Procedure, Politics, and Power

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In 1996, when the AALS Section on Civil Procedure presented a program designed to bring teachers in other fields up to speed on developments in procedure during the previous decade, I gave a short paper entitled "Procedure and Power." The thus of that paper, which was subsequently published in this journal, was that "the most important developments in federal civil procedure in the last ten to fifteen years have concerned power: who has it and who should have it both in litigation and in making the rules for litigation." I argued that we have "witnessed two shifts in power within the landscape of federal civil procedure in recent years. [First] there has been a shift in the locus of lawmaking power, as Congress has insisted that it has a proper role to play in devising the rules of the game. [Second] there has been a shift in the locus of power at the trial (or pretrial) level, as trial judges have insisted on playing a more active role in the conduct of civil cases."

Power is in fact the central organizing idea in both my teaching and my scholarship about procedure, whether the subject be the Rules Enabling Act of 1934, Rule 11, summary judgment, or the judicial work product of Judge Jack Weinstein. It is not, however, where I start in either domain, and I am aware of the potential for misunderstanding of an approach to procedure, or for that matter to law of any variety, that puts power at its most visible and important broker—politics—at center stage. I have never been mistaken for a member of the Conference on Critical Legal Studies. Yet I long ago realized that I share a number of approaches to law with those who are, just as I differ from them in some rather fundamental respects.

In my teaching and writing I try very hard to master the doctrine in an area, to be as precise as I can be about the logical implications of this or that holding, and to take seriously what a case or a Federal Rule of Civil Procedure says. And I try very hard to persuade my students of the importance of doing the same, believing that analytical ability is the sine qua non of a good lawyer and a good scholar of procedure, that, as Holmes observed, "[j]udgment is

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the heart of law reformers. People are glad to discuss a question on general principles when they have forgotten the special knowledge necessary for technical reasoning. Even those most critical of traditional legal education acknowledge the importance of learning how to manipulate doctrine. And even if one agrees in general with Judge P., anger about "the epistemology of the enterprise" of doctrinal scholarship, most lawyers do not aspire to be scholars, and judges need the assistance of good doctrinal scholarship in procedure more perhaps than in any other field.

Yet, although the technical reasoning required to be a master of doctrine is a necessary condition for good lawyering in and good scholarship about procedure, it is not a sufficient condition. In a little book written almost forty years ago, entitled Hazard in Civil Procedure—a book that should be required reading for all teachers of the subject—my colleague Geoffrey Hazard lamented the state of scholarship in the field. Hazard found that "relatively little thought has been directed to the philosophical problems of adjectival law," that "very significant doctrinal research has been aimed at legislative reform," that "[o]nly recently has serious attention been given to "epistemic" research in problems of adjectival law," and that "historical research in procedure has been seriously neglected." His lament, in other words concerned the lack of knowledge or perspective necessary to get behind the words of a case or a rule and to evaluate by some method more scientific than natural-guessing (which is how I would unhesitantly characterize many discussions of "policy" in procedure or other fields) and more socially productive than ideology (which is how I would unhesitantly characterize many words of critical legal scholarship) the fruits of technical reasoning, however acute.

Without such knowledge or perspective, we may be prisoners of the unarticulated agenda, conscious or unconscious, of those responsible for making and administering the rules, and of those with the power to bring about change in their content. True, a critique along technical lines can be devastating, but only on its own terms, and the question—"an increasingly insistent question today—"Who cares?" Or, as put very recently by the historian Edward Purcell, "legal abstraction, while never socially neutral, always remains socially volatile. Without constant reference to changing social dynamics and consequences, students of procedure can scarcely know what they are talking about."

Once one accepts that procedure is power, that like all power it can be used for good or ill, and that technical competence is essential but not enough to understand, let alone change, procedural law or procedural dynamics, the question remains how as a scholar best to explore the dimension of the field and how as a teacher most responsibly to impart it. The wonderful thing about
the field is just how many ways there are to do these things, which may be why so many first-year students, to their great surprise, find procedure their most interesting, as well as most useful, subject. Let me illustrate with some examples from my own work, which has tended to rely most on the social sciences, including history, empiricism, and more recently political science, to supplement and inform technical reasoning.

I have never been persuaded by the critical stance that maintenance of the status quo in law is itself a political act, at least to the extent that it is intended to suggest that because judges can use their power to advance their personal preferences they should do so. Nor, however, have I been persuaded by the traditional view of those responsible for federal court rule-making that there is a neutral enterprise, and, indeed, that a "reef of ignorance," as Paul Carrington put it, is the appropriate normative stance of those responsible for it. In that regard, my own empirical work on Rule 11 in the Third Circuit led me to suggest one reason why empirical work had played such a small part in the first fifty years of the Federal Rules of Civil Procedure and why it represented such a threat to that traditional posture. For, when one knows that a rule has a statistically significant differential impact on a class of litigants or in a particular type of case, the veil is lifted, the myth of neutrality as to litigant power is exploded, and the question of lawmaking power to address the situation is unavoidable. It may not be a coincidence, therefore, that the heightened attention to questions of rule-making power in the past ten years has come during a period of unprecedented attention to empirical investigation of the real-world effects of rules by the rule makers.

In an opinion for a bare majority of the Supreme Court a few years ago in the Grupo Mexicana Case, Justice Scalia held that a federal court hearing a case in which the plaintiff sought traditional legal relief lacked the power to issue a preliminary injunction tying up a defendant's assets pending a decision on the merits, that is, to issue what the English would call a Mareva injunction or an order freezing assets. The opinion, which elicited a strong dissent by Justice Ginsburg, relied on the tradition of equity, finding that such power had never been part of a federal judge's arsenal in aid of a common law damages remedy and that, given that tradition and the potential consequences of a change, legislation would be required. In an article that was critical of both the majority and dissenting opinions, I argued that the Court reached the right result but that to understand why it did so, and why the abstract arguments in both opinions were inadequate, one needed to know something both about the history of preliminary remedies at law and about the history of federal court injunctions. The history I explored revealed that one of the most contentious areas in the relations between federal and state courts in the nineteenth century involved precisely the question of different legal standards.

for provisional and final remedies, and that underlying that set of issues lay frustration by the federal courts of state efforts to assist debtors in times of economic crisis. The authors of the 1934 Enabling Act and of the original Federal Rules were well aware of this history, as they were of the abuses of the injunctive power by federal courts—again on behalf of the creditor class—and that knowledge was in part responsible for their modesty in seeking to deprive state law, or to prescribe any law at all, in Rules 64, 65, and 69.

Hershey is also essential to understand why the Court was also correct in its recent decision in the Smoot case, where it held that state law, borrowed as federal common law, governs most questions concerning the precise effects of a federal diversity judgment. My earlier quotation from Porec's brilliant book, Brandeis and the Progressive Constitution, was part of his analysis of Henry Hart's transformation of the Erie doctrine. As a result of Hart's transformation, generation of law students and law teachers lost sight of, or never really were aware of, the serious practical and social problems that so concerned Brandeis and that influenced him in persuading the Court to overrule Swift v. Tyson. It is fitting that the defendant in Smoot engaged in manipulative behavior quite similar to that which concerned Brandeis, but without grasping the history, both legal scholars and students are likely to continue to talk about Erie on the same plain as did Hart and his followers.

A problem with the traditional first-tier course in Civil Procedure is precisely that the view from Hart's plain obscures a great deal of that which concerns and drives the behavior of lawyers, including in particular the effects of legal rules. This, I take it, is why one of my colleagues, who teaches Civil Procedure II, consisting of jurisdiction, Erie, and judgments, was happy to leave what was described as "all of the dirty work" to colleagues. It was the dirty work done by American business corporations in exhausting weaker opponents and misusing the rules of federal court jurisdiction that most concerned Brandeis. And it is the dirty work of mastering the rules and of deploying them in a responsible manner in a client's interests that most


10. See id., supra note 9.


Lawyers call Erie a "great case" and "a paradigmatic landmark" which "notwithstanding remains controversial because it establishes a constitutionally controversial procedural boundary between state and federal courts jurisdiction.

12. See infra Part III for discussion of new books on constitutional and legal interest in constitutional law and in federal courts.


14. Cf. Stephen B. Burbank, Jurisdictions at Millennium: End of the Century or Beginning of the Millennium? 7 Yale J. Int'l L. & Comp. L. 111, 112-15 (1999), explaining five-year course's emphasis on federal limitations on state court jurisdiction "as part of the unitary function of law professors to show us to reach at least some constitutional law."
concerns me as a teacher. That is why, in concluding my first-year course, I tell my students, in words that I have recently also used to describe a great judge:

You may have heard that law is nothing more than politics. I want you to consider that it is also something else. The extent to which the equation causes your despair or satisfaction will depend on a number of things: your willingness to work hard, recognizing that change and experience will sometimes yield to compromise; your willingness to abide by existing rules, recognizing that others—whether from greed or profound discontent—will not be willing to do so; and your faith that change is possible. Ultimately, of course, your reaction to the law/politics equation will depend on your politics. For myself, the equation is the beginning and not the end of the analysis. That is not because I regard law, including the so-called "adjective law" of procedure, as neutral. It is rather because, in an imperfect world, and as a member of an imperfect profession, I have witnessed too many contributions to the betterment of the human condition by lawyers trained as you are being trained to permit either monomaniac fief of cynicism or the tyranny of ideology to block out the light of history. 13