PRESSING FOR FAIRNESS IN FEDERAL CIVIL LITIGATION

THE SET OF RULES that govern litigation in the U.S. federal courts were originally promulgated in 1938 as part of an effort to move the courts away from a rigid, hyper-technical system that often entrapped the unwary toward a system that permitted litigants to resolve their disputes on their merits, unfettered by procedural obstructions. Today, many question whether the rules of litigation in the federal system remain true to that original vision. Benjamin Spencer's focus has been to examine various aspects of that system with this question in mind: Does this rule or doctrine vindicate or thwart the effort to achieve justice for litigants in each case and across the full range of cases generally? Over the span of his career, he has identified a range of procedural topics—including the reach of personal jurisdiction and the introduction of heightened pleading standards—that challenge this vision of unfettered access to the courts. By placing the spotlight on subtle developments in these areas, Spencer presses for fairness in federal civil litigation while also contributing to our broader understanding of how to think about optimal access to justice in the federal courts.

Spencer's interest in federal civil procedure began in law school, under the tutelage of Harvard Law School Professor Arthur Miller. Miller made certain that his students understood from the beginning that procedure made the key difference in most cases: "If you let me control the procedure, I will win every time," he told Spencer's class. As Spencer entered practice through summer clerkships, he quickly saw how right Miller was. "Far from top of mind were the merits of each case; what consumed the activity on both sides were procedural battles over jurisdiction, pleadings and discovery," Spencer said. He found these concepts fascinating, and seeing their importance solidified Spencer's determination to work full-time in litigation.

After graduating from law school, Spencer clerked for one year at the U.S. Court of Appeals for the D.C. Circuit and then began working as an associate in the Litigation Department at Shearman & Sterling in Washington, D.C. Spencer spent most of his first year there responding to lawsuits filed against clients of the firm, developing arguments questioning some aspect of the suits' procedural soundness, and drafting motions to dispose of those cases. His second year was spent focusing more on the discovery process, managing document reviews, responding to discovery requests, defending depositions, and assessing and asserting claims of privilege and work-product protection.

Over time, as his work continued to substantiate the notion that litigation focused primarily on pretrial procedure rather than the merits of each case, Spencer thought his time would be better spent exploring how to improve civil procedure and training the next generation of lawyers to master and deploy civil procedure in the interest of justice. He decided to enter academia.

In the initial phase of his scholarly career, Spencer focused on jurisdictional doctrine, exploring how the Supreme Court's interpretation of the constitutional requisites of personal jurisdiction affected the ability of litigants to find a court that would be able to hear their case. The Due Process Clause of the U.S. Constitution places constraints on the ability of state courts to render judgments that will be treated as binding on persons with whom those states do not have sufficient contacts. The requisite contacts can be citizenship, corporate management activity, or conduct that gave rise to the dispute, for example.

Personal jurisdiction can get tricky, however, when the defendant commits more of a "virtual" offense from one state that has harmful effects in another, such as online defamation or copyright infringement. "It is unclear what level of contacts a person must have with a state to permit it to exercise jurisdiction when the Supreme Court's doctrine is based on increasingly outdated notions of physical presence and traditional wrongs," Spencer said.

Two of his early articles directly addressed this conundrum. His article "Jurisdiction and the Internet," 2006 *U. Ill. L. Rev.* 71 (2006), confronted this issue most directly by arguing that emerging approaches to personal jurisdiction in cases involving Internet-mediated conduct were inappropriately limiting the ability of remote victims to bring suit against perpetrators in the victim's home court. For example, under the dominant approach to such cases, if a newspaper defames a person on its website, the victim would have to travel to the home of the newspaper and sue it there rather than sue the newspaper in the victim's home jurisdiction, where the defamation and harm occurred. To Spencer, this makes little sense and, more importantly, compromises the ability of victims to access courts to vindicate their rights.

The law's struggle to apply traditional jurisdictional standards to ever-changing circumstances ushered in by the Information Age revealed deeper inadequacies with personal jurisdiction doctrine. Spencer explored this deficiency and proposed an overhaul of how personal jurisdiction is determined in his article "Jurisdiction to Adjudicate: A Revised Analysis," 73 *U. Chi. L. Rev.* 617 (2006). He ultimately concluded that the notion of minimum contacts, which has traditionally served as the primary basis for establishing personal jurisdiction, should be cast aside in favor of a state interest analysis: So long as a defendant is afforded the requisite notice and the opportunity to be heard that due process demands, states may exercise jurisdiction over disputes in which their legitimate governmental interests are implicated. For example, a state's interest can be based on the residency of the defendant, the fact that the dispute arose out of an incident or transaction within the state, or that persons, property, or relationships have been impacted within the state by conduct that may have occurred elsewhere. According to Spencer, issues pertaining to the convenience and burdens on parties litigating in a given jurisdiction should be resolved by alternative procedural doctrines, such as venue and *forum non conveniens*. Moreover, as Spencer argued in "Nationwide Personal Jurisdiction for our Federal Courts," 87 *Denver L. Rev.* 325 (2010), the federal courts should not be constrained to the same extent as their host states when seeking to assert jurisdiction over litigants. After all, federal courts purport to represent the interests of the entire nation.

Spencer is also known as a leading commentator on recent developments in federal pleading standards. Pleading refers to the process of stating and presenting one's claims to the court for adjudication. The Federal Rules of Civil Procedure govern this process, and require that a plaintiff provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Although for decades this requirement was interpreted—consistent with the original spirit of the 1938 Federal Rules revolution—to require little more than a generalized articulation of the wrong alleged and the harm done, the Supreme Court in recent years reinterpreted this language to impose a more stringent

requirement of demonstrating that one's claim is "plausible" before being able to proceed any further in court. This move was initiated in the landmark case of *Bell Atlantic Corp. v. Twombly*. Spencer has explored and critiqued the new plausibility standard in a series of articles.

The first, "Plausibility Pleading," 49 *Boston Col. L. Rev.* 431 (2008), highlighted the inconsistency of the Court's new doctrine with its own precedent and with other rules of the Federal Rules of Civil Procedure. It also identified several problematic policy implications of the revision. By raising the bar for stating a claim, the Court had made it more difficult for litigants lacking access to the details that animated their claims to get into court. For example, to make an allegation of employment discrimination plausible, one must include allegations that reveal some sort of discriminatory intent, or at least that make the inference of discrimination more than speculative. It may be, though, that the victim of such discrimination lacks evidence—prior to discovery—that would support the inference of discrimination. Plausibility pleading makes surviving a motion to dismiss the complaint for failure to state a claim a much more challenging prospect.

As the Court doubled down on plausibility pleading in *Ashcroft v. Iqbal*, Spencer continued his critique in several pieces, including articles published in the *Michigan Law Review* and the *UCLA Law Review*. These articles argued the Court had indeed revised and tightened the general pleading standard—something that it and others denied—and that this new standard was adversely impacting plaintiffs with potentially legitimate claims by keeping some of their claims out of court and by making other plaintiffs endure an additional and costly battle over the sufficiency of their claims before being allowed in.

Having observed various doctrinal developments over the years emanating from the Court or via amendments to the Federal Rules, Spencer began to notice an important trend: The collection of recent procedural reforms tended to favor civil defendants and stymie plaintiffs from presenting and vindicating their claims in the federal courts. Spencer explored this thesis in his essay, "The Restrictive Ethos in Civil Procedure," 78 *George Wash. L. Rev.* 822 (2010). As opposed to the liberal ethos that pervaded the set of procedural rules crafted for the federal courts in 1938, developments since the 1970s through the present day steadily reflected a restrictive ethos—a bias against plaintiffs that combined to restrict access to federal courts. As the essay detailed, these restrictions stem not only from developments in jurisdictional and

pleading doctrine, but also from changes related to summary judgment, discovery, and class-action litigation.

Spencer delved more deeply into two of these areas in more recent articles. In "Class Actions, Heightened Commonality, and Declining Access to Justice," 93 *Boston U. L. Rev.* 441 (2013), Spencer challenged the Supreme Court's decision to decertify a large employment discrimination class by developing a more stringent requirement for class commonality than the Federal Rules support. In "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court," 79 *Fordham L. Rev.* 2005 (2011), and "Rationalizing Cost Allocation in Civil Discovery," 34 *Review of Litigation* 769 (2015), Spencer argued in favor of approaches to two important discovery issues—the punishment of spoliation and the responsibility for costs in discovery—that would support the efforts of plaintiffs to hold defendants accountable for their wrongdoing. Specifically, in "The Preservation Obligation" Spencer articulated a way that courts could respond to the culpable loss of discoverable information in a way that would deter and minimize such losses, while in "Rationalizing Cost Allocation" Spencer argued forcefully against suggestions that requesters of information in civil discovery—rather than producers—should be responsible for bearing the costs of producing such information. Given the importance of discovery to plaintiffs seeking to prove their claims, preventing the unwarranted loss of evidence and preserving the ability of plaintiffs to obtain such evidence from their adversaries without having to pay for it are important issues to keep an eye on in the debate over access to justice.

Going forward, Spencer continues to monitor developments on the pleading front through his work as an author of the pleading volumes of the renowned Wright & Miller treatise, *Federal Practice and Procedure*. He also will look back on areas of civil procedure that have claimed his attention in the past to continue advocating for procedure that is fair to litigants and provides them the best chance of obtaining justice.

But Spencer's scholarship is also starting to broaden into new spheres as a result of his prior work as a law school administrator and his current service as an officer in the U.S. Army Judge Advocate General's Corps as a reservist. Spencer remains interested in studying how we provide legal education in this country and in developing strategies for better pedagogy, a topic he treated comprehensively in his article "The Law School Critique in Historical Perspective," 69 *Wash. & Lee L. Rev.* 1949 (2012). Spencer has also pursued this interest during his four-

year tenure as chair of the Virginia State Bar's Section on the Education of Lawyers.

Spencer's service as a JAG officer has led him to develop an interest in providing better materials to support military law practitioners, which he will seek to do in a forthcoming book on military law. Once this work is complete, Spencer hopes to dedicate a portion of his scholarship to exploring some of the more thorny issues facing military lawyers. This work echoes Spencer's consistent and driving theme of improving fairness in our legal justice system, even as it moves into more specific areas of application.

EXCERPTS

THE RESTRICTIVE ETHOS IN CIVIL PROCEDURE

78 *Geo. Wash. L. Rev.* 353 (2010)

Those of us who study civil procedure are familiar with the notion that federal civil procedure under the 1938 Rules was generally characterized by a "liberal ethos," meaning that it was originally designed to promote open access to the courts and to facilitate a resolution of disputes on the merits. Most of us are also aware of the fact that the reality of procedure is not always access-promoting or fixated on merits-based resolutions as a priority. Indeed, I would say that a "restrictive ethos" prevails in procedure today, with many rules being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court. In this Essay, after discussing some of the familiar components of the liberal ethos of civil procedure, I hope to set forth some of the aspects of federal civil procedure that reflect the restrictive ethos, following up with some thoughts on whether a dialectical analysis can help us understand the nature of the relationship between civil procedure's liberal and restrictive components.

I. THE LIBERAL ETHOS

The liberal ethos in civil procedure generally refers to those aspects of federal procedure that tend to promote access and merits-based or accurate resolutions of civil disputes. That the Federal Rules were originally designed to promote access cannot be denied. The very notion of uniformity itself was an innovation designed to make the civil justice system more accessible to litigants. Also promoting the vision of open access espoused by the drafters was the introduction of simplified "notice pleading," which was designed to minimize greatly the number of cases dismissed on the pleadings. With notice pleading replacing the cumbersome and "archaic fact-pleading[, m]ore people

with legal grievances could gain entry into the system." In many respects, the commitment to access endures; for example, the current post-1993 version of Rule 11—with its safe-harbor provision, emphasis on deterrence, and allowance for innovative legal arguments—was meant to complement simplified pleading by ensuring truthful allegations without deterring litigants from asserting what some may view as tenuous claims.

The innovation of modern discovery ushered in by the rules further promoted access by enabling plaintiffs to initiate their claims without having to have full and complete information. Relatedly, delaying the test of the factual sufficiency of one's claim until after discovery is completed is supposed to give plaintiffs sufficient ability to investigate their claims under the aegis of the courts rather than prior to filing. Liberal joinder rules, as well as the class-action device, have promoted access by enabling parties with substantially related claims to prosecute together claims that they might otherwise have been unable to sustain individually.

That the Federal Rules were originally imbued with a clear preference for merits-based, accurate resolutions of disputes is also clear. Simplified pleading and broad discovery were designed to promote resolution of disputes on the substantive merits as opposed to procedural technicalities. Liberal amendment rules permit parties to cure errors or omissions by amending their pleadings to add claims, defenses, or parties as necessary. The motion for judgment as a matter of law, the motion for new trial, and the motion for relief from judgment each provide litigants with an opportunity to seek a just, accurate resolution of their cause where the conclusion of the jury seems clearly inconsistent with the truth. Judicial discretion is rooted in the concern that disputes be resolved on their merits rather than procedural technicalities, resulting in a group of civil rules that permit judges to exercise significant discretion in the interest of justice. The disinclination of courts toward default judgments further indicates the preference for merits-based judgments over those obtained through procedural technicalities.

To the above-mentioned attributes of access and accuracy I would add another value to which the Federal Rules have generally aspired: the promotion of private efficiency and inexpensiveness. Indeed, a core value embodied in much of procedural law is the promotion of the efficient and inexpensive resolution of disputes

between parties. Notice pleading permits litigants to assert claims without incurring the delay and expense that would accompany an obligation to plead detailed facts. The obligation under Rule 12 to consolidate or waive certain preliminary procedural challenges is at least intended to prevent dilatory tactics to some extent. Initial disclosures—added to the Rules in 1993—were designed to save litigants the cost and hassle of having to pry such information from their adversaries, while the compelled-discovery system in general, coupled with the American rule requiring responding parties to cover their own discovery expenses, permits plaintiffs to have formal access to relevant information from defendants without ordinarily having to cover the expense of production.

In shaping the scope of an action, the broad joinder rules are designed to permit the action to be crafted in a way that permits most related claims to be litigated together, an innovation away from the rigidity of the common-law pleading system. The compulsory-counterclaim rule is an example of not only permitting the assertion of related claims within a single action but compelling it: "The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim 'shall' be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." Of course, supplemental jurisdiction supports this liberal joinder system by allowing jurisdictionally insufficient claims to be heard in federal court on the basis of their relationship with other claims in the action. In sum, claim and party joinder have as their principal rationale the avoidance of multiple lawsuits pertaining to similar and closely related matters, something which in most instances promotes the private economic interests of litigants. We see, then, that the liberal ethos favors access to courts, resolution of disputes on their merits, and the inexpensive and timely prosecution and defense of claims.

II. THE RESTRICTIVE ETHOS

Although the values that comprise the liberal ethos—access, accuracy, and private efficiency—are familiar, they may seem quaint to the practitioner or serious student of civil procedure. Not that these values were not in view of the drafters of the Rules or do not reflect

some part of their nature today; rather, it turns out that there are additional values that animate civil procedure, albeit in a contrary manner than those of the liberal ethos. These counter-values, if you will, form what I refer to as the restrictive ethos in civil procedure.

The major counter-value within the restrictive ethos is a threshold skepticism that yields an interest in excluding or discouraging claims rather than supporting and encouraging them. The open-access approach of the Federal Rules was not a welcome development in the eyes of all observers. Many jurists, particularly after the strengthening of the damages-class device under Rule 23 and the stream of public-rights legislation in the 1960s, felt that too many meritless claims were flooding the courts: "Relatively low barriers to entry have ... generated an undesirable result—a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed, and the unscrupulous." The response was a so-called "counterrevolution" that asserted that "the underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible" and sought to use procedural reforms to "keep out the worthless, the trivial, and those litigations which ... ought not to be in the courts[.]" Specifically, as a solution to the litigation explosion and perceived abuses of discovery and the civil process in general, this group of reformers promulgated a series of rule changes and practices that sought to clamp down on frivolous filings.

In 1983, Rule 16 was amended to empower judges to manage litigation more actively during the pretrial phase and to pare off meritless claims as they saw fit. Many judges obliged, using pretrial case management techniques to expedite proceedings, impose sanctions for abusive conduct, and coax parties toward settlement. Rule 11 was amended that same year to make sanctions mandatory and to eliminate the "good-faith" standard for judging the prefiling inquiry that supports the allegations in a pleading. Changes in this and other aspects of the rule could chill some litigants from bringing meritorious claims. In fact, it is by now commonly felt that prior to the amendment to its current form in the early 1990s, Rule 11 was disproportionately used to sanction plaintiffs' counsel in civil rights actions.

The history of the imposition of heightened pleading standards to frustrate the prosecution of certain types of cases, most notably antitrust and civil rights claims, has also been well documented.

Although the Supreme Court had steadfastly rejected this practice, more recently—as a result of its decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*—the Court has signaled that its commitment to notice pleading has waned. Congress has even gotten involved; in passing the Private Securities Litigation Reform Act of 1995, it imposed heightened pleading standards on claimants asserting securities-fraud claims. Beyond stricter pleading standards, plaintiffs still face difficulty in having amendments to those pleadings relate back when they seek to change unknown defendants to identified defendants, a rule that seems to impact victims of alleged law-enforcement misconduct the most. Those claimants making it to the summary judgment stage face significant hurdles as well, particularly in light of the ease with which defendants may raise such challenges in the wake of the *Celotex* trilogy of cases. Indeed, if the amendments to Rule 56 currently under consideration take effect in their current form, plaintiffs may face even more difficulty and expense in resisting the termination of their case on summary judgment.

On the class-action front, plaintiffs have faced challenging class-certification standards for classes seeking primarily money damages. For example, Rule 23(b)(3) requires that common questions of law or fact predominate over questions affecting only individual class members and multistate classes requiring the application of disparate state legal rules typically will not pass that test. Further, the costs of proceeding as a class seeking money damages may at times be prohibitive given the plaintiffs' obligation to pay for notice to class members. That federal class-certification standards are stringent has been recognized by Congress, which cited those strict standards as a primary rationale for moving more putative classes from state into federal court through the Class Action Fairness Act passed in 2005. Ultimately, a restrictive interpretation of class-certification standards tends to preclude classes from proceeding to a resolution of their claims on the merits.

Certainly, efforts to constrain discovery, most notably through amending Rule 26 to limit the scope of discovery to material related to claims or defenses in the action rather than the subject matter of the action, reflect a desire to discourage "fishing expeditions" that might yield additional claims and to protect litigants—mainly defendants—against the high costs associated with complex discovery. These efforts were spurred in part by longstanding concerns about

"predatory discovery" or "discovery abuse"—the perception that plaintiffs were using their ability to impose discovery costs on their opponents as a means of coercing them into early settlements. Although the Supreme Court at one time seemed to endorse the idea that "fishing expeditions" were allowed under the discovery rules, lower courts and even the Supreme Court itself seem to have settled on the contrary view. The new electronic-discovery rules, which permit producing parties to withhold information that is not reasonably accessible and allow the sharing of costs associated with burdensome production, reflect a prioritization of cost control over the interests of accurate resolution of disputes.

Finally, the restrictive ethos finds a voice in jurisdictional rules and doctrines. Personal jurisdiction doctrine seems tilted against plaintiffs given its excessive concern with convenience to defendants and tendency to preclude plaintiffs from bringing cases against out-of-state defendants in the plaintiffs' home state where they may have been harmed, particularly in the Internet context. Aspects of federal subject-matter jurisdiction are access-restrictive as well. Although diversity jurisdiction in some ways has expanded (such as, in a back-handed way, via the Class Action Fairness Act or the corporate-citizenship rule), the amount-in-controversy requirement continues to be increased periodically to exclude smaller claims from federal court. Additionally, the doors of the federal courts are closed completely to those seeking a federal forum for the enforcement of child- or spousal-support obligations even though such disputes otherwise might qualify for diversity jurisdiction. It is also worth noting that appellate-court jurisdiction was recently restricted by treating a statutory time limit for appeal as jurisdictional, preventing a plaintiff who had relied on a district-court extension beyond the time limit from having his appeal heard.

In sum, from this cursory survey of contemporary civil procedure and its major pressure points we can see that a collection of procedural rules and reforms reflect a restrictive ethos, characterized by a desire to discourage certain claims and to keep systemic litigation costs under control.

III. RESOLVING THE TENSION: A DIALECTICAL ANALYSIS

As we have seen, there are two sides to civil procedure. The first is access-promoting and favors resolution of disputes on the merits. The other is more restrictive and cost-conscious, creating various doctrines that frustrate the assertion and prosecution of potentially meritorious claims. In other words, much of procedure is expressly directed not at the traditional goal of facilitating accurate outcomes, but rather is designed and applied to frustrate or at least subordinate accuracy in certain contexts where efficiency of some sort or the interests of certain litigants are at stake.

These two sides of procedure coexist, although their opposing tendencies create a tension that cries for resolution. Resolution of this tension may be found in realizing that the liberal ethos and the restrictive ethos are dialectically related. That is, the basic thesis of procedure, its liberal ethos, yields its antithesis, the restrictive ethos, and the two can be reconciled through a synthesis that helps us understand how these seemingly contradictory attitudes cooperate toward a unified, more fundamental goal.

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Given the simultaneous presence of a dominant restrictive ethos and the visible vestiges of the liberal ethos within civil procedure, I would describe the synthesis of the two not merely as a checks-and-balances relationship. Rather, the restrictive ethos enables the civil justice system to survive by reducing the number of disfavored actions that burden the system while the more popularly known liberal ethos takes on the role of generating and sustaining the legitimacy of, and faith in, the civil justice system in the eyes of the public at large. In other words, procedure's central thesis (the liberal ethos) and antithesis (the restrictive ethos) can be synthesized into a concept I refer to as ordered dominance: procedure's overarching, unified goal is to facilitate and validate the substantive outcomes desired by society's dominant interests; procedure's veneer of fairness and neutrality maintains support for the system while its restrictive doctrines weed out disfavored actions asserted by members of social outgroups and ensure desired results.

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The idea of ordered dominance that I have described is certainly an oversimplification and likely fails to describe the whole of civil procedure accurately. However, it cannot be gainsaid that procedure

today is recognized by all the relevant players—the rulemakers, the judiciary, members of Congress, interested lobbyists—as being vitally connected with substantive policy interests and that some of those same players have consciously tinkered with (or manipulated) procedural rules or doctrines with a clear understanding of their likely impact on certain substantive policy ends. Given that fact, it does not take much more investigation to reach the ordered-dominance thesis; none of the aforementioned players represent members of societal out-groups but rather are drawn from or represent privileged elites. Although some among this group may fight for the interests of the out-groups when waging procedural battles, the restrictive regulatory and doctrinal outputs of procedural reform do not reveal much evidence in support of such a notion. To the contrary, modern procedural reforms, either through rulemaking, congressional intervention, or judicial interpretation, have bent towards the restrictive ethos, which undeniably has favored society's dominant interests as defined above.

CONCLUSION

Many may chafe at the idea of ordered dominance, given its seeming inconsistency with our traditional rhetoric of fair play, due process, and a day in court. Indeed, members of societal out-groups who are disadvantaged by the contemporary procedural regime may find the suggestion that civil procedure's restrictive ethos dominates its advertised liberal components particularly disheartening. But despondency is not the proper response to developing an understanding of the regime of ordered dominance revealed above. To the contrary, enlightenment is empowering; with a clear view of procedure one can articulate and advocate for appropriate reforms or, more likely, resist those reforms that are likely to further entrench the regime of ordered dominance.

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CLASS ACTIONS, HEIGHTENED COMMONALITY, AND DECLINING ACCESS TO JUSTICE

93 *B.U. L. Rev.* 441 (2013)

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III. HEIGHTENED COMMONALITY AND THE RESTRICTIVE ETHOS IN CIVIL PROCEDURE

In a previous article, I described what I call the "restrictive ethos" in civil procedure—to be contrasted with the "liberal ethos" of the Progressive-era civil rulemakers—as the contemporary theme underlying certain procedural doctrines and rule interpretations that disserve access to civil justice. Specifically, restrictive procedural doctrines are those reflective of a bias against claimants from societal outgroups asserting disfavored claims against members of the dominant class. This bias manifests itself in a threshold skepticism that raises the bar for entry into the judicial system in these cases, frustrating the ability of such claimants to reach an authoritative resolution of their claims on the merits. In *Walmart v. Dukes* we have a new specimen of this phenomenon that both buttresses and helps to further explicate the restrictiveness thesis. It does so in three ways.

A. THRESHOLD SKEPTICISM

The *Dukes* majority indicated that a "rigorous" analysis of the evidence supporting commonality was necessary, with the employment discrimination context demanding "significant proof" of a general policy of discrimination. By endorsing a "rigorous" probe into the proofs offered by the plaintiffs of their collective claims, the *Dukes* majority demonstrated threshold skepticism, using its prejudgments about the merits as a guide to its resolution of the procedural question before it. Threshold skepticism demands that before a court permits defendants to be subjected to the litigation process itself—which is generally derided as being so expensive as to coerce undeserved settlements—claimants must demonstrate, up front, that their claims have merit. The majority exhibited such skepticism in *Dukes* by

assessing the value and weight of the evidence presented by the class members regarding their discrimination claims and found the evidence completely wanting: "Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question."

The problem with this approach is that it seems to run counter to the Court's previous pronouncement in *Eisen v. Carlisle & Jacquelin* that "nothing in either the language or history of Rule 23 … gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." Further, no matter how "rigorous" such merits reviews are purported to be, in truth they are cursory quick peeks that not only fail to measure up to the thorough consideration of the merits that district courts can provide, but they also improperly displace them. Even in the class context, appellate courts are not in the position to provide de novo review of factual evidence, giving their own assessments without regard to the findings of the district court. This is especially so at the certification stage, where an appellate court may cherry-pick facts from an underdeveloped factual record in support of its commonality assessment. Though an appellate-level merits review is inevitably less thorough and sound than that which can be provided by the district court, the *Dukes* majority engaged in what it considered to be a "rigorous" search for "significant proof" of a general policy of discrimination. That meant a heightened evidentiary standard was being imposed in the context of a preliminary, yet appellate, review of the facts, something that was unfair to the plaintiffs. To the extent the *Dukes* majority is endorsing a rigorous review of factual questions that otherwise would warrant jury treatment, this approach echoes the jury-displacing effects of the Court's restrictive moves in the areas of summary judgment and pleading doctrine. In making this endorsement, the *Dukes* majority acknowledged that a likely post-certification settlement will preempt most jury trials in the class action context. In any event, merely requiring such proof at the certification stage raises the cost of certification and diminishes the chance of successful certification.

What is more fundamentally wrong with this threshold skepticism is its infusion into the commonality analysis. A court may rightfully be skeptical of class certification and take all necessary steps to ensure that claims have merit before permitting them to proceed, provided that the procedural hurdle at issue makes the merits relevant. But resting such skepticism on the back of a requirement as simple and straightforward as one that asks only for "questions of law or fact common to the class" is going too far. And that is the point: Threshold skepticism is not objectionable per se; what makes it illegitimate is when innocent provisions are conscripted into service of its ends. As the Court at another time concluded, it would be better to use the process for formally amending the rule than to infuse it with an alien reading to suit its members' policy prerogatives, even if such policy is to make sure that the consequential decision of permitting a class to go forward is only done when there is some assurance that the plaintiffs' claims are meritorious. In the end, what is troubling about this kind of threshold skepticism and the restrictive ethos in general is that it operates *sub terra*. Rules are not formally amended so that movement in the desired direction can be debated and vetted, transparent and democratic; rather, rules are contorted to mean what they do not say to dictate a result desired by their interpreters, not their drafters. Two plus two equals five.

B. DISFAVORED ACTIONS

The second way in which *Dukes* exemplifies the restrictive ethos in civil procedure is that it heightens entry standards in the context of discrimination claims, a type of claim that historically has been treated as disfavored, particularly when advanced by members of outgroups. From motions for sanctions under Rule 11, to summary judgment motions, to pleading standards, employment discrimination claims have faced a gauntlet of procedural hurdles that otherwise do not apply to civil actions. Why are discrimination claims disfavored? At bottom, it appears that jurists who disfavor these claims do so because they do not believe in them. They seem to espouse a deep suspicion of, or at least a doubt concerning, claims of mistreatment tied to a person's race or gender, believing that the vast majority of people do not discriminate and instead treat each other fairly. Explicit evidence of racial animus is demanded before this presumption can be overcome. This is a Pollyannish, counter-factual worldview but appears to be widely held. For example, Chief Justice John Roberts's remark that "[t]he way to stop discrimination on the basis

of race is to stop discriminating on the basis of race" evinces his oblivity to the existence of covert or unintentional discrimination that is preconscious, mediated by some other trait, or derivative of classifications or assumptions that are neither gender- nor race-based.

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By ratcheting up commonality to require central common questions and then defining what that question must be in the employment-discrimination context, the *Dukes* majority was able to operationalize its doubt-of-group-bias perspective under the guise of the common question requirement and forestall the prosecution of these disfavored claims.

C. ANTI-CLAIMANT BIAS AND OUTGROUPS AS CLASS CLAIMANTS

A final but lesser point related to the treatment of disfavored claims is that *Dukes* seems to confirm that component of the restrictiveness thesis that posits a bias against the types of plaintiffs who typically bring such claims: members of societal outgroups. Members of societal outgroups are "those outside the political and cultural mainstream, particularly those challenging accepted legal principles and social norms. ... [T]hose raising difficult and often tenuous claims that demand the reordering of established political, economic and social arrangements, that is, those at the system's and society's margins." The restrictive ethos thesis suggests that when plaintiffs from such groups are pitted against societal insiders, procedure is interpreted in ways that thwart the plaintiffs' efforts. That is fairly descriptive of what happened in *Dukes*, which involved female employees complaining of discrimination in pay and promotion decisions by managerial personnel of Wal-Mart, the largest corporation in the world. Women have historically been discriminated against in the employment context and continue to endure pay disparities and glass ceilings. Thus, in *Dukes*, when a massive group of working-class women presented quite plausible support for the idea that gender discrimination permeates the pay and promotion practices of a company the size of Wal-Mart, a majority of the Court found a way to thwart their claims. The Court did so not by confronting them on the merits, but by using an adulteration of the common question requirement for

the task. And that is what characterizes the restrictive ethos: insider bias against claimants from societal outgroups feeds into interpreting procedure to raise the standards for entry in a way that aborts outsider claims ab initio. Certainly, this point regarding anti-claimant bias could be rightly characterized as an intuition; the point here, however, is to highlight *Dukes* as an additional data point in the ongoing analysis of whether such a bias indeed exists. Time will tell, but for now suffice it to say that *Dukes* fits this aspect of the restrictiveness critique.

...

Dukes is merely the latest in a series of cases moving civil procedure in a restrictive direction. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Court used a heightened personal jurisdiction doctrine to protect a foreign corporate defendant against a suit by an individual plaintiff who had been severely injured by a product of the defendant shipped to the victim's state. The Court did so despite the fact that the defendant intentionally shipped its product—a shearing machine for the production of scrap metal—to its distributor in Ohio for sale across the entire United States, including New Jersey, the largest market for scrap metal. *Iqbal*'s and *Twombly*'s respective heightenings of the general pleading standard under Rule 8 has already been mentioned and is treated more extensively elsewhere, as are other recent moves toward restrictive procedure. Only time will tell whether these cases portend a permanent shift away from access to justice. In any event, heightened commonality nicks away at access in ways that serve to provide some confirmation of the restrictive ethos thesis and move us further in the anti-access direction.

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BIBLIOGRAPHY

BOOKS

Military Law: A Guide to the Law Governing U.S. Armed Forces (West Academic, forthcoming 2017).

5-5C *Federal Practice & Procedure* (supplement and revision author) (Thomson Reuters, 2016-date).

Civil Procedure: A Contemporary Approach (Thomson West, 2007; 2d ed. 2008; 3d ed. 2011; West Academic, 4th ed. 2014).

Acing Civil Procedure: A Checklist Approach to Solving Procedural Problems (Thomson West, 2005; 2d ed. 2008; 3d ed. 2011; West Academic, 4th ed. 2014).

ARTICLES AND OTHER PUBLICATIONS

"The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure," 15 *Nev. L.J.* 1113 (2015).

"Rationalizing Cost Allocation in Civil Discovery," 34 *Rev. Litig.* 769 (2015).

"Supporting and Promoting Scholarly Life in Turbulent Times," 31 *Touro L. Rev.* 25 (2014).

"Class Actions, Heightened Commonality, and Declining Access to Justice," 93 *B.U. L. Rev.* 441 (2013).

"Pleading and Access to Justice: A Response to *Twiqbal* Apologists," 60 *UCLA L. Rev.* 1710 (2013).

"The Law School Critique in Historical Perspective," 69 *Wash. & Lee L. Rev.* 1949 (2012).

"The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis," 46 *Ga. L. Rev.* 1 (2011).

"The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court," 79 *Fordham L. Rev.* 2005 (2011).

"*Iqbal* and the Slide Toward Restrictive Procedure," 14 *Lewis & Clark L. Rev.* 185 (2010).

"Nationwide Personal Jurisdiction for Our Federal Courts," 87 *Denv. U. L. Rev.* 325 (2010).

"Pleading in State Courts after *Twombly* and *Iqbal*," in *Back to the Future: Pleading Again in the Age of Dickens?* (Pound Civil Justice Institute Forum for State Appellate Court Judges, 2010).

"The Restrictive Ethos in Civil Procedure," 78 *Geo. Wash. L. Rev.* 353 (2010).

"Understanding Pleading Doctrine," 108 *Mich. L. Rev.* 1 (2009).

"Plausibility Pleading," 49 *B.C. L. Rev.* 431 (2008).

"Pleading Civil Rights Claims in the Post-*Conley* Era," 52 *How. L.J.* 99 (2008).

"Anti-Federalist Procedure," 64 *Wash. & Lee L. Rev.* 233 (2007).

"Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence," 79 *S. Cal. L. Rev.* 1085 (2006).

"Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts," 2006 *U. Ill. L. Rev.* 71.

"Jurisdiction to Adjudicate: A Revised Analysis," 73 *U. Chi. L. Rev.* 617 (2006).

"*Mistretta v. United States*," in Paul Finkelman, ed., *The Encyclopedia of American Civil Liberties* 1023 (Routledge, 2006).

"Obtaining Mareva-Type Provisional Relief in New York State and Federal Courts" (with Jordan Greenblatt), in Steven Gee, *Commercial Injunctions* (Sweet & Maxwell, 5th ed. 2004).

"Terminating *Calder*: 'Effects' Based Jurisdiction in the Ninth Circuit after *Schwarzenegger v. Fred Martin Motor Co.*," 26 *Whittier L. Rev.* 197 (2004).

Street Drinking in Camberwell: A Preliminary Assessment (London School of Economics and South Bank University, 2003).

Note, "Antitrust and the Information Age: Section 2 Monopolization Analyses in the New Economy," 114 *Harv. L. Rev.* 1623 (2001).

Policing Diversity: Lessons From Lambeth (with Michael Hough) (British Home Office, Policing and Reducing Crime Unit, Paper 121, 2000).

Recent Case, "*Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999)," 113 *Harv. L. Rev.* 627 (1999).