Animating Civil Procedure

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To my wife, Erie P. Vitiello, a
Civil Procedure professor's dream come true

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Introduction: Animating Civil Procedure

I will be in my fortieth year of teaching when this book is published. For most of that time, I have taught Civil Procedure. I continue to love to teach the course despite its many challenges. Some of these challenges include the need to animate arcane principles of law and overcome students' misperceptions that the course involves a series of dry concepts. If students have thoughts about the subject matter before the course, they are more likely to believe that they will be learning about where the courthouse is and how many days they have in which to file an answer to a complaint than they are to believe that the course is about some of the most important and exciting concepts in the law.

Students entering law school usually want to discuss broad themes about justice. For example, they may have strong opinions about whether the Constitution includes a right to privacy, encompassing the right to abortion. Or they may have unequivocal views about whether the Second Amendment creates a personal right to own weapons. Intuitively, few students have much interest whether the Supreme Court expands or narrows the interpretation of the Due Process Clause as it relates to personal jurisdiction. Nor are many likely to understand what is at stake if the Court heightens pleading requirements, narrows the scope of discovery, or alters the interpretation of a statute governing transfer of venue. And yet, many procedural lawyers and professors know that procedure is more important than is substantive law.

My memory is hazy about my law school experience; but I suspect that I did not recognize the power of procedure as a 1L. Indeed, I doubt that I did when I began teaching Civil Procedure in 1977. When my first associate dean told me that I would be teaching Civil Procedure, I accepted the assignment willingly enough because I was also able to teach Criminal Law and Criminal

Procedure, the courses that dovetailed with my scholarly interest in the early part of my career. Bringing Civil Procedure to life took me several years. A bit self-serving, I believe that I have done so for many of my students. Doing so required me to develop a much deeper understanding of the power of procedure and then find ways to communicate that to my students. Animating procedure is the major theme of this book. My hope is that if you are a law professor teaching Civil Procedure or a law student taking Civil Procedure, you will find the insights in this book helpful in enhancing the course.

This book also has a second theme that supports my first theme. Often, members of the public become engaged (or enraged!) when they read about Supreme Court decisions involving substantive rights. Examples are easy to come by: *Obergefell v. Hodges*,[1] the same-sex marriage case, produced a flood of comments on many websites including the *New York Times*' page. So, too, did the Supreme Court's decision in *District of Columbia v. Heller*,[2] the case involving gun rights. Yet another example is the response to *Citizens United v. Federal Election Commission*,[3] which struck down provisions of the campaign finance law. But members of the public are far less likely to understand the impact of procedural decisions.[4]

Few readers reacted passionately or otherwise to the Supreme Court's decisions narrowing personal jurisdiction. Nor did they call for changes in the rules governing pleading when the Court rewrote Federal Rule of Civil Procedure

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

2. District of Colombia v. Heller, 554 U.S. 570 (2008).

3. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

4. Linda Mullenix, *Federal Class Actions: A Near-Death Experience in a Shady Grove*, 79 Geo. Wash. L. Rev. 448 (2011). To make this point more fully, I asked one of my research assistants to look at online comments about major Supreme Court cases. The results support the point in the text. Members of the public respond (often passionately) in large numbers about cases where the Court renders a substantive decision, but far less frequently when the Court renders a procedural decision. Using the Google news search, my research assistant found about 25,000 comments about *Citizens United*, 558 U.S. 310 (dealing with campaign finance laws); almost 20,000 comments about *Heller*, 554 U.S. 570 (the Second Amendment right to bear arms); about 12,000 comments about *Obergefell*, 135 S. Ct. 2584 (same sex marriage equality); and about 1,400 comments about *Snyder v. Phelps*, 562 U.S. 443 (2011) (the First Amendment rights of protesters who demonstrated the funeral of a deceased soldier). By comparison, only 190 readers commented on *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (dealing with statute of limitations for an employment discrimination case); fewer than 120 readers commented on *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011) (denying personal jurisdiction to an injured plaintiff in a specific jurisdiction case), and only 106 readers commented on *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) (same, in a general jurisdiction case).

8(a)(2) in *Bell Atlantic Corp. v. Twombly*[5] and *Ashcroft v. Iqbal*.[6] And yet these decisions are critically important to whether plaintiffs have access to court.

This book focuses on a series of Supreme Court decisions and changes to the Federal Rules of Civil Procedure that demonstrate the current Court's subtle erosion of rules originally designed to allow plaintiffs access to court. Many of the Court's decisions unravel rules developed during the heyday of the Progressive Movement and the postwar era when courts created rules favoring plaintiffs' access to court.[7] The Court's decisions are eroding one of the foundational principles of American law—that the rule of law depends upon ready access to court, where litigants have a fair chance to bring their claims before a neutral arbiter.[8] Narrowing the opportunity to get into a convenient forum with other important procedural rights erodes that fundamental concept.

Many of the cases and other changes in the law covered in chapters below invite a discussion of underlying policies that support decisions to narrow access to our courts. When President Obama nominated Sonia Sotomayor to serve as a justice on the Supreme Court, he commented about the importance of her life experiences. Critics argued that a justice's life experiences are irrelevant. Either they were being dishonest or terribly naïve. Any observer of the system knows that judges' life experiences influence their views of the law. Indeed, in one famous case discussed in this book, Justice Kennedy referred explicitly to the need for judges to rely on their common sense and life experiences.[9] Given the makeup of the current Court—one of the most right-wing lineups in history, at least until Justice Scalia's death in early 2016—one should not be surprised that the Court has adopted positions taken by corporate and other business interests. In most of these cases, the right wing of the Court has taken the lead in narrowing access to our judicial system.[10]

By focusing on the policy implications of the Court's procedural case law, one can animate the importance of procedure. Thus, in addition to teaching students doctrine, I focus on the important policy implications in the Court's

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

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

7. *See infra* Chapter 2.

8. *See* Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No*, 17 Geo. J. Legal Ethics 175, 176–77 (2004).

9. *See infra* Chapter 5.

10. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014); Shelby County v. Holder, 133 S. Ct. 2612 (2013); United States v. Windsor, 133 S. Ct. 2675 (2013). Some commentators already see a shift in the direction of the Court since Justice Scalia's death. *See* Adam Liptak, *The Right-Wing Supreme Court That Wasn't*, New York Times (June 28, 2016), http://nyti.ms/29oGmqU.

case law and rulemaking. The Court has limited ability to alter substantive law. Some statutes create rights found to be unconstitutional, but such decisions are relatively few. In addition, when the Court renders substantive decisions, it faces intense public scrutiny. At times, such decisions have influenced presidential elections.[11] By comparison, as I develop in this book, the Court can achieve many of its policy goals by deciding cases on procedural grounds. A person with a host of substantive rights may not prevail absent access to a convenient forum with rules allowing liberal discovery.

Here is a list of specific topics covered in this book: Chapter One explores the overall theme of this book that the Court's procedural holdings seldom evoke a public outcry, making political backlash against the Court for such decisions unlikely. Chapter Two discusses the Supreme Court's recent personal jurisdiction case law and demonstrates how the Court follows its pro-corporate bias at the expense of injured plaintiffs. Chapter Three highlights the Court's rewriting of its pleading rules that, when drafted, originally reflected the Court's intent to encourage access to the judicial system through simplified pleading. Instead, the Court's modern case law has reintroduced arcane concepts of pleading that have the effect of limiting access to court. Chapter Four focuses on discovery, including a review of its importance in leveling the playing field for plaintiffs facing wealthy corporate defendants. The goal of discovery, to achieve just results based on the merits after full disclosure of all relevant material, is likely to be undercut by recent amendments to Rule 26(b), which now invites courts to limit discovery based on the overall value of the suit. Chapter Five examines the controversy surrounding President Obama's appointment of Justice Sotomayor when the President referenced the importance of a judge's life experience and empathy in deciding cases. Not only does the chapter explore that controversy, but it examines instances in which the members of the right wing of the Court have substituted their views for those of juries and demonstrated their own kind of empathy—favoring the interests of the powerful over the interests of injured plaintiffs. Chapter Six examines what appears to be a minor, noncontroversial transfer of venue case. *Atlantic Marine Construction Co. v. U.S. District Court*,[12] decided by a unanimous Court, demonstrates how a seemingly minor procedural decision may

11. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); *see also* Nadja Popovich, Roe v. Wade *at 40: Republicans More Conservative Than Ever About Abortion*, The Guardian (Jan. 22, 2013), https://www.theguardian.com/world/2013/jan/22/roe-v-wade-republican-radicalisation (describing how upholding or overturning the case is often a platform for Democrats and Republicans, respectively).

12. Atl. Marine Constr. Co. v. United States Dist. Court, 134 S. Ct. 568 (2013).

give corporations a less than obvious, but nonetheless real, advantage over less powerful parties. Chapter Seven considers how the Court's class action case law has undercut many litigants' substantive rights. It begins with a discussion of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance, Co.*,[13] an opinion written by Justice Scalia that seems to undercut my thesis about the rightwing of the Court closing the courthouse door. After exploring that case, the chapter focuses more fully on the drift of most of the Roberts Court's class action case law, where the trend has been to limit the availability of class actions. This results in denial of meaningful access to court for plaintiffs who possess claims too small to be litigated on their own.

Chapters Two through Seven largely focus on the broad theme that the net effect of the Court's case law has been to narrow access to our courts for many potential plaintiffs. Chapter Eight discusses the Court's arbitration case law, which also has the same effect. But that chapter focuses on a couple of developments that may reverse the recent trend. The first is that, unlike most procedural decisions, the Court's arbitration case law seems to have sparked public concern. Unlike the media's treatment of most procedural decisions, the *New York Times* has given front page coverage to those cases. Legislative and administrative efforts are now in place to reverse the Court's case law. While Donald Trump's election may slow those reforms, members of the public have begun to understand what is at stake in these cases.

Read on. My hope is that you will come to share my enthusiasm for the subject matter even if you do not share my policy preferences. By the time you have finished reading this book, I hope that you recognize that understanding procedure is the most important thing that you can do to become a good lawyer.

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13. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).