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GLOBAL CIVIL PROCEDURE TRENDS IN THE TWENTY-FIRST CENTURY

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Abstract: Recent scholarship in comparative civil procedure has identified "American exceptionalism" as a way to describe practices which set the United States apart from most of the world, particularly the civil law world. This Article focuses on two areas of "exceptionalism": pleading standards and the role of judges. Specifically, pleading requirements are considerably less strict in the United States compared to other countries. Additionally, U.S. judges are less active in conducting litigation than their counterparts elsewhere, especially judges in the civil law tradition. This Article traces some modern trends toward convergence between the United States and the rest of the world. With regard to pleading standards, two recent Supreme Court cases, *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, have moved U.S. pleading standards closer to the rest of the world. With regard to judicial roles, convergence has been bilateral, with U.S. judges becoming more "managerial" and European judges becoming less so. Additionally, civil law judges have begun to enjoy broader discretion, increasing their prestige and visibility in a manner similar to the U.S. judge. The final focus of the Article is whether these recent trends represent opportunities for improvement or an unwelcome disruption for the U.S. procedural system.

Introduction

In a number of areas, civil procedure practices in the United States differ significantly from the rest of the world, particularly the civil law world. Notable differences include the use of civil juries,[1] the prevalence of partisan experts paid for directly by the litigants,[2] the existence and extent of party-controlled pre-trial discovery,[3] standards for second

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[1] *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 Am. J. Comp. L. 277, 288–92 (2002).

[2] *See id.* at 300–01.

[3] *See id.* at 292–96.

instance (or appellate) review,[4] notions of finality in litigation (*res judicata*),[5] the use of class actions and other forms of aggregate litigation,[6] pleading requirements,[7] and the role and status of the judge.[8] Together, these individual attributes have given rise to a holistic assessment that U.S. civil procedure is highly exceptionalist when compared to the civil law systems in the rest of the world.[9]

This Article does not quarrel with that general assessment. Nevertheless, we are convinced that "American exceptionalism" is diminishing in some, if not most, areas of civil procedure. To be sure, the United States is still exceptionalist. But we see trends in both U.S. procedure norms and foreign norms that suggest convergence.

Convergence is not an unabashed good. There are both promises and perils of convergence. This Article does not take a position on whether convergence ought to happen. But this Article does stress that if convergence is occurring, it is important to be aware of what rewards it may hold and of what pitfalls to avoid.

This Article tackles these topics through the lens of two areas of traditional "American exceptionalism": pleading standards and the role of the judge.[10] In both areas, some convergence between the United States and foreign systems has occurred. With respect to pleading, whatever movement has occurred has only been in one direction, with the United States making a unilateral move toward stricter pleading requirements.[11] With respect to the role of judges, there is movement in both directions, though there are still significant differences between civil law countries.[12] Nevertheless, at least some U.S. judges are becoming more involved in the management of civil litigation, and some civil law countries have ceded more control over litigation to the opposing attorneys.[13]

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[4] *See* Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 Am. J. Comp. L. 709, 712, 717, 720 (2005).

[5] *See* Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 Vill. L. Rev. 1, 9 (2001).

[6] *See* Marcus, *supra* note 4, at 735–37.

[7] *See id.* at 718–19.

[8] *See id.* at 723–24.

[9] *See id.* at 710.

[10] *See generally* Chase, *supra* note 1 (discussing American "procedural exceptionalism" and how it is informed by U.S. culture); Marcus, *supra* note 4 (exploring American exceptionalism as it relates to pleading standards and the role of the judge).

[11] *See* Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 Va. L. Rev. In Brief 135, 138 (2007).

[12] *See* Marcus, *supra* note 4, at 723–24.

[13] *See* Chase, *supra* note 1, at 292–96, 298.

Further, the European Union (EU) is beginning to recognize the broad discretion that civil law judges are exercising in reality.[14] This recognition seems to be a factor increasing the prestige and public recognition of the civil law judge, making him or her more similar to a common law judge.[15]

What promises and perils might these convergences hold? The promises, we think, are many. The recognition of convergence and the resulting comparative inquiry can enrich and enlighten the debate about the trends: where they are going and why, and what possibilities they may hold. The convergences may provide opportunities for meaningful reform. Moreover, they may provide the opportunity for more inclusive participation in the development of global procedural norms.

There are corresponding perils as well. As such, this Article recommends studying these convergences and their likely benefit while remaining watchful of the possible adverse impact on other features of civil procedure, as well as system stability and workability as a whole.

A final note is in order. Naturally, our points are generalized. As a result, this Article strives for breadth rather than depth. In making these generalizations, we do not mean to give the impression that individual countries' procedural rules are not different—they are. Rather, we mean to focus on the broader similarities and convergences. And we do believe they exist and have important implications.

I. Pleadings

This Part discusses U.S. federal pleading standards in a global context, particularly in light of the Supreme Court's 2009 pleadings decision of *Ashcroft v. Iqbal*.[16] This Part begins with an overview of the state of the law on federal pleading in the United States and then compares it to pleading standards in other countries.

A. *U.S. Federal Civil Pleading*

In the past, federal pleading under Rule 8 was simple: provide notice of your claim and, as long as you did not plead a critical defect—such as the expiration of the statute of limitations—or ask for relief under a nonexistent statute, you would survive a motion to dismiss under Rule 12(b)(6).[17]

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[14] *See infra* text accompanying notes 116–129.

[15] *See infra* text accompanying notes 116–129.

[16] 129 S. Ct. 1937, 1950–52 (2009).

[17] *See* Conley v. Gibson, 355 U.S. 41, 46–47 (1957).

That was a stark change from the Code pleading system that Rule 8 replaced. The Code required the complaint to contain "[a] statement of the facts constituting the cause of action."[18] In addition, the Code differentiated between conclusions of law, evidentiary facts, and ultimate facts, where pleading required ultimate facts.[19] As the principal draftsman of Rule 8 forcefully argued, those distinctions were fuzzy at best and served the primary purpose of providing courts broad leeway to dismiss a complaint.[20]

Rule 8 eliminated these distinctions.[21] Rule 8 does not require any kind of statement of facts. It requires only a "short and plain statement of the claim showing that the pleader is entitled to relief."[22] Thus, Rule 8 reduces the importance of pleading as a courthouse gate and puts the weeding burden on discovery and summary judgment. The primary goal of Rule 8 shifted from isolation of issues, factual development, and merits determination, to simply notice. In this way, Rule 8 moved away from fact pleading and instituted something much closer to notice pleading.[23]

Of course, it would be difficult to provide proper notice without any facts at all. But any necessary facts under Rule 8 are those needed to provide *notice* of a claim as opposed to those needed to support the claim on its *merits*.[24] The upshot of Rule 8 is that notice—not factual support—is the focal point.

The Supreme Court confirmed this change in its 1957 decision in *Conley v. Gibson*. The Court held that Rule 8 does not require a claimant to set out in detail the facts upon which a claim is based.[25] Instead, Rule 8 only requires simplified "notice pleading," which means providing "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[26]

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[18] 1848 N.Y. Laws 521, ch. 379 § 120(2).

[19] *See* Charles E. Clark, Handbook of the Law of Code Pleading 225–26 (2d ed. 1947).

[20] *See* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 Va. L. Rev. 517, 534 (1925).

[21] *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 439 (1986).

[22] Fed. R. Civ. P. 8(a).

[23] *See* Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. Pa. L. Rev. 443, 463 (2010).

[24] *See* Charles E. Clark, *Simplified Pleading*, 2 Fed. Rules Decisions 456, 458, 460–61 (1943).

[25] *Conley*, 355 U.S. at 47.

[26] *Id.* at 47–48.

Congress, of course, is free to modify general pleading standards, and, beginning in 1995, it did so in two isolated areas. The Private Securities Litigation Reform Act of 1995[27] imposes heightened pleading for certain securities-related claims.[28] The Act requires pleading with particularity for claims based on misleading statements or omission,[29] and imposes heightened pleading for claims containing an element of scienter.[30] Shortly thereafter, Congress passed a similarly heightened pleading requirement in the Y2K Act.[31] The Y2K Act set forth several requirements: first, a claim must set out "a statement of the facts giving rise to a strong inference" of scienter;[32] second, the complaint must be accompanied by "a statement of specific information" regarding "the nature and amount of each element of damages and the factual basis for the damages calculation";[33] and third, the claimant must disclose "the manifestations of the material defects and the facts supporting a conclusion that the defects are material."[34] These congressional experiments broke from the usual *Conley* notice pleading mold under Rule 8 and replaced it, in these limited instances, with fact pleading.[35]

Despite these relatively unique and isolated congressional experiments with heightened pleading, *Conley* remained the paradigmatic pleadings case in all civil procedure books for fifty years, until the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*.[36] *Twombly* expressly jettisoned much of *Conley*.[37] Notice, according to *Twombly,* is not the critical component of pleading.[38] Instead, "plausibility" is key.[39] After *Twombly,* a complaint fails to satisfy Rule 8 if the complaint does not allege facts that show a "plausible" entitlement to relief.[40]

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[27] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

[28] 15 U.S.C. § 78u-4(b)(1) (2006).

[29] *Id.* ("[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.").

[30] *Id.* § 78u-4(b)(2) ("[T]he complaint shall . . . state with particularity the facts giving rise to a strong inference that the defendant acted with the required state of mind.").

[31] 15 U.S.C. §§ 6601–6617 (2006).

[32] *Id.* § 6607(d).

[33] *Id.* § 6607(b).

[34] *Id.* § 6607(c).

[35] *See id.* § 6607(b)–(d); *Conley*, 355 U.S. at 47–48.

[36] 550 U.S. 544, 549 (2007).

[37] *See* Dodson, *supra* note 11, at 135.

[38] *See Twombly*, 550 U.S. at 556.

[39] *See id.*

[40] *Id.* at 556–57.

In practice, the plausibility standard forces plaintiffs to plead a level of factual detail that not only provides clearer notice—as Rule 9's particularity requirement also might—but also demonstrates an increased likelihood of success on the merits.

During the 2009–2010 term, the Supreme Court added another bombshell twist. *Ashcroft v. Iqbal* held that a detainee's constitutional discrimination claims did not meet the *Twombly* plausibility standard.[41] By doing so, *Iqbal* confirmed that *Twombly*'s plausibility standard is meaningful and transubstantive.[42] But it also added a new wrinkle. The Court declined to consider certain factual allegations in the complaint that the Court characterized as "conclusory."[43] For example, Iqbal alleged that the defendants "knew of, condoned, and willfully and maliciously agreed to subject him to harsh confinement . . . solely on account of his religion, race, and national origin."[44] He also alleged that Ashcroft was the "principal architect" and that Mueller was "instrumental" in adopting and executing this policy.[45] The Court discarded these allegations as conclusory.[46]

Therefore, *Iqbal* represents a shift that is just as important as *Twombly*'s. After *Iqbal,* courts must consider whether a factual allegation is conclusory or nonconclusory for purposes of pleading requirements.[47] If an allegation is nonconclusory, the court must accept it as true.[48] If an allegation is conclusory, the court does not have to accept it as true.[49] The court then examines all the nonconclusory allegations together to determine whether they show a plausible entitlement to relief.[50]

Note the important point here. If the goal is notice, the distinctions between conclusory and nonconclusory allegations, and between plausible and possible entitlement to relief, are largely meaningless. If, instead, the goal is greater factual detail for a preliminary merits assessment, then the distinctions from *Twombly* and *Iqbal* make a lot of

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[41] *Iqbal*, 129 S. Ct. at 1954.

[42] *Id.* at 1953; Scott Dodson, *Beyond* Twombly, Civ. Proc. & Fed. Cts. Blog (May 18, 2009), http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html.

[43] *Iqbal*, 129 S. Ct. at 1951.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *See id.* at 1950, 1953–54; Dodson, *supra* note 42.

[48] *See Iqbal*, 129 S.Ct. at 1950, 1953–54.

[49] *See id.*

[50] *See id.*

sense.[51] When recent congressional experimentations with heightened pleading are examined together with the Supreme Court's reasoning in *Twombly* and *Iqbal*, it seems obvious that the United States is undergoing a momentous transformation in federal civil pleading standards. This transformation shifts U.S. pleading from its traditional notice-based regime to a fact-based system looking beyond notice and toward the merits of a claim.[52]

B. *Foreign Pleading Models*

The recent trend of U.S. federal pleading toward factual sufficiency is far more akin to the rest of the world than the notice pleading regime that existed before *Twombly*.

Germany requires "specific fact pleading and does not permit mere notice pleading."[53] The complaint is factually extensive and detailed, accompanied by available documentary evidence and explanations of any circumstantial evidence.[54] It also includes a proposed means of proof that the plaintiff will use to establish the facts stated.[55] For example, in a simple negligence case based on a car accident, the plaintiff's complaint usually will include "specific allegations of precisely how and why the accident occurred, an identified source of proof for each allegation, the amounts of damage set forth with precision, [and] attached copies of bills, police and medical reports, and even photographs to support the allegations."[56] This gives the judge a complete picture of the claim as well as a sense of the strengths and weaknesses of the plaintiff's case so that the judge can tailor the litigation process in an efficient manner.[57]

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[51] *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 870–71 (2010) (arguing that *Iqbal*'s "thick screening model" is an assessment of the likelihood of success on the merits); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821, 824–28 (2010) (arguing that after *Iqbal*, plaintiffs must plead factual support, and even some evidence, to survive a motion to dismiss).

[52] *See* Dodson, *supra* note 23, at 463. This Article does not equate the fact-based pleading of *Twombly* and *Iqbal* to the Code Pleading that dominated U.S. pleading before the Federal Rules: there are significant differences. *See* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal (Cornell Law Faculty Working Papers, Paper No. 76, 2010), *available at* http://scholarship.law.cornell.edu/clsops_papers/76.

[53] Peter L. Murray & Rolf Stürner, German Civil Justice 198 (2004).

[54] *See id.* at 197–98.

[55] *See id.*; Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. Kan. L. Rev. 9, 12 (1996).

[56] Murray & Stürner, *supra* note 53, at 198.

[57] *See id.*

Japan also requires fact pleading. The complaint must "specif[y] and particulariz[e]" the claim, include the facts on which it is based, delineate "relevant . . . indirect facts" related to the claim, and itemize the evidence corresponding to each point the plaintiff will prove.[58] It is not sufficient to allege ultimate facts.[59] The underlying evidentiary facts that need to be established to support the claim must also be asserted.[60]

Similarly, England requires a concise statement of the claim which must include "a concise statement of the facts on which the claimant relies," and must specify the remedy that the claimant seeks.[61] For certain claims, such as allegations of fraud, the claimant may also be required to provide additional details.[62] The rules also permit claimants to include relevant documents in their statement of claim.[63]

Thus, the United States appears to be shifting away from the notice-based exceptionalism toward a fact-based model more akin to the pleading standards in the rest of the world.[64] Of course, the trend is not direct. The plausibility standard's focus on facts is designed as a merits-screening tool;[65] foreign fact-pleading models, on the other hand, are designed as issue-development tools.[66] But the point here is more general; by moving away from pure notice and toward factual sufficiency, U.S. pleading is beginning to look a lot more like the global norm of fact-based pleading standards.

II. The Role and Status of Judges

This Part studies the role and status of judges in a comparative context. Like pleading standards, the relatively passive role and high prestige of U.S. judges have been viewed as examples of "American exceptionalism."[67] The unique status of the U.S. judge relates to procedural practices that set him or her apart from others. With regard to status, this Part explores why the "passive" U.S. judge occupies a more

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[58] Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. Kan. L. Rev. 687, 697 (1998).

[59] *See id.*

[60] *See id.*

[61] Neil Andrews, English Civil Procedure: Fundamentals of the New Civil Justice System 254 (2003).

[62] *Id.*

[63] *Id.* at 256.

[64] *See* Dodson, *supra* note 23, at 463.

[65] *See* Bone, *supra* note 51, at 853.

[66] *See, e.g.*, Kojima, *supra* note 58, at 697.

[67] *See* Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 Mich. L. Rev. 734, 746, 752 (1987).

prestigious position in society and the legal profession compared with the more "active" Continental European judges.[68] Further, there is an inquiry about convergence regarding the roles of U.S. judges and their counterparts in other countries.[69]

A. *Some Basic Differences*

Significant differences in judicial roles begin with the training and selection of trial court judges, although these differences continue throughout the judge's career. Shortly after law school, a Continental European graduate must generally choose a career either in private practice or as a member of the judicial corps.[70] A lateral move from private practice to the judiciary is rare, though it is the norm in the United States and other countries sharing a common law tradition.[71] Although some civil law judges have had practical experience, this experience is typically in the public sector: a prosecutor's office or the ministry of justice.[72] In short, the civil law method of selection and advancement follows a civil service model while the U.S. model is "political" at both the state and federal court levels.[73] Great Britain, Canada, and Australia follow the U.S. model in that judges typically come to the bench after years of practice, though they are appointed rather than elected.[74]

Probably the most widely noted and often praised distinction between the two systems is the more active role of the civil law judge in conducting litigation.[75] In the civil law system, the judge is expected to

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[68] *See infra* text accompanying notes 93–99.

[69] *See* discussion *infra* Part II.B.

[70] *See* Mullenix, *supra* note 5, at 8. *See generally* Carlo Guarnieri & Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (C.A. Thomas ed., 2002) (providing a detailed explanation of the appointment process and career structure for the judiciaries of the United States and six European countries).

[71] Guarnieri & Pederzoli, *supra* note 70, at 20.

[72] *See* Daniel J. Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 Judicature 16, 25–26 (1983).

[73] *See id.* at 31–34.

[74] *See* Dep't of Justice Can., Canada's Court System 11 (2005), http://www.justice.gc.ca/eng/dept-min/pub/ccs-ajc/pdf/courten.pdf; *see also* Guarnieri & Pederzoli, *supra* note 70, at 20, 21; Julie-Anne Kennedy & Anthony Ashton Tarr, *The Judiciary in Contemporary Society: Australia*, 25 Case W. Res. J. Int'l L. 251, 251–53 (1993).

[75] *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 830–41(1985) [hereinafter Langbein, *The German Advantage*] (comparing U.S. civil procedure to German civil procedure and finding the former inferior in several respects, including an impaired fact-gathering system due to its adversarial nature and the less active role of the judge). The most frequently compared system in this regard has been that of Germany. *See* Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure I*, 71 Harv. L. Rev. 1193, 1193–98 (1958) (seminal article describing Ger-

know the key facts in advance and guide the process.[76] A number of U.S comparative law scholars see this civil law practice as both more efficient and more likely to achieve a just result than the Anglo-American tradition, where the passive trial judge leaves the entire process up to the lawyers.[77] But others are skeptical about the ability of the active and involved civil law judge to retain objectivity and avoid arriving at premature conclusions regarding the merits of the case.[78]

Another area where many U.S. and foreign observers find civil law procedure superior is the designation of expert witnesses. In European litigation, this designation is typically performed by the judge rather than the opposing parties.[79] The U.S. practice of using highly paid "hired guns" has been criticized as completely inimical to the concept

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man civil procedure); *see also* William B. Fisch, *Recent Developments in West German Civil Procedure*, 6 Hastings Int'l & Comp. L. Rev. 221, 221–23 (1983) (comprehensive report on the effect of German procedural reforms in the 1970s). Professor Langbein's critical article generated a round of responses, with the sharpest criticism coming from Ronald J. Allen, Stefan Kock, Kurt Riechenberg, and D. Toby Rosen. *See generally* Ronald J. Allen, Stefan Kock, Kurt Riechenberg & D. Toby Rosen, The German Advantage in Civil Procedure: *A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 Nw. U. L. Rev. 705 (1988) [hereinafter Allen et al., *A Plea*] (criticizing *The German Advantage* and favorably comparing U.S. civil procedure to that of Germany); John C. Reitz, *Why We Probably Cannot Adopt* The German Advantage in Civil Procedure, 75 Iowa L. Rev. 987 (1990) (offering a less aggressive criticism of *The German Advantage*). Professor Langbein responded to Professor Allen's criticism with his own criticism of Allen's argument. *See generally* John H. Langbein, *Trashing* The German Advantage, 82 Nw. U. L. Rev. 763 (1988) (defending *The German Advantage* and criticizing *A Plea*). To this, Allen responded in turn. *See generally* Ronald J. Allen, *Idealization and Caricature in Comparative Scholarship*, 82 Nw. U. L. Rev. 785 (1988) [hereinafter Allen, *Idealization*] (defending *A Plea*). This heated debate has spawned additional literature more recently. *See generally* Michael Bohlander, The German Advantage *Revisited: An Inside View of German Civil Procedure in the Nineties*, 13 Tul. Eur. & Civ. L.F. 25 (1998) (comparing Langbein's and Allen's arguments in addition to providing his own insight into the German system); Bradley Bryan, *Justice and Advantage in Civil Procedure: Langbein's Conception of Comparative Law and Procedural Justice in Question*, 11 Tulsa J. Comp. & Int'l L. 521 (2004) (favorably comparing the German method of civil procedure to the U.S. method through the lenses of the Langbein and Allen articles).

[76] Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation?*, 42 Am. J. Comp. L. 147, 157 (1994). John Langbein argues that "by assigning judges rather than lawyers to investigate the facts, the Germans avoid the most troublesome aspects of our practice," and that the judge "soon knows the case as well as the litigants do." Langbein, *The German Advantage*, *supra* note 75, at 824, 831–32.

[77] *See, e.g.*, Stiefel & Maxeiner, *supra* note 76, at 156–57.

[78] *See* Allen et al., *A Plea*, *supra* note 75, at 728–29. One of the articles criticizing Langbein's thesis cites as an example a German judge seemingly leading an unsure witness to the judge's desired conclusion in an auto accident case. *Id.*

[79] Langbein, *The German Advantage*, *supra* note 75, at 837–38.

that a trial involves the search for "truth."[80] In contrast, in Continental litigation, the judge is responsible for both the selection and instruction of the expert, though an attempt is made to secure the agreement of the parties.[81] The goal is to choose a neutral expert who will assist the judge and not either of the parties.[82] Although Federal Rule of Evidence 706 gives U.S. judges the authority to appoint their own experts,[83] this authority is seldom exercised.[84] One possible reason for this is that the judge is not familiar enough with the facts of the case to choose an expert.[85] Another explanation for why U.S. judges do not exercise their authority under Rule 706 to call experts,[86] or Rule 614 to call ordinary fact witnesses,[87] has to do with deep-seated cultural attitudes about the judge's proper role in conducting a trial.[88]

Other scholars contend that the use of court-appointed experts in Germany has not been an unmitigated success.[89] For example, well-qualified experts are difficult to find.[90] Consequently, judges seldom use their authority to appoint experts, such that the choice is not between court-appointed experts and partisan experts, but between court-appointed experts and no experts at all.[91] Additionally, scholars worry that judges may be simply delegating to experts rather than overseeing them.[92]

There is irony in the fact that, whereas the U.S. judges have a less active role in conducting the trial, acting more like "umpires" than "managers," they are nevertheless seen as more of an authority figure in the courtroom, or as some have suggested, "culture heroes, even parental figures."[93] Why should this be so?

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[80] *See id.* at 835–36. Professor Langbein argues that "[t]he battle of experts tends to baffle the trier, especially in jury courts. If the experts do not cancel each other out, the advantage is likely to be with the expert whose forensic skills are the more enticing." *Id.* at 836.

[81] *Id.* at 836–37.

[82] *Id.* at 837.

[83] *See* FED. R. EVID. 706.

[84] *See* Langbein, *The German Advantage*, *supra* note 75, at 841.

[85] *See id.*; *see also* JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE ¶ 706[01], at 706-8 to -14 (1996); John Henry Merryman, *Foreign Law as a Problem*, 19 STAN. J. INT'L L. 151, 171 (1983).

[86] FED. R. EVID. 706.

[87] FED. R. EVID. 614.

[88] *See* Reitz, *supra* note 75, at 992–95.

[89] *See* Allen et al., *A Plea*, *supra* note 75, at 737–38.

[90] *See id.* at 739.

[91] *See id.* at 738–40.

[92] *See id.*

[93] *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 34 (3d ed. 2007); Kevin J. Mitchell, *Neither Purse Nor Sword: Lessons Europe Can Learn from*

There may be several factors, not the least of which is the previously mentioned political selection of U.S. judges, as well as the pattern of U.S. judges embarking on a judicial career only after achieving some degree of success in law practice. The relatively low social standing of the typical European judge may also be a factor.[94] The role's passive character may give the U.S judge an aura of being "above the fray" in contrast to the "hands-on" civil law judge.[95] Additionally, the power to issue contempt orders adds to the clout of the U.S. judge.[96] Moreover, the managerial authority of the civil law judges, while extensive, is exercised within a narrower band than that of U.S. judges who have a larger range of discretion and opportunities for creativity, thereby "making

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American Courts' Struggle for Democratic Legitimacy, 38 Case W. Res. J. Int'l L. 653, 659 (2007). Public opinion polls support these anecdotal observations about the prestige rankings of U.S. judges. *E.g.*, Cynthia L. Cates & Wayne V. McIntosh, Law and the Web of Society 75 (2001). In addressing this issue, two scholars have noted:

> Clearly, the judicial office carries with it tremendous prestige. Generally speaking, public opinion ranks judges near the top of the occupational heap in terms of status. Thus, for example, one study of occupational prestige ranked judges generally at about the high position of doctors, with college professors, "regular" lawyers, airline pilots, and nurses trailing behind. Supreme Court justices outranked even doctors.

Id. In a Harris poll dated August 8, 2006, seventy percent of those polled "would trust" judges, compared to twenty-seven percent for lawyers. *Doctors and Teachers Most Trusted Among 22 Occupations and Professions: Fewer Adults Trust President to Tell the Truth*, The Free Library (Aug. 8, 2006), http://www.thefreelibrary.com (navigate to "Date"; select "August 8, 2006"; navigate to "PR Newswire" under the "Business" section; scroll down to hyperlink with the article title and follow hyperlink) (last visited Oct. 20, 2010). Comparative statistics regarding the relative prestige of Continental lawyers and judges are not readily available. Nevertheless, the self-image of the two groups is relevant. In a 1972 poll, only twenty percent of the German judges thought that they enjoyed the prestige due to them by virtue of their profession, whereas forty-three percent of the attorneys thought they enjoyed such prestige. *See* Allen et al., *A Plea*, *supra* note 75, at 747–48.

[94] *See* Merryman & Pérez-Perdomo, *supra* note 93, at 110 ("The upper classes, who get the best education and who have influential friends, tend to have privileged access to, and to dominate, practice and academic life. Judicial posts are frequently filled by those who are rising to the middle class from humbler social origins.").

[95] *See* Gross, *supra* note 67, at 746. One of the many articles joining in the academic debate over *The German Advantage* cites the more passive role of the U.S. judge as contributing to the "prestige and autonomy" of U.S. judges as well as making them "more effective as guarantors of individual rights." *See id.*; *see also* Stephan Landsman, The Adversary System: A Description and Defense 50 (1984). Whether the trend in the U.S. toward a more involved role for judges would bring about a reduction in this level of prestige is uncertain. Perhaps there are enough other attributes of U.S. judges, noted in this Article, which would prevent any reduction of prestige.

[96] *See* Merryman & Pérez-Perdomo, *supra* note 93, at 123–24.

law" as well as interpreting it.[97] The role of *stare decisis* in the common law system is seen as central to the judge's more creative role.[98] Although the hierarchical structure of courts in Germany, for example, results in strong adherence to higher court decisions, there is less room for creativity when interpreting the law.[99]

This greater range for creativity in the United States is particularly striking in the context of judicial review of legislative and executive action, a power that can be exercised by state as well as federal judges. Although judicial review in the United States dates back to the 1803 Supreme Court decision in *Marbury v. Madison,*[100] across the Atlantic it has only been the norm since World War II in Western Europe, and the fall of communism in Eastern Europe.[101] Nevertheless, in Europe there is a strict separation between the new constitutional courts and the ordinary courts.[102] In Europe, only constitutional courts have the authority to strike down acts of the legislature, whereas even trial court judges can do this in the United States.[103] Nevertheless, in Germany and Italy,

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[97] *Id.* at 37 ("Civil law judges are not culture heroes or parental figures, as [in the common law system]. Their image is that of a civil servant who performs important but essentially uncreative functions.").

[98] Mitchell, *supra* note 93, at 659. One commentator compares the recognized role of such reputable judges as Coke, Mansfield, Marshall, and Cardozo as lawgivers in the common law tradition to legislators and politicians, such as Justinian or Napoleon, in civil law history. *Id.* at 660.

[99] *See* Mirjan R. Damaška, The Faces of Justice and State Authority 33–34 (1986); Allen et al., *A Plea*, *supra* note 75, at 755 (quoting Damaška, *supra*, at 42 n.37) ("[T]he result is a system of precedent that lacks the crucial element that maintains the vibrancy of the Anglo-American common law system: A 'Continental judge does not weigh the symmetry of factual situations which, under the aegis of stare decisis, permits fine distinctions and thus assures the flexible growth of the law. Instead, he seeks ever more concrete rules in prior decisions, disregarding the enveloping factual context.'").

[100] Mitchell, *supra* note 93, at 677, 679–80.

[101] Alec Stone Sweet, *Why Europe Rejected American Judicial Review—And Why It May Not Matter*, 101 Mich. L. Rev. 2744, 2766–69 (2003). Whereas Austria, at the urging of Hans Kelsen, established a constitutional court in 1920, its jurisdiction only extended to governmental structural issues, with the emphasis on abstract preventive norm control and not on the kinds of human and civil rights dealt with by most contemporary European constitutional courts. *See id.*; *see also* Mitchell, *supra* note 93, at 671–76 (discussing the "Kelsenian" constitutional court).

[102] Mitchell, *supra* note 93, at 675.

[103] *See id.* at 675, 680. At least one comparative scholar sees virtue in the Continental division of labor between various court systems:

> We must remember that the decision to isolate important components of constitutional and administrative-law jurisdiction outside the ordinary courts in Germany lowers the political stakes in judicial office, by comparison with our system, in which every federal district judge (and for that matter, every

members of the ordinary judiciary have the ability to refer any constitutional issues that arise in a civil or criminal case to the constitutional court.[104] This limited degree of constitutional "involvement" arguably constitutes some measure of "convergence."[105]

Also significant is the difference between ordinary courts and constitutional courts regarding methods of judge selection. In contrast to the civil service career judiciary model, constitutional court judges often have a background in politics or as law school faculty members.[106] Their career paths are closer to those of a common law judge. The appointment process is political, typically by a majority or super-majority vote of the Parliament.[107]

Common law judges have a greater identity as individuals, strikingly illustrated by the fact that they typically issue concurring and dissenting opinions. This may be a factor that enhances their prestige with the practicing bar and the general public. Civil law judges tend to be "invisible." Their opinions are typically unanimous and anonymous.[108] This is true of both the ordinary courts and the constitutional courts, although less so for constitutional court judges.[109]

B. *Convergence of Judicial Roles*

The most widely noted trend toward convergence is the increased managerial responsibilities of the U.S. judge, primarily in the "big case."[110] The complexity of class action certification and settlement

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state judge) purports to brandish the Constitution and thus to be able to wreak major social and institutional change.

Langbein, *The German Advantage*, *supra* note 75, at 853.

[104] *See* Mauro Cappelletti, Judicial Review in the Contemporary World, 74–76 (1971); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 Tex. L. Rev. 1671, 1688 (2004).

[105] *See* Cappelletti, *supra* note 104, at 84.

[106] *See* Ferejohn & Pasquino, *supra* note 104, at 1681–82.

[107] *See id.* The exception is France, "where the President of the Republic and the presidents of the two houses of Parliament each appoint three members of the Conseil Constitutionnel." *Id.* at 1681.

[108] *See id.* at 1681–82; Merryman & Pérez-Perdomo, *supra* note 93, at 37. The German and Spanish constitutional courts do permit dissents, but they are rare. *See* Ferejohn & Pasquino, *supra* note 104, at 1693–95. In Italy, a proposal was briefly considered that would permit only anonymous or unsigned dissents, but even this was rejected. *See id.*

[109] *See* Merryman & Pérez-Perdomo, *supra* note 93, at 35, 36. Speaking of the ordinary civil law courts, Professor Merryman asks rhetorically, "who knows the name of a civil law judge?" *Id.* at 36.

[110] *See* Arthur Taylor von Mehren, *Some Comparative Reflections of First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 Notre Dame L. Rev. 609, 623–27 (1988); *see also* Thomas D. Rowe, Jr., *Authorized Managerialism Under the*

hearings have motivated federal judges to take a number of actions not in keeping with their traditional common law "umpire" role.[111] Managerial techniques include departing from the trial plan proposed by the parties, appointing special "science panels," applying flexible evidentiary rules, and delegating the implementation of an alternative dispute resolution plan to magistrates.[112] Such innovations suggest a willingness by judges to override the lawyer's role in conducting litigation, leading one observer to conclude that "the American federal judge presiding over complex litigation now often acts like his or her civil law counterpart."[113] This is true not only in complex business and commercial lawsuits, but also with respect to public law litigation involving civil rights and institutional reform issues.[114]

At the same time, there has been a contrary trend in some European countries toward more party-adversarial practices and consequently less of a "hands-on" role for the judge.[115] In January 2004, Italy

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Federal Rules—and the Extent of Convergence with Civil Law Judging, 36 Sw. U. L. Rev. 191, 193–202 (2007) (providing a detailed, rule-by-rule listing of changes that have increased the managerial role of the federal judge). For somewhat differing views as to the desirability of this trend, compare Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 376, 403–30 (1962), with Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 Rutgers L. Rev. 253, 260–67 (1985).

[111] *See* Rowe, *supra* note 110, at 196–98. Although many intensively managed cases in U.S. federal courts have been class actions, the trend within the United States is toward more active case management even in non-class cases. At the same time, other countries are experimenting with "class like" litigation, further enhancing the convergence between the United States and the rest of the world. *See* Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 Temp. Int'l & Comp. L.J. 217, 225 (1992); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 Am. J. Comp. L. 311, 312–13 (2003) (listing countries); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1, 41–42 (2009) (observing foreign convergence toward U.S. class action models); Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 133 (2003).

[112] *See* Mullenix, *supra* note 5, at 17–20.

[113] *Id.* at 20.

[114] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976).

[115] *See, e.g.*, Geoffrey C. Hazard & Angelo Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, 39 Cornell Int'l L.J. 59, 69 (2006) (noting that Italian procedural reforms for alternative dispute resolution procedures for commercial cases sharply restrict the role of the judge); Astrid Stadler, *The Multiple Roles of Judges in Modern Civil Litigation*, 27 Hastings Int'l & Comp. L. Rev. 55, 56 (2003) (noting that new Spanish civil procedure rules limit the role of judges); *see also* Cecilia Carrara, *Critical Analysis of the New Italian Rule of Arbitration in Corporate Matters*, 7 Int'l Arb. L. Rev. 8, 10 (2004) (analyzing certain aspects of 2004 Italian legislative reform of commercial arbitration procedures). *But see* Andrés de la Oliva

adopted new rules providing alternative dispute resolution for commercial cases that sharply restricted the role of the judge, with the preparation of the factual and legal issues left largely to the lawyers for the parties.[116] The 2001 Spanish Civil Procedure Rules somewhat reduced the active rule of the judge by, among other things, substituting a system of cross-examination by counsel in place of examination of witnesses by the judge.[117]

In Germany, as a result of the 1977 revisions to the Code of Civil Procedure, there has been a trend toward a "concentrated trial," or at least toward making the trial more continuous than in the past.[118] Concentration involves the development of a cause prior to the actual trial, and is a characteristic traditionally associated with the common law trial procedure and attributed to the practicalities of the jury system.[119] One observer attributed this change to an increased concern with promoting the value of efficiency, but at the same time perhaps giving less emphasis to "other justice values," a trend also observed in the United States in regard to "managerial judges."[120] In addition to Germany, Austria has moved significantly in the direction of greater concentration.[121] This movement has been accompanied by a greater emphasis on "orality," historically regarded as a characteristic of common law procedure.[122] Additionally, Germany and Austria have moved away from the concept of a "documentary curtain" whereby a hearing judge takes the evidence and prepares a written summary, while a different judge or group of judges hear arguments and render a decision.[123]

Santos, *Spanish Civil Procedure Act 2000: Flying Over Common Law and Civil Law Traditions*, *in* Common Law, Civil Law and The Future of Categories 67 (Janet Walker & Oscar G. Chase eds., 2009) (suggesting that Spanish civil procedure reform has actually enlarged aspects of the judge's role).

[116] *See* Hazard & Dondi, *supra* note 115, at 69; *see also* Carrara, *supra* note 115, at 11.

[117] *See* Stadler, *supra* note 115, at 56. *But see* Santos, *supra* note 115, at 67.

[118] Mehren, *supra* note 110, at 615.

[119] *Id.* at 611, 615.

[120] *Id.* at 627.

[121] Merryman & Pérez-Perdomo, *supra* note 93, at 113.

[122] *See id.* at 114–15.

[123] *Id.* at 115. According to Merryman and Pérez-Perdomo:

> A trend toward immediacy in civil proceedings carries with it a trend toward orality, and orality is promoted by the trend toward concentration. Civil law proceduralists think of the three matters as related to one another and one frequently encounters discussions in which concentration, immediacy and orality are advanced as interrelated proposals for reform in the law of civil procedure.

Id.

There has also been a movement in Europe toward decreased use of "collegial" or multiple judges in first instance courts. In Germany, it seems that most decisions are now rendered by a single judge, rather than a panel of three, although there is some question about how much this has contributed to making litigation more efficient.[124] Nevertheless, this change makes the structure of the German trial more like the U.S. trial, and makes the authority of the German judge more similar to his or her U.S. counterpart.

The German Civil Procedure Rules Act of 2001 places somewhat less emphasis on *de novo* review of facts by second instance courts.[125] The original draft of these Rules mandated that courts of appeal would only decide points of law, which would have moved much further in the direction of U.S. practice.[126] The reformers' goal was to strengthen the fact-finding role of first instance judges.[127] But after much discussion, this far-reaching change was not included in the final version of the Act.[128]

Nevertheless, one should be cautious in generalizing about "civil law" procedure. There always has been diversity among European countries, and diversity is apparently increasing. To give one striking example of a long-standing deviation from the civil law model, in some cantons of Switzerland, judges are elected and come to the bench with prior practice experience.[129] Russia is now classified as a civil law country, but between 1995 and 2002 Russia experimented with some "common law like" features involving a more passive role for judges.[130] Additionally, Germany and France are the two countries whose judiciaries are most often compared to that of the United States.[131] Scholars have cautioned against lumping together the judiciaries of these two countries, pointing out, among other things, that German judges are more

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[124] *See* Fisch, *supra* note 75, at 227–36; Mehren, *supra* note 110, at 623; Stadler, *supra* note 115, at 75.

[125] Stadler, *supra* note 115, at 60.

[126] *See* Giesela Rühl, *Preparing Germany for the 21st Century: The Reform of the Code of Civil Procedure*, 6 German L.J. 910, 922 (2005); Stadler, *supra* note 115, at 60.

[127] *See* Stadler, *supra* note 115, at 60.

[128] *Id.*

[129] *See* Samuel P. Baumgartner, *Civil Procedure Reform in Switzerland and the Role of Legal Transplants*, *in* 49 Supreme Ct. L. Rev. 75, 83 (Janet Walker & Oscar G. Chase eds., LexisNexis 2d ed. 2010).

[130] *See* Dimitry Maleshin, *The Russian Style of Civil Procedure*, 21 Emory Int'l L. Rev. 543, 556 (2007).

[131] *See* John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. Cal. L. Rev. 1865, 1865 (1988).

"active" than their French brethren.[132] Further, such scholars have noted that if a "model" of a civil law judge "were extrapolated from all the civil law jurisdictions, he or she would look more Italian than French or German."[133]

C. *The Influence of International Arbitration*

Many transnational business and commercial disputes are now decided by arbitrators rather than judges.[134] There seems to be more convergence, harmonization, and "mixing" of common and civil law practices in arbitration proceedings than in the courtroom.[135] For example, the International Bar Association Rules of Evidence (IBA Rules), which were drafted by arbitrators from a number of different countries and are often used for international arbitration, combine the historically common law practice of live cross-examination of witnesses with the feature of free assessment of evidence and rejection of exclusionary rules, a characteristic of civil law courts.[136] Discovery, as provided in the IBA Rules, represents a compromise between the very broad scope allowed in the United States and the much narrower scope of discovery permitted in Europe.[137] While dissenting opinions by civil law judges are extremely rare, they are quite common in international arbitration proceedings.[138] Although the use of tribunal appointed expert witnesses is possible, experts in international commercial arbitration are more often appointed by parties. Nevertheless, the Chartered Institute of Arbitrators has attempted to change this practice.[139] An interesting question is whether some of the "blended" procedures now used by international arbitrators will gradually be adopted by national court systems.[140]

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[132] *See id.*

[133] *See id.* at 1867.

[134] Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 Int'l Law. 187, 187 (1989).

[135] *See* Pierre A. Karrer, *The Civil and Common Law Divide: An International Arbitrator Tells It Like He Sees It*, 63 Disp. Res. J. 72, at 74–75, 81 (2008).

[136] *Id.* at 74.

[137] *See* Seth Berman, *Crossborder Challenges for e-Discovery*, Bus. L. Int'l, May 2010, at 123, 125–26.

[138] Karrer, *supra* note 135, at 80. There is, however, some disagreement on how an arbitrator's time spent on a dissenting opinion should be compensated. *See id.* at 81.

[139] *See id.* at 77–78.

[140] *See id.* at 75. This has already happened to some extent in England. *See id.*

D. *Decodification and Global Judicialization*

"Decodification" involves a number of trends.[141] One trend is the growth of "special legislation" that treats subjects dealt with by code provisions but "differ ideologically from the code and are in this sense incompatible with it."[142] Examples of such systems of special statutory law include labor law, intellectual property law, company law, and securities law.[143] Also significant is the growth of judge-made law in the field of torts, a change that is inconsistent with traditional civil law ideology.[144] These developments tend to undercut legislative supremacy and require European judges to make choices that are similar to those made by judges in the "common law world."[145]

While legislation and codes have become less significant, constitutions have grown in importance. This shift is the result of the post-World War II and post-Communist establishment of constitutional courts, and the consequent ability of dissenting public officials as well as ordinary citizens to challenge the legality of parliamentary legislation and executive decrees.[146] Although the power to strike down legislation on constitutional grounds is strictly limited to the separate constitutional courts,[147] judges in the ordinary court system have still been affected by the phenomenon of "constitutionalization." Even in ordinary litigation where there is no *per se* constitutional challenge, the text of the constitution may influence the interpretation of the relevant law.[148] Because the judges of the ordinary courts must be guided in their decisions by the constitutional judges, some characteristics of the latter may rub off on the former. In fact, the lines of jurisdiction be-

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[141] Merryman, *supra* note 131, at 1868.

[142] *Id.*

[143] *Id.*

[144] *See id.* at 1869 ("The [French] code provisions are so rudimentary and empty of substance that judges have had to create the applicable law on a case-by case basis. The effective law of torts is not found in the code but outside it, in widely published, consulted and cited court decisions.").

[145] *See id.*

[146] *See id.* at 1870–71.

[147] *See supra* text accompanying notes 102–104.

[148] *See* Merryman, *supra* note 131, at 1872. Merryman writes as follows:

> When a choice among competing interpretations of a law must be made, the one that seems more consistent with the constitution will normally be favored. When a party argues that the constitution favors its position, the judge must consider the argument and in so doing must interpret and apply the constitution.

Id.

tween constitutional courts and ordinary courts are not always clear, occasionally leading to conflict. An example of such conflict occurred in Italy between the Supreme Court of Cassation and the Constitutional Court "regarding the right to counsel in criminal proceedings and the retroactive effect of holding that a statute deprived an accused of the constitutional right to counsel."[149]

There are political and structural factors at work in both the "Western Common-Law Democracies" and the "European Romano-Germanic Democracies" that permit and encourage an expansion of judicial power at the expense of the legislative and executive branches.[150] Additionally, the trend appears stronger in the Romano-Germanic countries, which seem more resistant to judicial activism based on historical deference to legislative supremacy.[151] The factors bringing about this "judicialization" include separation of powers, a politics of rights—enabled in part by the new constitutional courts—interest and opposition-group use of the courts, ineffective majoritarian institutions, positive perceptions of the courts, and "wilful delegation of majoritarian institutions."[152] The delegation of majoritarian institutions occurs when legislators fear voting or even taking a position on controversial questions, and are only too happy to let judges make such decisions.[153] Although these factors mainly influence the constitutional and administrative courts, these effects may "spill over" onto the ordinary courts.

The EU is another powerful "outside" influence on member-state judges. For example, national laws that violate the European Convention on Human Rights are subject to challenge before the European Commission and Court of Human Rights.[154] By undercutting the absolute sovereignty of national parliaments, EU courts have given additional powers and responsibilities to the various national courts, thus furthering "convergence." As one scholar noted, "[t]hat Great Britain, mother country of the Common Law, is a member of the EEC and a

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[149] John Henry Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 Am. J. Comp. L. 665, 665 (1966–1967). At the core of this controversy was a conflict between the Code of Penal Procedure of 1931, amendments adopted in 1955, and the Republican Constitution of 1948. *Id.*

[150] *See* C. Neal Tate & Torbjörn Vallinder, *Judicialization and the Future of Politics and Policy*, *in* The Global Expansion of Judicial Power 515, 516–19 (C. Neal Tate & Torbjörn Vallinder eds. 1995).

[151] *See id.* at 518–23.

[152] *Id.* at 526.

[153] *See id.* at 526–27.

[154] *See* Merryman, *supra* note 131, at 1873.

party to the Human Rights Convention, suggests the possibility, indeed the necessity of a rapprochement of the civil and common law traditions."[155]

One more possible influence in favor of greater convergence is the ALI/UNIDROIT Principles and Rules of Civil Procedure, a set of standards drafted jointly by a group of scholars from the United States and Europe with a view toward universal "standards for adjudication of transnational commercial disputes."[156] Although no country has adopted the Principles or Rules in whole or substantial part, they have nonetheless received significant attention on both sides of the Atlantic.[157] Although the Principles and Rules attempt to bridge differences between legal systems, there is something of a "tilt" in favor of European Civil Law. For example, the Principles and Rules generally keep "discovery" under the control of the judge as part of the "trial" rather than a "pre-trial" process.[158] The Principles also contain a strong statement on "Court Responsibility for Direction of the Proceeding."[159] Although this might seem strange to a rural common law judge, a modern federal judge handling a large case load would feel quite at home with these words.

III. Comparative Lessons

As the previous Parts have shown, convergence exists in at least two areas of traditional American exceptionalism: pleading standards and the role of the judge. This Part addresses what these convergences might mean for domestic and transnational civil procedure. There are both promises and perils.

A. *Comparative Promises*

First, at a minimum, these convergences ought to make comparative studies more approachable and thus might enrich the debates cur-

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[155] *Id.*

[156] Principles of Transnational Civil Procedure (Am. Law Inst. & UNIDROIT), Unif. L. Rev. 2004-4, at 758 (2004) [hereinafter ALI/UNIDROIT Principles].

[157] *See* James M. Klebba, *The Federal Rules at the Age of 70 Years—A Possible Model for the Implementation of the ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure*, 57 Pravni Zivot, no. 12, 2008, at 203, 206–08 (paper delivered at the Proceedings of the Annual Conference of the Mt. Kopaonik School of Natural Law on the Theme of "Law and International Integration").

[158] *Id.* at 204, 206–07.

[159] ALI/UNIDROIT Principles, *supra* note 156, at 784.

rently surrounding these two areas in U.S. academic circles.[160] U.S. proceduralists are notoriously provincial.[161] In the pleadings context, the convergence appears to be happening in a vacuum. Neither *Bell Atlantic v. Twombly* nor *Ashcroft v. Iqbal* mentioned foreign pleading systems at all.[162] Perhaps they should have, and perhaps commentators should as well. The foreign models suggest that the new U.S. fact-based pleading is not unique but rather enjoys some support among other advanced legal systems.[163] On the other hand, foreign models may have based their decision to impose rigorous pleading standards on other features of their procedural system that the United States lacks. The point is not that a comparative perspective will necessarily support or undermine the convergence but rather will enrich the debate. It may also facilitate a deeper understanding of the United States' own procedural system and norms.[164]

Indeed, this has already occurred in the other area of convergence: the role of the judge. That trend of convergence has tapped into the comparativist inquiry—albeit sometimes with harsh criticism—in a way that enlivens and enlightens both understanding and purpose. There are obvious differences of opinion, but at least those differences of opinion are being aired with the benefit of comparative analysis.[165] This Article suggests that the pleadings trend should learn from the judicial role debate and seek out comparativist attitudes as a way to better understand where pleading trends are heading and why.

Second, these convergences may provide opportunities for pleading reform for U.S. or transnational litigation. A major objection to harmonization is a resistance to change. Nonetheless, that objection seems less important in recent years, both because the U.S. judge has become more comfortable in an active role, and also because *Iqbal* and *Twombly* have shifted the U.S. pleading system toward foreign pleadings systems.[166] As noted above, U.S. trends in both areas are forcing the change anyway.[167] Because these trends are moving toward foreign models that enjoy wide international support, foreign procedural norms

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[160] *See* Dodson, *supra* note 23, at 463–64.

[161] *See* Antonio Gidi, *Teaching Comparative Civil Procedure*, 56 J. Legal Educ. 502, 502 (2006) ("[A]merican proceduralists are among the most parochial in the world.").

[162] *See* Ashcroft v. Iqbal, 129 S. Ct. 1937 *passim* (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 *passim* (2007).

[163] *See* Dodson, *supra* note 23, at 463–64.

[164] *See id.* at 464–65.

[165] *See* sources cited *supra* note 75.

[166] *See* Dodson, *supra* note 23, at 463.

[167] *See id.*

may be more easily imported into U.S. civil procedure. In addition, these convergences may provide support for the ALI/UNIDROIT's proposals for fact pleading and an active judicial role.[168] To date, no country has adopted the ALI/UNIDROIT Principles, but these convergences may create opportunities for consideration and support of the Principles within the United States.

Third, these procedural trends may provide an opportunity for the United States to change its "go-it-alone" attitude. Perhaps partly as a result of United States' isolationism, many foreign scholars resist U.S.-style reforms and ridicule U.S. civil procedure.[169] A willingness to accept comparative assessments may allow the United States to join, and perhaps even have a respected voice in, the international conversation on global procedural norms. In turn, that may provide opportunities for the United States to export its procedural norms abroad. This may influence a host of reforms in other countries that are converging toward U.S. procedure.[170] Some of those convergences in civil law countries with respect to the role and status of judges converging toward U.S. norms have already been discussed, but we believe this opportunity has far broader implications. Asian and Russian systems, for example, are experimenting with juries, a feature generally unique to U.S. procedure.[171] Latin and Scandinavian countries are experimenting with aggregate litigation, another quintessentially U.S. phenomenon.[172] The trends we have identified provide the opportunity for the United States to make a positive impact on the development of a host of global procedural norms, instead of perennially being contrasted with them.

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[168] *See* Klebba, *supra* note 157, at 204. These proposals are contained in Principle 11.3. ALI/UNIDROIT Principles, *supra* note 156, at 778.

[169] *See* Bryan, *supra* note 75, at 523–24; Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with those Systems*, 45 U. Kan. L. Rev. 9, 23–24 (1996–1997).

[170] *See* Hazard & Dondi, *supra* note 115, at 68—70 (describing convergence of civil and common law systems in modern commercial disputes).

[171] *See* Robert M. Bloom, *Jury Trials in Japan*, Loy. L.A. Int'l & Comp. L. Rev. 35, 37 (2006) (reporting that mixed-jury trials will begin in Japan for certain criminal offenses in 2009); John C. Coughenour, *Reflections on Russia's Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism and Our Federal Sentencing Regime*, 26 Seattle U. L. Rev. 399, 399–400 (2003); *S Korea Holds First Trial by Jury*, BBC (Feb. 12, 2008), http://news.bbc.co.uk/2/hi/asia-pacific/7241514.stm. In addition, civil law litigation is generally becoming more concentrated and trial-like. *See* Merryman & Pérez-Perdomo, *supra* note 93, at 113–15.

[172] *See* Gidi, *supra* note 111, at 313 n.1.

B. *Comparative Perils*

In addition to the promises discussed above, there are perils to avoid. This Article does not address all possible perils, but a few are worthy of mention, if only to express a strong need for caution going forward.

First, tinkering with just one feature of U.S. procedure may disrupt settled features in other aspects of U.S. procedure in unwelcome ways. Pleadings and judicial roles are tied to the scope of discovery, for example, and it is difficult to have a conversation about these features without also having a conversation about discovery. Indeed, failing to do so might lead to grave systemic problems.[173] But the existence of convergence in these areas suggests that broader undercurrents of convergence are happening. Caution is still warranted, and U.S. scholars should be fully aware of broader trends, but the interconnectedness of civil procedure—long an obstacle to convergence and reform—may end up being an ally.

Tinkering with pleadings and judicial roles may also erode the transubstantivity of the Federal Rules—the foundational assumption that the U.S. rules apply regardless of the underlying substantive issues at stake[174]—in unintended ways. For example, *Twombly* and *Iqbal* may suggest that the rigor of pleading standards should vary depending on the type of case.[175] Similarly, active case management may be better suited for the "big case" or for public litigation, while passive judicial oversight is better for the small private case. The foundational assumption of transubstantivity would have to be rethought carefully.

Finally, changes in U.S. procedure must be made with full knowledge of the greater systemic repercussions. On the pleadings side, for example, if rigorous pleading standards tend to divert vindication of private rights outside the civil system, will public enforcement of those rights become more robust? What will that mean for the criminal system and the administrative state? Assuming foreign jurisdiction is proper, will litigants resort to other means by, for example, taking their claims abroad, thereby forcing U.S. citizens to defend in foreign courts? Will the U.S. system need to provide an alternative process or system for vindicating claims that otherwise could not be pleaded?[176]

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[173] *See* Dodson, *supra* note 23, at 445, 466–68.

[174] David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DePaul L. Rev. 371, 372 (2010).

[175] *See Iqbal*, 129 S. Ct. at 1944–49.

[176] *See* Dodson, *supra* note 23, at 467.

Regarding the trend toward active judicial roles, will such closer attention reduce the impartiality of the ultimate decisionmaker? In counteracting that risk, will trial-level courts rely more heavily on a two-tiered system of judges, in which magistrates become the "active" case managers, while Article III district judges reserve their time for bench trials? Will judges push cases toward settlement or arbitration, against the parties' wishes? Will active roles erode the high status of judges in the U.S. system? The convergences discussed in this Article may raise these questions, and scholars ought to explore what implications they hold for system stability and workability.

Conclusion

This Article explores two areas of recent convergence between U.S. civil procedure and that of the rest of the world: pleading standards and the role and status of judges. Recent pleadings changes in the United States have moved away from a pure "notice" concept and toward a more demanding factual sufficiency standard that is akin to what is required in most other countries. The role of judges has experienced convergence in both directions, with U.S. judges becoming more "activist" and European judges becoming less so. As for the status of judges, several recent events have given more discretion to civil law judges and at the same time increased their prestige and visibility, including "spillover" effects from international arbitration procedures, the post-World War II establishment of constitutional courts and EU courts, as well as a phenomenon called "de-codification." Therefore, civil law judges look more like their common law counterparts in terms of prestige, visibility, and their role in conducting trials.

These observations prompt speculation about what these convergences might herald for the future. This Article finds potential promises and perils, particularly in the integration and interface with other facets of civil litigation. In particular, it proposes cognizance of how the recent tightening of U.S. pleading standards will affect discovery, and whether civil-law style discovery might hold promise for U.S. procedure. This Article concludes by questioning the continuing vitality of trans-substantivity in light of the pleadings changes and the movement toward more active case management for "big cases." Finally, the Article questions whether more active case management by judges will undercut the historically high degree of prestige of the common law judge, which has perhaps been based in part on being "above the fray."

Where these convergences will take civil procedure, both in the United States and elsewhere, is unknown. The challenge will be to max-

imize their promises, both locally and globally, while simultaneously minimizing their perils.