Designing a Procedural System

Before we can explore the fundamental principles underlying the American procedural regime, it is helpful to have an overview of the basic structure of American civil procedure and how it came to be. We need to know, in other words, what issues and options arise in the design of any system of dispute resolution, and then how the United States came to choose its particular procedural structures. This chapter thus first asks two basic questions: What is adjudication for, and what are the possible structural approaches to accomplish its goals? Once we have laid out the choices in the abstract, we turn to history to provide the necessary context for understanding our own procedural regime.

DESIGN QUESTIONS

The Point of Adjudication

At its most basic level, Civil Procedure is about the process that courts do and should follow when they adjudicate cases. *Adjudication* is simply a way to make a decision between

* We italicize terms of art or common procedural phrases when we first use them in a chapter. We include most of these italicized phrases in the Glossary.
competing alternatives. Adjudication places the decision about which alternative is best into the hands of a third person who has a less immediate stake in the choice than the people most affected by the decision. Typically adjudication is associated with the court system (although sometimes it can be done through arbitration or administrative proceedings). The competing alternatives involve a claim of legal right or remedy by one party and a denial of that right or remedy by another. A third person—the judge—determines the "correct" alternative, and enters a judgment that binds the parties to the result. The power of the government stands behind the judgment, ready to enforce it against a recalcitrant losing party.

In reality, this model is too simple. It assumes that there is only one judge, when in fact the judicial function is often divided between trial and appellate courts, and the trial function can be divided between judge and jury. It assumes that there are only two parties, with two diametrically opposed legal positions, when in fact a legal dispute can involve multiple parties and nuanced differences among legal positions. We will explore some of these complications as we go through this book. For now, let us assume a simple two-person dispute over a legal entitlement, and a single judge as the adjudicator.

Let us also assume that the judge wants to resolve this dispute as accurately as possible. Although this assumption seems self-evident, stop a moment to think about it. Why do we want judgments to be accurate? Suppose we handed judges two-sided coins, and told them to make decisions by flipping them. Think of how many lawsuits a judge could resolve in a day! Think of how cheap litigation would become! The problem with a coin flip, of course, is that the judge is likely to make the wrong decision a lot of the time. Being frequently wrong imposes costs. To take a recent example, consider the many lawsuits against the Merck pharmaceutical company for harms allegedly caused by the drug Vioxx. If our society resolved suits like these with a coin flip, that would make litigation less expensive—and more enticing. Because every person who sued Merck would have a 50–50 chance of winning, there would be many false or trumped-up claims. Merck would have to pay millions of dollars even if Vioxx is completely safe. In such a world, what incentive does Merck have to develop new drugs? What incentive does anyone have to be productive and accumulate wealth if it might be lost with the flip of a coin? The coin-based procedural system would also be unfair to people who were actually harmed by Vioxx, because half of them would likely remain uncompensated. So although we want adjudication to be swift and inexpensive, it also needs to be accurate—but not necessarily perfectly accurate. If we assumed that we could resolve each case with perfect accuracy at a cost of $10 million, the expense would not be worth it for disputes worth less than $10 million. But we do want results that are reasonably accurate.

To resolve disputes with reasonable accuracy, adjudication must accomplish several things. The law specifies certain standards of behavior for people living within a society, and then enforces those standards against transgressors. Therefore, adjudication first must determine the relevant legal standards. To continue with our earlier example, we have to decide how safe Merck must make its products, what risks it must disclose, and how the behavior of patients or doctors might change Merck's liability. As your courses in substantive law teach you, this task is not always easy. No big book precisely identifies how we should act in every particular situation on every occasion. American law contains conflicting, overlapping, and often incomplete expectations of behavior that the adjudicatory process must distill into the appropriate "rules" to follow in instances like the Vioxx litigation.

Next, adjudication must determine the facts of the dispute. The appropriate legal rule can often be written in this form: When a person does X and Y, then legal consequence Z
Attaches. Adjudication must determine, as a matter of fact, whether X and Y occurred. Again, this process is not always simple. Eyewitnesses might have different memories, documents might be incomplete about important details, or the most valuable evidence on X and Y might be unavailable. Sometimes, determining even the most basic facts—for instance, whether a person actually started to take Vioxx before suffering from a fatal heart attack—can be a tricky business.

Adjudication must then apply the law to the facts. This process might sound mechanical, once the court has determined that X and Y happened, and has further determined that Z is the legal consequence for such behavior, then the outcome is clear. But in many cases applying the law to the facts is the most difficult part of the job. Often legal rules operate at a level of generality removed from the particulars of a dispute. For instance, one legal rule is this: When a defendant manufactures a defective product that causes physical injury, the defendant is liable. Suppose Merck had spent many millions of dollars investigating the safety of Vioxx, which alleviated the severe symptoms of thousands of arthritic patients but doubled the risk of a patient suffering a heart attack. On these facts, is Vioxx defective or not defective? (Obviously, if the legal rule was "When a manufacturer’s product causes five or more heart attacks, then the product is defective," the process of applying the law to the facts would be mechanical. But legal rules are rarely so precise.)

Finally, adjudication must determine the appropriate remedy. Sometimes money will be compensation enough. Sometimes it will not be, but it will be all that the legal system can provide: Merck cannot relieve the pain or disabilities of a patient who suffered a heart attack, or bring back a loved one who died. In these cases, the court orders the defendant to pay money, or damages. In other cases, however, an injunction of some sort might be appropriate: Merck might be ordered to take Vioxx off the market, or to perform certain tests on its other products. An adjudicatory system must deal with the potential mismatch between what people want from adjudication and what it can give them.*

So now we have at least four functions that adjudication must perform if it is to render reasonably accurate judgments: Find the facts, declare the law, apply the one to the other, and determine an appropriate remedy. Behind these four central functions lie subsidiary tasks that are equally vital to accurate adjudication. First, for the facts to be “found,” some person (or people) must investigate what happened, accumulate any additional relevant information, and then organize and present the most salient aspects of the dispute in a way that helps the adjudicator. Second, to determine the relevant legal principles, some person (or people) must research the law, and describe for the adjudicator the merits of the possible legal principles or approaches that might apply to the dispute.

At this point, the rules of procedure come into play. Procedural rules provide structure for the process of adjudication. They decide who must, and who may, participate in the adjudication, and in which court or courts the adjudication must, or may, take place. They determine which participants must fulfill which responsibilities for determining the facts and the law, for applying the facts to the law, and for investigating, researching, and presenting the evidence and arguments. Procedural rules also specify the methods or mechanisms that the participants must, or may, use to discharge their

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* Your class in Civil Procedure will not focus much on the issue of remedies. Your school might offer an upper level class on Remedies, and classes like Torts and Contracts will probably devote some time to the damages or injunctive relief that an injured person can receive. In the real world, the question of remedies is critical to the functioning of an adjudicatory system. Most clients care only about the bottom line. Thus, plaintiffs will typically litigate only when the net remedy (calculated by multiplying the amount of the remedy by the probability of obtaining it, and then subtracting the expenses of litigation), is (1) greater than zero, and (2) greater than they could achieve through alternative methods of dispute resolution such as arbitration or settlement.
responsibilities. Some procedural rules are positive commands—they describe how a particular adjudicatory task must be performed. Just as often, they are negative commands or guidelines—they outlaw certain practices but leave to the relevant participants some choice about whether and how to perform their tasks. Obviously, there are many possible procedural permutations. In allocating the tasks of adjudication, however, two principal procedural models—one highly centralized and one highly decentralized—have emerged over time.

Two Models for Adjudication: Inquisitorial and Adversarial

With respect to the central functions of determining the facts and the law, applying the law to the facts, and declaring the remedy, the adjudicator is in control; otherwise, it would not be adjudication. But who should be in charge of the subsidiary tasks of investigation, research, and presentation of the evidence and arguments? Keeping in mind that we want the ultimate decision to be reasonably accurate, the candidates with the most incentive to ensure that the investigation, research, and presentation are effective are the judge and the parties.

Both choices have some merit. If we centralize the tasks of investigation, research, and presentation in the judge, we can expect that the work will usually be performed with a degree of impartiality. Moreover, because he or she will be the ultimate decision maker, the judge is likely to keep the preliminary tasks of research and investigation tightly bound to the ultimate task of making a decision. The conscientious judge has an incentive to do everything necessary to decide the case, and no more.

If we place the parties in charge of investigation, research, and presentation, we must split the task between them, because we cannot trust either of the parties to be disinterested enough to do a good job for both sides. Having two parties rather than one judge perform these tasks might seem wasteful, but that is not necessarily true. The parties probably know more about the circumstances of the case than the judge, so they can streamline the investigation and research. Moreover, because they pay for their share of investigation and research, the parties are often in a better position to decide whether particular lines of research and investigation are worthwhile. Keeping the judge neutral while the case is investigated, researched, and presented also might make the judge's decision more accurate; early judicial involvement carries with it the risk that the judge will begin to prejudge the case before all the facts are in.

The centralized approach—having the judge research, investigate, and present the case—is usually called the inquisitorial approach to adjudication. The decentralized approach—placing the parties in charge of the preliminary adjudicatory tasks—is usually called the adversarial approach to adjudication.* Different legal systems around the world use one approach or the other. The inquisitorial approach is dominant in continental Europe and in other countries with legal systems that are influenced by the continental systems. The adversarial approach derives from English common law.

* Sometimes the inquisitorial approach is also called the civil law (or civilian) system, and the adversarial approach is called the common law system. Civil law systems usually use a foundational legal document, such as a code, to specify legal rules and entitlements; prior similar cases can be helpful guides, but only the code itself is binding authority on the judge. Common law systems treat prior cases as a binding statement of the law (precedent), which judges in subsequent cases must follow except in unusual circumstances. Whether a code or a case is the source of binding law presents a question distinct from the question of whether the judge or the parties should handle the preliminary tasks in adjudication. Nonetheless, as a matter of history, those legal systems that adopted the inquisitorial process have tended to be civil law systems, and those legal systems that adopted the adversarial process have tended to be common law systems.

You should not confuse the civil law system with the civil justice system in America. "Civil" is one of those words with multiple meanings. As is true of many countries, the American legal system contains a basic division between criminal and civil (i.e., noncriminal) law. Thus, "civil procedure" refers to the procedures used to resolve noncriminal cases, not the procedures used in civil law countries.
practice, and is used mostly in those legal systems around the world influenced by the English system. In the real world, no legal system is purely inquisitorial or purely adversarial; even the most inquisitorial system allows the parties to suggest lines of investigation and research to the judge, and even the most adversarial system expects the judge to assist in the development of factual and legal issues. Overall, inquisitorial civil justice systems are more prevalent. As descendants of the English system however, American courts inherited the adversarial approach to adjudication. Indeed, on the spectrum from more inquisitorial to more adversarial, the United States today is arguably the most adversarial system in the world. It makes the plaintiff the master of the complaint by putting him or her in charge of such fundamental tasks as deciding whether, when, where, against whom, and on which legal claims to file suit, and it expects both parties to be the principal forces investigating, researching, and driving the case forward to trial.

Whether the inquisitorial or the adversarial approach is “better” is a topic much debated among lawyers, judges, and academics. Chapter 2 examines the consequences and merits of our choice of an adversarial approach. But if both inquisitorial and adversarial systems are defensible — and if the inquisitorial system is more common (and, according to some, better) — why is American procedure so adversarial? Thereby hangs the tale of the next section, which describes the history of American procedure that underlies the rest of the book.

A BRIEF HISTORY OF CIVIL PROCEDURE

Our English Heritage

Litigation as we know it began with the Norman invasion of England in 1066. The Romans — with their great system of centralized civil law governed by detailed written codes — had, much earlier, ruled England for over three centuries. But when the Romans left in 407, the various disunited tribes remaining on (and invading) what ultimately became the British Isles developed their own law, which was based on local custom rather than on written codes. Roman law would later reappear in different guise, but for the next 600 years, England had a localized, informal, and somewhat irrational dispute resolution system that often depended on supernatural signs to reveal the truth of the dispute. Some of the irrationality survived even into the American colonies: Throwing suspected witches into the water to see whether they would float (a witch) or drown (not a witch) was a remnant of this early system. The rejection of the Roman system of civil law also persists today in both English and American law, which are still based more on common law — made case-by-case by judicial decisions (including decisions interpreting written statutes), which then become precedent for the next case — than on detailed written codes that are designed to answer every legal question in advance.

The Normans gradually regularized and centralized the English legal regime. The king, and later the royal courts, heard disputes and corrected errors committed by the local courts (which the Normans retained for some time as useful for the day-to-day administration of the law). Because the Normans were French, the language of the royal courts was an Anglicized version of French called Law French. It is from Law French that we inherited words such as plaintiff and defendant — and even “court,” which comes from the courtiers who were the advisors to the king and the earliest decision makers of what became the royal courts. The development of the various royal courts and their interactions, against the background of the centuries-long power struggle between the king and Parliament, is a fascinating story but only marginally relevant to modern civil procedure.

Much more important is the Norman introduction of what has become a key feature in Anglo-American law: trial by jury.
Instead of looking for divine guidance, the law began turning to members of the community to resolve disputes. That innovation in turn drove many other features of the system, and, as we will see in Chapter 3, still does. Citizen-jurors are not trained in the law or in resolving disputes; an individual might sit on only a single jury in his or her whole life. Medieval English jurists (both judges and lawyers) therefore did not fully trust the jury to get it right, nor did the king and his advisors. English law after the Norman conquest gradually responded to this problem by narrowing the scope of the jury’s authority in two ways: It limited the kinds of claims that could be brought and it relied on procedures that would pare each claim down to a single, and preferably simple, issue for the jury to decide.

The claim-liming function was performed by the writ system. A writ was a piece of parchment, issued by the chancellor, the king’s most trusted advisor. It entitled its bearer to be heard on his claim in a royal court; without it, the court had no jurisdiction over the dispute. Each writ was limited to one type of claim: There was one writ if you claimed that your neighbor trespassed on your property, another if he stole your cow, and a third if you claimed to own the land his house stood on. (Most cases involved property disputes of one sort or another.) The writ enabled the royal court—and the jury—to know exactly what sort of claim was at stake in any particular case.

This administrative gatekeeper worked well as long as the chancellor had the flexibility to issue writs for whatever disputes happened to arise. Through about the middle of the thirteenth century, the chancellor retained this flexibility, and the number of writs gradually multiplied as new types of claims arose and old writs morphed into new ones. Some of the basic substantive principles established under this system have survived, and you might even read some old English writ cases in your Property or Torts classes.

During the latter half of the thirteenth and into the fourteenth century, however, the writ system ossified. Mistrust of juries and a corresponding desire to limit the types of claims they could hear was only part of the cause. A second factor was that, as wealth began to accumulate in forms other than land, new types of disputes were continually arising and it became harder to adapt an old writ to a new purpose. The third, and probably most important, factor was the king’s ongoing battles with Parliament and with his own courts, which were becoming more independent. The Statute of Westminster, enacted by Parliament in 1285, forbade the chancellor from issuing new writs unless they were similar to existing writs. The royal courts began quashing—denying the validity of—writs issued by the chancellor if they were not close enough to existing writs. Without a valid writ, the case could not be heard.

Complementing the increasingly rigid writ system was the equally rigid procedural system, which revolved around the pleadings and was designed to leave the judge or the jury with but a single easy issue to decide. The plaintiff’s opening plea was dependent on which writ he was using. From there, the defendant had to choose a single response: He could raise some procedural challenges with a dilatory plea and others with a special demurrer. Denying that he did what the plaintiff accused him of doing was pleading the general issue. A general demurrer meant that he was claiming that his action was not a legal wrong, and a special plea argued that he was justified in his action. (We should warn you that the italicized terms in the preceding three sentences are unimportant in federal civil procedure today, but are included to give you a flavor of the complexity of the pleading system. They are not included in our glossary, but you can look them up in Black’s Law Dictionary if you’d like—even though we advise against it.) Further pleading followed, with each plea dependent both on what it

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Some state systems still retain these or similar terms, although the devices they describe do not usually operate in the way that demurrers and pleas had operated at common law. In any event, the study of state procedural systems is beyond the scope of most Civil Procedure courses.
was responding to and the particular argument it was intended to raise.

At each stage, the party had to choose a single plea and could not change it later. Once a defendant started down the road of alleging a procedural defect with a special demurrer, for example, he or she could never use a general demurrer to claim that he or she did not act as alleged, and he or she could not make both pleas together. Not only that, but each writ had its own procedures, so that a pleading that worked with one writ did not necessarily work the same way with another. One historian gives a flavor of the variations:

Each form of action [or writ] . . . had its own form of general denial, so called because it imported an absolute and complete denial by a defendant of each and every allegation in a plaintiff’s declaration. For example, in trespass either vi et armis or on the case the appropriate form of general denial was not guilty; in debt, owes nothing; in debt on a bond, it is not the defendant’s deed; in assumpsit, never promised. If the defendant pleaded the wrong general issue, as not guilty to a plea of assumpsit or owes nothing to a plea of trespass, . . . then judgment would be given on demurrer for the plaintiff.¹

The goal of this mandatory precision was to narrow the case to a single issue for the judge or jury to decide, but it did so at great cost. As one description summarizes it, “Pleading was a game—a very serious game—in which mistakes were common. Specialists in the art of pleading thrived on an opponent’s miscues.”² Because there was no going back, mistakes were not only common but fatal, and many meritorious claims or defenses were dismissed solely because a lawyer used the wrong writ or the wrong plea, or simply made a bad choice among available claims or defenses. From these inauspicious beginnings came our adversarial system.

The English common law system of writs and pleading had two other weaknesses, neither as spectacular as the rigidity that prevented claimants from obtaining justice when justice was due. First, there was almost no way for the parties to ferret out facts unless they paid for an investigation—and, of course, the opposing party would do its best to hide any useful evidence. Second, because the writ system had hardened in the late thirteenth century, the types of relief that could be awarded were limited. In an economically developing society, limiting relief to such things as the payment of money or the transfer of land was insufficient.

Nevertheless, this system did not begin to change until the nineteenth century. How could such an inefficient and unjust system have survived for so long? A number of factors contributed to its longevity, but the most important for our purposes is that the common law regime was not the only game in town.

Go back to the Norman beginnings, and the chancellor. Claimants could always petition the chancellor to hear their cases directly instead of issuing a writ that sent them to the royal courts, although at first such petitions were rarely granted. But as the writ system became more ossified, the chancellor began to hear more claimants whose claims did not fit an existing writ or who could not get relief in the common law courts. The chancellor was originally an ecclesiastical official, trained in canon law, which itself derived from Roman law. (We told you Roman law would be back.) He was therefore not bound by the writ system or common-law pleading. He had no jury, and instead decided cases himself. He borrowed from canon law the inquisitorial processes of subpoena and deposition, commanding the production of evidence and the testimony of witnesses. He could also award relief—such as ordering a party to perform an act—

¹ Hindsight is 20–20, but it was harder for people immersed in the system to see its flaws. Moreover, for a good period of this time the system did a respectable job of resolving the most common types of disputes. Finally, the jury trial—inextricably linked to the whole procedural mosaic—became the pride of the English legal system, and its benefits were thought to outweigh any costs.
for accepting limits on their authority!

This alternative system of adjudication by the chancellor was known as chancery or equity. It was formalized in the Court of Chancery, although the chancellor or his chief assistant — the master of the rolls — always maintained control over the final decision. By the middle of the fifteenth century, the Court of Chancery rivaled the common law courts. Because Chancery was within the control of the king, and the common law courts (originally the royal courts) had become much more independent, the rivalry between the two sets of courts was intertwined with the battles between the king and Parliament. Each court remained powerful, however, and both law and equity were very much part of the English legal system from the time America was colonized through (and after) it became independent.

Like the courts of law, equity had its drawbacks. Justice in the Court of Chancery was measured, in a commonly used phrase, by “the chancellor’s foot” — in other words, by the chancellor’s own sense of justice, which could differ considerably from chancellor to chancellor. It was also exceedingly slow and expensive. The chancellor decided every case individually, and could always ask for more information, which often produced the kind of interminable case that Charles Dickens described in Bleak House. As the case dragged on, moreover, every chancery official who collected information or performed some required administrative task had to be paid by the parties, and the costs of litigation mounted. Finally, although never as rigid as the common law, equitable pleading also became less

From this brief description, you should be able to identify four primary, and interrelated, differences between equity and (common) law. First, and probably most important, while the common law system revolved around procedural form rather than substantive justice, equity was “impatient of pedantry and inclined to place substance before form.” Second, law was adversarial, while chancery — at least in its early years — was inquisitorial: In the courts of law, the parties were in control and the judges (and juries) were neutral arbiters, while in the Court of Chancery the judge collected the evidence, questioned the parties, and retained complete control over both the proceedings and the decision. Third, because the chancellor sat without a jury, litigation in equity was a meandering sequence rather than a single trial. The chancellor asked for evidence, made decisions about some issues, then perhaps looked at more evidence to make further decisions, and could even reopen a case at will if he thought justice had not been done. You will see in the Federal Rules and in modern civil procedure generally an attempt to combine the best features of both systems.

Finally, law and equity differed in the type of relief that was afforded. As noted earlier, the chancellor, unlike the common law courts, could directly order the parties to take action or refrain from taking action. But relief in chancery was also limited: Because the chancellor supposedly worked only on the “conscience” of the parties, he could only tell the parties what to do and could not order the transfer of property or money. This remedial distinction lives on in the substantive law of remedies: Damages are legal remedies, and injunctions (as well as specific performance of contracts, restitution, accounting, and various other things) are equitable relief. This distinction rarely makes more than a semantic difference, with one large and one small exception. Under the Seventh Amendment

* Aside from the common law courts and equity, the English system had other courts of limited jurisdiction — an admiralty court, ecclesiastical courts, local courts, and other courts with a narrow subject-matter focus. Common law and equity were, however, the two court systems that exercised the greatest influence over modern American procedure.
to the United States Constitution, parties are entitled to a jury trial if and only if their dispute would have been tried at law rather than in equity in 1791, when the Amendment was ratified. And because equity originally arose to fill the holes in the common law regime, a party cannot get any form of relief that is considered to be equitable unless he or she can show that he or she has no adequate remedy at law.

This, then, is how the law of England—and of the American colonies—stood at the time of the American Revolution. We turn in the next section to what the new United States did with its legal heritage.

**Transplantation and Growing Dissatisfaction**

Almost all the newly independent states initially adopted the English system, complete with the writ and pleading regime and the distinction between law and equity. The addition of a system of federal courts, as part of the national government apart from the individual states, complicated matters somewhat, as we explore in detail in Chapter 8. The federal system retained the distinction between law and equity, and by and large conformed to the procedures adopted in state courts.* And of course the federal Constitution, as well as the constitutions of the states, entrenched the pride of the English system, the jury.

America's unique geographic and sociological conditions, however, quickly began to influence its legal development. With vast uncultivated land, expanding commercial opportunities, and a mobile population, the United States desperately needed a coherent body of substantive law to govern the increasingly complex relationships among citizens. The writ system, tied as it was to procedure rather than substantive law, could not fill this need. As one commentator put it: "By the early nineteenth century . . . the emerging concern in pleading was with substance, not with form. This concern was of great significance, for it compelled the bench and bar to think about law in substantive categories, such as 'tort' and 'contract,' rather than in the old procedural categories of trespass, assumpsit, and the like."* A second aspect of the new concern with substance was a demand for *trans-substantive* procedure—that is, a common procedural system for all the different categories of substantive law. These concerns moved the legal system away from both the writ system and common-law pleading, and also allowed for some amendment of the pleadings to give litigants somewhat greater procedural flexibility.

This new American focus on substantive law had two enduring consequences for our procedural regime. First, it affected the relationship between judge and jury. Recall that one goal of the English common law system was to narrow and simplify the claims that juries could hear. Once American courts began moving away from that system, they had to confront a choice between allowing the jury more authority or devising other methods of jury control. They chose the latter course. This choice was assisted by the American preference for divided authority: Balancing power between judge and jury came naturally to a society whose Constitution divided power between the federal and state governments and among the branches of the federal government. Many of the nineteenth-century jury-control innovations have survived in the form of the distinction between fact and law, evidentiary rules that limit what the jury can see and hear, and rules of procedure that allow the judge to take some factual decisions away from the jury.

The second consequence of a changing legal focus was felt in Britain as well as the United States: increasing dissatisfaction with common-law pleading and writs, and with the separation of law and equity. New York was the first to act,

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* This is a very simplified description; we give a fuller description of the convoluted and evolving relationship between state and federal courts in Chapter 8.
abolishing its chancery court in 1846 and adopting the Field Code (the brainchild of David Dudley Field, a lawyer and reformer) in 1848. Taken together, these two developments merged law and equity, created a single form of action to replace the multiplicity of writs, and replaced common-law pleading rules with what came to be known as code pleading. 

"If the common law may be termed issue pleading, since its main purpose was the framing of an issue, code pleading may be referred to as fact pleading, in view of the great emphasis placed under the codes upon getting the facts stated."  

By the end of the nineteenth century, 27 states had adopted some version of code pleading, more had retained common-law pleading but relaxed its procedural rigidity, and even Great Britain, in the Judicature Acts of 1873 and 1875, had brought law and equity closer together and greatly relaxed and simplified pleading in both.

Code pleading, however, was far from a panacea. In some ways, it combined the worst aspects of law and equity. It made no provision for either a narrowing of the issues (as the common law had) or the discovery of evidence (as equity had) at the pretrial stage. Thus the parties might arrive at trial with multiple issues and little or no idea of what evidence would be presented. And although code pleading was simpler and more flexible than common-law pleading, it was still relatively complex, and it grew both more complex and more rigid with time. As with the common law system, the complexity and rigidity meant that small mistakes were both easy to make and likely to be fatal to one's case. The merger of law and equity in some states, moreover, deprived litigants of any alternative system of adjudication. The upshot was that by the beginning of the twentieth century, justice was almost as hard to obtain under code pleading as it had been under the old system of common law and equity.

Enter a new cadre of reformers, led by Roscoe Pound. Pound later became dean of the Harvard Law School (in 1916), but he began his crusade in 1906 when he delivered a speech to a meeting of the American Bar Association (ABA) entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." In that speech—which the ABA almost refused to publish—Pound laid out the principles that eventually came to undergird the Federal Rules of Civil Procedure. It is to the long gestation and birth of those Rules that we turn in the next section.

The Federal Rules of Civil Procedure

Pound's reform efforts focused on three related defects of the administration of justice under both code pleading and common-law pleading. First, he decried what he called the "sporting theory of justice":

The inquiry is not, What do substantive law and justice require? Instead, the inquiry is, Have the rules of the game been carried out strictly? If any material infraction is discovered . . . our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

Second, he made a plea for the kind of judicial discretion that had been available in courts of equity. He criticized what he called the "mechanical operation of legal rules," and suggested that adjudication "involves, not logic merely, but discretion." Finally, he believed that procedural rules should, in the words of one of his contemporaries, be "the 'handmaid rather than the mistress' of justice." According to Pound, "rules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such opportunity." The heart of Pound's vision, then, was very close to the original system of equity: a judge with great discretion and
control, whose goal was to do justice between the parties rather than enforce procedural rules. Ultimately, most of his vision was implemented, although it took more than 30 years.

The first change came in a backwater of American jurisprudence: the still functioning but mostly inconsequential federal equity system. (Although there was only one set of federal courts, there was still a division between cases at law and cases in equity, with different rules governing each.) Using authority that had been granted to it in the early nineteenth century, the Supreme Court promulgated a comprehensive set of Equity Rules in 1912. Because cases at law far outnumbered those in equity, the new rules had little practical effect, but they are significant as precursors of the Federal Rules of Civil Procedure.

The 1912 Equity Rules adopted virtually all of Pound’s principles. Pleading was simplified to require only a bill of complaint and an answer in most cases, and those needed only to describe the parties’ dispute in “short and plain” or “short and simple” terms. No longer tied to a single writ or claim, parties could join multiple claims or raise multiple defenses. And the Equity Rules were shot through with opportunities for the judge to exercise discretion and excuse procedural mistakes in the interest of justice. The 1912 Rules also added an important innovation that Pound had not thought of: They permitted parties to discover information from each other before trial by requesting the production of documents, answers to written questions called interrogatories, and even live testimony through depositions.

Pound, joined by others including Charles Clark (dean of the Yale Law School, later appointed to the United States Court of Appeals for the Second Circuit) and Edson Sunderland (a professor at the University of Michigan Law School), continued to advocate procedural reform. In 1934, their efforts bore fruit: Congress passed the Rules Enabling Act, which authorized the Supreme Court to promulgate one set of rules for both law and equity and directed that any such rules “shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” Congress retained the power to veto any rule. The Supreme Court immediately appointed a committee, led by Clark and Sunderland, to draft new federal rules of procedure. The committee drafted a comprehensive set of rules, which were issued by the Supreme Court without change and took effect in 1938. Thus were born the Federal Rules of Civil Procedure.

The Rules merge law and equity into a single form of action, the “civil action.” Otherwise, however, they look very similar to the 1912 Equity Rules, especially with regard to the simplicity of pleading, the availability of pretrial discovery, and the discretion of the judge. As one modern commentator has put it:

The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law. The expansive and flexible aspects of equity are all implicit in the Federal Rules. Before the rules, equity procedure and jurisprudence had applied to only a small percentage of the totality of litigation. Thus the drafters made an enormous change: in effect the tail of historic adjudication was now wagging the dog. . . .

When one looks at the disgruntlement over unwieldy cases, uncontrolled discovery, unrestrained attorney latitude, and judicial discretion, . . . the pattern is clear. These are not the complaints about the rigor and inflexibility associated with the common law, but the opposite. The symptoms sound like what one would expect from an all-equity procedural system.

To say that the Federal Rules are “all equity” is an exaggeration, as the 1938 Rules retained two important aspects of common law adjudication: the idea of a party-driven adversarial system with the judge as neutral arbiter, and the jury trial as the centerpiece of litigation. As we will see in the next two chapters, however, both of these common law holdovers sometimes sit
uncomfortably within the largely equitable system created by the Federal Rules, even as they are central to it. And both have been somewhat diluted by subsequent amendments and interpretations of the Rules.

As you go through your Civil Procedure course—and as you read the rest of this book—you should keep this history closely in mind. This book follows the lead of most Civil Procedure courses by focusing on the history and development of the Federal Rules of Civil Procedure, as well as related federal procedural doctrines. Although the Federal Rules apply only in federal courts, and each state adopts its own rules for its state courts, they have heavily influenced the rules of procedure in every state; indeed, about half of the state courts have state rules of procedure that are nearly identical to the Federal Rules. Thus, the Federal Rules provide a common language for discussing how procedural principles have intersected with procedural doctrine. The history is relevant to both; because the Federal Rules of Civil Procedure are an amalgam of common law and equity rules (although heavy on the equity), many of the problems that arose under each of those systems might be replicated under the Rules. And the very act of trying to combine two very different systems creates problems of its own. One reason the Rules have been amended many times is to repair some of the problems. Your Civil Procedure class is likely to explore how well today’s Rules navigate the pitfalls of law and equity, and whether (and how) they should be changed. It is impossible to answer those questions without an understanding of where the Rules came from.

THE PRINCIPLES OF PROCEDURE

From this history of American procedure, we can identify seven fundamental principles that together shape the structure of modern American civil procedure. From our common law heritage, we draw the adversarial system and the centrality of a trial by jury. The crucial insight from equity is that cases should not turn on procedural technicalities, but instead should be decided with an emphasis on accuracy. The drafters of the Federal Rules also had to make new choices in combining law and equity, and we are still making choices. First, equity’s strength was dispensing justice, but it was terribly slow, expensive, and inefficient. The law courts were ruthlessly efficient, but often at the cost of justice. Balancing the two requires us to explore both procedural fairness and efficiency. Procedural fairness also implicates the Due Process Clause of the United States Constitution, which requires certain minimum procedural guarantees. Second, if cases can combine multiple claims and multiple parties (as equity permitted) but still must be tried before a single jury (as law required), what principles should govern the size of the lawsuit? The primary limiting principle in our system is transactionalism. Finally, the constitutional division of authority between the state and federal governments means that we have multiple courts, multiple procedural regimes, and multiple substantive legal doctrines. The interactions among them are mediated by principles of federalism. How each of these principles undergirds, intersects with, and influences the different parts of our procedural system is the subject of the next seven chapters.