

## BOMB THROWING, DEMOCRATIC THEORY, AND BASIC VALUES—A NEW PATH TO PROCEDURAL HARMONIZATION?

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**ABSTRACT**—From the beginning of his career, Marty Redish has been something of a bomb thrower, repeatedly challenging legal orthodoxy. During the last decade, democratic theory has been at the center of many of his challenges to widely accepted procedural rules. Meanwhile, American proceduralists are gradually waking up to the reality that the rest of the world handles procedure quite differently. Redish’s theoretical challenge to U.S. procedure—premised on political theory—therefore also corresponds to efforts to harmonize American procedure more closely with that of the rest of the world. But the United States remains stubbornly resistant to that harmonization, and even limited shifts in the direction Redish endorses excite very vigorous opposition. This Article recognizes the ways in which Redish’s democratic theory could lead to greater harmonization with the rest of the world, but contrasts several other political theory explanations for American exceptionalism that support retaining our current methods. It concludes by recognizing that this tension presents considerable challenges to American rulemakers.

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INTRODUCTION

Marty Redish has long been a bomb thrower. By that, I mean that he has launched trenchant critiques of established doctrine that shake up the academic and, sometimes, the judicial establishment. When he was new to academia, for example, he established himself with major articles—bombs—about the right to jury trial,<sup>1</sup> the *Erie* doctrine,<sup>2</sup> the timing of appellate review,<sup>3</sup> the Anti-Injunction Act,<sup>4</sup> and the proper handling of due process limitations on personal jurisdiction.<sup>5</sup>

Many begin as bomb throwers but end up staid Establishment defenders. Not so with Marty. He has persisted in his clear-eyed and rigorous scrutiny of the solemn precedents in many fields, and has become a giant in constitutional law and federal courts, in addition to civil procedure, the only field I can claim to have mastered even partly.

In the last decade or so, Marty’s civil procedure bomb throwing, broadly construed, has shifted from the focus of his first decade in

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<sup>1</sup> Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486 (1975).

<sup>2</sup> Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); see also Martin H. Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980).

<sup>3</sup> Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975).

<sup>4</sup> Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717 (1977).

<sup>5</sup> Martin H. Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112 (1981).

teaching. In particular, he has raised a series of challenges to the foundations on which many of the principles of modern American civil procedure have been built.<sup>6</sup> In other words, he has invited us to get back to basics, most recently by emphasizing the foundations of modern procedure. As in his other endeavors, Marty has shaken those foundations. That's what good academic bomb throwers do.

I want to reflect on Marty's recent challenges to orthodoxy, partly from the perspective of one who has found himself laboring in the vineyards of the procedure establishment, at least in relation to several of the topics Marty has within his sights. In addition, I've had some exposure (more than most American proceduralists) to efforts at procedural harmonization in the rest of the world, and I approach these topics with that effort in mind. In the process, I will take some liberties with Marty's actual positions, hopefully not too many, to elaborate on a theme that I take from his recent writings. I will suggest that the combined effect of Redish's critiques could be seen as endorsing a revision of American procedure that would move our practice toward harmonization with the rest of the world. The contrasting attitude might be generalized as the procedure of Continental Europe, which relies on precise specification of factual allegations and evidentiary support, leaves fact-gathering to the judge rather than party-controlled discovery, generally allows less generous monetary relief, and permits the winner to recover its attorney's fees. Drawing then on this comparative perspective, I intend to offer some political theory explanations for the persistence of American procedure in what Marty (and much of the rest of the world) would likely call its erring ways. And then I finish with brief reflections on the consequent messiness of contemporary American procedure reform.

My basic point will be that we really need bomb throwers like Marty, but that their striking insights may not regularly be followed to their logical end points. Life is, in some ways, too messy for that.

#### I. AMERICAN PROCEDURAL EXCEPTIONALISM

Americans who dabble in comparative civil procedure rapidly learn that the rest of the world—even our English cousins—find our practices peculiar, perhaps bizarre.<sup>7</sup> Many of us have learned to be diffident about embracing American exceptionalism in many arenas—foreign policy and military adventurism come to mind—and it may have come time for American proceduralists to take a hard look at their insularity and isolation. Within constitutional limits, we could do much to get into step with the rest of the world.

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<sup>6</sup> See, e.g., Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845 (2012).

<sup>7</sup> See, e.g., Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709 (2005) (book review).

But the elements of American exceptionalism should be identified at the outset so that all can understand why they strike the rest of the world as so incongruous. At least the following distinctive elements come immediately to mind<sup>8</sup>:

*Lax pleading standards.* Since before all of us were born, the amount of detail, much less proof, that a plaintiff has to include with her complaint has been quite limited. Without belaboring the point, the introduction of Rule 8(a)(2)'s "short and plain statement of the claim showing that the pleader is entitled to relief" led in 1957 to the declaration in *Conley v. Gibson* that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>9</sup> As all know, the Court has recently backtracked on this 1957 declaration,<sup>10</sup> but the basic point is that American pleading is far more lenient than most other countries' standards. Opening the litigation door is uniquely easy here.<sup>11</sup>

*Broad discovery.* Once the litigation door is opened, great treasures lie within because broad discovery permits, perhaps invites, aggressive inquiry.<sup>12</sup> Rule 45 permits parties to use a subpoena to compel similarly broad disclosure by nonparties as well as their adversaries.<sup>13</sup> And they need not get the judge's say-so before they begin this effort. As Geoff Hazard has observed, discovery has assumed an almost constitutional status in

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<sup>8</sup> Though I will offer some citations in support of these comparative characterizations, it seems almost unnecessary to do so.

<sup>9</sup> 355 U.S. 41, 45–46 (1957). For an examination of the seeming happenstance that this phrase came to be included in this opinion, see Emily Sherwin, *The Story of Conley: Precedent by Accident*, in *CIVIL PROCEDURE STORIES* 295 (Kevin M. Clermont ed., 2d ed. 2008).

<sup>10</sup> See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) ("retiring" the "no set of facts" notion from *Conley*).

<sup>11</sup> For proof of this point, consider Rule 12.1 of the Transnational Rules of Civil Procedure, drafted by the American Law Institute in collaboration with UNIDROIT: "The plaintiff must state the facts on which the claim is based, describe the evidence to support those statements, and refer to the legal grounds that support the claim, including foreign law, if applicable." AM. LAW INST. & UNIDROIT, *PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE* r. 12.1, at 111 (2006) [hereinafter ALI/UNIDROIT]. Rule 12.3 adds: "The statement of the facts must, so far as reasonably practicable, set forth detail as to time, place, participants, and events." *Id.* r. 12.3, at 111. The commentary makes clear that this provision requires much more than "notice pleading" under the Federal Rules of Civil Procedure. *Id.* cmt. R-12A, at 111. This point is repeated in the text later. It is a basic point.

<sup>12</sup> See FED. R. CIV. P. 26(b)(1) (authorizing discovery so long as it is "reasonably calculated to lead to the discovery of admissible evidence"). Contrast the explanation in the commentary to the Transnational Rules of Civil Procedure of the stricter, fact-based pleading requirements: "[T]he facts pleaded in the statements of claim and defense establish the standard of relevance for exchange of evidence, which is limited to matters relevant to the facts of the case as stated in the pleadings." ALI/UNIDROIT, *supra* note 11, cmt. R-12A, at 111.

<sup>13</sup> See FED. R. CIV. P. 45.

recent decades.<sup>14</sup> Indeed, some American courts have even suggested that plaintiffs could validly file lawsuits in order to obtain discovery rather than as a method of obtaining court-ordered relief.<sup>15</sup>

*Jury trial.* Sanctified in the Constitution, jury trial is distinctively American. Most countries never had anything like it, or only recently got something like it. Even England—the source of so much of our heritage—moved away from jury trial in civil cases about a century ago.<sup>16</sup> In the United States, however, jury trial continues to reign supreme (at least in theory), and courts only rarely can deprive juries of their final say. True, for the last quarter century, summary judgment has assumed greater importance,<sup>17</sup> and the *Daubert* decision<sup>18</sup> sometimes puts the brakes on the use of innovative expert evidence by plaintiffs. But the abiding reality is that most cases may go to a jury unless settled or decided on the pleadings or summary judgment.

*Pain and suffering damages.* Economic damages—lost wages or profits and out-of-pocket expenditures—can mount up in many cases in many countries. But proof of them is often challenging, and routine doctrine suggests that the value of lost items should be discounted and the likelihood of future fortune (lost future earnings) should also. For most of the world, that means that monetary recoveries in most cases are modest. In the United States, however, tort law and other doctrines often permit recovery of pain and suffering or emotional distress damages that far outstrip any proven monetary losses.<sup>19</sup> To some extent, that distinctive reality results from our lack of a social insurance safety net.<sup>20</sup> In any event,

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<sup>14</sup> See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1694 (1998) (“Broad discovery is thus not a mere procedural rule. Rather it has become, at least for our era, a procedural institution perhaps of virtually constitutional foundation.”).

<sup>15</sup> See *Chi. Council of Lawyers v. Bauer*, 522 F.2d 242, 258 (7th Cir. 1975) (noting, with seeming approval, that “certain civil suits may be instigated for the very purpose of gaining information for the public,” and adding that “[s]uch revelations should not be kept from the public”).

<sup>16</sup> See, e.g., ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 402 n.19 (2d ed. 2006) (noting that, by 1883, jury trial was available for only six causes of action, and adding that “[j]ury trial declined because it was not being asked for”).

<sup>17</sup> For discussion, see Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005).

<sup>18</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (directing federal judges to act as “gatekeepers” to ensure that only reliable expert evidence reaches the jury). For the implementation of this principle in the rules, see FED. R. EVID. 702.

<sup>19</sup> For a critique, see Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 VA. L. REV. 1401 (2004).

<sup>20</sup> “The financial burden of litigants is different [in Germany] from the US as almost all European systems offer legal aid or the chance to get legal cost insurance. Comprehensive social insurance and welfare systems cover to a large extent damages which are in dispute at least in US personal injury class actions.” Astrid Stadler, *Aggregate Litigation—Group/Class Actions in Germany*, in LITIGATION IN ENGLAND AND GERMANY 79, 90 (Peter Gottwald ed., 2010). This sort of function for pain and suffering has long been recognized. Thus, in his classic treatise, Professor Dobbs recognized: “[P]ain and suffering awards . . . serve an eminently practical and important purpose in providing a fund from

it is a critical factor in making the American contingent fee system work, as caps on noneconomic damages have demonstrated because they deter lawyers from taking cases that are expensive to litigate for plaintiffs who can't prove substantial lost future earnings.<sup>21</sup>

*Punitive damages.* As though emotional distress damages were not sufficient leavening for litigation, American courts often permit additional recoveries of punitive damages. This sort of litigation adventurism is nearly unique to this country, but it has grown greatly in seeming importance in recent decades.<sup>22</sup> Other countries often refuse to enforce the punitive damages portions of American judgments even if they are willing to enforce the rest of the award.<sup>23</sup>

*Class actions.* To wrap much of the foregoing into a bigger bundle, since 1966 the United States has had a more vibrant class action practice. Largely unknown in other countries,<sup>24</sup> and premised on the "opt-out" provisions that make inaction sufficient to achieve membership in the class,<sup>25</sup> this procedural device could on occasion have a major effect. On the one hand, it could magnify the impact of what would otherwise be small claims. On the other hand, in the settlement mode, it could substitute what in effect would be a privately designed claim resolution system for the public court system.<sup>26</sup>

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which the plaintiff's attorney's fees can be paid without drawing too heavily on that portion of the award actually needed to pay medical bills or replace lost earnings." DAN B. DOBBS, *LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 8.1(4), at 659–60 (2d ed. 1993).

<sup>21</sup> See Rachel Zimmerman & Joseph T. Hallinan, *As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, WALL ST. J., Oct. 8, 2004, at A1; see also Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1265 (2004) (using empirical research to show how damage caps will harm the interests of vulnerable groups because they routinely have limited "hard" damages proof).

<sup>22</sup> The literature on punitive damages is vast. See, e.g., Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004).

<sup>23</sup> See, e.g., Ernst C. Stiefel et al., *The Enforceability of Excessive U.S. Punitive Damage Awards in Germany*, 39 AM. J. COMP. L. 779, 780–81 (1991).

<sup>24</sup> For a study of the recent interest in developing some sort of collective action procedure, albeit one free of the "defects" of the American class action, see CHRISTOPHER HODGES, *THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS* (2008).

<sup>25</sup> Thus, Rule 23(b)(1) and (b)(2) class actions are "mandatory" in the sense that class members are not routinely offered a chance to opt out, and Rule 23(b)(3) class actions do require notice of class certification, but the rule further provides that all class members are included in the class and bound by the judgment unless they opt out. See FED. R. CIV. P. 23(c)(2)(B)(v). For Europeans, by way of contrast, only an opt-in approach has been found to satisfy autonomy concerns, even with claims of minimal value. See Stadler, *supra* note 20, at 84–85.

<sup>26</sup> For reflection on the remarkable possibilities of settlement class actions, see Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858 (1995).

## II. A PERFECT CURE OR A PERFECT STORM?

Those who evaluate American procedural exceptionalism tend to regard the adoption of the Federal Rules of Civil Procedure in 1938 as the critical watershed in creating what we have today. But it's not so clear that they were quite so revolutionary as we all suppose.

Certainly the framers did not say they were revolutionary; Charles Clark instead sold the new rules as valuable, if somewhat modest, improvements on existing regimes.<sup>27</sup> As to some matters—particularly pleading and discovery—the Federal Rules surely moved well beyond prior arrangements. Professor Subrin, for instance, has detailed how the discovery rules were revolutionary.<sup>28</sup> But American discovery had long been distinctive; as early as the 1870s, the German government protested what it regarded as the unduly intrusive nature of American civil discovery.<sup>29</sup> And attitudes toward pleading sufficiency don't seem to depend entirely on rules. Though the adoption of the Federal Rules is widely thought to have been a decisive break from the “fact pleading” of the Field Code, states that retain code pleading may be considerably laxer in their pleading requirements than the federal courts have been under the Federal Rules standards. In California, for instance, it has long been agreed that the state courts (operating under the code pleading regime adopted in 1872) have been much more forgiving than the federal courts in evaluating the sufficiency of complaints.<sup>30</sup> And states that model their procedures on the Federal Rules have sometimes resisted the Supreme Court's recent interpretation of the federal pleading standards.<sup>31</sup>

But the mid-twentieth century did produce dramatic changes in American government, and civil litigation was hardly exempted from the

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<sup>27</sup> See, e.g., Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 962–73 (1987) (describing the way in which the framers of the rules looked to the more relaxed traditions of equity to avoid the technicalities of common law procedure). Although Charles Clark, the chief drafter of the rules, was himself committed to the use of litigation to do more than merely resolve private disputes, see *id.* at 966, “many strands of the ideology of conservatives who initially sponsored the [Rules] Enabling Act coalesced with the ideas of liberals who later participated in its enactment and implementation,” *id.* at 969.

<sup>28</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 718–19 (1998) (describing the array of discovery procedures authorized by the federal rules as unprecedented).

<sup>29</sup> See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 971 (5th ed. 2011) (describing German protests in 1874).

<sup>30</sup> I say this based on my practice experience in California in the 1970s and early 1980s.

<sup>31</sup> See, e.g., *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1086 (Vt. 2008) (reaffirming its commitment to the view that a complaint should not be dismissed unless the court is certain the plaintiff can prove no set of facts justifying relief); *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 863–64 (Wash. 2010) (refusing to follow the Supreme Court's revision of the standard for motions to dismiss for failure to state a claim even though Washington's civil procedure rules are modeled on the Federal Rules). *But see Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (following the Supreme Court's new approach).

effects of that watershed era. The Federal Rules may thus be seen as a significant aspect of this more general governmental metamorphosis.

A. *The “Perfect Cure” View*

So far as civil litigation is concerned, in general there has been much applause for the new era that emerged from the mid-century reform era. Along with many New Deal governmental programs, civil litigation became the vehicle for much social change.<sup>32</sup> Civil rights litigation led the way, and other forms of social impact litigation followed. By the mid-1970s, Professor Chayes was able to suggest that “the dominating characteristic of modern federal litigation is that lawsuits do not arise out of disputes between private parties about private rights. Instead, the object of litigation is the vindication of constitutional or statutory policies.”<sup>33</sup> And Professor Fiss wrote around the same time that the courts should only be concerned about articulating public values; resolving private disputes was, in his view, “an extravagant use of public resources, and thus it seems quite appropriate for those disputes to be handled not by courts, but by arbitrators.”<sup>34</sup>

Thus, there was much enthusiasm for civil litigation as a perfect cure for what ailed society. From initially being controversial, *Brown v. Board of Education* became an icon attesting to the ways in which civil litigation could move society forward and break through barriers that other parts of government had not overcome.

At the same time, the whole notion of what should be regarded as the “public interest” took on new aspects. For example, the emergence of product liability theories might be characterized as simply a new breed of private litigation, but increasingly it was handled as a method of prompting improvements in product safety for all, seemingly introducing an important

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<sup>32</sup> Indeed, for some academics, enthusiasm for this new role for civil litigation antedated the New Deal. Consider Professor Subrin’s description of the attitude of Dean Clark, who was chief drafter of the Federal Rules:

As early as 1928, Clark began to look at law and litigation with the broader focus of an emerging social reformer. Clark perceived litigation as designed for something more than the purpose of merely resolving a dispute between two parties. In his first article describing his empirical research, Clark wrote: “One of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants.” Unlike [David Dudley] Field, [drafter of the Field Code,] . . . Clark came to perceive the need for government to play a more active role in society.

Subrin, *supra* note 27, at 966 (footnote omitted).

<sup>33</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

<sup>34</sup> Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29–30 (1979).



new ingredient.<sup>35</sup> By the 1970s, Professor Chayes recognized this expanded role for what he called “public law litigation”:

School desegregation, employment discrimination, and prisoners’ or inmates’ rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation.<sup>36</sup>

Around the same time the Federal Rules took effect, another new development began to make its presence felt. Coined in the early 1940s by Jerome Frank,<sup>37</sup> the concept of the “private attorney general” emerged as a stimulus for efforts to seek social change or enforce regulatory prescriptions through private litigation.<sup>38</sup> In the 1970s, this notion broadened to include the concept of the “public interest lawyer” pursuing the sorts of litigation Professor Chayes applauded.

### B. The “Perfect Storm” Reaction

Not everyone was applauding; the 1970s became a new watershed in some attitudes towards these new aspects of civil litigation. For some, in other words, American procedural exceptionalism had produced a perfect storm rather than a perfect cure.<sup>39</sup> By the mid-1970s, Chief Justice Burger had inveighed against what he viewed as excesses in civil litigation. The

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<sup>35</sup> For discussion of these issues, see Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 668–75 (1988). For an illustration of how “private” litigation can serve a “public” regulatory purpose, see AM. ASS’N FOR JUSTICE, *DRIVEN TO SAFETY: HOW LITIGATION SPURRED AUTO SAFETY INNOVATIONS* (2010), which contends that private tort suits resulted in safer cars. This effect might be compared to efforts by public regulatory agencies to improve the safety of cars. Yet most would probably say that auto tort litigation is not “public law” litigation. See W. Kip Viscusi, *Overview*, in *REGULATION THROUGH LITIGATION* 1, 1 (W. Kip Viscusi ed., 2002) (exploring what Professor Viscusi describes as a “new phenomenon”—litigation that “results in negotiated regulatory policies to settle the suit or serves as a financial lever to promote support for governmental policies”).

<sup>36</sup> Chayes, *supra* note 33.

<sup>37</sup> See *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

<sup>38</sup> See William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

<sup>39</sup> See, e.g., Stephen Berry, *Ending Substance’s Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 300 (1980); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 4–5 (1971). Both these articles decry the extent to which procedural developments seemed to have dominant importance that overshadowed substantive concerns; the Berry article, for example, expressed the views of a Department of Justice lawyer that these developments meant that substantive principles were “indentured” to procedural provisions.

1976 Pound Conference was convened to examine these problems.<sup>40</sup> Many said that litigation was out of control and urged that American procedures be curtailed to respond to the risks they caused. By the end of that decade, formal proposals were afoot to narrow the scope of discovery.<sup>41</sup> Meanwhile, the 1966 expansion of Rule 23, the class action rule, had been followed fairly soon by a strong adverse reaction chronicled by Professor Miller in 1979.<sup>42</sup> Altogether, this collection of misgivings that surfaced in the 1970s has not dissipated. The attitude is perhaps summed up in the title of a book to be published by Yale University Press in 2013: *The American Illness*.<sup>43</sup> This is the “perfect storm” view.

From the perfect storm perspective, one might be tempted to conclude that the adverse circumstances resulted from a mid-century conspiracy by trial lawyers to endow themselves with the power to control the land. In retrospect, however, there seems to be little reason to attribute such foresight to those who produced significant changes in American civil litigation. The framers of the Federal Rules, for example, were hardly a revolutionary rabble. To the contrary, they were drawn from the highest echelon of the private bar, mainly those who usually represented large corporations (the entities supposedly most harmed by the new reality of American litigation).<sup>44</sup> And the American judiciary did not welcome all the “revolutionary” changes with open arms; to the contrary, among federal judges there was for nearly twenty years a rearguard reaction against relaxed pleading standards that was scotched in 1957 by *Conley v. Gibson*.<sup>45</sup> Even in 1963–1966, when the class action rule was being revised, few envisioned the manifold ways in which its new provisions could be used.<sup>46</sup>

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<sup>40</sup> See *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (Apr. 7–9, 1976).

<sup>41</sup> See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 753–60 (1998).

<sup>42</sup> Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979).

<sup>43</sup> THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW (F.H. Buckley ed., forthcoming May 2013). It bears mention that this view is far from universal. For an argument that recurrent assertions that litigation—and particularly tort litigation—has hurt the American economy are not justified, see Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28 (2011).

<sup>44</sup> See, e.g., Subrin, *supra* note 27, at 971–72 (reporting that the drafting committee that developed the Federal Rules consisted of Dean Clark and four other law professors from elite law schools and nine lawyers, most of whom were associated with what was then considered large firm practice).

<sup>45</sup> 355 U.S. 41 (1957). For a description of the rearguard insurgency by federal judges, see Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 445 (1986).

<sup>46</sup> For example, Professor Charles Alan Wright forecast in the early 1960s that Rule 23 would not prove important even after amendment because class actions were so rare. See John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 334 (2005). Rabiej noted that “Professor Wright’s usually unerringly accurate prescience faltered on this occasion.” *Id.* at 334 n.43.

But the drumbeats of opposition to American exceptionalism have continued from the 1970s to the present. For instance, a letter that was recently submitted to the federal rulemakers asserts that, in 2008, “for each \$1 of profit earned, on average survey respondents spent between \$0.18 and \$0.31 on litigation costs.”<sup>47</sup> A 2010 study conducted partly under Northwestern University’s auspices found that multinational companies had much higher litigation costs in the United States than in other countries in which they operated.<sup>48</sup>

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For another report from one present at the time of the 1960s amendments, consider what Professor Arthur Miller told the Advisory Committee more than thirty years later. He testified at a hearing in 1997 about proposed Rule 23 amendments then under consideration and related his recollections about the attitudes and expectations at the time the rule amendments were adopted in the 1960s:

[I]f anybody can claim to have been there at creation, I was there at creation. If anyone can claim to tell you what was in Ben’s mind [referring to Ben Kaplan, Reporter of the Committee at the time] or the Committee’s mind, John [Frank, a member of the Advisory Committee in the 1960s who also testified in 1997] comes close, but I yield not to John. Nothing was in the Committee’s mind. And anyone who tells you that wondrous things were going on with direct relevance to the year 1997, it’s good story telling. Just put yourself back in 1960 to ’63. Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative.

You did not have due process legislation; you do not have safety legislation; you did not have the environmental or consumer legislation. And the rule was not thought of as having the kind of application that it now has.

That doesn’t tell you a thing about what the rule should be used for. But you can’t blame the rule, because we have had the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendant [sic] jurisdiction, now codified in the supplemental jurisdiction statute.

It’s a new world. It’s a new world that imposes on this Committee problems of enormous delicacy. And you’re shooting at a moving target, as I say in my written remarks . . . It’s *deja vu* all over again. We had this debate in the ’70s about the utility of the class action. We’re having it again.

Public Hearing: Proposed Amendments to the Federal Rules of Civil Procedure Rule 23, at 64–65 (Jan. 17, 1997) (testimony of Professor Arthur D. Miller), in 3 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 (1997).

<sup>47</sup> Letter from Professor Henry N. Butler, Exec. Dir., Searle Ctr. on Law, Regulation & Econ. Growth, to Judge Lee H. Rosenthal et al. 3 (June 2, 2010) (on file with the *Northwestern University Law Review*).

<sup>48</sup> See LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf>. This research effort collected data on legal expenditures (not including amounts paid to satisfy judgments or settle cases) by Fortune 200 companies for the period from 2004 to 2008. It contrasted the amounts paid for U.S. litigation costs and non-U.S. litigation costs. The comparison presented those legal costs as percentages of revenue—U.S. legal costs as a percentage of U.S. revenue and non-U.S. legal costs as a percentage of non-U.S. revenues.

Responsible rulemakers could not regard these sorts of reports as unimportant. But a virtually simultaneous study by the Federal Judicial Center showed that usually litigation costs in U.S. federal courts were reasonably proportional to the stakes involved in the case.<sup>49</sup> How can one reconcile this divergent result? One answer is that the stakes in American litigation themselves are much higher than in the rest of the world. All of the factors mentioned above—substantive and procedural—can contribute to that distinctive result. Exceptional litigation stakes are simply another aspect of American procedural exceptionalism.

What we are left with now, from this view, is a situation in which the push for more aggressive reform of American procedure (seemingly unconsciously) urges that our procedure be made more like the procedure in the rest of the world. In other words, it is a push for what is in effect harmonization of American procedure with that of Western Europe and other industrialized countries. From that perspective, American companies will no longer be “hobbled” by the burden of American procedural exceptionalism.

### III. THE REDISH CHALLENGE: DEMOCRATIC THEORY V. THE PERFECT STORM

Marty Redish does not proceed, so far as I know, from the comparativist or harmonization starting point. Instead, he proceeds from a theoretical analysis to conclusions that correspond in several instances with

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Figure 9 of the study presents those comparisons, and they are striking:

	U.S. Costs	Non-U.S. Costs
2004	0.48%	0.11%
2005	0.48%	0.06%
2006	0.56%	0.07%
2007	0.53%	0.06%
2008	0.51%	0.06%

*Id.* at app. 1, fig.9, at 13. As the study points out, measured in this manner the U.S. costs range from four times as much to nine times as much. It suffices to emphasize that they are much higher. The survey was administered and the data were compiled by the Searle Center on Law, Regulation, and Economic Growth of the Northwestern University School of Law.

<sup>49</sup> See EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY 28 (2009). Figure 14 shows that more than 50% of plaintiff and defense lawyers reported that the costs of discovery in the randomly selected case about which the Federal Judicial Center researchers inquired were “just the right amount” compared to the client’s stakes in the matter. More specifically, the respondents were asked to respond regarding whether the amount of discovery in the subject case was too much or too little in light of the client’s stakes in the case. They were asked to use a scale of 1 to 7, with 4 being “just the right amount,” 1 being too little, and 7 being too much. More than 55% chose 4. Of the other respondents, roughly half said there was too little discovery, and half said there was too much. Only about 5% of respondents chose 7 (for far too much discovery), and the percentage of respondents who chose 3, 4, or 5 was about 80%.

the perfect storm critique. As mentioned at the outset, this Part takes liberties with Marty's work to build a theme. But at arm's length, it seems fair to note that his critiques could be a solid foundation for significantly modifying the broadest view of aggressive private American litigation. Indeed, at least some have urged corporate general counsels to take note of his arguments and use them to support dismantling the American litigation juggernaut.<sup>50</sup>

I cannot do justice to the democratic theory on which Marty bases his critique, but I will summarize it as emphasizing that all important governmental decisions must be made by politically accountable actors.<sup>51</sup> That means that neither courts nor rulemakers should be making such decisions. To some extent, one could counter that critique of the status quo by emphasizing that most decisions by unelected actors can be countermanded by elected bodies. Congress, for example, can alter nonconstitutional results reached by federal courts, and it certainly can reject or modify anything the rulemakers do. Taking advantage of that theoretical opportunity is actually extremely difficult, however; the "stickiness" of American political institutions means that change is very difficult to accomplish through them. A striking example of that stickiness

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<sup>50</sup> Thus, Mark Hermann, Vice President and Chief Counsel at Aon, the world's leading provider of risk management services, posted a comment on *Above The Law* urging that in-house counsel focus on Redish's book *Wholesale Justice*:

I understand that nobody reads law review articles or books published by an academic press. And I wouldn't condemn any practicing lawyer to reading any issue of a law review from cover to cover. But I don't think it's asking too much to insist that lawyers remain gently abreast of the academic literature in their field and deploy new ideas aggressively when scholars propose them. Redish's book shows why in-house counsel should demand more of their outside lawyers.

Mark Herrmann, *Inside Straight: Torpedoing Class Actions*, ABOVE THE LAW (Jan. 12, 2012, 10:12 AM), <http://abovethelaw.com/2012/01/inside-straight-torpedoing-class-actions>.

Herrmann explains that he has no firm views on whether Redish's criticisms of class actions are right. "But Redish is a smart guy. His ideas are surely plausible, and no law firm would be sanctioned for making these arguments in a brief. So where are the law firms? Why isn't every class action defense firm in America mentioning to clients that these arguments exist?" *Id.* He explains that law firms have been "derelict" because "[t]hey should have seized on this issue and started raising it with their clients the instant Redish's book was published." *Id.* And if law firms are not doing that, their clients should make them. "Clients should look for lawyers who are at least passingly engaged in the scholarship surrounding their field of law. Although much scholarship has little relevance to practicing lawyers, a small chunk of what's written in the ivory towers could do clients a world of good. Competent lawyers will embrace those ideas and deploy them to good use." *Id.*

Perhaps in somewhat the same vein, a Kirkland & Ellis partner writing in this law review reported: "Seldom does a work break new ground in a field that has been plowed as often as that of class actions. Martin Redish's *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* is the rare exception." Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (Part I), 104 NW. U. L. REV. 775, 775 (2010).

<sup>51</sup> The summary in this paragraph could be supported with myriad citations to recent Redish work, but having run this summary past Redish himself, I think burdening the reader with the citations is not necessary.

was the failure to stop the introduction of the initial disclosure requirement in 1993; although the Clinton Administration favored taking that feature out of the pending amendment package, and Congress was also almost unanimously in favor of doing so, a single Senator was able to prevent it from being done.<sup>52</sup>

From this perspective, one can identify much that seems quite important but has emerged not from legislatures but instead from the courts or the rulemakers. The entire edifice of common law substantive rules—in particular tort rules like products liability doctrine—was produced mainly by court decision rather than legislation. One key feature of David Dudley Field’s more general codification movement (which produced the Field procedural code) was to supplant common law principles with legislative provisions. More to the immediate point, a good deal of the metamorphosis of American litigation that underlies either the perfect cure view or the perfect storm reaction resulted from decisions by judges (sometimes in the rulemaking role), not legislative action. In this Part, I will try to catalogue some of Marty’s provocative challenges to features of modern American litigation, stressing often that accepting this critique would move U.S. procedure (and substance) toward a model more like that prevailing in the rest of the industrialized world. In addition, I will occasionally offer some reactions to these prescriptions.

*Rulemaking authority.* Given the centrality of the 1938 adoption of the Federal Rules, it seems appropriate to begin with a constitutional challenge to the entire enterprise. In 2006, Marty wrote that the Rules Enabling Act was on shaky constitutional ground because “many of the Federal Rules have a dramatic impact on fundamental socio-political and economic concerns.”<sup>53</sup> Congress seemed to have assumed that procedure and

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<sup>52</sup> Senator Howard Metzenbaum (D-Ohio) prevented a unanimous consent vote in the Senate that was necessary to produce a bill in time to prevent the rule from going into effect. If one wants to illustrate the concept of stickiness, this episode could work well. Here’s the story as told by Paul Carrington, who was then the Advisory Committee’s Reporter:

[T]he [Supreme] Court’s idea that Congress has somehow approved rule changes that it does not derail should be reappraised by the Court in the light of the events of 1993 regarding the changes made in Rule 26. Readers will likely recall the brouhaha raised by members of the bar who felt that fundamental values were threatened by the disclosure requirements authorized by that amendment. The United States House of Representatives voted unanimously to derail the [Advisory] Committee’s proposal and substitute one of its own. The House bill was brought before the Senate Judiciary Committee on the day before adjournment when that committee was acting under a rule requiring unanimity. When Senator Metzenbaum objected to the House bill, that killed it. And so Rule 26 became law as the result of its support by a single Senator voting against a unanimous House, a House that would have been joined by an almost unanimous Senate if the matter had ever reached the Senate floor. The final vote was thus one Senator against the world, with the one Senator prevailing.

Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 484–85 (1997) (footnotes omitted).

<sup>53</sup> Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303,

substance were totally separate, but as the Supreme Court has noted, “the rules of procedure have important effects on the substantive rights of litigants.”<sup>54</sup> For this reason, Redish theorizes that rulemaking should be limited to things readily classified as “housekeeping,” suggesting as an example Rule 10, which deals with captioning.<sup>55</sup>

Perhaps obviously given the time I’ve spent working on federal rulemaking,<sup>56</sup> I find this conclusion difficult to accept. To take one topic on which I’ve worked, consider the 2006 amendments regarding electronic discovery. Redish points out that many people sought during the public hearing process to address the Committee about these proposed amendments, urging that “regulations of electronic discovery will have important and inescapable implications both for litigants’ ability to enforce existing substantive law and for businesses of all sizes seeking to operate in an economically efficient manner.”<sup>57</sup> It’s true there were many witnesses and many public comments on those changes; as the person responsible for summarizing all the public comment, I’m acutely aware there was a lot of it. We even had to schedule an extra day of hearings in Washington, D.C. (on a Saturday, as it happened), to accommodate all who wanted to speak.

But the level of interest does not show that the topics addressed in the proposed amendments were not “procedural.” For proof of that point, consider what those amendments actually did: They required that the parties talk about these issues and report to the judge about them,<sup>58</sup> permitted parties making Rule 34 requests to direct that electronically stored information be produced in specified forms,<sup>59</sup> and provided a procedure to deal with an ongoing problem caused by privilege waiver that sometimes hamstrung federal litigation.<sup>60</sup> Were these problems important in some cases? Yes. Does that mean rules about them could not be made through the rulemaking process? I think the answer is “no.”

It is surely true that much of civil procedure “matters” a lot more than rules like Rule 10 about captions on papers filed in court. If it did not, one might wonder that we make students take a course in the subject in law school or why professors spend their lives studying it. But as Professor Ely said a generation ago, even though arguments can be made at the margins, it can surely be said that there is a difference between rules of procedure

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1303 (2006). It should be noted, however, that the article follows up by acknowledging that “[w]e of course do not mean to suggest that the constitutionality of the Rules Enabling Act . . . is today in serious doubt.” *Id.* at 1305.

<sup>54</sup> *Mistretta v. United States*, 488 U.S. 361, 392 (1989).

<sup>55</sup> Redish & Amuluru, *supra* note 53, at 1325 & n.104.

<sup>56</sup> Since 1996, I’ve been the Associate Reporter of the Advisory Committee on Civil Rules. In this Article, however, I speak entirely for myself and not for that Committee or anyone else.

<sup>57</sup> Redish & Amuluru, *supra* note 53, at 1318.

<sup>58</sup> See FED. R. CIV. P. 26(f)(3)(C).

<sup>59</sup> See *id.* 34(b)(1)(C).

<sup>60</sup> See *id.* 26(b)(5)(B).

and substantive legal rules.<sup>61</sup> Having those specialized procedure rules devised on a transsubstantive basis by a specialized body seems sensible and worthwhile.<sup>62</sup> And conventional procedural issues hardly seem likely to stimulate public interest comparable to the public interest in sentencing in criminal cases, which the Supreme Court has found to be permissibly regulated by a judicial branch activity.<sup>63</sup>

*Pleading.* The Federal Rules' breakthrough on pleading reached its high water mark in 1957, when *Conley v. Gibson* seemed to say that no case could be dismissed unless the court was certain the plaintiff could prove no set of facts justifying relief.<sup>64</sup> In context, that was a slapdown to insurgent federal judges who resisted relaxation of pleading requirements. As a standard, however, it was meaningless; as Professor Hazard put it, this standard "turned Rule 8 on its head"<sup>65</sup> because the rule says that the pleading must "show[] that the pleader is entitled to relief,"<sup>66</sup> but the case seems to say the plaintiff may move forward unless the complaint shows that he is not entitled to relief.

As I wrote more than twenty-five years ago, the lower federal courts continued to scrutinize complaints despite *Conley*, in part because they were concerned about the perfect storm aspects of modern American procedure, particularly broad discovery.<sup>67</sup> From time to time, the Supreme Court would issue a pleading decision, either denouncing or supporting activity of this sort in specific cases.<sup>68</sup> But in *Twombly* in 2007<sup>69</sup> and *Iqbal*

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<sup>61</sup> See John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724–25 (1974) (footnotes omitted):

We have, I think, some moderately clear notion of what a procedural rule is—one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be more likely to get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story, or because, and this may point quite the other way, it is a means of promoting the efficiency of the process. Or the protection of the process may proceed at wholesale, as by keeping the size of the docket at a level consistent with giving those cases that are heard the attention they deserve. The most helpful way, it seems to me, of defining a substantive rule . . . is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.

<sup>62</sup> On the value of transsubstantive rules, see in particular Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989).

<sup>63</sup> See *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding Sentencing Guidelines against challenge that they were generated improperly outside the legislative branch).

<sup>64</sup> "[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

<sup>65</sup> Hazard, *supra* note 14, at 1685.

<sup>66</sup> FED. R. CIV. P. 8(a)(2).

<sup>67</sup> See Marcus, *supra* note 45, at 444–51.

<sup>68</sup> *E.g.*, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (rejecting plaintiff's complaint for failing to provide "fair notice of what the plaintiff's claim is and the grounds on which it rests" (quoting *Conley*, 355 U.S. at 47)); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (overturning a



in 2009,<sup>70</sup> it said that *Conley*'s "no set of facts" directive had "earned its retirement" and told lower courts to ask whether plaintiffs' claims were "plausible" before allowing cases to proceed to discovery.<sup>71</sup>

Barely a month after *Twombly* was announced, Justice Ginsburg (who dissented) addressed the Judicial Conference of the Second Circuit (which the Court had reversed) and predicted that the Court's decision "gave procedure professors cause to write prolifically."<sup>72</sup> She underestimated. There has probably never been an academic reaction to Supreme Court decisions of a civil procedure issue to equal the one that greeted *Twombly* and *Iqbal*. One reaction has been that this action by the Court was inappropriate because it effectively "amended" a rule but did so outside the rulemaking process. But that might be said of *Conley* itself; the dividing line between "interpreting" a rule and "amending" it is sometimes difficult to discern.

The prevalent academic attitude, however, has stressed the perfect cure view of modern American procedure and has denounced the Court's effort to "shut the courthouse door" before even discovery is allowed. Whether the Court's decisions really had that consequence has been feverishly studied, with inconclusive results.<sup>73</sup> To the extent the Court did shut the door partly, it would seem to have moved in the direction of the rest of the world, which has long expected plaintiffs to do much more than American courts ask of American plaintiffs. Consider by contrast the compromise rule devised for commercial litigation in the *Principles of Transnational Civil Procedure* prepared by the ALI and UNIDROIT: "The plaintiff must state the facts on which the claim is based, describe the evidence to support those statements, and refer to the legal grounds that support the claim,

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Second Circuit requirement that plaintiffs in employment discrimination suits include facts establishing a prima facie claim in the complaint); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (rejecting Fifth Circuit "heightened pleading" requirement for cases alleging municipal liability). As a commentator said over thirty years ago, it sometimes seems that the Court approaches pleading issues with "appalling casualness." David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 399 (1980).

<sup>69</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>70</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>71</sup> *See Twombly*, 550 U.S. at 556, 562–63.

<sup>72</sup> Justice Ruth Bader Ginsburg, Remarks at the 2007 Judicial Conference of the Second Circuit (June 9, 2007), in 278 F.R.D. 268, 272.

<sup>73</sup> The Advisory Committee has monitored the lower courts' decisions, with the resulting memorandum now nearly 700 pages long. *See* Memorandum from Andrea Kuperman to the Civil Rules Committee and Standing Rules Committee (Nov. 23, 2011), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/iqbalmemo\\_112311.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/iqbalmemo_112311.pdf). As Professor Cavanagh has observed:

[The Federal Judicial Center's March 2011 empirical] study suggests that the lower courts have been pragmatic—not dogmatic—in construing *Twombly* and *Iqbal*; and as the dust from those decisions continues to settle, it has become increasingly apparent that the parade of horrors feared by critics has not materialized . . . .

Edward D. Cavanagh, *Making Sense of Twombly*, 63 S.C. L. REV. 97, 103 (2011) (footnote omitted).

including foreign law, if applicable.”<sup>74</sup> Even plaintiffs who survive this sort of scrutiny do not usually get discovery in other systems; in the American system, defendants who cannot challenge the complaint successfully often face fairly rigorous discovery demands.

Marty Redish has persuasively dissented from the prevailing American academic view and urged that the Supreme Court’s revision of pleading standards is sensible, particularly given the growing potential burden of electronic discovery.<sup>75</sup> Meanwhile, the rulemakers continue to monitor the actual situation (including an updated review of lower court decisions that is nearly 700 pages long<sup>76</sup>). The point for the present is that, to the extent the Court’s decisions moved American pleading rules toward those prevailing in the rest of the world, they did not move them very far.

*Discovery.* This is, of course, the most distinctive feature of American procedure. Much of Continental Europe has operated, at least until recently, on the assumption that privacy interests should enable a civil litigant to refuse to divulge any evidence that might hurt her case in court. Indeed, “[t]he [European] codes of civil procedure of the 19th Century strictly adhered to the principle *nemo tenetur edere contra se*, i.e. the principle that no party has to help her opponent in his/her inquiry into the facts.”<sup>77</sup> In the United States, the closest we come to that sort of attitude is the Fifth Amendment protection in criminal cases against requiring the accused to be a witness against himself, a protection not traditionally accorded the accused on the Continent. The civil litigant in most industrialized countries is therefore left to try to persuade the judge to demand that the adverse party produce specified documents.<sup>78</sup>

Since 1970, the American federal courts have been very different. Until that year, advance court approval was technically required for Rule 34 requests, but that requirement seemingly was regularly overlooked and was removed from the rules in the comprehensive 1970 discovery amendments. On occasion, this wide-open discovery has produced

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<sup>74</sup> See ALI/UNIDROIT, *supra* note 11, r. 12.1, at 111 (quoting additional provisions of the Transnational Rules).

<sup>75</sup> See Redish, *supra* note 6.

<sup>76</sup> See Memorandum from Andrea Kuperman, *supra* note 73.

<sup>77</sup> Nicolò Trocker, *Transnational Litigation, Access to Evidence and U.S. Discovery: Learning from American ‘Exceptionalism’?*, in CURRENT TOPICS OF INTERNATIONAL LITIGATION 145, 156 (Rolf Stürmer & Masanori Kawano eds., 2009); see also Abbo Junker, *Access to Documentary Evidence in German Civil Procedure*, in LITIGATION IN ENGLAND AND GERMANY, *supra* note 20, at 51, 52 (“The principle applied was that no party must produce a document which is required to win the case of the opponent.”).

<sup>78</sup> This reality has produced at least one notable academic dissent. KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW (2003). Huang argues vehemently that American-style discovery should be imported into civil law and that the burden of proof in civil law should be changed from its more demanding present requirement to the preponderance of the evidence, as is true for most subjects in American law.

remarkable results in terms of revealing evidence critical to accurate resolution of lawsuits. But it has also produced some less savory consequences. Not only did some American courts endorse the idea of suits brought to obtain discovery, rather than substantive relief in court, American courts for some time endorsed the idea that anything obtained through discovery could be used for any purpose unless some strong showing were made to justify a court-imposed limitation on its use.<sup>79</sup> Some suggested that this wide-open attitude threatened unconstitutional takings as to some property.<sup>80</sup> Reacting in part to these circumstances, economists Robert Cooter and Daniel Rubinfeld urged in 1995 that any discovery demand that required the responding party to expend more than the value to the case of the evidence being sought should be regarded as “abusive.”<sup>81</sup>

The controversy about excessive or abusive discovery continues to bubble vigorously. Marty Redish has trenchantly criticized the prevalent notion that the responding party should normally have to shoulder the cost of responding to discovery requests.<sup>82</sup> In part, he echoes the regular criticism that this arrangement can enable parties with weak claims to impose huge costs on their adversaries for discovery forays that are unlikely actually to contribute much to proper resolution of the cases. A decade ago, he offered an initial critique of the impact of electronic discovery (already beginning to be appreciated then) on the existing discovery debate.<sup>83</sup> In 2011, he moved beyond that view and got back to basics, urging that the proper attitude to take toward the burdens of discovery is not that discovery is a taking or abusive unless well calculated to produce probative evidence. Instead, the proper attitude is that discovery provides a governmental subsidy under which the plaintiff gets a free ride. Fundamental principles of quantum meruit require, he urges, that the responding party be compensated for the benefit he confers on the other side by responding to discovery.<sup>84</sup>

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<sup>79</sup> See, e.g., *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) (“It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public.”). For a dissenting view, see Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331 (2006).

<sup>80</sup> See Gregory Gelfand, “Taking” *Informational Property Through Discovery*, 66 WASH. U. L.Q. 703 (1988).

<sup>81</sup> Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61 (1995).

<sup>82</sup> Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

For a stronger argument, consider E. Donald Elliott, Twombly *in Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional*, 64 FLA. L. REV. 895 (2012), which argues that because being sued imposes burdens on a defendant, there is a due process right to a preliminary (preservice) review of the plausibility of the complaint by a judge.

<sup>83</sup> Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561 (2001).

<sup>84</sup> See Redish & McNamara, *supra* note 82, at 784–91.

This is a striking notion. It seems to reverse the Cooter and Rubinfeld idea that discovery that is unlikely to produce evidence of importance to the case would be forbidden or allowed only if the party seeking discovery paid for it.<sup>85</sup> To the contrary, it seems that the party seeking discovery is liable to pay mainly *because* the discovery produces what Cooter and Rubinfeld deemed a valid goal of the exercise—probative evidence. For Redish, the benefits of discovery to the plaintiff are that she does not have to assemble her evidence by other means, and sometimes that she can get what she needs to prove her case only by using discovery.<sup>86</sup> Frankly, the notion that the “value” to the plaintiff of the make-or-break internal memo that proves her discrimination case is equal to the value of the claim would seem to undercut discovery in the very situations in which it is most defensible.<sup>87</sup>

*Punitive damages.* From the perspective of the rest of the world, American punitive damages verge on being deplorable; in several countries American judgments for punitive damages are not entitled to be enforced even though compensatory damage judgments are. In recent years, the Supreme Court has returned to the subject fairly frequently, providing some due process limitations on the award of these damages.<sup>88</sup> States have

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This message is getting through in some high places. In March 2012, Rep. Trent Franks, Chairman of the House Judiciary Committee’s Constitution Subcommittee, wrote to the judges who serve as Chairs of the Judicial Conference’s Standing Committee on Rules of Practice and Procedure and Advisory Committee on Civil Rules to relay some views developed in a Subcommittee hearing about discovery matters. Among other things, Rep. Franks cited the Redish and McNamara article’s points about how discovery in effect requires the responding party to subsidize the requesting party’s discovery forays. See Letter from Rep. Trent Franks to Hon. Mark R. Kravitz and Hon. David G. Campbell 4 (Mar. 21, 2012) (on file with the *Northwestern University Law Review*).

<sup>85</sup> See *supra* text accompanying note 81.

<sup>86</sup> See Redish & McNamara, *supra* note 82, at 789.

<sup>87</sup> A somewhat related subject that Marty Redish has not yet addressed is the “American Rule” that each side ordinarily pays its own lawyer. That cost is, to a considerable extent, the reason why responding to discovery is so burdensome. The responding party has to pay its lawyer a lot of money to review the responsive materials and ready them for production. The recent RAND report on e-discovery emphasizes this fact; according to that study, 73% of the cost of responding to electronic discovery is due to document review. See NICHOLAS M. PACE & LAURA ZAKARAS, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY xv (2012).

Perhaps there is an argument that it is unconstitutional to impose that cost on a responding party; if so, perhaps the “loser pays” attitude of the rest of the world could be advanced in its place. Suffice it to say that the loser pays rule has been linked to some pathologies where it applies (in England, particularly); to a certain extent, the American Rule serves to reinforce impulses toward frugality in litigation while a full-indemnity loser pays rule can strip away any resistance to a litigation arms war.

<sup>88</sup> See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (endorsing a four-to-one ratio of punitive damages to compensatory damages as “instructive” on the due process limits); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (holding that a punitive damages award of \$2 million was constitutionally excessive because compensatory damages were only \$4,000); see also *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (adopting a limitation of one to one for admiralty law—that punitive damages may not exceed compensatory damages—subject to the Court’s common law jurisdiction).

developed some innovations of their own, sometimes directing that part of a punitive damages award go to the state or someone other than the named plaintiff.<sup>89</sup>

Marty Redish has not stopped with such half measures. To the contrary, in 2004 he called for “a radical reconsideration of the entire issue of punitive damages” on the ground that permitting such awards violates the central precepts of liberal democratic theory.<sup>90</sup> The problem is that punitive damages serve as a bounty to encourage private actors to enforce the law,<sup>91</sup> a power reserved exclusively to the state. “[T]he concept of punitive damages represents a perverse transfer of what is inherently public power to private individuals . . . .”<sup>92</sup>

*Class actions.* Though they have been around for a long time,<sup>93</sup> class actions have in the last generation assumed a much higher profile, largely due to the 1966 amendment to Rule 23. Although a *New York Times* story entitled *The Rise and Fall of the Class-Action Lawsuit* reported in 1988 that “class actions had their day in the sun and kind of petered out,”<sup>94</sup> since then they have returned to the fore. By the early twenty-first century, it was reported that “the class action device has changed from the more or less rare case fought out by titans of the bar in the top financial centers of the nation to the veritable bread and butter of firms of all shapes and sizes

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<sup>89</sup> See, e.g., GA. CODE ANN. § 51-12-5.1 (West 2003); MO. ANN. STAT. § 537.675 (West 2008 & Supp. 2012). In *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002), the court ordered that two-thirds of a \$30 million punitive award be paid not to the plaintiff but to “a place that will achieve a societal good, a good that can rationally offset the harm done by the defendants in this case.” *Id.* at 146. In times of austerity, there may be a temptation to direct that some of the money go into the public purse; defendants particularly fear that juries might learn that is where the money they award goes. See, e.g., *Ford v. Uniroyal Goodrich Tire Co.*, 476 S.E.2d 565, 567 (Ga. 1996) (holding it was improper to inform jurors that 75% of the punitive damages award would go into the state treasury); *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1020 (Or. 1990) (holding that it was improper to tell jurors that part of a punitive damages award would go to the state’s Criminal Injuries Compensation Account).

<sup>90</sup> Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages Are Unconstitutional*, 53 EMORY L.J. 1, 52 (2004). For competing views receptive to the use of punitive damages, see, e.g., William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629 (1999) (arguing on grounds of economic efficiency that punitive damages should be available in all cases of breach of contract, or at least willful breach of contract); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003) (urging that punitive damages be understood not only to provide retribution, deterrence, or both, but also as a form of “societal compensation” to redress harms the defendant has inflicted on others as well as the individual plaintiff).

<sup>91</sup> Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1451 (1993).

<sup>92</sup> Redish & Mathews, *supra* note 90, at 3.

<sup>93</sup> See STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987) (tracing the modern class action back to precedents in medieval litigation in England on behalf of groups).

<sup>94</sup> Douglas Martin, *The Rise and Fall of the Class-Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7 (quoting Paul Carrington, the official Reporter of the Federal Rules of Civil Procedure).

across the country.”<sup>95</sup> In 2005, Congress recognized its importance by passing the Class Action Fairness Act (CAFA).<sup>96</sup>

Consistent with his view of the proper limits of the rulemaking power, Marty Redish has challenged the constitutionality of the use of that power to reformulate the rule in 1966, devoting an entire book to the challenge. He recognizes that accepting this view would mean that “there can be little question that the class action as we have come to know it in recent years could not survive.”<sup>97</sup> Nonetheless, the problem is that the class action changes the “DNA” of the underlying law, particularly when it results in weighty lawsuits where none would otherwise be filed. The problem, in his view, is that the class action is so important that it could only be adopted by legislative action by those accountable to the voters. This is the book that a general counsel exhorted other in-house lawyers at companies that might find themselves facing class actions to examine carefully.<sup>98</sup>

As a reaction, it must be emphasized that this view of class actions has not enjoyed much favor in the courts. True, the Supreme Court and the lower courts approach the use of class actions with a considerable nod to the need to avoid going beyond the rulemaking power.<sup>99</sup> But the Supreme Court’s *Shady Grove* decision<sup>100</sup> does much to weaken that argument. There, the Court confronted a claim entirely dependent on New York law for a penalty against insurers who fail to pay claims on time. When an insurer fails to pay, this New York law permits the victim to sue and collect a penalty (and attorney’s fees). But the New York legislature was alert to the possibility that the impact of such laws might be inflated beyond their purpose if class actions could aggregate such penalty claims, so it directed also that class actions in New York courts would not be allowed for actions for penalties unless the legislature explicitly authorized them.<sup>101</sup> Due to CAFA, however, the plaintiff in *Shady Grove* was able to sue in federal court and to seek class certification under Rule 23. Faced with the New York legislature’s effort to calibrate enforcement of state law, Justice

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<sup>95</sup> Benjamine Reid & Chris S. Coutroulis, *Checkmate in Class Actions: Defensive Strategy in the Initial Moves*, LITIG., Winter 2002, at 21, 21.

<sup>96</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

<sup>97</sup> MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 53 (2009).

<sup>98</sup> See *supra* note 50 and accompanying text.

<sup>99</sup> See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (“The Rules Enabling Act underscores the need for caution.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–13 (1997) (“Rule 23’s requirements must be interpreted in keeping with . . . the Rules Enabling Act . . .”).

<sup>100</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

<sup>101</sup> N.Y. C.P.L.R. 901(b) (MCKINNEY 2006) (“Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”).

Ginsburg favored respecting the state legislators' choice,<sup>102</sup> but the majority held that Rule 23 applied and the misgivings of the state legislators did not matter. It is difficult to imagine a more striking example of the sort of contretemps that Redish emphasizes.<sup>103</sup>

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This summary admittedly does not come close to doing justice to Marty's thorough and thoughtful dissection of a wide variety of topics. Instead, it is intended to emphasize that his work provides a theoretical basis—grounded in liberal democratic theory—for retreating from the perfect cure view of much modern American procedure, and also provides noninstrumentalist grounds for curtailing many perfect storm aspects of American exceptionalism. I have indulged in a few reactions to these arguments merely to provide perspective on how striking they are. The main point is that—whether or not Marty so intended—adopting wholesale his panoply of arguments would tend to move American procedure very much in the direction of European procedure and that prevailing in the rest of the world. It is thus a constitutional argument for what is, in effect, harmonization of many procedural differences between the United States and the rest of the world.

#### IV. ALTERNATIVE POLITICAL THEORIES FOR AMERICAN EXCEPTIONALISM

The pervasive persuasiveness of Redish's invocation of liberal democratic theory to challenge the whole structure of American procedural exceptionalism invites consideration of competing political theories. Though confident more can be identified, I will turn to three different kinds of justification. All depend, in some sense, on the role of American procedure in applying public law through private litigation. I will, finally, contrast a fourth political theory analysis that does not fit the American model.

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<sup>102</sup> See *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

<sup>103</sup> It should be emphasized that this does not mean that Redish disagrees with the decision if one accepts that Rule 23 was properly promulgated. Then the question is whether the rule directs that the propriety of a class action in federal court should be governed by the rule's provisions even if the claims asserted were created by state law. On this point, Justice Ginsburg (and three others) tried to sidestep the rule. But Justice Stevens agreed with the Court that the rule had to be applied (having concluded that it was valid) and rejected Justice Ginsburg's efforts to avoid that result even though he generally found her views to provide a more nuanced view of the application of the Rules Enabling Act. *Id.* at 1448 (Stevens, J., concurring).

A. *Solving the Problem of Enforcing Public Law Without Creating a Strong State*

Marty Redish's critique of contemporary American procedure often emphasizes the need for public authorities to implement public values. But private litigation is often justified as doing the same thing. Indeed, in the view of Professor Chayes<sup>104</sup> and Professor Fiss<sup>105</sup> a generation ago, that might be seen as its main goal. Even now, some seem to deny that the perfect storm argument has any validity and emphasize that those who advance these concerns are solely attempting to blunt the enforcement of the law.

The notion that private enforcement is inimical to orderly democracy is not universal. Professor Kagan, a political scientist, has long charted the ways in which "adversarial legalism," in his phrase, actually implements distinctive American political attitudes. As he explains:

[A]dversarial legalism in the United States has been stimulated by a fundamental mismatch between a changing legal culture and an inherited set of political attitudes and structures. Americans have attempted to articulate and implement the socially transformative policies of an activist, regulatory welfare state through the political and legal institutions of a decentralized, nonhierarchical governmental system.<sup>106</sup>

Professor Burke, another political scientist, agrees: "[T]he distinctive aspects of the structure of American government, particularly judicial independence and separation of powers, create a strong incentive for activists of all stripes to favor litigious policies. And this in turn helps to explain the distinctively litigious policy style of the United States."<sup>107</sup>

The very elements of American procedural exceptionalism, then, seem to be addressed to the distinctive tradition of Americans to resist concentrated governmental power. Litigation opportunities empower large numbers of citizens to pursue relief in court. Lax pleading standards and broad discovery are the tools by which they can do so. Those who bemoan the prospect that the doors to the courthouse are closing are not only voicing fondness for the classic civil rights structural litigation of a generation ago, but are more generally embracing a public attitude of growing vitality in these Tea Party times that make mistrust of governmental institutions the centerpiece of discussion.

Yes, this arrangement enables private actors to control the implementation of public policy in important ways, and sometimes to frustrate important public goals for selfish reasons. Yes, adopting pleading rules like those in the rest of the world would curtail that ability, and

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<sup>104</sup> See *supra* text accompanying note 33.

<sup>105</sup> See *supra* text accompanying note 34.

<sup>106</sup> ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 40 (2001).

<sup>107</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 176 (2002).



constricting discovery would also. But one who seeks to do so runs into forceful arguments. Thus Judge Higginbotham, former Chair of the Advisory Committee on Civil Rules, warned in 1997:

The revolution in procedure wrought by the changes of the 1938 rules has served us well for an extraordinary period of time. Over the years access to the powerful federal engine of discovery has become central to a wide array of social policies. Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.<sup>108</sup>

At the same time, Dean Carrington, a former Reporter of the Advisory Committee, issued a related admonition:

Private litigants do in America much of what is done in other industrial states by public officers working within an administrative bureaucracy. Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.<sup>109</sup>

Those who calculate the costs of private litigation in this country and compare similar costs in other countries probably do not account for the increased costs (and intrusion) that result from direct governmental law enforcement in those countries. Of course, it may be that there are no similar efforts at enforcement by administrative or other means in those other countries, but the political science predicate for the work of Professors Kagan and Burke is that the populations of Western Europe do want and expect a similar level of legal protection, but accept a much more pervasive state as a way to provide it. As emphasized in Part V, calculating what is the right amount of clout for plaintiffs, or protection for defendants, often presents nice questions. The point here is that adopting procedures that facilitate private enforcement—even “subsidize” it—is not inherently politically indefensible, and that leaving enforcement using those procedural tools in private hands is not politically indefensible either.

Recent frustration with American administrative enforcement of constraints on business before and during the financial crisis underscore these points. The recurrent assertion that the SEC had been too easy on the

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<sup>108</sup> Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997).

<sup>109</sup> Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) (footnote omitted).

bankers is only one illustration.<sup>110</sup> Americans are not necessarily willing to leave the enforcement of public policy entirely to public officials.

*B. The “Lesser Evil” Political Explanation for Private Enforcement*

Professor Farhang’s 2010 book *The Litigation State*<sup>111</sup> offers another explanation for our regime of private enforcement dependent on permissive procedures. It focuses primarily on the adoption of Title VII of the 1964 Civil Rights Act. As that bill was making its way through Congress, the strong preference of its liberal democratic supporters was to empower the EEOC to enforce the new protections against discrimination. The leaders of civil rights groups felt the same way.<sup>112</sup> But conservative Southern Democrats in the Senate could be counted upon to filibuster any civil rights bill, so the liberals needed Republican votes to pass the legislation.<sup>113</sup>

The Republicans opposed enforcement by the EEOC. They claimed that the EEOC would engage in “the excessive bureaucratic regulation of business that was characteristic of the NLRB, and of so much administrative state-building since the New Deal.”<sup>114</sup> Thus, “the key move of Republicans in the Senate, led by Dirksen, was to substantially privatize the prosecutorial function. They made private lawsuits the dominant mode of Title VII enforcement, creating an engine that would, in the years to come, produce levels of private enforcement litigation beyond their imagining.”<sup>115</sup> As Farhang observes in the first sentence of the book: “Next to petitions by prisoners to be set free, job discrimination lawsuits are the *single largest category* of litigation in federal courts.”<sup>116</sup>

A few years later, the same scenario was played out again in regard to the Fair Housing Act: “Private litigation was again offered by conservative Republicans as a substitute for bureaucratic state-building, and it again commanded broader consensus than the administrative power sought by liberal civil rights advocates.”<sup>117</sup> Thereafter, during the period 1965–1976,

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<sup>110</sup> See, e.g., Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785 (2009); Joanna Chung, *SEC to Enlist Help on Fraud*, FIN. TIMES, Apr. 1, 2009, at 15.

<sup>111</sup> SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

<sup>112</sup> Thus, Professor Engstrom reports that right after World War II leading civil rights groups “coalesced around the idea of an administrative agency as the *exclusive* means of enforcement” and stuck to this preference “despite growing evidence that courts and litigation might offer the better course.” David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071, 1073–74, 1076 (2011).

<sup>113</sup> For a detailed review of these events, see FARHANG, *supra* note 111, at 94–128.

<sup>114</sup> *Id.* at 100.

<sup>115</sup> *Id.* at 106.

<sup>116</sup> *Id.* at 3.

<sup>117</sup> *Id.* at 120.

the same mode of enforcement was included in a wide range of protective regimes enacted by Congress.<sup>118</sup>

It may be that the Republican legislators who favored this arrangement would not have done so had they been able to foresee how dramatically private enforcement could implement such public norms. It may be that they did not appreciate that—particularly when coupled with fee-shifting legislation—these private enforcement measures would lead to the development of an entire sector of the bar that built successful practices on bringing such cases. The contemporary “public interest bar” did emerge, however. And it may well be that they did not fully appreciate that the class action could combine with some of these statutes to magnify the enforcement power.

But Professor Farhang offers some astute political explanations for legislative preference for private enforcement in the American legal system, with its separation of powers and independent judiciary.<sup>119</sup> Any given Congress might worry about how later elections could dilute the Executive Branch’s enthusiasm for the programs it adopted. Relying on an administrative agency to enforce such programs could be risky. A telling example pertinent to the Title VII story is the behavior of the EEOC after Clarence Thomas became its head. Private litigants pursuing remedies in court and private lawyers pursuing fee awards do not, of course, follow the election returns in the same way. The “stickiness” of American political processes made it unlikely a subsequent Congress would undo the private enforcement machinery this one had passed, and private litigants could invoke judicial enforcement no matter how the new Administration or Congress felt about the goals of this Congress.

Similarly, having independent federal judges interpreting the provisions of those laws might insulate them from the consequences of electoral reverses in a way that relying on public enforcement controlled by the Executive would not. In fact, proponents of civil rights laws often were pleased by the judges’ interpretation of the provisions Congress had adopted:

At the very time the executive branch moved rightward on civil rights with Nixon’s assumption of office, the federal courts were issuing far more liberal interpretations of Title VII . . . than most observers had expected. Civil rights groups were jubilant at the judiciary’s substantive elaboration of Title VII doctrine . . . . By the late 1960s, civil rights advocates judged that federal courts were actually *their* ideological allies, which fueled their preference for implementation through private enforcement regimes.<sup>120</sup>

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<sup>118</sup> For a review of these developments, see *id.* at 129–71.

<sup>119</sup> This paragraph summarizes chapter two of FARHANG, *supra* note 111, at 19–59.

<sup>120</sup> *Id.* at 165.

In the face of this history, there is much to be said for the view that our current private enforcement regime actually embodies the results of American democratic political processes, whether or not it also is entirely consistent with liberal democratic theory. Indeed, considering more particularly the notion that rulemaking and other judicial activity that affects resolution of litigation somehow subverts the democratic process, another political scientist counters: “[T]o the extent that courts and judges have become central to American politics, it is because elected politicians have *actively, repeatedly, and strategically* assisted them in becoming so.”<sup>121</sup> He therefore rejects what he describes as “a paranoid skepticism that judicial power was ‘stolen’ from the people and their representatives.”<sup>122</sup>

### C. *The Jury Trial and Democratic Decisionmaking*

The third explanation is more tentative and perhaps a symptom of a lost era. It might also be advanced as a reason for embracing some of the changes Marty has urged for other reasons because they might increase the frequency of trial, which has become less and less frequent over the last century. A first vision of American democracy emphasizes quite a different set of concerns from those advanced in Redish’s recent work. In some ways, it seems to rely on a lost way of doing judicial business—frequent jury trials in which citizen-jurors applied general rules of law to decide particular disputes. At its most vibrant, that can be viewed as what constitutional guarantees of jury trial seek to ensure.

There is surely something to the notion that jury trials played a role in the American political fabric. As an illustration, consider Professor Feldman’s description of trials handled by future Justice Robert Jackson in his early legal practice about a century ago:

With the financial stakes typically tiny, the cases Jackson took early in his career were as much theater as they were law. The local community treated a day’s worth of trials as entertainment. Court was not held before a judge, but in front of a justice of the peace who was not a lawyer. Trials took place not in a regular courtroom, but wherever there was space to gather: in a school, a church, or the dance hall of a Masonic Temple. One time, Jackson recalled,

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<sup>121</sup> JUSTIN CROWE, *BUILDING THE JUDICIARY* 272 (2012). With particular regard to the Rules Enabling Act, Professor Crowe observes:

[T]he Rules Enabling Act was actually *more* important than the Federal Rules of Civil Procedure—and would have remained so regardless of what the Court did (or did not do) with the power delegated to it. The sheer fact that Congress was compelled to delegate power to the Court in the first place suggests that the federal judiciary had arrived as a power player on the national political scene. For an institution that had long had even its most mundane institutional arrangements dictated to it by Congress, the legislative cession of the power to make rules—the power to make procedural law, in essence—governing judicial practice across the entire nation can only be regarded as a momentous step toward the realization of full institutional independence and autonomy.

*Id.* at 224.

<sup>122</sup> *Id.* at 271.

when the justice of the peace did not have room in his house, “we put up some oil lanterns, put some boards across potato crates for people to sit on, and we tried the case in the barn.”<sup>123</sup>

Perhaps this community involvement was an important reason why jury trial did not disappear in this country. At roughly the same time, it was slipping away in England,<sup>124</sup> even though the whole notion of jury trial originated there.

As recently as the 1980s, courts still declared that trial was “the centerpiece of the litigation,”<sup>125</sup> but declining trial rates have made this assertion hard to justify nowadays. That decline can be traced to many things, including the impact of increased criminal enforcement, the growing costs of pretrial preparation, including extensive discovery in some cases, and the increasing stakes involved in cases tried to conclusion—the “bet the company” scenario.<sup>126</sup>

This decline can be viewed as diminishing American democracy. Professors Burbank and Subrin have recently reacted to the decline in the trial rate by emphasizing that, “[s]ince the founding of our country, trials in open court resulting in decisions by either a judge or a jury have been thought to be constitutive of American democracy.”<sup>127</sup> They posit that the Bill of Rights was critical to the founding of the country, and add: “There would not have been an acceptable Bill of Rights without a right to trial by jury. Distrust of concentrated authority is a central feature of our system of government.”<sup>128</sup> Jury trial was a way of assuring that this form of democracy would thrive on “citizen’s justice”:

[M]any legal norms need community input for the decisions applying them to be accepted by that community. Issues such as negligence, intentional discrimination, material breach of contract, and unfair competition are not facts capable of scientific demonstration. Nor are these issues pure questions of law. Rather, they are concepts mixing elements of fact and law that become legitimate behavioral norms when the citizenry at large, acting through jury representatives, decides what the community deems acceptable.<sup>129</sup>

This vision of the role of trials in particular, and private civil litigation in general, has on occasion played a critical role in the development of the

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<sup>123</sup> NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 45 (2010).

<sup>124</sup> See *supra* note 16 and accompanying text.

<sup>125</sup> *Walters v. Inexo Oil Co.*, 440 So. 2d 268, 275 (Miss. 1983).

<sup>126</sup> For a set of reactions to the decline in the frequency of trials in the United States, see Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

<sup>127</sup> Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 401 (2011).

<sup>128</sup> *Id.* at 402 (footnote omitted).

<sup>129</sup> *Id.* at 401–02.

distinctive American way of litigation. A key example is the trial bar's fight to prevent the adoption of no-fault insurance schemes in place of the right to sue in court. As recounted by Professor Witt, the trial lawyers had to take on powerful labor unions to resist the move away from trial in court as the main route to compensation for injury. "[E]ven as the New Deal sought to replace courts, juries, and trial lawyers with efficient bureaucratic agencies, the trial lawyers contended that those same common-law institutions could best carry out the vision of the New Deal."<sup>130</sup> The trial lawyers looked to courts "as an institution for a new kind of regulatory activity that adapted New Deal notions to the institutions of the common law."<sup>131</sup> These developments led to the sorts of effects we have heard about recently:

Between 1950 and 1959, . . . the total expenditures in the American tort system increased threefold. By the end of the twentieth century, the costs of the tort system as a share of gross domestic product reached 2.3 percent, almost twice as great a share as the next leading industrialized nation state (Italy), and almost four times as great as the United Kingdom.<sup>132</sup>

From this perspective, the recent critique of aspects of American procedural exceptionalism presents a possibly mixed bag. Arguably, discovery costs could impede the assertion of claims, although it seems that those who consistently emphasize that point are often allied with what might be called the defense side of litigation; few plaintiff lawyers urge that discovery be curtailed to expedite their ability to get cases to trial. Heightening pleading standards, lowering potential recoveries for pain and suffering, removing punitive damages from the table, and curtailing jury trial would surely not serve the interests of this democratic impulse.

In many ways, this perspective is consistent, therefore, with the prior two—private enforcement serves American democratic goals in a distinctly American way. But the vibrancy of private enforcement depends significantly on American procedural exceptionalism. That suggests that some versions of democratic theory need not wholly favor moving toward more vigorous procedural harmonization with the rest of the world.

#### *D. Questioning a Political Theory for Procedural Configuration*

Thus far, this Article has suggested three political theories that would explain (and perhaps to some extent justify) some of the distinctive features of American procedure. As a counterpoint, it seems worthwhile briefly to note one that does not. Specifically, a generation ago Professor Damaška, a comparativist, undertook an ambitious effort to relate procedural arrangements at the most general level to the political organization of

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<sup>130</sup> JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS 261 (2007).

<sup>131</sup> *Id.* at 266.

<sup>132</sup> *Id.* at 268.

societies.<sup>133</sup> It's an exceptionally informative and intriguing work. For our purposes, however, the problem is that the theory really seems not to connect with the American reality.

Professor Damaška presents a dichotomy of procedural arrangements that correspond to two types of states. One he describes as the “reactive” state and the other the “activist” state.<sup>134</sup> The former contemplates a relatively limited role for government, while the latter, as the label “activist” suggests, relies on an interventionist governmental attitude. The procedural arrangements for the reactive state look very much like the American setup, with emphasis on party control of the case, concentrated proceedings, and reliance on live testimony and “day in court” aspects.<sup>135</sup> The policy-implementing method, on the other hand, seems like the communist countries of the former Soviet bloc (quite extant when Damaška was writing), relying on pervasive official control of the litigation process and routine hierarchical intervention to control courts of first instance.<sup>136</sup> It is an exceptionally elegant picture.

The United States is easy to fit into this picture; with its reliance on jury trial, limited opportunity to appeal under the final judgment rule, and relatively weak state, it may be the prototype of the reactive state. The only problem is that this overlooks the enforcement feature of American private litigation. Damaška recognizes that anomaly, entitling the last subsection in his book “Contemporary Activist Justice in America.”<sup>137</sup> In this section, he says that the public interest cases described by Professor Chayes<sup>138</sup> presented “perplexing examples” because although “public interest litigation retains overtones of ‘reactive’ justice,” “the traditional arrangements of civil procedure became an increasingly transparent cover for what is essentially a policy-implementing process.”<sup>139</sup>

In the end, he throws up his hands, declaring that “public interest litigation more and more resembles the marsupial wolf that only looks like a wolf, but is actually a sort of opossum.”<sup>140</sup> In this surrender, he offers a foretaste of the analysis set forth fifteen years later by Professor Kagan<sup>141</sup>:

The rise into prominence of American public interest litigation is . . . intimately linked to a governmental structure in which authority is widely distributed. Where there are so many checks and balances, the realization of activist ideas is a difficult enterprise: vehement controversy over policy

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<sup>133</sup> See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

<sup>134</sup> *See id.* at 72.

<sup>135</sup> *See id.* at 57–66, 97–146.

<sup>136</sup> *See id.* at 47–57, 147–80.

<sup>137</sup> *Id.* at 231–40.

<sup>138</sup> *See supra* text accompanying note 33.

<sup>139</sup> DAMAŠKA, *supra* note 133, at 237, 238.

<sup>140</sup> *Id.* at 238.

<sup>141</sup> *See supra* note 106 and accompanying text.

alternatives produces more animated stand-stills than discernible movement. What remains to an activist group, frustrated by stalemates in other branches of government, is to find a “coordinate” judge who agrees with its notion of desirable change and is willing to take public interest litigation in hand. Thus a program that can, in differently structured activist states, be formulated in the legislature and implemented by vigorous executive action has its last chance in American courts: an independent and powerful judge, with the legacy of his ill-defined powers still strongly present, can be at once a minilegislature, an administrator, and a player of the more specific judicial role.<sup>142</sup>

So we must be cautious about the validity of political theory as a measure for procedural arrangements, and perhaps also about bomb throwing in the house of procedure that seeks to implement political theory.

#### V. THE CHALLENGES OF PROCEDURAL REFORM IN THIS ENVIRONMENT

One conclusion to be drawn from this ambiguity is that grand themes have limited utility in adjusting procedural rules. They can be marshaled to support (or oppose) many of the sorts of changes that are energetically endorsed nowadays. Some seem to favor strengthening the hands of plaintiffs at every turn.<sup>143</sup> Others, somewhat along the lines of Marty Redish, find reasons why curtailing or limiting the options available to plaintiffs should often be pursued. Certainly non-academics lobby for quite aggressive efforts to shut down the private enforcement regime that continues to typify American procedure.<sup>144</sup>

For those called upon to navigate this maelstrom, one source of guidance would be what Marty calls “first order” issues dealing with basic policy values that should be served by the procedural system.<sup>145</sup> Others have similarly urged the rulemakers to emphasize such values.<sup>146</sup> Certainly efforts like Marty’s litigation matrix provide useful guidance.

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<sup>142</sup> DAMAŠKA, *supra* note 133, at 238–39.

<sup>143</sup> Indulging in oversimplification, an example might be Professor Gilles, who frequently weighs in favoring private enforcement and opposing arguments that plaintiffs have undue advantages. *See, e.g.,* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006); Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving!*, 58 U. MIAMI L. REV. 143 (2003); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000).

<sup>144</sup> *See, e.g.,* John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441 (2005) (challenging the private attorney general theory).

<sup>145</sup> *See* Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, Nov. 2011, at 145, 145.

<sup>146</sup> *See, e.g.,* Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008) (urging the rulemakers to shift their focus to developing fundamental theory before devising further reforms).



That guidance regularly does not seem to answer the sorts of questions that the rulemakers must try to answer, however. Unless one adopts the version of liberal democratic theory that Redish expounds, for instance, alternative analyses like those in the previous Part may point toward retaining or strengthening provisions that Redish would dismantle. Moving beyond dismantling for the purpose of dismantling, then, leaves difficult judgments to be made. All should be able to agree that it would be undesirable for courts to empower plaintiffs to extort unjustified settlements from defendants by neglecting any judicial scrutiny of the validity of claims at the pleading stage and enabling plaintiffs to use discovery to inflict such cost on defendants that they have no choice but to pay tribute. That, after all, has been the specter haunting the liberal ethos of mid-twentieth century American procedure for nearly two generations.

But most would deplore retracting our existing procedural provisions to the point where plaintiffs with valid claims routinely have no meaningful enforcement. That, of course, is sometimes a prime argument in favor of the class action device. Marty's critique that the class action transforms the DNA of substantive rights might in that instance suggest that it does so by making real those rights that would otherwise be empty. As he acknowledges, "If the individual injuries recognized by the substantive law are so small as not to justify the individual victim's decision to enforce them, then the rights will not be enforced."<sup>147</sup> Perhaps it is consistent with some versions of democratic theory for the legislature to enact protections fully expecting that they will not be enforceable and will not be enforced; procedural shortchanging could well serve as a sleight of hand to such ends. But it becomes more difficult to articulate that goal as one rulemakers should embrace.

Given these competing considerations, the rulemakers may often focus on "second order" problems—how most pragmatically to balance the considerations that matter in adjusting the system they have. Indeed, some urge that the tethers of the private enforcement system be applied to the public enforcers.<sup>148</sup> The path to theoretical clarity may be beyond current rulemakers; muddiness will instead afflict them.

In this environment, empirical questions may often dominate theoretical ones. It is certain that dubious empirical assertions abound in the debates about procedural matters. And it sometimes seems that more disciplined work itself is attacked for ideological reasons. In the fog of these procedural wars, those making the choices make the best ones they can, but don't assume they are the only ones that could be made. It would

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<sup>147</sup> REDISH, *supra* note 97, at 41.

<sup>148</sup> See, e.g., Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385 (2011) (urging that protections developed in private class actions be used as a model to provide safeguards for victims of criminal activity in connection with the actions of public prosecutors).

surely be desirable to be able to offer more definite prescriptions, but that seems presently too difficult, and perhaps even perilous.

## CONCLUSION

Marty Redish does not expect the muddy reality described in the last Part to disappear soon. To the contrary, while repeatedly challenging the status quo he recognizes that it is likely to remain as it is.<sup>149</sup> A Supreme Court that decided *Shady Grove* in 2010 is unlikely soon thereafter to shift course and determine that the entirety of Rule 23 is unconstitutional. True, the Court has made some striking changes of direction in recent years. One of the most striking is *Crawford v. Washington*,<sup>150</sup> which reconceptualized the Confrontation Clause. One pertinent to civil procedure would be *Finley v. United States*,<sup>151</sup> which suddenly abandoned and denounced the federal courts' accrual of jurisdiction through doctrines like pendent and ancillary jurisdiction. But about-faces are very rare, even in reaction to bomb throwing.

At the same time, American civil procedure owes a great debt of gratitude to Marty Redish in large measure *because* he has been willing to throw academic bombs. He has not done so because he enjoys bomb throwing. And he hardly needed to do so to get attention, as some academic bomb throwers may; Redish's eminence has long been assured. Instead, he launches fundamental challenges because they flow from his rigorous analysis of basic policy issues. We all need to be reminded of those basic issues lest we become completely mired in everyday problems. That does not mean, however, that the prescriptions that result will quickly be adopted.

Instead, the American preference for private enforcement seems likely to continue.<sup>152</sup> And enthusiasm for this sort of activity may actually spread beyond our shores. Professor Farhang explained that our Congress might

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<sup>149</sup> See, e.g., Redish & Amuluru, *supra* note 53, at 1305–06 (“We of course do not mean to suggest that the constitutionality of the Rules Enabling Act—at least as a practical matter—is today in serious doubt. The Supreme Court has confidently asserted the Act’s constitutionality on more than one occasion, and there is absolutely no reason to imagine that this attitude will change in the foreseeable future.” (footnote omitted)).

<sup>150</sup> 541 U.S. 36 (2004).

<sup>151</sup> 490 U.S. 545 (1989).

<sup>152</sup> It’s worth noting that there is a mountain of academic literature about whether private enforcement works. For a sampler, see David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244 (2012); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010); Maria Correia & Michael Klausner, *Are Securities Class Actions “Supplemental” to SEC Enforcement? An Empirical Analysis* (May 15, 2012) (unpublished manuscript) (on file with the *Northwestern University Law Review*).

favor private enforcement because it would set in motion enforcement activities that subsequent elections could not stop.<sup>153</sup> The European Union might be said to confront similar problems of enforcement if its enactments depend on decisions by national governments with different priorities. Consider Professor Kelemen's recent book on the emergence of "Eurolegalism," a variant of American adversarial legalism as described by Professor Kagan:

Eurolegalism is emerging as a quite unexpected—and in many circles unwanted—stepchild of European integration. Together, the EU's institutional structure and its ongoing project of market integration generate political incentives and functional pressures . . . for private enforcement. In other words, adversarial legalism is emerging in Europe for much the same reason it emerged decades earlier in the United States. As Kagan has emphasized, in the US case, the combination of "fragmented governmental authority" and "fragmented economic power" was crucial to the emergence of adversarial legalism. In the United States, regulation through litigation emerged as a tool of a weak, highly fragmented state attempting to regulate an expansive and highly liberalized economy. So too in Europe.<sup>154</sup>

Maybe, then, some harmonization will actually turn out to favor America's "exceptional" procedures more than one would recently have thought possible. Only time will tell. But as we confront these issues we will owe a debt to bomb throwers like Marty Redish who force us to face the hard problems.

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<sup>153</sup> See *supra* note 119 and accompanying text.

<sup>154</sup> R. DANIEL KELEMEN, *EUROLEGALISM* 9 (2011) (citation omitted).

