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The Psychology of Procedural Justice in the Federal Courts

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The Psychology of Procedural Justice in the Federal Courts

Rebecca Hollander-Blumoff*

This interdisciplinary article examines our federal court system from the perspective of the psychology of procedural justice – that is, subjective perceptions about the fairness of process. The article considers some of the central features of civil litigation from the standpoint of the psychology of procedural justice, highlighting some of the aspects of the system that are likely to increase perceptions of fair process, and exploring, conversely, rules and practices that may decrease those perceptions. The article focuses on procedural justice in two contexts: basic rules and practices of civil procedure and more complex federal court doctrines that involve the allocation of judicial business between the states and the federal government. In both cases, procedural justice is considered from the perspective of litigants involved in civil disputes; in the latter case, the analysis broadens to encompass the procedural justice experiences of other important actors in civil litigation, including judges, legislators, and state executives. The article argues that, while legal academics have typically analyzed the fairness of federal procedure and rules through an analysis of procedural due process, the psychology of procedural justice provides an important and potentially wider perspective through which to consider the procedural fairness of our legal system. Because perceptions about fair process are critical to assessments of legitimacy and deference to legal authority, scholars in both law and psychology should devote greater attention – both empirical and theoretical – to the potential procedural justice effects of specific legal rules and doctrine.

INTRODUCTION

How satisfied are litigants with our federal courts? Do litigants and the public perceive the federal courts and their decisions as legitimate? Research in social psychology suggests that the fairness of process, or “procedural justice,”¹ provides the key to answering these

* Associate Professor, Washington University Law School. Thanks to Susan Appleton, Matt Bodie, Richard Freer, Emily Hughes, Pauline Kim, Tom Tyler, Laura Rosenbury, Jamelle Sharpe, Larry Solum, Verity Winship, and participants in the University of Illinois Junior Federal Courts Workshop and the faculty colloquia at St. Louis University Law School and the University of Illinois College of Law for valuable thoughts, comments, and suggestions. Thanks also to Elizabeth Chen for excellent research assistance.

¹ JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE (1975). As discussed at greater length, infra Part I.B, legal scholars have also explored procedural justice from a non-psychological perspective. See, e.g., Lawrence B. Solum, Procedural Justice, 78
critical questions. This research has indicated that when people feel that they have been treated fairly by decision-making authorities, they are more likely to accept and comply with decisions, feel satisfied with outcomes, and believe in the legitimacy of the authority. These perceptions of procedural justice, then, play an important role in ensuring the successful functioning of our legal system. This article offers an interdisciplinary analysis of federal civil litigation through the lens of the psychology of procedural justice, suggesting ways in which certain rules and doctrines may foster or frustrate perceptions of fair process.

A focus on fair process and legitimacy is certainly no stranger to legal theorists, as a voluminous body of scholarship demonstrates. From the legal side, scholars consider the elements of process fairness historically, philosophically, and doctrinally. These analyses range from broad philosophical examinations of the theoretical underpinnings of the legal system with respect to fairness to a more fine-grained analysis of the fairness of individual rules and doctrines. Two (sometimes entwined) approaches dominate legal work on the fairness of procedure: first, scholars have endeavored to formulate comprehensive theories about procedural fairness that sort through and reconcile economic, social, political, and dignitary concerns, among others; second, commentators have considered fair process from the perspective of procedural due process, using this constitutional benchmark to assess fair process in any given context.

Legal scholars examining process fairness and social psychologists studying procedural justice thus share a concern with processes, separate and distinct from, albeit sometimes related to, substantive outcomes. Yet despite the fundamental concern over fair process in each discipline, rarely have the twain met. Scholars writing in these two areas – even as they use similar and sometimes even identical language – take fundamentally different tacks as they grapple with the relationship between fair process, fair outcome, and the legitimacy of the system as a whole. Neither the first, more

3 Procedural justice effects have been found in the criminal context, see infra note 15, and a similar analysis is certainly feasible for criminal cases. However, this Article expressly limits its focus to civil cases in the federal system.
4 See, e.g., infra Parts I.B.1-I.B.2.
5 See, e.g., infra notes 51 to 58.
6 But see JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 162 (1985) (providing a very brief discussion of Thibaut and Walker’s work on procedural justice in context of whether procedural protections are valued for instrumental or dignitary values); Frank I. Michelman, Formal and Associational Aims in Procedural Due Process, in DUE PROCESS: NOMOS XVIII, supra note 1, at 126, 127 (noting summarily, without exploring empirical data or psychological research, that participatory opportunity may be “psychologically important” to litigants).
philosophical strain nor the second, more doctrinal strain of legal scholarship on process fairness has systematically considered or focused on empirical data about individual perceptions of procedural fairness.\(^7\) Psychologists, in contrast, are typically concerned purely with subjective experiences with the legal system, without regard to broader historical, philosophical, or doctrinal bases. And while some legal scholars have examined the procedural fairness of particular rules and doctrines, psychologists usually consider participants’ broad-brush ex post opinions about the sum total of their treatment in the legal system, rather than examining the specific effects of any individual rules or procedures, despite the fact that global perceptions of fairness are likely to be a product of the cumulative impact of these effects. While legal scholars’ work may overlook the fact that the legal system is made up not just of rules and structures but of real disputes engaged in by real people, psychology in turn may undervalue the importance of specific legal structures and philosophical meaning.

In this article, I begin to bridge the gap between the law and the psychology perspectives by exploring the psychology of procedural justice as it plays out on the ground of federal court litigation. As part of this exploration, I also argue that legal commentators’ focus on theories of procedural fairness and on procedural due process, while of grave importance, is nonetheless limited in its capacity to fully address issues about citizens’ actual perceptions of fairness and legitimacy. I demonstrate the distinct scope of a psychological procedural justice analysis in several ways. I first explain the fundamental difference in meaning and goals between theoretical accounts of procedural fairness in law and empirical research on procedural justice perceptions; I also explicitly examine the similarities and differences between procedural due process and procedural justice in psychology. Additionally, as I analyze the procedural justice experience of civil litigants in the federal court system in a variety of contexts, I make clear how this analysis departs from the classic procedural due process paradigm that has previously been applied to particular rules and practices. Similarly, I explain how procedural justice effects might be found among parties, such as lawyers, judges, and legislators, who are well beyond the scope of a procedural due process analysis.

In Part I, I explore the contours of procedural justice in psychology, procedural justice in law, and procedural due process, examining the questions of how they differ. Although the frameworks do overlap conceptually, I argue that the psychological perspective is not

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\(^7\) This failure to include the psychological framework is not accidental. See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U. L. Rev. 485, 506 (2003) (stating that using empirical data about the psychology of procedural justice “has a fatal defect”); Solum, supra note 1, at 267 (“[T]he satisfaction interpretation of the participation model fails as a stand-alone theory of procedural justice”).
subordinate to a theoretical account of procedural justice, nor merely duplicative of a procedural due process analysis. Instead, because it provides a much broader and more cross-cutting framework, as well as a way to actually measure the experiences of real individuals, examining the psychology of procedural justice adds to an understanding of our legal system in a way that both complements and deepens classic legal analysis. In this section, I also discuss the parties for whom procedural justice is relevant, including a consideration of the role of lawyers versus clients and individuals versus entities.

In Part II, I look to several basic rules of federal civil litigation through the procedural justice lens, describing the factors that lead to perceptions about procedural justice in psychology and considering how they play out in the context of a host of relatively straightforward civil procedure rules – including those governing pleading, notice, motion practice, and discovery.

Part III examines more complex federal court doctrine through this same lens. I consider diversity jurisdiction and abstention from a procedural justice perspective from the viewpoint of individual litigants; I then expand my analysis – and demonstrate the wider applicability of the procedural justice paradigm – by considering procedural justice from a systemic perspective, from the viewpoint of federal and state judges, legislators, and executives. All of these parties have a stake in the division of business between federal and state courts, and these individuals are able to form an opinion about the procedural fairness of the judicial decisions about which forum will hear any given case.

Finally, in Part IV, I suggest implications of my analysis for the legal system and for empirical work in law and psychology. I argue that the details relevant to procedural justice in the basic federal rules, as well as in allocating the business of the court between state and federal forums, are important to fundamental perceptions of the legitimacy of our federal court system by individual litigants and government actors, and that courts and rule makers ought to pay greater attention to the likely impact of procedure in light of what research has shown about how individuals form judgments about fair process. In addition, I suggest that psychological research could provide greater insight into the experiences of litigants and government actors by focusing more closely on individuals’ perceptions of fairness about specific legal rules and doctrines.

I. PROCEDURAL JUSTICE: PSYCHOLOGY VERSUS LAW

A. The Psychology of Procedural Justice

Over thirty years ago, psychologists began to research legal systems in an effort to increase compliance with judicial decisions. In particular, researchers focused on what kinds of processes would seem
most fair to disputants and would lead to increased acceptance of and adherence to judicial decisions. This research provided robust empirical evidence that individuals care deeply about the fairness of the process by which decisions are made, apart from considerations about the outcome of the decision. Procedural justice scholars do not suggest that individuals are indifferent to the favorability or the fairness of their outcomes; those things do matter, and often matter a lot. But the additional component of fair treatment by a decision-making authority matters as well – and matters independently, even apart from the effect that fair treatment has on fair and good outcomes.

Thibaut and Walker’s original procedural justice research took place in a controlled laboratory setting, where participants rated dispute resolution mechanisms that afforded them a higher degree of control over process as more procedurally fair than other mechanisms. Participants’ view of a particular process as fair was significantly related to their satisfaction with outcomes that the process produced. From this original research stemmed a multitude of subsequent studies that amplified, clarified, honed, and expanded our understanding of the role of procedural justice, including the scope of contexts where procedural justice is relevant, the particular effects procedural justice has on individuals, the antecedent conditions for determining procedural justice, and the underlying mechanisms explaining why procedural justice is important. I briefly review the various facets of this research below.

Procedural justice research has shown that procedural justice effects are present in a wide range of settings. Civil litigants in court care about their treatment by a judge, criminal defendants care about their treatment by judge and jury, disputing parties in arbitration and mediation care about their treatment by an arbitrator or mediator, and

8 See THIBAUT & WALKER, supra note 1.
10 Id.
11 See THIBAUT & WALKER, supra note 1.
12 Id.
13 As Robert MacCoun has said, “[f]ew if any socio-legal topics . . . have received as much attention using as many different research methods.” Robert J. MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 ANN. REV. L. & SOC. SCI. 171, 172 (2005) [hereinafter MacCoun, Procedural Fairness].
even disputing parties in negotiation care about their treatment by each other. Research outside the legal dispute resolution system has demonstrated that people care about their treatment by other authority figures, such as police officers, work supervisors, and health care administrators. Beyond both the legal dispute resolution context and the third party context, research has suggested that individuals care about procedural justice in highly relational settings like the family and even in classic economic settings like markets. Effects are found in field studies, simulations and experimental settings, and in situations with low stakes and with very high stakes.

24 Raymond Paternoster, Robert Brame, Ronet Bachman & Lawrence W. Sherman, Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault, 31 LAW & SOC’Y REV. 163 (1997) (showing procedural justice effects in a study in which the data was collected based on actual offenders’ experiences).
25 See, e.g., THIBAUT & WALKER, supra note 1, at 30 (showing procedural justice effects in a study in which first year law students participated in a simulation in which they acted as attorneys).
26 See, e.g., Hollander-Blumoff & Tyler, supra note 18 (study involving student performance on in-class negotiation exercise); TYLER, WHY PEOPLE OBEY THE LAW, supra note 14, at 19 (“This book . . . examines the general level of noncompliance with everyday laws regulating behavior. Its concern is with the degree to which people generally follow the law in their daily lives.”).
Research has suggested that procedural justice is an important component of individuals’ judgments about whether to comply with legal rules and authorities, as well as whether legal systems are legitimate. When people feel that they have received fair treatment, they are more likely to adhere to, accept, and feel satisfied with a given outcome, and to view the system that gave rise to that outcome as legitimate.

Psychologists have focused, almost exclusively, on individuals’ subjective perceptions of procedural fairness. This subjective focus, far from troubling researchers, is in fact a central component of justice research in psychology. As Tyler has explained, “The especially striking thing about social justice is that it is a social concept that exists only in the minds of the members of an ongoing interaction, a group, an organization, or a society. Hence justice is a socially created concept that . . . has no physical reality. It exists and is useful to the degree that it is shared among a group of people.” For psychologists, measuring subjective perceptions of procedural justice is important because this measurement captures individuals’ real experiences of fairness or unfairness of the legal system, as opposed to the effects that the architects of the system might think or expect to be likely products of the system’s structure and rules.

Researchers have also studied the factors that individuals use to form judgments about whether they have been treated fairly. Although numerous factors have been identified, Tyler has argued that four “elements of procedures are the primary factors that contribute to judgments about their fairness.” These elements include, first, how much voice and opportunity to be heard the party believes she has experienced; second, neutrality of the forum; third, the trustworthiness of the decision maker; and fourth, the degree to which the individual has been treated with dignity and respect. As noted above, the importance

27 Tom R. Tyler, The Role of Perceived Injustice in Defendants’ Evaluations of their Courtroom Experience, 18 LAW & SOC’Y REV. 51 (1984) (finding that defendants sentenced to steep prison terms are more satisfied and more positive in their views of decision-making authorities when the defendants perceive the authorities as being honest and unbiased, and when the legal process itself seems fair); Paternoster et al., supra note 24 (finding that procedural justice effects can help deter spousal assault recidivism); E. Allan Lind, Arbitrating High Stakes Cases: An Evaluation of Court-Arbitrated Arbitration in a United States District Court, RAND (1990) (finding that litigants in high stakes arbitration cases evaluate procedural fairness similarly to litigants in low-stakes ADR studies).
28 See TOM R. TYLER, WHY PEOPLE OBEY THE LAW, supra note 14, at 162.
29 Id.
31 Id. at 121.
32 While courtesy and respect were originally conceptualized as the interpersonal or social component of procedural justice, some psychologists have suggested that courtesy and respect are more properly considered in the context of “interactional
of these factors in forming procedural justice assessments does not in any way preclude the importance of other factors, such as concerns about costs, accuracy, winning, or punishment, to name a few; all of these factors may play a role in how individuals evaluate distributive justice, outcome favorability, or their more general satisfaction with outcome. Psychologists suggest, however, that they are not a critical component of how individuals form judgments about the fairness of a decision-making process.

Psychologists have suggested that perceptions about control over process are an important determinant of whether people feel that procedural justice has occurred. Individuals typically determine the degree of process control by assessing how much participation they have had in the dispute resolution process—that is, how much voice and opportunity to be heard they have experienced. Participation is perhaps the most robustly researched of the factors that contribute to procedural justice. Its effects have been widely noted, in both laboratory and field studies. Participation yields procedural justice results in civil litigation, mediation, and criminal law. Not surprisingly, individuals value participation highly when they believe that their input will have an effect on the decision at hand, but perhaps more interestingly, individuals also place value on the opportunity for voice

justice,” conceptually distinct from “procedural justice.” See, e.g., Robert J. Bies & J. S. Moag, Interactional Justice: Communication Criteria of Fairness, in 1 RESEARCH ON NEGOTIATION IN ORGANIZATIONS 43 (Roy Lewicki ed., 1986); Robert J. Bies, Interactional (in)justice: The Sacred and the Profane, in ADVANCES IN ORGANIZATIONAL JUSTICE 89 (J. Greenberg & R. Cropanzano eds., 2001). However, there is a lively debate on this issue among researchers, and at present, I incorporate courtesy and respect into my procedural justice analysis in keeping with the work of Tyler and others.

Thibaut & Walker, supra note 1.


Thibaut & Walker, supra note 1.


even in contexts where they are aware that their participation will not meaningfully affect the decision.  

Neutrality and trust are distinct but related factors. Neutrality means that decision makers are honest, impartial, and objective, and that they do not allow their own personal values and biases to enter into their decision-making calculus; instead, this calculus should be based on rules and facts. Trustworthiness, in contrast, suggests that the decision maker’s motivation is above-board: that the decision maker is “benevolent and caring, is concerned about [the parties’] situation and their concerns and needs, considers their arguments, tries to do what is right for them, and tries to be fair.” Obviously, these are intertwined judgments: if a decision maker were manifestly non-neutral and biased, it would be very difficult for that decision maker simultaneously to be trustworthy. However, neutrality relates fundamentally to the set of rules that an authority is using, while trustworthiness encapsulates a separate (albeit quite often related) judgment about that authority’s motives. Finally, research has suggested that individuals value being treated with courtesy and respect, because these factors “recognize[] and acknowledge[ ]” individuals’ “dignity as people and as members of society.”

Psychologists have proffered three main theories for why individuals care about procedural justice separate and apart from outcome favorability and outcome fairness. First, the original procedural justice researchers, Thibaut and Walker, believed that procedural justice was important to people because what people really cared about was in fact outcomes. In this purely instrumental model, they hypothesized that people cared about fair process because of a belief that only a fair process would yield a fair outcome. Thibaut and Walker suggested that fair process was valuable solely because of its effects on outcome. Over a decade later, Tyler and Lind posited that the desire for, and centrality of importance of, fair process was not so inextricably linked to outcomes. Instead, Tyler and Lind suggested in their “group value model” that people care about fair process because when an authority figure treats an individual in a fair manner, that authority figure conveys positive information about that individual’s status in society to the individual. This in turn affects the individual’s self-esteem and other

40 Tyler, Social Justice, supra note 30, at 122.
41 Id.
42 Id.
43 THIBAUT & WALKER, supra note 1, at 4.
psychological factors. Tyler and Lind’s research made clear that instrumental effects could not fully account for the importance of procedural justice. Finally, more recently, Van den Bos and colleagues have suggested that people find it difficult to know how to assess their outcomes, and use fair process as a heuristic, or shortcut, to form judgments about their outcomes. “Fairness heuristic theory” thus suggests that the main value of fair process is to serve as a type of proxy for judgments about outcomes in the face of uncertainty.

The findings from over three decades of research on the psychology of procedural justice research stand in sharp contrast to the continuing insistence of law and economics scholars that individuals are most interested, in any given setting, in maximizing their economic outcomes. This exclusive focus on instrumental gain has repeatedly been refuted empirically, in both the procedural justice and other contexts. Simply put, the empirical evidence suggests that individuals value fairness of process, separate and apart from outcome, because of the special message that fairness of process sends to its recipients: an authority who acts in a fair manner is an authority who is legitimate and cares about the dignity and social standing of those who stand before it.

B. Procedural Justice in Law

1. Theories of Procedural Justice

Philosophers and legal scholars have grappled with the question of fair process, attempting to offer a unified general conception of the role of fair procedures and what such fair procedures would look like. As with the psychology of procedural justice, theorists have largely

45 Tyler & Lind, supra note 44.
47 Id.
48 As Lynn Stout describes this perspective, it portrays the rational actor who “worries only about himself, calculately and opportunistically pursuing the course of action that brings him the greatest material advantage.” She further notes the widespread dissemination of this viewpoint throughout and beyond economics. LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 4-5 (2011).
49 See, e.g., DANIEL GILBERT, STUMBLING ON HAPPINESS 217-220 (2006) (describing research demonstrating that more money does not always lead to increased happiness).
50 The volume of writing on fair process is too large to cite completely here. For a set of varying perspectives, see, for example, JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999); RONALD DWORKIN, Principle, Policy, Procedure, in A MATTER OF PRINCIPLE 72-103 (1985); MASHAW, supra note 6; LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002); Solum, supra note 1.
fallen into two camps when offering their visions for procedural fairness: some scholars focus on the outcomes that a given process will produce (the instrumental approach), while others focus mainly on process per se, without much regard to outcome (the dignitary approach).

The instrumental theories begin from a premise that the legal system is designed, at heart, to product substantively accurate outcomes. As Bone has noted, “Outcome-based theories assume that the primary purpose of adjudication is to produce outcomes that enforce the substantive law. . . . This is not to say that procedure cannot produce value in other ways, but it is to say that its primary value lies in the decisions, judgments, and settlements it generates.”\(^{51}\) The instrumental theorists, starting from this premise, suggest that a fair process is meaningful because it is only through fair procedures that parties can achieve a substantively just outcome.\(^{52}\) As Tribe has explained, this perspective indicates that the system is designed “less to assure participation than to use participation to assure accuracy.”\(^{53}\)

Furthermore, case law has explicitly reflected this notion: in *Fuentes v. Shevin*, the Supreme Court described “the Constitutional right to be heard” not as purely a device to “ensure abstract fair play to the individual,” but rather, “more particularly, . . . to minimize substantively unfair or mistaken deprivations of property.”\(^{54}\) This means that the legal system must calibrate the return on its investments in procedures with the reduction in error risk to create the “appropriate” level of procedural due process.\(^{55}\)

In contrast, dignitary theories of procedural due process argue that its importance lies in its intrinsic, non-instrumental value – in its

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\(^{52}\) Conversely, instrumental theory suggests, it is only those fair procedures that do meaningfully yield a substantively just outcome that are important. Other fair procedures are irrelevant and – worse – inefficient. For example, one treatise explains that “the quantum and quality of the process due in a particular situation depends on the need to serve the due process function of minimizing the risk of error in decision-making.” 16B AM. JUR. 2D Constitutional Law § 904 (2010) (referencing holdings in Gilbert v. Homar, 520 U.S. 924 (1997)).

\(^{53}\) See, e.g., LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 667 (2d ed. 1988) (emphasis in original). See also Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112-13 (suggesting that “substance and process are intimately related,” and that [t]he procedures one uses determine how much substance is achieved, and by whom.”)


\(^{55}\) By characterizing the right to due process as a right to procedures that will, in turn, produce the substantively fair outcome to which one also has a (paramount) right, these theorists have inextricably wedded efficiency to the rights discourse. As Bone has explained, “Obviously, parties cannot have a right to perfect accuracy since perfection is impossible. More precisely, if the right guaranteed perfect accuracy, every case would involve a rights violation, which hardly fits common intuitions of procedural fairness.” Bone, *supra* note 51, at 1017.
value in enforcing norms about human dignity and human interaction in society. Dignitary theorists of procedural due process take the perspective that the value of process relates to the role of the human being in society, rather than to the type of outcome achieved. Tribe has described the due process right to be heard as “a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her,” and has concluded that this right, “analytically distinct from the right to secure a difference outcome,” conveys “the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.”

Tribe further noted the words of Felix Frankfurter, who wrote that the “validity and moral authority of a conclusion largely depend on the mode by which it was reached.” As Tribe explained, “At stake here is not just the much-acclaimed appearance of justice but, from a perspective that treats process as intrinsically significant, the very essence of justice.” Mashaw has argued that “the dignitary approach is both necessary to and sufficient for an adequate jurisprudence of due process.”

Other explanations for procedural justice are harder to pigeonhole. For example, Solum suggests that participation is the core value for procedural justice, and that procedural justice’s main value in the adjudicatory process is not reducible to instrumental concerns about cost or accuracy but rather is purely as a legitimating feature. That is, a process that does not allow for participation is illegitimate, and participation is important not solely for its value in producing better or more efficient outcomes, but, distinctly, for its central role in legitimating the process itself. Hay also explored the idea of procedural justice, suggesting that procedural justice merely captured the subjective experience of any process that an individual would agree to, ex ante, for the resolution of disputes.

While this body of important scholarship on procedural justice engages with questions about fairness in serious and important ways, its goal is fundamentally different than that of procedural justice in psychology. The legal and philosophical literature is explicitly normative, while the psychological literature is explicitly descriptive. Psychological research on procedural justice does not argue for or against particular tenets of fair process; rather, it seeks to measure and quantify how individuals form judgments about fairness in particular situations, and what effects these judgments then have. The

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56 Tribe, supra note 53, at 666.
57 Id.
58 Id.
59 Mashaw, supra note 6, at 169.
philosophical and legal theory perspectives, in contrast, rely on philosophical conceptions about the nature of procedural justice rather than on any empirical research, or empirical consensus, about the features that make a particular process appear fair to participants. While it is certainly true that there is a dynamic relationship between these perspectives – that psychology shapes our sense of what rules and systems are acceptable, and that the systems we create in turn influence our psychological experiences – they each offer a distinct outlook on fairness. This project focuses not on offering a grand unified theory of procedural justice in law, but instead on the ways in which real individuals are likely to experience procedural fairness through the civil litigation process.

2. Procedural Due Process

Much of the legal scholarship on the fairness of the process of litigation has centered around procedural due process. Procedural due process, a bedrock feature of our legal system,\(^6\) defines the appropriate level of procedural safeguards that must be in place to ensure a fair legal process, and scholars have considered at great length these safeguards’ contours,\(^6\) pedigree,\(^6\) and theoretical basis. The constitutional right to due process, found in both the Fifth and Fourteenth Amendments, has been interpreted to include a right to procedural, substantive, and structural due process.\(^6\) Procedural due process “delineates the

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constitutional limits on judicial, executive, and administrative enforcement of legislative or other governmental dictates or decisions.” 66

Put simply, procedural due process is about “adequate safeguards.”67 The “core elements of due process” include notice of the issue in the case, the opportunity for a hearing, and an impartial decision maker.68 Scholars have emphasized the fundamental nature of these factors in determining whether procedural due process requirements have been met:

[T]he core content of procedural due process placed upon government the duty to give notice and an opportunity to be heard to individuals or groups whose interests in life, liberty or property were adversely affected by government action. The assurance of a fair trial or at least a fair hearing mandated that the individual be accorded an open hearing before a “neutral and detached magistrate” who has no “direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case,” and who is free from domination by “a mob,” with counsel provided for indigents in criminal cases.”69

Determining the exact procedures required to yield procedural due process for any given party has required a context-specific analysis by the courts,70 who have considered the question in areas as disparate as forfeiture,71 prisoners’ rights,72 children’s rights,73 and family rights.74 The specific procedures required have been tailored to the needs of the particular setting. Without a doubt, however, commentators have agreed

66 TRIBE, supra note 53, at 664. In contrast, substantive due process “asks whether the government has an adequate reason for taking away a person’s life, liberty, or property.” CHEMERINSKY, CONSTITUTIONAL LAW, supra note 62, at 546. In contrast to procedural due process, substantive due process is a concept that has been controversial. Id. at 547.

67 CHEMERINSKY, CONSTITUTIONAL LAW, supra note 62, at 546.

68 Id. at 580.

69 TRIBE, supra note 53, at 683-684.

70 See Hilao v. Estate of Marcos, 103 F.3d 767, 786 (9th Cir. 1996) (holding that due process “is not a technical conception with a fixed content unrelated to time, place, and circumstances”); Redish & Marshall, Adjudicatory Independence, supra note 63, at 456 (“the content of due process is extremely flexible, and not susceptible to precise definition”)


72 See, e.g., Hewitt v. Helms, 459 U.S. 460 (1983) (“[L]awfully incarcerated persons retain only a narrow range of protected liberty interests . . . our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners.”).


74 See, e.g., Gomes v. Wood, 451 F.3d 1122, 1127 (10th Cir. 2006) (holding that the government may not remove children from their homes without providing due process).
that the cornerstone of procedural due process is the right to one’s “day in court”\textsuperscript{75} before an impartial decision maker.\textsuperscript{76}

Although scholars agree that the Constitution protects a right to procedural due process, and even often agree on how to define the right, they, like procedural justice theorists, have differed as to why such a right is important. Some theorists argue that procedural due process is instrumental, dovetailing with Thibaut and Walker’s original theory about the importance of procedural justice.\textsuperscript{77} Others argue that procedural due process is critical because of its dignitary purpose,\textsuperscript{78} which fits well with Lind and Tyler’s subsequent group engagement model.

C. The Wide Net of the Psychology of Procedural Justice

Procedural due process and procedural justice in psychology have some clear conceptual overlap. First, the two share a focus on the meaningful nature of participation in legal proceedings. Procedural due process calls such participation notice and an opportunity to be heard, while procedural justice calls it voice, process control, or opportunity to be heard. Second, procedural due process and procedural justice also share a focus on the importance of an impartial decision maker who uses a set of substantive rules rather than personal biases to make decisions; the procedural due process “impartial decision maker” term can potentially encompass both the neutrality and the trustworthiness elements of procedural justice.

However, where procedural due process elevates concerns about voice, neutrality, and trustworthiness to a constitutional level and thus requires some minimum standard of conduct, procedural justice merely asks individuals to what degree they felt that such concerns were met. Courts fix the legal system’s procedural due process requirements, presumably at some threshold level that will ensure fair treatment for participants. In contrast, the subjective experience of procedural justice can be measured on a continuous, sliding scale that includes unfair, very fair, and all the shades of fair in between.

Another distinction between the two concepts is that procedural due process does not expressly enshrine courteous and respectful treatment as a constitutional guarantee. Again, this difference in included criteria points out clearly that while procedural due process jurisprudence ensures some minimum level of conduct by courts and


\textsuperscript{76} Redish & Marshall, Adjudicatory Independence, supra note 63, at 457 (arguing that the only truly necessary – and perhaps even sufficient – requirement of due process is that an impartial decision maker hear the case). See also Niki Kuckes, Civil Due Process, Criminal Due Process, 25 YALE L. & POL’Y REV. 1, 1 (2006).

\textsuperscript{77} See, e.g., TRIBE, supra note 53.

\textsuperscript{78} Id.
litigants with respect to fairness of process, it does not encompass all of the behavior that individuals use to form their judgments about when they have been treated fairly.

From a theoretical perspective, the explanations for why procedural justice and procedural due process matter largely dovetail, falling into one of two camps, instrumental or dignitary. First, Thibaut and Walker’s original instrumentalist perspective on procedural justice is reflected by what the instrumental theorists of due process have argued. Second, as noted above, other scholars have suggested, in rough parallel to the Tyler relational group value model, that the value of procedural due process lies in its dignitary and legitimizing value to the individual in society.

Although legal theorists and social psychologists may not share the same vocabulary, and, indeed, discourse between them is far too rare, psychology has brought insights into how individuals make sense of and evaluate their dispute resolution processes that comport with the reasons legal scholars have offered for why fair processes matter. From this perspective, indeed, the psychology of procedural justice can help inform the debate over why we ought to care about fair process. Research in psychology has suggested that individuals do care about the instrumental value of fairness, but has also suggested that individuals do not solely care about the instrumental value of fairness. That is, empirical work has supported the idea that individuals value fair treatment, separately and independently from its instrumental value, for its dignitary importance. In turn, a focus on the dignitary importance of fair process leaves us freer to care more about aspects of procedures that scholars focused on procedural due process might leave on the cutting room floor because they are not bound up with accuracy and substantive rights.

Another important distinction between procedural justice in psychology and procedural due process is that procedural due process, by definition, is about what is due to one before one is deprived of life, liberty, or property by the government. Scholars have focused on the particular circumstances in which procedural due process may be required because of such deprivations. Property has been defined expansively for procedural due process purposes, as has liberty.

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79 Fairness heuristic theory has no parallel in the due process literature.
80 Tyler & Lind, supra note 44.
81 See, e.g., Goldberg v. Kelly 397 U.S. 254, 264 (1970) (holding that “when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process”); Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 543–44 (1985) (holding that government employees have a property interest in their employment when that interest is conferred by the state, and thus they are entitled to procedural due process prior to termination). But see Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (holding that in order to have a property interest in a benefit, an individual needs to have a “legitimate claim of entitlement to it”).
82 The Supreme Court stated in Meyer v. Nebraska, 262 U.S. 390 (1923), that the liberty guaranteed by the Constitution includes:
Nonetheless, as the Supreme Court has explained, “[T]he range of interests protected by procedural due process is not infinite.” There are interests that procedural due process protections do not cover, and yet parties with those interests at issue will experience procedural justice—a subjective experience about how fairly they have been treated—when courts resolve their disputes.

Additionally, because procedural due process protection is only triggered by a deprivation of protected rights, procedural due process is typically considered in the context of a party who has something to lose. Therefore, courts and scholars gravitate towards analyzing procedural due process rights of a defendant in civil litigation, or a plaintiff in a suit against the government. Although procedural due process does provide protection for plaintiffs in suits against private actors, the structure of civil litigation between private parties, by its nature, gives more choice and autonomy to plaintiffs. Plaintiffs typically make the initial decision with respect to a number of structural elements of the lawsuit, including the type of court and the location of the court. This choice, coupled with basic rules that ensure equal treatment of parties during the litigation (e.g., both parties may engage in discovery, both parties may not participate in ex parte communication), means that it is defendants’ due process rights that courts more often litigate and scholars more often consider, and it is defendants’ due process rights that are largely considered through a constitutional lens.

Procedural justice, in contrast, is a phenomenon that can always be discussed with respect to all parties to a dispute. Because procedural justice perceptions help promote acceptance of and adherence to outcomes, the procedural justice experienced by a losing party, whether plaintiff or defendant, may be of particular concern. For our legal system to function smoothly, a losing plaintiff should not need to pursue extra-legal relief, and a losing defendant should be willing to pay a judgment or otherwise comply with a court ruling. But procedural justice effects are not limited to the losing party. Indeed, the procedural justice perceptions of the winning party may be just as important as those of the losing party.

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399. See also Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (“We are dealing here with … one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”); CHEMERINSKY, CONSTITUTIONAL LAW, supra note 62, at 565; Roth v. Board of Regents, 408 U.S. at 572 (1972).

Roth v. Board of Regents, 408 U.S. at 570 (1972).

See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) (noting that “a chose in action is a constitutionally recognized property interest” and is thus subject to due process protection).
of the loser for purposes of satisfaction with the system and perceptions of legitimacy. Thus procedural justice effects are both experienced by, and important for, both plaintiffs and defendants, whether they prevail on the merits of the case or not.

Additionally, perhaps the most interesting difference in terms of procedural justice effects versus procedural due process requirements is that procedural justice effects may even be felt by non-parties to any particular dispute: other actors in the legal system with a stake in the decision-making process may also experience procedural justice effects that in turn affect perceptions of legitimacy of the legal system.85 A procedural justice analysis thus captures a wider range of consequences than procedural due process may include.

Finally, although there are undoubtedly individual differences in experiences of procedural justice, and although the philosophical underpinnings of the legal system are important and valuable, there is a real benefit to exploring the idea of procedural fairness in the legal system from the subjective perspective of individual participants in that system, rather than from the perspective of a third-party observer of that system. A psychological perspective suggests how participants in the system may understand that system as they engage with it, rather than as they contemplate it from afar. This analysis may indicate that while rules that are in place to provide sufficient procedural due process may appear sound from a structural point of view, subjective perceptions about procedural fair process based on these rules may fall short of our expectations and our desires.86 Because of these subjective perceptions’ likely influence on our compliance with the law and our opinions about the law’s legitimacy, they must be taken seriously. A greater understanding of how individuals actually form assessments about the

85 See, e.g., Rebecca Hollander-Blumoff & Matthew T. Bodie, The Effects of Jury Ignorance About Damages Caps: The Case of the 1991 Civil Rights Act, 90 IOWA L. REV. 1361 (2005) (arguing that jury members, as citizens, may experience procedural justice effects); text accompanying notes 86 to 90, infra.

86 One concern worth raising – although its full consideration is beyond my scope here – is to what extent the very procedures we mandate may, in turn, shape our perceptions of what procedural justice looks like. That is, there may be a classic chicken-and-egg problem between the structure of our legal system and our use of particular factors and (not others) as we form subjective judgments about procedural justice. On one hand, it may be that our innate psychological vision of fairness has led us to form a system with protections that match this vision; on the other hand, our psychological preferences may be shaped by the structures we have created. Interestingly, procedural justice effects have been found – largely similar to the ones experienced by citizens in the United States – in other countries with different legal systems and different cultural orientations, see E. Allan Lind, Tom R. Tyler & Yuen Huo, Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments, 73 J. PERSONALITY & SOC. PSYCH. 767 (1997) (finding similar antecedents for individuals in United States, Germany, and Hong Kong), suggesting that there are some shared human conceptions about fair treatment even when legal structures differ.
fairness of the treatment they receive in the courts can only help efforts to provide fair process to litigants and other relevant actors.

D. Whose Procedural Justice

1. Clients Versus Lawyers

The role of lawyers in procedural justice research has largely been ignored.\textsuperscript{87} Studies focus almost exclusively on perceptions of procedural justice by individuals, rather than lawyers.\textsuperscript{88} This focus makes sense because parties are most often responsible for continuing adherence to outcomes. Additionally, researchers have been more concerned with the effects of procedural justice on the general citizenry than on the far smaller group of attorneys involved in dispute resolution because of the size differential between these populations and the potential for large policy implications. However, a close look at procedural justice in litigation does suggest that the role of the lawyers may be important. In particular, factors that guide individuals’ perceptions of procedural justice may be complicated by the fact that individuals are represented by counsel. More specifically, although assessments about trust and neutrality may reasonably be formed by individual litigants, the degree to which someone feels that she has had a voice in the litigation process and has been treated with courtesy and respect by a judge may be hard to measure precisely in a system where lawyers almost always speak on behalf of clients, and judges most often interact with lawyers rather than directly with clients.

Studies of procedural justice in the litigation context conflate the voice experienced by a litigant with the extent to which a lawyer was able to present the litigant’s perspective to the court.\textsuperscript{89} Because the lawyer is hired to represent the client in court, this conflation makes sense: to the degree that the lawyer has the opportunity to present the client’s case, the client ought to feel that her case has been heard. Of course, representation adds an extra layer that may not be fully under the control of the judge: the effectiveness of voice may not depend solely on the opportunity provided by the judge, but may also depend on the skill and actions of the lawyer. The procedural justice perceptions of the client may not only be affected by the performance of the lawyer before the judge or in the dispute context itself. Some commentators have suggested, for instance, that the procedural justice that the client

\textsuperscript{87} But see Rebecca Hollander-Blumoff, Just Negotiation, 88 WASH. U. L. REV. 381 (2010).

\textsuperscript{88} But see Hollander-Blumoff & Tyler, supra note 18 (presenting results of study involving procedural justice assessments of law students in the role of attorneys in a simulated negotiation).

experiences in her relationship with her lawyer is most important to her perceptions of legitimacy, and studies have occasionally even measured procedural justice by asking about the amount of time clients were able to spend in communication with their lawyers.

2. Individuals Versus Entities

In light of long-standing popular stereotypes that federal courts are bastions of corporate interests and the elite, a concern about the psychology of procedural justice in federal court may seem inapposite because federal litigation involves so many corporate parties, for whom the concept of procedural justice appears irrelevant. I offer two responses to this concern. First, procedural justice effects, although attenuated, may still be present in the corporate party context. Second, federal court litigation may include more corporate parties than other types of litigation, such as state court, family court, or small claims court, but that does not mean that there are not large numbers of individuals involved in federal litigation. I consider these points below.

On one hand, it is true that the studies in psychology about procedural justice examine the perspective of individual disputants, not corporate representatives; there have not been empirical studies exploring the procedural justice perceptions of entities engaged in dispute resolution, or of the effects and boundary conditions of the procedural justice perceptions of entities’ agents. As with the lawyer/client divide, the addition of an entity’s agent to the mix complicates the psychological procedural justice analysis by potentially attenuating procedural justice effects. Additionally, an entity represented by an agent simply cannot, as a definitional matter, have any perceptions of procedural justice; it is an entity, with no independent psychological experience. On the other hand, however, there is no reason to believe that an individual representative of a corporation or other corporate form would not experience some procedural justice effects based on her perceptions of how fairly her organization, and her organization’s agents, were treated by certain court procedures. However, because responsibility for adherence to an outcome may be diffuse, or because there are many other potential individuals in the corporation who will also form an opinion about the outcome who were not directly involved

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91 Casper et al., supra note 15, at 498.
92 See Michael Wells, *Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee*, 1991 BYU L. REV. 924, 925 (arguing that even the Committee holds the belief that the federal courts should be more elite because it “believes that the efficacy of the federal courts and public confidence in their decisions rest on their composition”).
in litigation, the procedural justice effects may be narrower and more constrained.

In addition, because there are so many corporate litigants in federal court, and because the psychology of procedural justice may be most acutely meaningful as it applies to individual litigants, one might discount the potential importance of procedural justice in the federal courts. However, statistics suggest that there are still a vast number of individual litigants in federal court. For example, in 2005, Hadfield estimated that although 90 percent of nonprisoner and nonstudent-loan cases involved at least one corporate defendant, 70 percent of plaintiffs in nonprisoner and nonstudent-loan litigation were individuals. Of course, prisoner and student loan litigation always involve one individual party, and given that there were a total of 306,816 pending cases in federal court as of September 30, 2009, this suggests that at a minimum, well over 150,000 individuals are involved in pending civil litigation in federal court.

Thus, although procedural justice effects may be attenuated for corporate parties, they are not impossible to imagine; perhaps more importantly, there are many individual litigants for whom procedural justice effects are likely to be more profound. In fact, perceptions that the federal courts cater to corporate interests and to the rich elite highlight the importance of a focus on procedural justice. Perceptions of fairness of process may be particularly critical in counteracting negative impressions of bias towards corporate parties and resource-based rather than merit-based decisions.

II. PROCEDURAL JUSTICE IN BASIC FEDERAL RULES AND PROCEDURES

Many of the rules of civil litigation reflect precepts of the psychology of procedural justice. By conscious design, the American legal system attempts to provide a voice for participants, mandates that judges and lawyers act with courtesy and respect, and requires a trustworthy and bias-free decision maker. If all goes according to this design, a participant in the legal system should experience litigation as a procedurally just process, regardless of its outcome. Indeed, some of the very rules that could form the basis for an individual’s subjective sense that a process is fair are the same rules that judges, lawyers, and scholars understand to be the critical safeguards of due process. But this view is too simplistic. Merely because one intent of the design of our system is to foster a fair process for participants does not automatically mean that the effect of the design of the system, or the implementation of the design of the system, yields this result.

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In this section, I consider a number of basic rules of civil litigation in light of the four factors that psychological research has suggested lead to procedural justice judgments, as discussed above. I also consider ways in which the rules or their application may complicate, frustrate, or fail to foster perceptions of procedural justice. I have chosen a handful of relatively simple but disparate rules and doctrines highlighting the ubiquity of fairness of process considerations.

One point of clarification is in order here before I proceed: procedural justice in psychology should not lend itself automatically to a zero-sum analysis. That is, increased procedural justice for one party does not naturally mean decreased procedural justice for another. Of course, although many rules that may affect perceptions about procedural justice apply equally to both parties (say, rules against ex parte communication), it is true that some rules may affect one party more than another (such as pleading rules, as I explain more fully below). But providing more voice, more neutrality, more trustworthiness, and more courtesy and respect to any one party does not obviously decrease those factors for the other party.94 In certain circumstances, as described in this article, it may be that this zero-sum effect appears to occur, but it is by no means inevitable or obvious.95 A psychological perspective on procedural justice offers the potential to increase parties’ perceptions of procedural justice without necessarily concomitantly diminishing perceptions of procedural justice for other parties; indeed, this may be one of the strongest positive aspects of a focus on procedural justice.

A. Notice

Consider something as fundamental as the rules surrounding the pleading and service of a complaint. What will constitute proper service so that notice is adequate has been heavily litigated,96 and the question of

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94 However, dramatically increasing procedural justice for one party while keeping it constant for another may raise the possibility that the perceptions of the latter party will change. Because people often evaluate their circumstances based on comparisons with others (a phenomenon called in the justice literature “relative deprivation”), a level of procedural justice that might have initially appeared positively may show to ill advantage when contrasted with another party’s heightened fair process. See SAMUEL A. STOUFFER ET AL., THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE, VOL. 1 (1949); Robert K. Merton & Alice S. Kitt, Contributions to the Theory of Reference Group Behavior, in CONTINUITIES IN SOCIAL RESEARCH: STUDIES IN THE SCOPE AND METHOD OF “THE AMERICAN SOLDIER” (Robert K. Merton & Paul F. Lazarsfeld eds., 1950).

95 For a different perspective on the potential zero-sum nature of procedural rules, see Mark Moller, Procedure’s Ambiguity, 86 Ind. L.J. 645, 693 (2011) (arguing that the plaintiffs’ bar and corporate litigants are antagonists in a zero-sum rule making process).

proper notice is one that invokes defendants’ due process rights under the Fourteenth Amendment. The Supreme Court has held that “[t]he fundamental requisite of due process of law is the opportunity to be heard,”97 and has further explained that the right to be heard “has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”98 The right to a voice is critical, and the right to a voice must be protected by appropriate notice requirements.

If what we really care about is the opportunity to participate, however, then as long as actual notice has occurred, the courts should be satisfied. Yet courts have placed certain limits on what kinds of behavior are permitted in an effort to provide notice: in particular, judges balk at achieving notice through deceptive means. As one court explained, “It is clearly established law that where a ‘person has been induced by trickery to come within the jurisdiction of a court for purposes of procuring service of process upon such person, the service will be set aside.’”99 From a procedural justice standpoint, the served-by-trickery defendant has no complaint about voice or opportunity to be heard, but this behavior does relate both to the trustworthiness of the decision-making authority and to the treatment of the party with dignity and respect. By its very nature, deception is untrustworthy, and an authority structure that tolerates, condones, or even encourages parties to trick one another is not likely to induce feelings of trust in its participants. Similarly, trickery makes a mockery of the tricked party, which certainly does not comport with courteous and respectful treatment. Additionally, service by trickery sometimes may serve a substantive purpose – to gain personal jurisdiction over the defendant by virtue of his presence within the forum.100 When a defendant is not otherwise subject to the court’s jurisdiction, and is tricked into presence in the forum, which then results in a finding of personal jurisdiction, the defendant may form an opinion that the decision maker is acting in non-neutral way, with a bias towards citizens of the home state. Thus preventing trickery helps to foster a defendant’s belief that the decision maker is neutral and trustworthy.

On the other hand, federal courts do not allow a defendant who has been evasive of service, or has herself resorted to trickery, to prevail on a claim of improper notice. As one district court recently noted, “Where the defendant receives actual notice and the plaintiff makes a good faith effort to serve the defendant pursuant to the federal rule,


service of process has been effective. Good faith efforts at service are effective particularly where the defendant has engaged in evasion, deception, or trickery to avoid being served.101 Service of process is “not a game of hide and seek,” and a defendant “cannot claim that the court has no authority to act when he has willfully evaded the service of process.”102

Indeed, Federal Rule of Civil Procedure 4, which allows for service by mail if personal service is waived, largely eliminates the potential for the shenanigans of service that had been common in earlier times. The request for waiver of personal service contained in Rule 4(d)(1), and the resulting drawbacks for failure to waive enumerated in Rule 4(d)(2),103 suggest that notice in the federal court is to be streamlined and is not a fertile field for antics, tricks, or deception. The Advisory Committee Notes for Rule 4 suggest that the rule will be helpful in dealing with “furtive” defendants, and that one goal of the new rule is “to foster cooperation among adversaries and counsel.”104 By making service of process available by mail, Federal Rules 4 makes service of process easier, and limits the situations where a plaintiff would be tempted to resort to trickery or deception or a defendant would benefit from doing so. In the process, the rule is likely to provide positive perceptions of procedural justice for plaintiffs, who see their opportunities for voice increase and see the potential for discourtesy diminish; the rule similarly decreases opportunities for disrespectful behavior towards the defendant, but does not provide defendants with a similar increased opportunity for voice.

B. Complaints and Other Pleadings

The adversary system generally speaking, as contrasted with other types of dispute resolution systems such as the inquisitorial model, relies heavily on the parties’ voice in the process.105 In considering the Federal Rules of Civil Procedure, it is clear that affording the parties a sense of their own voice in litigation is critical, and that this voice begins

103 The rule provides that if a U.S. defendant “fails, without good cause, to sign and return a waiver requested by a plaintiff,” the court “must impose on the defendant: (A) the expenses later incurred in making service; and (B) the reasonable expenses, including attorney’s fees, of any motion required to collect those service expenses.” FED. R. CIV. P. 4.
105 Thibaut & Walker, supra note 1 (finding that parties prefer adversarial process to inquisitorial process, largely because of perception that adversary system provides greater voice and thus procedural justice).
with the pleading process. The plaintiff, the party bringing a claim, has an easy first opportunity to have a voice in the process—the plaintiff brings the action, after all, and must state the case in a pleading that describes the grounds for the action both factually and legally. The back and forth of the pleading system—complaint, answer, reply, ability to amend the complaint—and the motion system—motion, response, reply—provides all litigants opportunities to express their views and have them considered by the decision maker. Although the system fairly rigidly controls the form and manner of expression, parties are nonetheless provided ample opportunity to express their views and their version of the facts to the court.

The content of the complaint itself also speaks to a concern with the opportunity for voice. Typical pleading rules require a statement of the claim showing that the pleader is entitled to relief. The complaint must give the defendant ample notice and understanding of the nature of the claims brought, which typically means that the plaintiff must provide a statement of the facts that underlie the complaint. This requirement is important because it allows the defendant the opportunity to respond to the right facts, and to have an appropriate voice in the action. It would be difficult for the defendant to feel that she had a voice in the proceeding if the defendant did not have any idea what the basis for the specific claim against her was, and was forced to respond with a general denial of wrongdoing rather than a specific rebuttal of the plaintiff’s assertions.

The recent decisions by the Supreme Court in *Twombly* and *Iqbal* have heightened requirements for what must be included in a plaintiff’s complaint. Between the two opinions, they call for the

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107 Similarly, ex parte communication is prohibited because it would allow one party to express its views to the decision maker without allowing the other party a similar opportunity to voice his or her response. ABA Model Rules of Professional Responsibility 3.5(b).
109 See Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that plaintiff must provide a statement of the claim that will give defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests”).
110 Of course, another reason that this is required is in order to give the judge the right information to decide the case.
plaintiff to provide more information about the basis of her claim in the complaint, and subject the information that is provided to a plausibility or common sense test on a defendant’s motion to dismiss. These decisions are likely to have an effect on the procedural justice perceptions of both parties. From the plaintiff’s perspective, the restrictions on pleading – even though they require a pleader to say more – will be likely to decrease the perceptions of procedural justice. Pleadings often are not fully aware of the facts in a dispute, especially the facts most helpful to support their allegations. Although requiring them to say more about these facts may look, at first blush, like an opportunity to increase participation, in fact this requirement dampens participation because it raises the bar to have one’s case heard before the court at all. By raising this level, these decisions will cause some cases not to be heard, thereby completely depriving potential plaintiffs of their voice. From the defense perspective, in contrast, these cases are likely to increase perceptions of procedural justice based on increased voice: requiring the plaintiff to say more means that the defendant has more information to which to respond, so that his or her participation in preparing an answer or other responsive pleading is more meaningful.

The new standards in *Twombly* and *Iqbal* raise concerns along the lines of the other procedural justice factors, as well. The old standard, set forth in *Conley v. Gibson*, famously required the deciding court to dismiss a complaint “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.” I do not suggest here that the *Conley* standard was pure formalism and that no judicial discretion or bias could creep in, but the standard was far along the spectrum away from judicial discretion and opportunity for bias. In contrast, the *Iqbal* Court expressly asks the deciding judge to use his or her own world view in evaluating the sufficiency of the complaint. As the Court explains, “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” This individualization of the standard for decisions is likely to affect participants’ judgments about both trust and neutrality. The common sense (and past experience) of an individual judge may suggest, for example, that a productive employee is likely to be promoted, regardless of race or gender; the common sense

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116 Iqbal, 129 S. Ct. at 1950.

and past experience of a plaintiff in a discrimination case may be quite different. This is likely to lead the plaintiff to an inference that the judge is not neutral, as well as a potential judgment that the judge is not trustworthy. In contrast, when the judge’s common sense and experience are similar to that of the defendant, the defendant’s perceptions about the neutrality and trustworthiness of the decision maker may increase. (When the judge’s common sense comports with the plaintiff’s, the situation will be reversed.) Because the change in standard, in general, appears likely to result in more dismissals of complaints, Iqbal and Twombly appear, on the whole, poised to work a change for the worse in plaintiffs’ perspective and for the better for defendants’ perspective about procedural justice.

C. Discovery

Discovery, too, is a mechanism that is expressly designed to enable participation and voice. Several scholars have considered discovery from a procedural due process perspective. Just as an opportunity to be heard is worthless without notice, so, too, an opportunity to go to court is worthless without relevant evidence. Discovery provides both parties with the opportunity for meaningful participation by allowing them access to information that will form the basis for their presentation to the court. Imagine a system in which discovery was not permitted: the opportunity for participation would be severely hampered. The focus on whether due process has been provided by discovery rules, paired with an instrumental motive for due process, has opened the door for debate over discovery rules to be largely about efficiency. Accuracy is balanced against cost, and when discovery is too broad, it may be unreasonably inefficient. On the other hand, when discovery is too narrow, there is not only a risk of substantive inaccuracy, there is also a very real concern that individuals may not experience the litigation process as procedurally just. When discovery is so restricted that it prevents a party from identifying and receiving important material, it in turn prevents a party from adequately presenting her case.

Restrictive discovery rules, taken in tandem with the heightened pleading requirements discussed above, pose a serious threat to individuals’ perceptions about their opportunity for voice in litigation.


118 A number of scholars have considered the connection between restrictive discovery rules and the new pleading requirements. See, e.g., Suzette M. Malveaux, Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases, 14 LEWIS & CLARK L. REV. 65 (2010).
and thus in turn their procedural justice judgments. Because individuals may lack the data to support their case, notice pleading in conjunction with liberal discovery was a system well-poised to offer voice to plaintiffs. But when an individual must reach a heightened standard of pleading and has little opportunity to gather potentially hidden information, it can make opportunities for voice very difficult. Compounding this problem, one type of situation in which it is particularly difficult to have all the facts about the other side’s behavior is that of alleged discriminatory behavior. When a potential plaintiff believes he has been discriminated against, the situation is rife for concerns about trust and neutrality, and the very decision not to afford voice, or to severely limit voice, may itself lead to perceptions of bias and untrustworthiness.119

Discovery is not without costs, however, and while the voice benefits of liberal discovery are obvious, there are also procedural justice concerns that may cut the other direction. One party may overwhelm the other with discovery requests, or “over-comply” in producing responses to discovery requests in order to swamp the other party with documents. When this happens, perceptions of procedural justice may be negatively affected because these behaviors appear discourteous and disrespectful. Although courts may sometimes step in to manage discovery to prevent these effects, this kind of discovery dispute rarely rises to the level of a procedural due process concern, and discovery is largely self-policing by the parties.

D. Impartial Decision Maker

An impartial decision maker is a key focus of a procedural due process analysis in the federal courts.120 It is not exaggerating to say that the amount of academic attention given to the topic of judicial impartiality is “staggering.”121 The federal judicial system is designed to afford litigants an impartial decision maker. One of the primary ways that the federal system attempts to accomplish this goal is by giving federal judges lifetime tenure,122 so that they are free to decide without

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119 Psychological research suggests that members of “out-groups” may have heightened perceptions about their perceived status in interactions with “in-groups.” This may suggest that in discrimination cases status concerns may be more salient, and that plaintiffs may be more poised to perceive disrespect and discourtesy or other dignitary insults.

120 See, e.g., Redish & Marshall, Adjudicatory Independence, supra note 63, at 456.

121 Amy B. Atchison, Lawrence Tobe Liebert & Denise K. Russell, Judicial Independence and Judicial Accountability: A Selected Bibliography, 72 S. CAL. L. REV. 723, 724 (1999) (“topics of judicial independence and judicial accountability have been written about extensively, and the number of possibly relevant writings from the past forty years is staggering”).

122 State judges, in contrast, tend to be elected to fixed terms. Even when terms are quite lengthy, preventing judges from being unseated immediately following an unpopular decision, there nonetheless typically comes a time when these judges must
the bias that might creep in if they had to answer to powerful interest groups\textsuperscript{123} or an electorate. Lifetime tenure, however, does not completely insulate federal judges from bias related to the taking and keeping of office: becoming a federal judge involves a networking process among legislators and other benefactors,\textsuperscript{124} and the appointments process itself has been subject to criticism for its potential to threaten judicial independence.\textsuperscript{125}

Once in office, federal judges are subject to rules that expressly attempt to limit their capacity to adjudicate to situations in which they themselves do not have a particular interest. Additionally, the federal system strives for transparency so that parties have enough data to conclude that the decision-making authorities and process are impartial. Judges are required to act transparently and to state publicly their financial holdings.\textsuperscript{126} Additionally, judges are required to recuse themselves from decision-making when they have an interest in the subject matter of the case.\textsuperscript{127} Courts note that this helps reduce the probability of bias.\textsuperscript{128} Recusal is important, so that there is not even an


\textsuperscript{125} This disclosure is mandated by the Ethics in Government Act, 5 U.S.C. §§ 101-111 (1978), and is available to the public at http://www.judicialwatch.org/judicial-financial-disclosure.

\textsuperscript{126} 28 U.S.C. § 455 (1990) expressly provides for recusal when a judge’s “impartiality might reasonably be questioned.”

\textsuperscript{127} As the Supreme Court has explained, “Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” In re Murchison, 349 U.S. 133, 136 (1955).
“appearance of impropriety.” Even when there is no technical impropriety, courts have suggested that cases coming close to the line should be decided in favor of recusal, because it is crucial that courts appear to be neutral and bias-free decision makers. Even an appearance of biased decision-making might be enough to shake citizen trust in the court system, and so must be avoided.

In reality, of course, bias is more complicated. What is a neutral and bias-free decision maker? Robust research in political science has suggested that the ideology of a judge (or the ideology of those in control of that judge’s appointments process) influences judicial decision-making. And in any given case, judgments about neutrality and absence of bias for a particular judge are, perhaps ironically, themselves subject to bias. This issue was notably considered over three decades ago when parties sought Constance Baker Motley’s recusal in a gender discrimination case. Judge Motley, the first African-American female judge ever appointment to the federal bench, noted, “if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.” More recently, the same argument has been leveled at Judge Vaughn Walker in the consideration of the California ban on same-sex marriage, based on Judge Walker’s own sexual orientation. And these concerns are not

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129 See, e.g., United States v. Fazio, 487 F.3d 646, 653 (8th Cir. 2007) (the “key ingredient” in a recusal case is “avoidance of the appearance of impropriety, as judged by whether the average person on the street might question the judge’s impartiality”).

130 Id.; see also the recent high-profile case of Caperton v. A. T. Massey Coal Co., 556 U.S.__, 129 S. Ct. 2252 (2009); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988) (“The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible”); Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977) (noting that “appearance of impartiality is virtually as important as the fact of impartiality”).

131 Id.


134 Id. at 4.

limited to cases involving discrimination: the famous 2004 refusal by Justice Scalia to recuse himself when one party in a case, Vice-President Dick Cheney, had recently been his companion on a duck-hunting trip, also sparked criticism. From a procedural justice perspective, rules about neutrality and bias-free decision makers may provide some protection, but individual actors and interested parties to the litigation have individual differences with respect to when they believe that a decision maker truly is impartial: impartiality is, in many instances, in the eye of the beholder. In some situations, it may be difficult, if not impossible, to find a decision maker whom all parties perceive as neutral and bias-free.

E. Rules about Conduct

Courts also make an express effort, at least on the books, to hew to a norm of civility and politeness. While there is no constitutional guarantee that judges behave nicely in their dealings with litigants, courtesy and respect are expressly called for by Canon 3(A)(3) of the Code of Conduct for United States Judges. The Canon provides that “[a] judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge’s control, including lawyers to the extent consistent with their role in the adversary process.”

Although the Canon does not carry the force of law, and “cannot be the standard for judicial discipline,” it puts forth aspirational goals for the judiciary that courts seem to take seriously, at least on occasion. So, for instance, the Seventh Circuit Court of Appeals noted, “It is a hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect.” In an opinion describing the gross discourtesy and partiality of an immigration judge, the Third Circuit Court of Appeals indicated that the

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139 In re Charge of Judicial Misconduct, 62 F.3d 320 (9th Cir. 1995) (holding that although “perhaps a judge's rudeness could be so egregious as to constitute misconduct under [relevant law], the incidents at issue here do not rise to that level”).

140 Iliev v. INS, 127 F.3d 638, 643 (7th Cir. 1997).
treatment of defendants with courtesy, respect, and dignity is inextricably tied up with perceptions of neutrality and impartiality, and together these factors help to dictate whether or not a party has received due process.¹⁴¹ The court explained, “We began with a reminder of the ‘dignity,’ ‘respect,’ ‘courtesy,’ and ‘fairness,’ that a litigant should expect to receive in an American courtroom. These words . . . are not merely advisory or aspirational. Indeed, although [respondent] has no Constitutional right to asylum, he was entitled, as a matter of due process, to a full and fair hearing on his application.”¹⁴² The court displays an intuitive grasp of the way that, according to psychological research, discourtesy and disrespect can help lead to a perception of unfair process.¹⁴³ In other less formal but nonetheless entrenched ways, court practices may reinforce a norm of courtesy and respect: for example, the Fourth Circuit Court of Appeals has a tradition in which “judges come down from the bench following argument to shake hands with counsel and thank them for their advocacy.”¹⁴⁴

Courts are also tasked with the oversight of attorney behavior. Attorneys are subject to relevant disciplinary rules in their jurisdiction. Although the current ABA Model Rules of Professional Responsibility summarily prohibit lawyers from “engag[ing] in conduct intended to disrupt a tribunal,”¹⁴⁵ prior versions of the Model Rules were far more explicit. The Ethical Canons of the Model Rules formerly called for an attorney to be “respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears,”¹⁴⁶ as well as “courteous to opposing counsel.”¹⁴⁷ Similarly, the Disciplinary Rules forbade a lawyer to “[f]ail to comply with known local customs of courtesy,”¹⁴⁸ or “[e]ngage in undignified or discourteous conduct which is degrading to a tribunal.”¹⁴⁹ Numerous states govern the conduct of their attorneys through rules that still call for courteous behavior.¹⁵⁰

¹⁴² Id.
¹⁴³ There are, additionally, a number of state court cases that authorize disciplinary action against judges who repeated behave in discourteous ways towards litigants. See, e.g., In re O’Dea, 622 A.2d 507 (Vt. 1993); Matter of Kellam, 503 A.2d 1308 (Me. 1986); In re Wood, 720 So. 2d 506 (Fla. 1998); but see Matter of Hocking, 546 N.W.2d 234 (Mich. 1996).
¹⁴⁵ MODEL RULES OF PROF’L CONDUCT R. 3.5(d) (2010).
¹⁴⁶ MODEL CODE OF PROF’L RESPONSIBILITY CANON 7-36 (2010).
¹⁴⁷ Model Rule 7-38
¹⁴⁸ DR 7-106(5).
¹⁴⁹ DR 7-106(6). Additionally, the previous Model Disciplinary Rules expressly stated that a lawyer does not violate the rules mandating zealous advocacy “by treating with courtesy and consideration all persons involved in the legal process.” DR 7-101(A).
¹⁵⁰ See, e.g., New York (whose disciplinary rules largely track the earlier version of the ABA Model Rules); Michigan’s Rule 6.5 (“A lawyer shall treat with courtesy and respect all persons involved in the legal process.”)
Although attorneys are not decision makers themselves, they are nonetheless in a position of some status in a court proceeding and their behavior may affect the procedural justice perceptions both of the other attorneys involved in the action and the litigants themselves.

Courts have expressly made the connection between the behavior of attorneys and the legitimacy of the proceedings: the Supreme Court long ago defended the authority of the judge to sanction the behavior of the lawyer in the courtroom on the grounds that “it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved.”  

Attorneys have been faced with suspension and the threat of disbarment for disrespectful behavior in court.

Of course, not all conduct that is unpleasantly discourteous is sanctionable. So, for instance, the Supreme Court offered this analysis in one case:

[The tone of a letter written by petitioner] can be read as ill-mannered. All persons involved in the judicial process - judges, litigants, witnesses, and court officers - owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy-in this context-does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is “not presently fit to practice law in the federal courts.” Nor does it rise to the level of “conduct unbecoming a member of the bar” warranting suspension from practice.

Although courteous behavior does not always occur, and discourteous behavior does not always bring forth sanctions from the governing court, it is nonetheless clear that the federal courts have an aspirational norm of respectful and courteous behavior for both lawyers and judges. Thus,

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151 Ex parte Burr, 22 U.S. 529 (1824). This authority is not limited to the federal judiciary. Similarly, the Illinois Supreme Court, highlighting the importance of the courts having “the confidence and respect of the people,” suggested that “unjust criticism, insulting language and offensive conduct toward the judges, personally, by attorneys, who are officers of the court, which tend to bring the courts and the law into disrepute and to destroy public confidence in their integrity, cannot be permitted.” The People ex rel. The Chicago Bar Association, v. Metzen, 291 Ill. 55 (1919).

152 See, e.g., In re Zeno, 517 F. Supp. 2d 591 (D.P.R. 2007), aff’d, 504 F.3d 64 (1st Cir. 2007) (attorney suspended for three months because of “disrespectful” behavior to judge); In re Evans, 801 F.2d 703, 706 (4th Cir. 1986) (attorney disbarred for making complaint about judge that was “unquestionably undignified, discourteous, and degrading”).

although procedural due process rarely formally considers questions of courtesy and respect, when this aspirational norm is met, psychological research suggests that this will help to foster perceptions of procedural justice and, in turn, legitimacy.

### III. PROCEDURAL JUSTICE IN FEDERAL COURT DOCTRINES

From before the time of the Constitutional Convention, Americans have disagreed as to the appropriate relationship between the states and the federal government. The substantive allocation of decision-making between the federal and state courts is, of course, extremely important. But the procedural mechanisms for determining that allocation may also have the potential to affect overall satisfaction with the division and the legitimacy of the federal system vis-à-vis the states. In this section, I examine through the lens of procedural justice in psychology two doctrines, diversity jurisdiction and federal court abstention, that implicate the appropriate scope of federal court authority and, often, the division of judicial business between the federal and state court systems. I first explain to whom I will extend this analysis, and then consider in turn potential assessments of procedural justice in the context of diversity jurisdiction and abstention doctrine.

#### A. Whose Procedural Justice, Redux

Both diversity and abstention affect individual litigants, and so I begin with the most visible analysis, examining the procedural justice implications of these doctrines on the involved parties. I then turn to a less obvious procedural justice analysis. Specifically, instead of imagining the perceptions of justice merely among the litigants, I also

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155 For a comprehensive examination of the “multilevel tensions” between the state and federal government, particularly with respect to federal courts and state courts, see MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 1 (1980).

consider the procedural justice perceptions among the structural actors in the system – the state and federal judges before whom the cases are heard, as well as any number of other interested parties (state and federal legislators, executives, and ordinary citizens) to the division of business between the court systems.

Judges are most certainly not parties who are asking an authority to make a decision about their own personal dispute; they are relatively autonomous individuals who have working relationships with one another. While this relationship may not be personal, it is interconnected and each judge’s actions may have influence on other judges both within their own judicial system and within other systems. Judges do make decisions about inter-system disputes over who will hear the substance of a case, however. The judicial system is decision maker and societal institution to litigants, but is workplace and societal institution to its judges. There is a robust literature on procedural justice within the organizational context, and this literature suggests that individuals care about fair process within the workplace and other organizations structures.

Research on procedural justice in the workplace has repeatedly demonstrated that individuals care deeply about the fairness of process for decision making in the workplace, separate and apart from how fair or how favorable their outcomes may be. In particular, procedural justice concerns “loom larger” than distributive justice issues when individuals in the workplace are considering their commitment to a system and trust in its authority. It is widely suggested that federal judges are underpaid relative to the salary they could command in the private sector, meaning that judges have already largely self-selected as individuals who are not motivated solely by instrumental monetary gain. Thus, issues of system fairness may already be of more critical importance to the judiciary than to other workers.

I suggest here that thinking about judges as individuals embedded in a judicial workplace – that can be writ small (courthouse) or large (legal system as a whole) – is a valuable endeavor that can offer insight about how judges themselves will understand the legal system. Beyond the workplace context, too, judges are also citizens engaged in disputes about the appropriate scope of their own power and influence. To the extent that procedural justice effects have been found in a wide array of contexts, including ones in which there is no third-party decision maker and ones in which the free market governs, it is not unreasonable to suggest that judges may be subject to procedural justice effects based on

157 See supra note 20.
158 Folger & Konovsky, supra note 20, at 125-26.
their own experiences within the legal system. To the extent that procedural justice enhances legitimacy and adherence to the law, enhancing procedural justice among members of the judiciary can only yield positive effects.

So, too, legislators who have enacted laws, or executives who are charged with the laws’ enforcement, also have a stake in whether the laws are fully considered by a judicial body, and what particular judicial body has that opportunity. A legislator whose handiwork may be considered by either a state or a federal judge for its constitutional validity may have a strong interest in the outcome of that decision; to that extent, such a legislator is, in a way, subject to a decision making process and may evaluate that process for its procedural justice. There is not yet empirical research that demonstrates – or even explores – procedural justice effects on the part of the judiciary, legislators, and executives. For that reason, this analysis is theoretical and speculative, rather than grounded in empirical data. However, the analysis relies on the robust framework for the psychology of procedural justice that has been developed over the past three and a half decades.

B. Diversity Jurisdiction

Scholars have considered jurisdiction, generally speaking, from a due process perspective quite often. Personal jurisdiction doctrine, in fact, is based almost completely on tests that are designed to define due process as applied to out of state defendants. Subject matter jurisdiction, in contrast, is not immediately and obviously susceptible to a due process analysis. At first glance, it may not seem that subject matter jurisdiction – that is, the division of judicial business between the state and federal court systems – relates in any way to procedural justice concerns. When the division is straightforward – state courts considering state law questions, and federal courts considering federal law questions – the importance of procedural justice may not be obvious. But when both state and federal courts are available to consider state law questions – as is the case under the aegis of diversity jurisdiction – there may be a tension surrounding the distribution of those questions to the appropriate authority that raises procedural justice concerns.


Although scholars disagree on the rationale behind diversity jurisdiction, most theorists suggest that it was meant to protect against some type of bias. The most popular theory holds that diversity jurisdiction mitigates bias against out of state defendants – an area where procedural due process’ requirement of an impartial decision maker and procedural justice’s insistence on a neutral and trustworthy decision maker converge. Chief Justice Marshall described diversity jurisdiction in the following way:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that is has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.  

Judge Friendly rejected the argument that diversity jurisdiction was created because state courts would be biased against out of state citizens, instead suggesting that the state courts would be biased against interstate commerce and business, and that such bias would be more likely to originate in the legislature. Judge Friendly also noted, perhaps because of the provision of life tenure made in the federal system, state judges in contrast “would be more likely to be influenced by populist sentiments and be biased against merchants.”  

In either event, the apparent genesis for diversity jurisdiction was some fear of a decision maker who was not neutral and could not be trusted. Unfortunately, it is not at all clear that diversity jurisdiction succeeds in its efforts to provide a more impartial decision maker for cases involving the citizens of two different states. While some commentators are strong advocates for the benefits of diversity jurisdiction with respect to impartiality and neutrality, others argue that in fact diversity jurisdiction instead perpetrates bias.

How does diversity jurisdiction appear, in procedural justice terms, to litigants themselves? Both parties may agree on a suitable forum, but often the parties do not. When a case involving citizens of different states is brought in state court, an out-of-state defendant may

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162 The actual existence of this bias has long been debated. See, e.g., Henry Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483, 493 (1928) (data “entirely fails to show the existence of prejudice on the part of the state judges”).

163 In the pre- Erie world, of course, federal courts sitting in diversity could use “federal common law” to protect businesses, and did not need to apply the law of the state in which the court sat. See, e.g., Swift v. Tyson, 41 U.S. 1 (1842).

164 ERWIN CHEMERINSKY, FEDERAL JURISDICTION 275 (5th ed. 2007).

remove it to federal court. In this case, although the traditional rule is to allow a plaintiff’s choice of her home forum to govern, the plaintiff is no longer allowed to be heard in her chosen forum as between state and federal court. Not only may the plaintiff believe that she has traded her chosen decision maker for one less neutral and unbiased, but this shift may also decrease the plaintiff’s sense of voice. Additionally, procedures for removal may not be particularly suited to fostering a plaintiff’s subjective perceptions of voice: removal is accomplished by simple virtue of the defendant filing a notice of removal in the federal court. Once the petition is filed, the state court no longer has jurisdiction over the case. There is no opportunity during this process to object to the removal petition. It is only after removal has been effectuated that a party can voice her objections to the change in court system by moving to remand the case to the state court.

Even though the federal system does eventually allow a plaintiff to voice her objections to the federal court taking jurisdiction over the case, and even though the federal court system’s own rules will provide the opportunity for the plaintiff’s case to be heard, as described above, the plaintiff nonetheless may experience diminished procedural justice, first because her opportunity to speak in her chosen forum was thwarted, and second, because she had little voice in the moment of transition between court systems. Additionally, the plaintiff who initially chose a state court forum may believe that the state court judge is more trustworthy than a federal court judge, or more impartial, and this diminishment in trust or belief of impartiality in turn will likely affect her assessments of procedural justice. Of course, the plaintiff may believe positively that a state court judge is not impartial, and thus one might imagine that her assessments about procedural fairness ought to increase when the case is removed to a federal court. In any event,

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166 This assumes, of course, that the case meets the amount in controversy requirement. See 28 U.S.C. § 1332; 28 U.S.C. § 1441.
167 Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947) (“Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff’s home forum if that has been his choice”).
168 CHEMERINSKY, FEDERAL JURISDICTION, supra note 164, at 359.
169 See supra, Part II.A.
170 Because individuals do not evaluate situations from a neutral reference point, but rather from the perspective of losses or gains, even when the federal court might have been otherwise perceived as trustworthy, neutral, or voice-providing, the loss of the plaintiff’s original forum may suggest to the plaintiff that lower degrees of these factors will be found in the new forum. See, e.g., Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 ECONOMETRICA 263 (1979). Although there is no research on the effect of voice in the procedural justice context and its relationship to status quo bias and endowment effects, it nonetheless seems reasonable that a person who has a broader opportunity for expression curtailed will feel that her voice has been diminished, even if the curtailment results in a level of voice that she might have found perfectly acceptable had it been the first option offered.
though, the switch from a biased to an unbiased judge should not have any negative consequences for procedural justice assessments.

Similarly, a defendant sued in federal court under diversity jurisdiction who would have preferred to be in state court may experience diminished procedural justice because he may believe the federal decision maker is biased. (Again, if instead he believes instead that the state court judge is biased, but that the federal judge is unbiased, there should be, at least, no corresponding drop in procedural justice.) This defendant, unlike the plaintiff above, is not likely to experience a diminishment in perceptions of voice and opportunity to be heard. Because the defendant did not actually ever have a choice of courts, and was not removed from one court to another, this defendant’s status quo is the federal court. Whereas the plaintiff described above experiences a potential drop in voice, the defendant here has no such comparison to make.\textsuperscript{171} Assuming proper notice, the federal court does provide procedures that afford a reasonable opportunity to be heard.

From the standpoint of the federal judge, voice and an opportunity to be heard are increased when diversity jurisdiction occurs: the federal judge adds to her opportunities to pronounce judgment on a variety of issues. From the state court judge’s viewpoint, in contrast, this type of jurisdiction removes an opportunity for voice that may be quite important. Diversity cases, by definition, are not about matters of federal substantive law. Therefore, federal judges in diversity cases are called upon to apply and interpret state law.\textsuperscript{172} Sometimes these questions of state law may be complicated or issues of first impression. Scholars have suggested that state courts may be the most appropriate arbiter of state law (just as federal courts may be the most appropriate arbiters of federal law).\textsuperscript{173} It is likely that state court judges feel themselves quite qualified to rule on questions of state law, and federal court judges

\textsuperscript{171} Id.
\textsuperscript{172} Erie v. Tompkins, 304 U.S. 64 (1938).
\textsuperscript{173} As Martin Redish has explained,

\begin{quote}
[I]t makes practical sense for a sovereign's courts to have primary responsibility for adjudication of that sovereign's law. . . . both common sense and practical experience dictate that a court's primary duties will concern the development of the law of its own sovereign. Not surprisingly, a court's level of expertise in and familiarity with a sovereign's body of law will be in direct proportion to the amount of time it devotes to interpretation of that law. Moreover, it is not unreasonable to believe that courts of a sovereign will likely be more sensitive and sympathetic to the interests of that sovereign, if only because of the obvious factor of sovereign allegiance. Thus, there are good reasons for a sovereign to prefer that its own courts have primary responsibility for the protection of that sovereign's interests and for the evolution of its body of law.
\end{quote}

“stealing” these questions away from them may be an affront to their opportunity to be heard.\textsuperscript{174}

There are two ways in which federal courts have tried to ameliorate the tension inherent in the federal judiciary interpreting state law. First, although the general rule is that federal courts must take jurisdiction in diversity cases even when state law is unclear,\textsuperscript{175} some federal courts have abstained from hearing these cases. Such abstention is appropriate only in special circumstances, such as where there is unclear state law and the doctrine at issue is “intimately involved with [the state’s] sovereign prerogative.”\textsuperscript{176} Abstention is a doctrine inherently about both the comity and the friction between two sovereign systems.\textsuperscript{177} Some scholars have criticized the abdication of federal jurisdiction in these cases, arguing that abstention in these cases frustrates the very purpose of diversity jurisdiction in providing a “neutral” federal forum.\textsuperscript{178} Abstention in this setting has the potential to deprive individual litigants (most acutely, plaintiffs) of their opportunity to be heard, as well as diminish perceptions of neutrality and trust in decision-making for the party who chose the federal forum and believes the state forum is biased or less trustworthy. Additionally, the lengthy delay that abstention may produce is likely to diminish perceptions of courteous and respectful treatment for both parties.

For federal judges, abstention may enhance perceptions of the trustworthiness of the system as a whole: sending a case to the most qualified decision-maker seems to increase the likelihood that the decision is sound. Although federal judges choosing to abstain would experience a decrease in their own opportunity to make law, because they have a voice in the decision not to consider the case, they may feel positive about their voice and opportunity to be heard. From the state court perspective, such abstention is likely to increase perceptions of procedural justice on all fronts: abstention gives the state judge the

\textsuperscript{174} Issues related to procedural justice have been discussed in the context of institutional players rather than individual litigants. \textit{See, e.g.}, Judith Resnik & Julie Chi-hye Suk, \textit{Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty}, 55 STAN. L. REV. 1921, 1927 (2003) (arguing for the utility of institutional dignity).

\textsuperscript{175} Meredith v. Winter Haven, 320 U.S. 228 (1943).

\textsuperscript{176} Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (holding that a case involving unclear state law and eminent domain was appropriate setting for abstention by federal court in diversity action); see also Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593 (1968) (holding that the issue of water resources is of vital concern to state government of New Mexico and thus the case is appropriate for abstention).


opportunity for voice in settling questions of state law, provides the state judge with reason to believe that the federal judge is unbiased and trustworthy, and demonstrates that the federal judge respects the state judge. Although this view of deference and respect to state courts is widely held in the literature on certification, others have taken a different view, arguing that the certification process actually demonstrates disrespect to the state court by unreasonably and willfully treating state law as foreign, acting as though it is alien, mystifying, and practically occult in its opacity, as well as treating it as less essential to the nation’s legal development than federal law.

Second, certification is a procedure that may ameliorate the tension between state and federal courts: when a federal court is presented with an important question about state law, the federal court can ask the state court for its opinion. Beyond the value of getting the legal question substantively correct and the benefit of not creating contrasting precedent between the two systems, the certification process may provide procedural justice to the state court judges. The process not only permits the state court judge to offer her opinion, but it also signals respect and deference to the state court system’s capabilities to determine its own state law. Additionally, it suggests that federal courts are not seeking to impose their own normative framework onto questions of interpretation of state law, which will augment perceptions of trustworthiness and neutrality.

So, too, certification procedures, when they work smoothly, may offer state legislators heightened feelings of procedural justice. First, the legislation will be heard and considered by the state judicial body that, presumably, the legislators expected to be the ultimate audience for their work, which may increase perceptions of voice. Second, it seems likely that state legislators will be more trusting of the state court, and also will believe the state to be more neutral in its actions towards state behavior.

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180 Id. at 158-59.
184 See Nash, supra note 182, at 1697 (stating that certification “gives the state judiciary the opportunity to rule on important issues of state law in cases in which it might not otherwise have had the chance”).
185 See id. (finding that the “prerogative of a state government to establish and define its own state law is enhanced by” certification)
than a federal court might be. Finally, state legislators presumably share
some strong identification with the state government, as well, and the
respect and courtesy that certification shows to the state from the federal
system may be appreciated by the legislators. Similarly, the state
executive may also as appreciate certification procedures as a fair
process from voice, neutrality, trust, and courtesy perspectives.

In contrast, however, the certification process adds delay to the
process of litigation\textsuperscript{186} – indeed, many certified questions are not
answered\textsuperscript{187} – and this delay may be interpreted as frustrating the voice
of the individual litigants (who are not heard in as timely a manner).
Certification may also frustrate the voice of federal court, which will
most likely – after its initial decision to certify the question – remain
silent until such time as the state court responds. Additionally, to the
extent that certification puts a question of state law in front of a decision
maker who is less impartial – the very justification for diversity
jurisdiction to begin with – it will diminish procedural justice
perceptions by litigants.\textsuperscript{188} On the other hand, the federal judiciary may
not feel that its voice is diminished if it feels that it is not qualified to
offer an opinion.\textsuperscript{189} Finally, the delay by state courts in responding to
certified questions – and the lack of response entirely in some cases –
may be interpreted as discourtesy, so that both individual litigants and
the federal judiciary feel that they have been treated disrespectfully and
thus with low procedural justice.\textsuperscript{190}

C. Abstention

As noted above, abstention is a doctrine whereby federal courts
decline to hear a case in which jurisdiction is otherwise proper. There
are three basic types of abstention: abstention because of unclear state
law (\textit{Pullman, Thibodaux}, or \textit{Burford} abstention), abstention to avoid
interference with pending state proceedings (\textit{Younger} abstention), and
abstention to avoid duplicative litigation in the state court (\textit{Colorado
River} abstention).\textsuperscript{191} Volumes have been written about the scope, merit,

\textsuperscript{186} See, e.g., Sandra Schultz Newman, \textit{Certification of State Law Questions:}
\textit{Pennsylvania’s Experience in the First Five Years}, 75 PENN. B. ASS’N Q. 47 (2004);
\textit{Jona Goldschmidt, Certification of Questions of Law: Federalism in Practice} 66 (1995);

\textsuperscript{187} See M. Bryan Schneider, \textit{But Answer There Came None: The Michigan Supreme

\textsuperscript{188} Nash, supra note 182, at 1698.

\textsuperscript{189} Most judges – at both the state and federal levels -- appear to support the
certification process, in particular because it “improves federal-state comity.”
GOLDSCHMIDT, supra note 186, at 66 (1995); see also Cochran, supra note 183, at 166.

\textsuperscript{190} More fine-grained analysis of courtesy and respect seem largely inapposite in the
structural context. Assuming that the courts do not go out of their way to use offensive
or disparaging language, plain factual exposition ought to suffice in these contexts.

\textsuperscript{191} CHEMERINSKY, FEDERAL JURISDICTION, supra note 164, at 783-888.
and wisdom of these doctrines; that is not my aim here. Each of these
doctrines has potential procedural justice effects. After a brief caveat, I
consider them in turn below.

Abstention doctrines are notoriously difficult to understand, both
for law students, lawyers, judges, and certainly not least, litigants and the
public. While I analyze these doctrines below, I cannot suggest that any
given litigant or even her counsel will fully experience all of the
potential effects I describe. The degree to which any effect may occur
may depend on counsel’s explanations; when counsel fails to offer any
explanation at all for the twists and turns the case may take, the opacity
of the system as a whole (including from one’s attorney) seems likely to
produce a perception of low procedural justice. Nonetheless, it is
clear that abstention does have effects on parties and the public: the
recent case involving California’s same-sex marriage ban, Perry v.
Schwarzenegger, where the U.S. Court of Appeals for the Ninth
Circuit abstained from question of state law and certified that question to
California’s highest court, demonstrates that such practices do create
impressions of fairness (or unfairness) in the public eye. Especially in
light of this type of case, it is a worthwhile exercise to explore the
possible permutations of procedural justice effects for abstention. To the
extent that a lawyer, a sophisticated client, a client whose lawyer does
explain procedure, or even the public understands at least some of the
abstention process, these effects may be possible.

1. Abstention Because of Unclear State Law

There are three bases for abstention because of unclear state law:
abstention to avoid constitutional rulings (Pullman abstention),
abstention in diversity cases (Thibodaux abstention), and abstention to
defer to complex state administrative procedures (Burford abstention).
Because Thibodaux abstention has already been discussed in the above
section on diversity, I consider Pullman and Burford abstention in this
section.

When federal courts abstain on Pullman grounds, they are doing
so because “a state court’s clarification of state law might make a federal
court’s constitutional ruling unnecessary.” The Supreme Court noted
three reasons for abstaining in such circumstances. First, abstention in
this type of case could avoid “needless friction” between the state and
federal systems. Second, abstention will reduce the likelihood of the

192 See supra, text accompanying note 90.
193 Perry v. Schwarzenegger, Order Certifying a Question to the Supreme Court of
California, No. 10-1669, available at
194 Id. at 785.
195 Railroad Comm’n v. Pullman Co., 312 U.S. 496, 500 (1941).
federal court making mistakes as it interprets state law.\footnote{Id. at 499-500.} Third, the Court suggested that abstention in these cases would be a way to avoid unnecessary constitutional rulings.\footnote{Id. at 501.} For \textit{Burford} abstention, the rationale is slightly different: the goal is to “protect[] complex state administrative processes from undue federal interference.”\footnote{New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 362 (1978).} In \textit{Pullman} cases, the federal court retains jurisdiction over the case, but in \textit{Burford} cases, the case is dismissed entirely.\footnote{CHEMERINSKY, \textit{FEDERAL JURISDICTION}, supra note 164, at 808.}

For the individual litigants, abstention is likely to frustrate perceptions of voice and opportunity to be heard. Notwithstanding the fact that defendants are typically happy with the status quo and have less interest in the case moving forward quickly, abstention forestalls \textit{any} opportunity for either party to have its case heard. This stagnation may be of substantive benefit to the defendant, but it is not useful in fostering procedural justice perceptions. Nonetheless, the voice effects of abstention are likely to be greater on the plaintiff, since the defendant’s voice is only relevant in relation to his opportunity to defend himself against the allegations of the plaintiff. And if the plaintiff has no opportunity to be heard, then the defendant is likely to be less concerned – even procedurally – with an opportunity to likewise present his defense. From the perspective of impartiality and trust, the forum choosing party presumably will experience a drop in procedural justice assessments, while a party who was in the forum unwillingly may believe that the state court or administrative body is more impartial and trustworthy. Finally, with respect to courtesy and respect, it is not clear how litigants would perceive abstention. On one hand, the tremendous delay that abstention adds to proceedings, and the dismissive nature of the court’s response, may suggest disrespect for the litigants. On the other hand, a refusal to consider the question because another tribunal is likely to have more expertise in handling the matter, or because of courtesy to a governmental body that was the originator of the right in question, may not appear discourteous or disrespectful to individual litigants.

From the perspective of the state and federal actors involved, abstention in \textit{Pullman} and \textit{Burford} cases seems likely to foster perceptions of procedural justice on the part of the state courts, legislators, and executives. Indeed, the fact that the Court suggests that one of the goals of \textit{Pullman} abstention is to avoid friction between the systems indicates that the doctrine has procedural justice implications. While reducing erroneous results and limiting unnecessary decisions are instrumental goals related to the accuracy of the judicial system, reducing friction suggests a more dignitary or relational goal for
abstention. If cases involving abstention are cases in which federal judges are determining whether or not to decide certain types of matters that state governmental authorities, whether judges or administrative agency actors, may prefer to determine for themselves, then state actors will be more satisfied with the outcome when they have experienced procedural justice. Here, federal court abstention gives the state actors greater voice and opportunity to express themselves, sends a signal that federal courts are not biased and can be trusted to leave states to manage their own business, and shows courtesy and respect to the state system of government by allowing it to self-govern and have the privilege of interpreting its own statutes. It may be that even the occasional abstention by federal courts is sufficient to provide the state actors with broader procedural justice benefits. That is, the ultimate division of labor in a larger set of cases is at issue, but being provided procedural justice in some subset of those cases suggests to state actors that the federal judiciary is handling its division of court business, more generally, in a procedurally just manner.

2. Abstention Because of Pending State Proceedings

In Younger v. Harris,\textsuperscript{200} the Supreme Court created an abstention doctrine that prevented federal courts from interfering with pending state court criminal proceedings, in part on comity grounds,\textsuperscript{201} and the scope of Younger abstention was subsequently broadened to include civil proceedings.\textsuperscript{202} But civil Younger abstention is fairly narrow: a federal court may not enjoin or otherwise interfere with a private civil state proceeding, and should abstain from hearing the case, only when there is an important state interest involved.\textsuperscript{203}

From the perspective of individual litigants, the federal courts’ refusal to hear a case involving a proceeding in the state court may decrease the experience of voice for the plaintiff in the federal action. On the other hand, for the defendant in the federal action, such abstention is likely to increase feelings of voice, because defendants will feel that they have had the opportunity to be fully heard in their preferred forum, and will not be forced to divide potentially scarce resources to present cases in both forums. From a perspective of neutrality and trust, a party seeking a federal forum may do so because of distrust of the state forum, so abstention will decrease that party’s assessments about the neutrality of the decision maker – both the decision maker in the actual litigation and, potentially, the decision maker as to where the case will be

\textsuperscript{200} 401 U.S. 37 (1971).

\textsuperscript{201} Id. at 44. The decision also relied heavily on equity jurisprudence principles. Id. at 43-44.


heard. The party seeking federal court relief may also believe that the federal court’s refusal to hear the case is discourteous or disrespectful.

Discussions about the comity rationale for Younger abstention explicitly invoke concerns about harmony between federal and state courts. So, for example, Redish has suggested, in arguing in favor of abstention in these cases, that federal court injunctions may disrupt state proceedings and are likely to engender ill will towards federal judges. On the other hand, Chemerinsky noted that the claim about friction is “based on an assumption about the likely psychological reactions of state court judges,” and that in most cases, these judges “probably will not even know that an injunction has been issued.”

Chemerinsky further argued that even if the state judges did know of the federal injunction, they would likely welcome the decrease in their workload and would be particularly pleased to be relieved of a controversial case. He also suggested that state court judges might take no “insult” from the removal of the case from their purview: this abstention “is no more of an affront to state courts than is the existence of removal jurisdiction.”

The procedural justice analysis differs. From the perspective of voice, an injunction diminishes state courts’ opportunity to be heard on matters of importance; additionally, state courts’ opportunity to be heard on the very question of whether they may consider the issue is completely nonexistent when a federal court unilaterally enjoins the state court proceeding. Abstention, then, to allow the state case to proceed, is likely to enhance the state courts’ perception of voice, especially because such abstention is only warranted for those cases that most clearly involve important state interests. Abstention is also likely to enhance state actors’ perceptions that the federal judiciary is unbiased and trustworthy; an injunction of a current state proceeding might engender feelings that the federal court is making a grab for power that state actors may not perceive as bias-free. Finally, abstention may signal respect and deference to state courts, whereas an injunction may appear discourteous and disrespectful of state authority.

3. Abstention Because of Duplicative Litigation

When parallel proceedings exist in both federal and state forums, principles of res judicata mean that whichever court is the first to rule on the identical issues will have the dispositive word on the outcome. In Colorado River, the Supreme Court provided that a federal court could abstain from hearing a case when there was a concurrent state action

206 CHEMERINSKY, FEDERAL JURISDICTION, supra note 164, at 831.
only in exceptional circumstances. In most cases, then, abstention because of concurrent litigation is not permitted.

From a procedural justice viewpoint, individual litigants are able to participate fully in both state and federal jurisdictions: on one hand, litigating in two forums provides multiple opportunity for voice, but on the other hand, presenting one’s case in two forums presents a resource management problem that may undercut the ability to present one’s case fully in either court. The effect of allowing the case to proceed in both forums on parties’ perceptions of their opportunity to be heard is uncertain. From a neutrality and trust standpoint, the litigants may simply disagree about the most neutral forum; the party who prefers to be in federal court, then, is likely to be more dissatisfied with a decision to abstain on procedural justice grounds. From a courtesy and respect perspective, the party who initiated the first action may feel that the existence of a second action is disrespectful.

From the perspective of the judicial actors involved, federal judges ought to feel increased voice when they do not abstain, while state actors ought to feel increased voice when abstention does occur. When a federal court hears a case that is duplicative, it does not seem to implicate neutrality and trust concerns by state actors; when a federal court abstains, on the other hand, it may heighten the perception of state actors that the federal court wants to act neutrally. Abstention signals courtesy and respect from the federal to the state court, on the one hand, but a refusal to abstain – when there is no special basis for such abstention beyond duplicativeness – does not seem particularly disrespectful to the state court, either.

IV. IMPLICATIONS OF THE PSYCHOLOGY OF PROCEDURAL JUSTICE FOR LAW AND PSYCHOLOGY

An examination of the way in which individuals caught up in our federal civil system may experience procedural justice demonstrates that certain practices and rules are more likely to produce subjective assessments of fairness than others, and sometimes may have differing effects on different parties. Understanding the antecedent factors that produce judgments about fairness is critical to system design that meets expectations for fairness, and in turn such system design can yield increased deference to legal authorities and greater perceptions of legitimacy. When litigants and other players in the legal system have

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208 *Id.* There is great disagreement about what “exceptional circumstances” means, and a discussion of this question is outside my scope here.

209 A discussion about the potential to manipulate procedural justice variables in order to create a “false consciousness effect” in which people receive substantively poor outcomes but are satisfied because of fair process is outside the scope of this article. For a useful review of literature on this point, see MacCoun, *Procedural Fairness*, supra note 13.
an opportunity for voice, feel that a decision maker is trustworthy and neutral, and believe that they have been treated with courtesy and respect, they are more likely to believe that the decision-making process is fair and that the system is legitimate.

One concern about a psychological procedural justice approach, however, is that individuals may define fairness – including its shared antecedents – differently. While one person might care most about voice, another might care more about courtesy. While one party might find one set of behaviors courteous, another might find those same behaviors brusque. Indeed, the very basis of the psychology of procedural justice – measuring subjective perceptions of fairness – suggests the limitations of a one-size-fits-all template for procedural fairness. Although very few studies have sought to separate the effects of structural factors from the effects of individual differences on procedural justice judgments, implicitly assuming, instead, that most of the variability in judgments comes from external structural features of dispute resolution mechanisms, it is certainly plausible that individual differences represent a significant challenge to designing systems that appear fair to all participants.

At the same time, however, because robust findings have demonstrated that individuals rely on the same set of factors in making judgments (even if the relative weight may differ between settings or individuals), these factors serve as a useful focal point in assessing the successes and failures of our procedural rules and doctrine. Additionally, studies have also shown that procedural justice effects are widespread and that both the effects and the antecedents of procedural justice often cut across gender, culture, and racial divisions. Individuals are often alike in their valuation of fair process, and they are often similar in the ways that they make procedural justice assessments: that is, they converge in valuing voice, a neutral and trustworthy decision maker, and courteous and respectful treatment. Even so, individuals may differ, as discussed above, over when they believe they have been treated fairly. And in some situations, the same rule may have different effects – not just on different parties to litigation, but on different individuals who have different ways of – and thresholds for – assessing courtesy, or neutrality, or trustworthiness, or voice. But these shared antecedent factors at least provide a useful beginning point in thinking through the likely effects of certain rules.

More research on individual differences in assessments about the antecedent variables of procedural justice will be critical to the success of any future efforts to think about the rules’ procedural justice effects in a systematic way. If certain practices are found to lead to consistently high fairness assessments across a range of the population, we can be

210 But see Rebecca Hollander-Blumoff, Objective Antecedents of Procedural Justice Judgments in Bilateral Negotiation, manuscript on file with author.

211 See supra note 86.
more positive about adopting those practices. If there is high variability for any particular behavior or reform, then it should not be adopted on the grounds that it will increase procedural fairness. But where rules and doctrine can be shaped to maximize perceptions of fairness – and where, as with courtesy and respect, procedural justice perceptions can be shaped at little additional cost or effort – decision makers and rule makers ought to be aware of the psychology of procedural justice as it will likely play out among litigants and system participants.

A focus on subjective perceptions has been rejected by some theorists, who believe that the very nature of subjectivity calls for ignoring a psychological procedural justice as meaningful in relation to the crafting or analysis of rules. But this perspective is simply too narrow. A psychological procedural justice perspective is a critical complement to a philosophical and doctrinal approach. When theory and doctrine set the threshold rules for fair process, it is important to be able to clarify whether those rules are able to effectuate the stated fairness goals. It should not suffice for theorists and rule makers to create rules and doctrine that they mean to be fair. Research on the psychology of procedural justice offers insight into the human psychology of perceiving fair process. When we better understand the mechanisms that drive assessments of fair process, we can better hone our fairness rules to meet those criteria, without losing a focus on normative theoretical commitments to fair process.

Additionally, procedural justice research in psychology offers a complement and a practical rejoinder to the debate among legal theorists about how to weight instrumental and dignitary concerns in procedural fairness. Although no research can purport to answer the question of how properly to weigh accuracy, cost, fairness, and efficiency in designing procedures, the research on why people care about fair treatment has several implications in considering this calculus. First, the research shows that individuals are not solely instrumental in their desire for fair process. People do care about fair process for relational and dignitary reasons, in addition to its instrumental value. This suggests that we ought to be careful to value the dignitary effects of process even when they have no likely effect on outcome. This leads to a related point: the procedural justice research suggests that people value being treated with courtesy and respect, a system feature that is not a part of procedural due process analysis and does not speak in any way to accuracy. However, courteous and respectful treatment is relatively costless to provide, and such treatment may provide important societal benefits that the instrumental model overlooks. Because procedural justice research has demonstrated that people are not solely motivated by instrumental concerns, a system for fair process that addresses their needs ought to incorporate features that provide dignitary benefits.

212 See supra note 7.
213 See Tyler & Lind, supra note 44.
especially when those benefits are likely to have almost no negative impact on efficiency.

CONCLUSION

The legitimacy of our legal system is premised on its constitutional roots, which guarantee due process of law. But in practice, the subjective assessments about the quality of justice received will also influence participants’ perceptions about legitimacy – in particular, the quality of procedural justice received. A focus on the subjective perceptions of participants in the legal system – on the psychology of procedural justice – offers a valuable perspective on the way that real people understand the legal system. Looking at specific legal rules and structures through the lens of procedural justice provides a multi-faceted way to explore whether those rules and structures are effective in producing perceptions of fair processes that motivate people to obey and respect the law and legal system. Furthermore, considering rules and doctrine from a procedural justice perspective in psychology helps us understand and take seriously the effects of these rules and doctrines not just from an instrumental but also a dignitary perspective.

In this article, I have suggested that individual litigants will evaluate the procedural justice of rules, behavior, and doctrine in court. More controversially, I have suggested that other participants in the legal process, such as judges, legislators, and executives, will also evaluate the procedural justice of the legal system writ large – not just considering the way that individual litigants’ cases are judged, but also considering the way that judicial business is allocated between the state and federal judiciaries. Of course, empirical research is needed to clarify and refine how individuals perceive our legal system with respect to procedural justice.214 In particular, it would be useful to study litigants’ procedural justice reactions to particular rules and behaviors in litigation, as well as to broaden the empirical focus to study reactions of judges and other government actors to different procedural mechanisms for the allocation of judicial business. This project contributes to the foundational conversation about what kinds of relationships we might hope to explore.