the courts' rulemaking authority under the Practice Acts was formally abolished. The first treatise on federal practice, Benjamin Vaughan Abbott's *Treatise Upon the United States Courts*, appeared in 1869. Abbott's second volume, covering pleading and practice, appeared in 1871, just in time to become obsolete. In it, Abbott instructed lawyers to use the "general" principles of common-law pleading, being sure to check if those principles had been "modified by rule of court."[30] As this brief sketch has illustrated, each district court was different, and each set of rules told a different story. Some adapted rules from local state practice, some from the general common-law principles Abbott elaborated, and some from England limited to a definite point in that country's procedural history.

In 1872, Congress unexpectedly brought federal court rulemaking to an end by passing the Conformity Act. As its name implied, the Act required that "the practice, pleadings, and forms and modes of proceeding" in federal court common-law cases "shall conform, as near as may be," to their state counterparts. As in the Process Act of 1828, the enforcement of remedies was made to conform to state law on the date of the Act's passage. Court rulemaking was restricted only to updating enforcement procedures on a case-by-case basis as states changed their own rules.[31]

Little is known about the impetus behind the Conformity Act. As one commentator noted, "there was singularly little debate on it in Congress—a short portion of one day being devoted to it in the Senate and also in the House."[32] Newspapers did little more than reprint the text of the bill as an item of interest to local lawyers. Commenting on the legislative history in 1875, the Supreme Court opined that the spread of code practice had made conformity an obvious necessity. A generation of lawyers had arisen who no longer knew the common law well enough to bring their cases in federal court without "studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements

29. Rules of Practice in the District Court of the United States for the Northern District of Florida (1858), Rule 12; Rules of Practice in the Federal Courts of Iowa (1871), Rule 1; Rules of Practice for the Northern District of Ohio (1859); Rules of Practice for the Eastern District of Wisconsin (1871), Rule 3; Rules for the Districts of Michigan In Cases at Law, In Equity, Admiralty, and Bankruptcy (1871), Rule 14.

30. Austin Abbott and Benjamin Vaughn Abbott, *A Treatise Upon the United States Courts, and Their Practice* (New York: Diossy, 1871), 2:52.

31. Conformity Act of 1872, 17 Stat. 196 (1872).

32. Warren, "Federal Process and State Legislation," 562.

of both."[33] The *American Law Review* mostly agreed. The *Review* hardly approved of the codes state legislatures had come up with, but "they have at least the advantage of being known to the lawyers who practise in the particular district." As for a general common-law practice at which many district courts aimed, the *Review* reasoned that "the common law has little to recommend it except its connection with substantive legal doctrines." That is, by 1872 enough lawyers had come to see the common law as a source of rules that could be extracted and divorced from the pleadings by which those rules had been made known. That extraction accomplished, the forms of the pleadings could be abandoned.[34]

Although court rulemaking came to an end, very little changed in practice under the Conformity Act. The trouble was its qualified language. Conforming "as near as may be" to state practice left a lot of room for judges to resist state-created procedures. The first Supreme Court case to construe the Act illustrates the point well. Illinois tightly regulated judicial interactions with the jury. Judges were not permitted to voice their opinion on the factual presentations of the lawyers. They could instruct the jury on the law to be applied, but the instructions had to be written, retained by the jury, and—the implication seems to be—preserved for appeal. Renée Lettow Lerner has described in detail nineteenth-century movements among state bars to "silence" judicial commentary on the evidence as lawyers gained greater control over courtroom oratory. In this way, Illinois was no different from its neighbors, but it was different from federal practice. By the late nineteenth century, federal judges still retained their discretion to comment however they liked to the jury.[35]

Nudd v. Burrows challenged this practice. The federal judge in a bankruptcy-related proceeding freely commented on his view of the evidence and refused to deliver his comments in writing, despite the mandates of the state Practice Act and the federal requirement for conformity. The Supreme Court affirmed the federal judge, dodging the clear aim of the Conformity Act by overscrutinizing its every word. "The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding within the meaning of those terms as found in the context," the Court held.[36] True enough, judicial comment was not pleading, and it was not "practice" in the sense of what lawyers did to prepare for litigation. "Mode" had no standard meaning as a term of art. But overall, it would be difficult

33. *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

34. Editor's Note, *American Law Review, 1871–1872* (Boston: Little, Brown, 1872), 6:748.

35. Renée Lettow Lerner, "The Transformation of the American Civil Trial: The Silent Judge," *William & Mary Law Review* 42, no. 1 (2000): 195–264.

36. 91 U.S. at 442.

to imagine something more procedural than the manner of a judge's instruction to the jury. By creating a category of "ministerial" conduct, the Court provided district courts an easy path to ignore state practices. State rules, if treated as trivial, merely regulated *ministerial* conduct and escaped the conformity rule. But if state rules were quite serious and fundamental, then they were *substantive* and so also escaped the conformity rule.[37]

In practice, that meant lawyers under the Conformity Act continued to practice as they had without it. Before the Act, federal practitioners had to, as Abbott advised, study the local court rules and read reports of local precedents to determine which practices applied in a given district court. Under the Act, lawyers continued to rely on case reports and treatises to inform them which parts of a state's code or common law the district court had adopted "as near as may be." By 1889, one popular treatise organized itself as a code of enumerated sections. Many sections mimicked the Field Code or copied the language of its most widespread adaptations. Each section then went state by state to explain where state practices diverged, and then court by court to explain whether the federal district courts followed those divergences.[38] Probably the personalities of the judges counted for most in many cases. Then, as now, the federal bench remained comparatively small and compact relative to state judiciaries. For decades, entire federal districts might be staffed by a single judge who was thereby the sole rulemaker of federal practice in his district. John F. Dillon later reported to the American Bar Association that all that was needed to turn the district courts of Missouri from common law to code practice was his accession to the bench.[39] Any reasonably thorough history of federal practice would require more scrutiny of specific judges in specific districts than we currently have.[40] Such studies would better enable us to assess how federal judges interacted with and policed state and local legal practices over time, and they might reveal whether Justice Grier had cause to worry about the infusion of civilian-style

37. By this time, the ruling in *Swift v. Tyson*, 41 U.S. 1 (1842), had long permitted a federal common law to supplant state law in most substantive areas, confining the Rules of Decision Act to state statutory enactments only.

38. William G. Myer, *Federal Decisions Volume XXVI: Practice* (St. Louis, MO: Gilbert Book Co., 1889).

39. Report of the Eleventh Annual Meeting of the American Bar Association (1888), 76.

40. Promising starts on federal district court histories include Harvey Bartle III, *Mortals with Tremendous Responsibilities: A History of the United States District Court for the Eastern District of Pennsylvania* (Philadelphia: St. Joseph's University Press, 2011); Mark Edward Lender, *"This Honorable Court": The United States District Court for the District of New Jersey, 1789–2000* (New Brunswick, NJ: Rutgers University Press, 2006); Wallace Hawkins, *The Case of John C. Watrous, United States Judge for Texas* (Dallas: University Press, 1950).

procedure in the federal courts, especially in its relation to nationally uniform rules protecting slavery.[41]

* * *

The move from conformity with state practices to uniformity across the federal courts is a much better-known story, thanks to tireless archival efforts by Stephen Burbank and Stephen Subrin.[42] The impetus for a uniform federal code of procedure arose within the nascent American Bar Association, headed by its then-president David Dudley Field, the prolific codifier of state law.[43] Despite personal lobbying by Field and other ABA committees over time, Congress refused to override the Conformity Act or delegate rulemaking power to an advisory board for nearly four decades. Much of the credit (or the blame) for the holdout has been laid on the populist Senator Thomas Walsh of Montana, who claimed to advocate "for the one hundred [lawyers] who stayed at home as against the one who goes abroad." That is, Walsh and others who resisted uniformity understood themselves arrayed against the nationally elite corporate bar, the only perceived beneficiaries of a specialized and nationally uniform practice.[44]

In part due to the outsize influence of President-turned-Chief Justice William Howard Taft, and in part due to the death of Senator Walsh, Congress finally granted rulemaking power to the Supreme Court, acting in conjunction with an advisory board, in the Rules Enabling Act of 1934. Four years later, the board finished its initial work by promulgating the Federal Rules of Civil Procedure that remain—with certain significant alterations—in place today. Because of their continuing relevance to practitioners, nearly every rule has had some part of its history excavated and scrutinized by scholars. Less emphasized has been the advisory board's overall view of what procedure actually consists of. Professor

41. For local studies of "freedom suits," some of which were filed in federal courts before the *Dred Scott* decision, see Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence, 1787–1857* (New York: Cambridge University Press, 2016); Lea VanderVelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York: Oxford University Press, 2014); Andrew Fede, *Roadblocks to Freedom: Slavery and Manumission in the United States South* (New Orleans: Quid Pro, 2012).

42. Stephen B. Burbank, "The Rules Enabling Act of 1934," *University of Pennsylvania Law Review* 130, no. 5 (1982): 1015–197; Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," *University of Pennsylvania Law Review* 135, no. 4 (1987): 909–1002.

43. Report of the Ninth Annual Meeting of the American Bar Association (1886), 11, 69–70, 328–29.

44. Quoted in Burbank, "Rules Enabling Act," 1063–64; see also Stephen N. Subrin, "Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns," *University of Pennsylvania Law Review* 137, no. 6 (1989): 1999–2051.

Burbank has demonstrated that the rules committee took a rather pragmatic approach to drawing a line between substance and procedure, not—as the Court has mistakenly held—in deference to state prerogatives and federalism concerns but in deference to Congress and the view that only Congress could amend the substantive law.[45]

Indeed, as of late 1937 the Federal Rules advisory committee had only a working definition of procedure that seemed to be pragmatically based only on what they could get away with under Congress's and the Court's purview. As one member candidly wrote to another: "The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one."[46] Marshall's capacious view of procedure as the near-essence of federal power continued to live on in some members of the Court. Justice James Clark McReynolds gave as his spur-of-the-moment definition: "A method of determining and enforcing rights and liabilities which have been prescribed by law," thus including both the rules of recognition and the rules of enforcement as procedural, much as Marshall did.[47]

But the chief architects of modern federal procedure adopted a decidedly instrumentalist view of procedure. In an article titling procedure the "Handmaid of Justice," the chief draftsman of the Federal Rules and dean of the Yale Law School Charles Clark stated, "I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case." In his view, the new Federal Rules brought about the "due subordination of civil procedure to the ends of substantive justice."[48] Clark was by no means alone. In his famous "Causes of Popular Dissatisfaction with the Administration of Justice," the dean of Harvard Law School Roscoe Pound dismissed procedural rules as "the mere etiquette of justice."[49] The Michigan professor and architect of Federal Rules discovery procedures Edson Sunderland

45. Burbank, "Rules Enabling Act."

46. William D. Mitchell to Hon. George Wharton Pepper, December 19, 1937, quoted in Burbank, "Rules Enabling Act," 1134 n.530.

47. *Procedure in Federal Courts, Hearing on S. 2060 and S. 2061 Before a Subcomm. of the House Judiciary Comm.*, 68th Cong., 1st Sess. (1924), 56.

48. Charles E. Clark, "The Handmaid of Justice," *Washington University Law Quarterly* 23, no. 3 (1938): 297–320.

49. Report of the Twenty-Ninth Annual Meeting of the American Bar Association (1905), 395.

shared with the codifier David Dudley Field a preference for the metaphor of procedure as the "machinery of justice."[50]

Clark insisted that his code was in line "with the whole trend of modern procedural reform" ("modern" being Clark's highest term of approbation).[51] Much of his procedural scholarship declared one or another device "the most modern view."[52] But Clark defined legal modernity not through high theory but through reference to practical procedural devices. In an address to the ABA, Clark professed to articulate the "underlying philosophy" that "basic provisions" of his code shared with "all pleading reform of modern times." But instead of discussing metaphysical principles of law or legality, Clark offered as his "basic philosophy" a description of mundane procedural devices only a lawyer could love: "the generality of allegation and the free joinder of claims and parties."[53] For Clark, modernity inhered in processes, not philosophies.

In the modernist turn to procedure as a subordinated tool of substantive law, much remains to be explored. Some have located the turn in the evolution from Baconian induction to Euclidean deduction as a dominant paradigm of turn-of-the-century science.[54] It is surely no coincidence that the founder of the modern case method and the modern scientific approach to law, Christopher Columbus Langdell, was a preeminent proceduralist at Harvard.[55] No doubt another impetus was the pragmatic politics of rulemaking traced by Professor Burbank. It was undeniably easier to make the case for rulemaking by unelected commissioners if the commission were limited to a purportedly apolitical, objective, and subordinated instrumentalist procedure.[56] And of course running alongside all of these was the old hope—at least as old as the writings of Jeremy Bentham—

50. Edson Sunderland, "The Regulation of Legal Procedure," *West Virginia Law Quarterly* 35, no. 4 (1929): 305. On Field's use of the machinery metaphor, see Funk and Mullen, "Spine of American Law," 140.

51. Charles E. Clark, "The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure," *ABA Journal* 23, no. 12 (1937): 97.

52. Charles E. Clark, "Procedural Reform and the Supreme Court," *American Mercury* 8, no. 4 (Aug. 1926): 447; Charles E. Clark, "The Code Cause of Action," *Yale Law Journal* 33, no. 8 (1924): 826.

53. Clark, "The New Federal Rules of Civil Procedure," 976.

54. See Thomas C. Grey, "Langdell's Orthodoxy," in *The Philosophy of Legal Reasoning*, ed. Scott Brewer (New York: Routledge, 1998), 115–67.

55. See ibid.; Bruce A. Kimball and Pedro Reyes, "The 'First Modern Civil Procedure Course' as Taught by C.C. Langdell, 1870–78," *Journal of American Legal History* 47, no. 3 (2005): 257–303.

56. See Burbank, "Rules Enabling Act," 1132–37; Funk and Mullen, "Spine of American Law," 140–42.

that substantive justice could be done without the mediation of devices and professionals to muck it up along the way.[57]

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Anyone passingly familiar with procedural history eventually comes across Sir Henry Maine's stilted yet somehow famous aphorism: "So great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms."[58] Writing those lines in the 1880s, Maine was purporting to describe the evolution of legal thought from antiquity to modernity, but his words aptly describe a revolution in thought that had occurred in the United States only a few years before he wrote. Under the Marshall Court, everything, including the determination of rules for a decision and the execution of a remedy, was secreted away in the interstices of *process*. As the Taney Court recognized, federal jurisdiction and federal remedies—two domains quintessentially defined as procedural in America—could become the undoing of chattel slavery or its firmest bulwark. In the technicalities of trover lay the keys to federal power over slavery and a host of other political issues. While many fewer cases today turn on the distinction between law and equity and the common-law forms of action, new "procedural" devices such as abstention and exhaustion have arisen as tools of restraint on federal court power to remedy what are otherwise conceded to be constitutional and human rights abuses.[59] But too often, legal historians have been inclined to repeat uncritically the modernists' view of procedure as a mere "technical" machinery of the law, one that often inadvertently raised "impediments" to substantive justice. Instead, historians must do a better job of recognizing the political judgments lying behind technicality. Ultimately all mediation of law is technical—it requires some kind of technique—and any impediments are usually there by design, to advance or restrain the use of power. Rather than the handmaid of justice, as Clark would have it, or even its "mistress" as he imagined the alternative, procedure in early modern American practice reigned as queen.[60]

57. Bone, "Mapping the Boundaries of a Dispute," 88–89; see Jeremy Bentham, *Of Laws in General* (1782) (ed. H.L.A. Hart, London: Athlone Press, 1970), 158–68. See also David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (New York: Cambridge University Press, 1989), 219–40.

58. Henry Sumner Maine, *Dissertations on Early Law and Custom* (London: John Murray, 1883), 389.

59. See, for instance, Fred O. Smith Jr., "Abstention in the Time of Ferguson," *Harvard Law Review* 132, no. 8 (2018): 2283–358.

60. Clark's use of gendered language to describe procedure is intriguing but as yet unstudied. For a masterful overview of the coded masculinity of early federal courts practice, see Michael Grossberg, "Institutionalizing Masculinity: The Bar as a Man's Profession," in *Meanings for Manhood: Masculinity in Victorian America*, eds. Mark Carnes and Clyde Griffen (Chicago: University of Chicago Press, 1990), 133–51.