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PROCEDURE, POLITICS, PREDICTION, AND PROFESSORS:
A RESPONSE TO PROFESSORS BURBANK AND PURCELL

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It is a daunting assignment to attempt to add something of merit to the work of Stephen Burbank and Edward Purcell, two of the leading scholars of American civil procedure and procedural reform. Their papers,¹ though, do suggest four themes to me, which I will comment upon briefly: (1) the relationship of substantive and procedural law; (2) the place of politics in procedural reform; (3) the difficulty of reliably predicting consequences of procedural reform; and (4) challenges that the Class Action Fairness Act of 2005 (CAFA) and similar reforms present for law professors, both in their roles as researchers and writers, and as teachers of would-be lawyers.

I. THE RELATIONSHIP OF SUBSTANTIVE AND PROCEDURAL LAW

According to Professors Burbank and Purcell, CAFA demonstrates how that which is labeled procedural law impacts substantive rights. By way of comparison, some procedural reformers of the early twentieth century saw the relationship of procedural and substantive law quite differently. For instance, Thomas Shelton, one of the early and major proponents of the Rules Enabling Act of 1934, which authorized the Supreme Court to promulgate uniform federal rules of civil procedure, spoke of creating procedures that would step aside and let the merits of cases pass through unscathed.² He analogized procedure to a clean pipe, unclogged artery, clear viaduct, or bridge that channels substantive law without change.³ This may be an admirable

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¹ See Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

² See Janice Toran, Essay, *'Tis a Gift To Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 374-75 (1990).

³ *Id.* For a more general discussion of the tension between procedure and substance, see STEPHEN N. SUBRIN & MARGARET Y.K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 292 (2006), and Stephen N. Subrin, *How Equity Conquered*

comparison, but it is an unrealistic one. Can we continue to pretend that the rules of pleading, discovery, summary judgment, or, as we have heard at this Symposium, jurisdiction, do not have an important bearing on substantive results, whether or not neutrality is attempted? It is not easy to find an accurate analogy. That is because many procedures, regardless of the motives behind their adoption, inevitably influence who brings suits, the value of settlement, and often the results at trial or by forced termination before trial.

One problem is that metaphor does not capture the complexity and subtlety of what occurs in litigation and during the interplay of substance and process, and through the unavoidable interaction with many other variables. The litigation process includes an extremely complex interplay of laws attempting to influence prelitigation behavior; procedural rules and statutes, which often have their own independent and competing goals (such as efficiency and community participation); parties who decide to sue; evidence law (with its many policy compromises in excluding relevant evidence); facts of the case (known, distorted, and unknown); quality of lawyers; luck of the draw of jurors and judges; the education, experience, skills, and values of judges; local culture; strategic choices made by lawyers and their clients; and, undoubtedly, many other variables of which we may be only dimly aware. This means, of course, that CAFA will impact results, and will interact with the variables I have listed in subtle and not-so-subtle ways.

One implication of the impact of many, if not most, procedural rules on substantive results is that the Rules Enabling Act, which mandates that the procedural rules promulgated pursuant thereto “not abridge, enlarge or modify any substantive right,”⁴ looks even more baffling today.⁵ Many provisions of the Federal Rules that we assume are procedural—pleading, discovery, and summary judgment rules for instance—do in fact “abridge, enlarge or modify . . . substantive right[s]” in the sense that they materially affect who wins and loses. We are now so aware of the “predictable and identifiable” effect on primary rights—Professor Burbank’s brilliant attempt at finding a dividing line embedded in the Act’s history⁶—of such matters as plead-

Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 962-65 (1987) (describing the views of Charles Clark).

⁴ 28 U.S.C. § 2072(b) (2000).

⁵ For the history of the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

⁶ *Id.* at 1128.

ing requirements, Rule 11, the amount of discovery, and summary judgment rules (especially when combined with the impact of *Daubert*⁷), that much procedure looks quite substantive in application. One way around this dilemma is to let the legislature make procedural rules. David Dudley Field⁸ and Senator Thomas Walsh⁹ (who fought the Rules Enabling Act) thought this appropriate in a democracy. But CAFA does not give one much confidence in Congress as a careful and balanced enactor of procedural law.

II. POLITICS AND PROCEDURE

A second implication of Professors Burbank's and Purcell's papers is that issues of allocation of power, as well as politics designed to achieve shifts in power, have played and continue to play a significant role in what is called procedural reform. Fights over diversity jurisdiction, removal, and vertical choice of law issues frequently seem to have had a political component, while at the same time the advocates spoke of federalism and fairness.¹⁰ The passage of the Rules Enabling Act was the result of over three decades of dogged political fights, which until the end of the battle had Democrats and Republicans lined up on opposite sides.¹¹ There was intense disagreement as to whether what was perceived by many as a very conservative, pro-business Supreme Court was the appropriate forum for procedural rulemaking.

But I think it is important to realize that the picture Professors Burbank and Purcell have painted does not necessarily show politics as usual if we compare it with other procedural reform efforts. It is true, as Professor Purcell so skillfully displayed, that in the debates over procedural reform—in this case, debates about diversity jurisdiction—it is not unusual for both sides to talk about public values (such

⁷ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁸ See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988) (examining the evolution of the Field Code).

⁹ Subrin, *supra* note 3, at 996 (describing Senator Thomas Walsh's arguments against the Rules Enabling Act and uniform federal rules).

¹⁰ Both papers cite to Professor Purcell's superb work on histories, EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000), and EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* (1992).

¹¹ See Burbank, *supra* note 5, at 1081, 1095-98 (discussing the eventual passage of the Rules Enabling Act); Subrin, *supra* note 3, at 955, 969, 998 (same).

as fairness and federalism) while really seeking partisan advantage.¹² It is also true, as Professor Burbank demonstrated, that a fair-minded legislator might in fact think that there were benign, rational, nonpartisan reasons for supporting a federal statute that would allow class actions primarily involving interstate parties and nationwide class members to be brought or removed to federal court, and for trying to solve the problem of multiple overlapping class actions through removal to federal court.¹³

I think there is a troubling difference in degree, and maybe in kind, however, in the CAFA experience when compared to other reform efforts I have studied. David Dudley Field, while at the time representing corporate giants, genuinely believed in Jeffersonian ideals and was passionately concerned about individual freedoms and the rights of others outside of his socioeconomic class.¹⁴ As one law professor pointed out, Field believed in and worked for “scientific law reforms, international peace, feminism, and abolition of slavery.”¹⁵ Turning to the twentieth century, perhaps the two most influential procedural reforms have been the Federal Rules of Civil Procedure and the movement toward mediation. In each case, conservatives and liberals, Republicans and Democrats, and plaintiffs’ and defendants’ lawyers found common ground.¹⁶ Moreover, in both developments there was general agreement between the right and the left as to the nature and contours of the problems to be solved and the direction the solutions should take.¹⁷ So far as I have been able to determine, the drafters of the original Federal Rules did not know whether their new product would help plaintiffs or defendants more, and I think the same can be said of mediation, and, for that matter, the Field Code.

¹² See Purcell, *supra* note 1, at 1860 (“Efforts to address troublesome legal problems blended with efforts to secure benefits for favored interests, and efforts to serve accepted public values blurred with efforts to shape those values into weapons of partisan advantage.”).

¹³ Burbank, *supra* note 1, at 1525-36.

¹⁴ Subrin, *supra* note 8, at 319-27.

¹⁵ Peggy Rabkin, *The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and Its Contribution to the Passage of the Early Married Women’s Property Acts*, 24 BUFF. L. REV. 683, 714 (1975).

¹⁶ See SUBRIN & WOO, *supra* note 3, at 216-18, 224-28 (discussing Alternative Dispute Resolution and mediation); Subrin, *supra* note 3, at 961-73 (discussing the Rules Enabling Act and the Federal Rules of Civil Procedure).

¹⁷ Subrin, *supra* note 3, at 961-73.

In the case of the drafting of the 1966 amendments to the federal class action rule, the then-reporter, Ben Kaplan, told us the following:

[We knew the new rule] would apply particularly in certain substantive fields such as securities fraud; and, with no great flight of imagination, one might predict that the working of the rule must bring about changes of substance—as it has in fact done in the very fraud field, to cite one instance. To go further afield, there was a sense in which the amended rule was not neutral: it did not escape attention at the time that it would open the way to the assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants.¹⁸

And, of course, the Advisory Committee Note to the amended Rule 23(b)(2) states, “Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”¹⁹ Presumably this is a result they wanted. But we should remember that there was a time in our country when trying to give procedural help to the disadvantaged was thought to be a public good and when the federal courts were thought to provide a level playing field for those who had been systematically discriminated against in the past, the poor, and individual consumers attempting to find justice in suits against corporations.

The movement that led to the adoption of CAFA strikes me as more like the movement toward binding arbitration agreements. One side—business—is quite overtly trying to gain an advantage in achieving the results it wants by forcing cases to the forum of its choice. In studying the drafting of the Federal Rules, I was impressed by the extent to which the Chairman, William Dewitt Mitchell, a Republican who had been Solicitor General under President Coolidge and Attorney General under President Hoover, quite consistently tried to be fair, and looked out for the interests of the public at large.²⁰ That bal-

¹⁸ Benjamin Kaplan, Commentary, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126-27 (1989).

¹⁹ FED. R. CIV. P. 23(b)(2) advisory committee’s note, reprinted in 39 F.R.D. 69, 102 (1966).

²⁰ Some examples include Chairman Mitchell seeking balance in handling discovery rules, protecting the right to jury trial, and denying judges the power to strike out issues without a full record and with no right of appeal. See Subrin, *supra* note 3, at 972 n.374, 978-79.

ance was apparently lacking in the deliberations—lobbying probably being the more accurate term—that led to CAFA.²¹

As a result, in the examples Professor Burbank has presented, some provisions of CAFA are exemplary of overreaching and blatant attacks on federalism values. By treating corporate defendants as citizens only of their place of incorporation and principal place of business, even when they do substantial business in the forum state from which the alleged liability arises, and by letting one defendant remove a case against even a citizen of the forum state, cases of an almost totally intrastate nature will end up in federal court. The provisions that exempt cases from mandatory remand—when there has been a previous class or individual action in state court on the same or similar factual allegations against any of the defendants during the previous three years—will have the same result: the elimination from state court of what are quite legitimate cases involving mostly state activity to which that state’s law should be applied. Similar considerations for discretionary remand may keep what is largely an intrastate case in federal court. Moreover, that plaintiff and defendant lawyers can together decide to make deals in state court without the protections to class members that CAFA purported to provide is another example of the cynicism and hypocrisy underlying what is called a “fairness act,” an example of bad drafting, or a compromise that does not deliver on purported goals.

III. UNINTENDED CONSEQUENCES AND ACTIONS CAUSING REACTIONS

I learned to be a trial lawyer from a senior partner who frequently commented, often in giving an extension of time to the opposite side or cooperating in exchanging evidence, that “it is a long road that doesn’t turn.” Overreaching through time can have unexpected consequences. I am not at all certain that most federal judges, regardless of political background, will fail to certify as class actions cases that should, in fairness to the litigants and adherence to the rules, be handled as class actions. How many federal judges can each of us name who were appointed by Republican Presidents and ended up rather consistently trying to protect the interests of minority groups and the have-nots? Who were the federal judges who, notwithstanding their

²¹ I realize that opponents of CAFA were able to achieve some concessions, such as increasing the amount needed from \$2 million to \$5 million, and demanding or allowing remand under some circumstances. *See* 151 CONG. REC. S1233 (2005); 151 CONG. REC. S1166-67 (2005) (statement of Sen. Feinstein).

prior politics and class, and threats to their lives, courageously attempted to integrate our nation's schools? The empirical evidence already pointing in the direction of similarity in state and federal court treatment of class actions may not be perfect, but it does suggest that I might be right.²² Many, if not most, federal judges will in fact try to interject fairness into CAFA.

Moreover, the composition of the federal courts, as well as the state courts, changes over time. During the four decades I have taught civil procedure, the federal courts have gone from the preferred courts of civil rights and consumer plaintiffs to the opposite. I would not be surprised to see this change once again during the teaching lives of my younger colleagues. And, as Professor Burbank has pointed out, a Congress more receptive to balance could legislate amendments to CAFA and the Anti-Injunction Act²³ that would bring our laws more in line with the expressed goals of CAFA.²⁴

Both of our authors have alluded to the phenomenon of unintended consequences. Professor Purcell points out that *Erie*,²⁵ which tried to blunt the effect that pro-business *Swift v. Tyson*²⁶ federal common law had on accident cases, ended up being used to make it difficult to find one state's tort doctrine to apply to cases with multistate plaintiffs and multistate transactions. Consequently, *Erie* makes it difficult or impossible in some cases for plaintiffs to achieve class action advantages.²⁷ Professor Burbank points out that the noncertification of potential class actions may result in single plaintiffs or joined plaintiffs under state or federal non-class action joinder doctrine (e.g., Rule 20) or multiple class actions, each of an intrastate nature, and all may be referred to one judge for pretrial activity under the Multidistrict Litigation statute.²⁸ The vast majority of these cases, like all cases, settle. Such settlements, facilitated, encouraged, or cajoled by a fed-

²² See THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS 21 fig.7 (2007), available at http://www.uscourts.gov/rules/CAFA_Third_Interim.pdf (finding a marked increase in diversity class actions in federal court); see also Burbank, *supra* note 1, at 1458 n.72 (noting potential flaws in the study).

²³ 28 U.S.C. § 2283 (2000).

²⁴ Burbank, *supra* note 1, at 1543.

²⁵ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

²⁶ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. at 79.

²⁷ Purcell, *supra* note 1, at 1925-26.

²⁸ 28 U.S.C. § 1407 (2000); see also Burbank, *supra* note 1, at 1510-11.

eral court judge, may end up creating the pressure on defendants to settle that CAFA was supposed to discourage.²⁹

We should not underestimate the resources, imagination, and ability of the plaintiffs' bar. Why won't plaintiffs' counsel seek out federal forums that seem more receptive to class actions? CAFA does not change geographic forum shopping for either state or federal courts. In cases of injury with substantial damages allegedly caused by the same activity of one or more defendants—the opposite of negative value cases—plaintiffs' lawyers with resources will cooperate and find ways ultimately to win substantial verdicts or to force a broad settlement without the need for class actions.³⁰ In negative value cases, the civil lawsuit by big time tort lawyers is not the only game in town. There are now large numbers of law school clinics, as well as backup centers, like the National Consumer Law Center, that presumably do not rely on large fees. They can attempt, through lawsuits or legislation, to reach untoward corporate activity. Moreover, there is also the potential for administrative agencies, state and federal, and attorneys general, state and federal, to police behavior in lieu of, or in addition to, the activity of private civil lawyers. Investigative reporting and bad publicity for those engaging in harmful behavior can also be powerful disincentives for that behavior. The fact that we did not buy toys made in China this holiday season is not, to the best of my knowledge, the result of civil lawsuits.

IV. OUR ROLES AS LAW PROFESSORS

Our awareness of the inevitable interplay of substantive and procedural law raises important questions about how we teach law and whom we hire to do so. Treating civil procedure as a separate course helps students learn procedural doctrine, which is difficult enough to learn without simultaneously trying to master, say, torts or securities law. And concentrating on civil procedure as scholars helps professors to concentrate on the intricacies of procedural doctrine, as well as more global interdisciplinary procedural issues. I suspect that most of the professors involved with this Symposium also frequently point out to their students how procedure impacts substantive results.³¹

²⁹ *Id.* at 1537-39.

³⁰ The Vioxx experience is a telling example. See Alex Berenson, *Merck Agrees To Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES, Nov. 9, 2007, <http://www.nytimes.com/2007/11/09/business/09merck.html>.

³¹ For a recent example, see *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

I wonder, though, whether law professors could do a better job training students for the practice of law by spending more time on how procedure operates in a few actual cases, so that the students learn not to see procedure in a vacuum, but rather to integrate in their minds the interplay of substance, process, and the practicalities involved in litigation. I suspect that the apprentice method of education, notwithstanding its burdens, in some ways did a better job of preparing one to be a lawyer. And I am pretty sure that many practitioners know more about how procedure actually works than many of the civil procedure professors in this Symposium (myself included), because they are integrating substance and procedure on a daily basis. Law schools could learn from how medical educators utilize practicing doctors in more creative ways to achieve the benefits gained by employing those with extensive experience, both as fulltime and part-time professors.

CAFA also raises the question of what a law professor should do when faced with what purports to be a reform or change that she thinks is flawed or, for that matter, finds salutary. This Symposium is one sensible response. We can find out from each other and from other experts, be they empiricists, legislators, or judges, as much as we can about the new law, its historical background, its likely results, its ambiguities, and its strengths and weaknesses. As Professor Burbank has demonstrated in the case of Rule 11 and summary judgment,³² even those of us with nonscientific or nonstatistical educational backgrounds can learn to grapple with numbers. The results of CAFA, to the extent they can be measured, may end up a good deal less negative—or in any event different—from what many predict. When professors think that judicial opinions, rules, or statutes are unsound—or even unconstitutional³³—of course they should bring this to the public's attention. I would hope that law professors resist the temptations

³² AM. JUDICATURE SOC'Y, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (Stephen B. Burbank rep., 1989); Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571 (2004); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

³³ With respect to CAFA, the work of Professor Floyd comes to mind. The constitutional tension, both before and after CAFA, is displayed in C. Douglas Floyd, *The Inadequacy of the Interstate Commerce Justification for the Class Action Fairness Act of 2005*, 55 EMORY L.J. 487 (2006), and C. Douglas Floyd, *The Limits of Minimal Diversity*, 55 HASTINGS L.J. 613 (2004).

to their own sense of fairness even when they are paid to be consultants or witnesses.

One Boston law professor who teaches civil procedure complained to me recently that some students, in their evaluations of his teaching, say that he is too political. I think that every law professor has to examine what “being too political” means. Much of my life as a civil procedure teacher has been spent studying the socio-politico-economic forces that have influenced procedural reform. Such study animates my teaching and energizes me. I have too much respect for my students not to tell them what my research, along with the research of Professors Purcell and Burbank and others, has taught me and not to share with them my own prejudices, so that they can take them into account in making their own judgments. I think professors have an obligation to give opposing arguments, but that should not mean they must pretend as though they do not have their own views, “political” or not. I disliked the portion of my own law school education that pretended that laws and judges were neutral (while also condemning juries for their nonneutrality, I might add). No one said one word to me about the politics behind the Rules Enabling Act. That portion of my legal education was unsound in my view. It did, however, give me something to rebel against.

I cannot resist a word about the messages, hidden and otherwise, that we give our best students about where they should practice law. We live in an era when business, the market, and money dominate much of politics and much of the practice of law. CAFA is one such result. Many of our students arrive with high ideals and want to give the poor, the marginalized, the struggling, as well as average middle-class Americans, representation in the legal arena. I think we have some obligation to let our students know that we think there are other measurements of success besides the size of a firm they get into and how much money they earn. I think we have an obligation to explore with them in our offices, if not in our classrooms, the importance of their own integrity and their own values and happiness, as well as the obligation of all lawyers, law professors, and judges to promote the public good.

What does this have to do with CAFA? It is called a “fairness” act, and I think lawyers, law professors, judges, and law students have to consider what that means and whether their own lives take into account the fairness afforded others.