Overcoming the Substance-Procedure Dichotomy

Thomas O Main

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Abstract: The substance-procedure dichotomy is a popular target of scholarly criticism because procedural law is inherently substantive. This article argues that substantive law is also inherently procedural. I demonstrate that the construction of substantive law entails assumptions about the procedures that will apply when that substantive law is ultimately enforced. Those procedures are embedded in the substantive law and, if not applied, will lead to over- or under-enforcement of the substantive mandate. Yet the substance-procedure dichotomy encourages us to treat procedural systems as essentially fungible—leading to a problem of mismatches between substantive law and unanticipated procedures. I locate this argument about the procedural foundation of substantive law within a broader discussion of the origin and status of the substance-procedure dichotomy.

INTRODUCTION

The substantive implications of procedural law are widely acknowledged. Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights. For example, there is no need to change the substantive contours of employment discrimination law when modifications to pleading rules and motion practice can bypass the more arduous substantive law-
making process and deliver similar results. That procedure has substantive implications is well understood.

Yet few have examined the converse. In this piece, I demonstrate that substantive law entails assumptions about how that law ultimately will be enforced. Many of those assumptions are rooted in the procedures pursuant to which a claim to vindicate that law would be litigated. The drafting of substantive law, rather than occurring in a vacuum, is informed by expectations about pleading rules, the availability of a class action, the scope of discovery, case management techniques, rules of evidence, trial practice, and a constellation of other procedures.

Because substantive law is calibrated to achieve some outcome, fidelity to that law requires that it remain hinged to the corresponding procedural law that was presumed its adjunct. If the drafters of some substantive law require proof of defendant’s intent, for example, that legislation is predicated on parochial procedures—say, that plaintiffs would have broad access to defendants’ records through discovery, that plaintiffs would be able to introduce expert testimony at trial, and that defendants would be subject to cross-examination under oath. If this substantive law were enforced instead in a system without the presumed procedures, there would be a mismatch between the desired and achieved levels of deterrence.

Because procedure matters, these mismatches, which lurk whenever the procedure that is applied varies from that which was contemplated by the drafters of the substantive law, matter too. And such scenarios are commonplace. There is a mismatch in every diversity case that is filed in federal court, in every state case that involves federal law claims, and in every conflict of laws case that results in the application of another jurisdiction’s substantive law. There is also a mismatch in virtually every instance of alternative dispute resolution because, of course, the substantive law would be applied in a setting without the presumed procedural accoutrements. In addition to all these mismatches that occur on a geographic dimension, there are also chronologic mismatches: because even when litigation takes place in the very forum anticipated by the drafters of the substantive law, there is a mismatch if the procedure has changed since the substantive law was promulgated.
Once we see that procedure is embedded in substantive law, we can appreciate how the substance-procedure dichotomy is profoundly strained. The premise of a substance-procedure dichotomy is that substance and procedure are divisible. And the value of a substance-procedure dichotomy is that procedural systems can be treated as essentially fungible. But the premise of divisibility is dubious since procedure has substantive qualities, and as this article will establish, substance has an embedded procedure. Moreover, adhering to this false premise has tremendous cost: systemic over- and under-enforcement of substantive law.

My argument proceeds in five parts. In Part I, I present the origin of the substance-procedure dichotomy. This is important context because understanding when and how the substance-procedure nomenclature emerged helps explain the fragility of the dichotomy. This dichotomy was neither time- nor battle-tested when it was codified as a foundational precept of our contemporary jurisprudence. Indeed, codification of a substance-procedure dichotomy is something of an accident of history. Appreciating these circumstances helps explain some of the incoherence of the doctrines constructed upon the dichotomy. I summarize that doctrinal incoherence in Part II.

In Part III, I relate the familiar narrative about how procedure is inherently substantive. The narrative presents in two basic forms. In one, procedure is substantive because procedure affects the outcome of cases; in the other, procedural reform is a disguise for the reform of substantive law. Both are demonstrably true.

In Part IV, I argue that procedure is embedded in substantive law. Using a stylized example of a state statute, I demonstrate that substantive law is neither aprocedural nor trans-procedural. Rather, substantive law has an associated procedure that must be applied by the enforcing court if the substantive law is to achieve the level of deterrence intended by its drafters. To apply any other procedure leads to over- or under-enforcement of the substantive mandate.

This problem, in turn, compels us to reconsider the substance-procedure dichotomy and the legitimacy of doctrines that are premised upon that dichotomy. The consequences of admitting that there is a false dichotomy at the core of our legal system may be staggering. But the magnitude of this problem should influence only
the treatment of the condition, not the diagnosis. I tackle the conceptual possibilities in Part V.

There are essentially three available courses of action, though all may appear radical to generations conditioned to accept a substance-procedure dichotomy. One approach would abandon the notion that it is possible to apply some other jurisdiction’s law. Instead, a strict lex fori regime would require the application of the forum’s substantive and procedural law in all circumstances. In other words, there would be no choice of law doctrines. A second approach posits that because we have misunderstood the nature of a substantive right, our choice of law doctrines are not robust enough, such that the application of another system’s law would include all of that law, substance and procedure. A third approach would seek to harmonize all procedural systems and establish a universal procedure to ensure that forum procedure always matched the embedded procedure.

Ultimately, I suggest a hybrid approach, combining parts of all three. First, choice of law doctrines could express greater humility and skepticism about the ability to apply another jurisdiction’s law. Second, when such application is unavoidable and necessary, our choice of law doctrines could apply as much of that law as reasonably possible, without regard to the labels substance and procedure. And finally, procedural conformity efforts should be appreciated for their ability to enhance the integrity of substantive law.

I. FROM ANTINOMY TO DICHOTOMY

The history of Anglo-American law, which is typically dated from 1066, is approaching the end of its first millennium. Interestingly, however, the categories of substance and procedure appear only in the last quarter of that historical narrative. One scholar has traced the development of a substance-procedure dichotomy to the waning years of the 18th century:

The dichotomy was fathered by Jeremy Bentham in a 1782 work entitled *Of Laws in General*, *sub nom* the distinction between substantive law and adjective law. Bentham there makes clear that he believes he is drawing a new distinction in the descriptive organization and analysis of the concept of law,
and an examination of the leading pre-Bentham sources on English legal theory supports his claim.¹

As Professor Risinger observes, Bentham located a substance-procedure dichotomy within an extremely elaborate conceptual analysis of the phenomenon of law.² And the originality of the dichotomy was a major point of the entire structure of Of Laws in General.³

In previous work I have credited (or blamed, as the case may be) Sir William Blackstone for introducing categories of substance and procedure.⁴ In his famous Commentaries on the Laws of England, Blackstone, using what he called a “solid, scientifical method,” restated the entire corpus of English law in the form of substantive rules.⁵ In so doing, he appears to have differentiated substantive rights from the procedural mechanisms to prosecute the wrong, announcing in his Commentaries:

I shall, first, define the several injuries cognizable by the courts of common law, with the respective remedies applicable to each particular injury; and shall, secondly, describe the method of pursuing and obtaining these remedies in the several courts.⁶

Blackstone died in 1780, so we do not have the benefit of his response to the claims of originality that fill Bentham’s 1782 book.⁷ But there is no doubt that Bentham was very familiar with his former professor’s work.⁸ Bentham was a persistent and often savage critic of

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² Risinger, supra note 1, at 191 n.11.
⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *34, at 18 (Cooley ed. vol. 1 1872) (1765).
⁶ 3 BLACKSTONE, supra note 5, *115, at 71 (Cooley ed. vol. 2 1872) (1768).
⁷ See generally WILFRID PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 303 (Oxford 2008). Even if Blackstone had been alive, he may well have declined to respond. See id., at 8 & n. 31 (describing how Blackstone had four years to respond to Bentham’s Fragment on Government, a “scarifying attack” on the Commentaries, yet chose not to answer in any public way).
Blackstone, and may have been loath to share credit for introducing the substance-procedure paradigm.9

More important than attributing the paradigm to a single source is understanding the context of its emergence. Specifically, why would the categories of substance and procedure (or “adjective law”10) emerge in the 18th century, rather than earlier in the many centuries of English jurisprudence? The answer is that, until then, substance and procedure were inextricably intertwined in both the Law courts and in the Equity courts.11

First, the Law courts had centuries of experience with writs, forms of action, and single issue pleading.12 That system boasted a network of highly technical pleading and practice rules that determined the course and outcome of litigation.13 These rules earned common law the dubious distinction as “the most exact, if not the most occult, of the sciences.”14 Importantly, these procedural forms “were the terms in which the law existed and in which lawyers thought.”15

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10 At that time, the word “adjective law” would have been more popular than “procedure.” Some have argued that procedure is “only a part, though the major part, of adjective law.” See Risinger, supra note 1, at 191 n.11 (quoting Bentham). But certainly by the turn of the twentieth century, the terms “procedural law” and “adjective law” were synonymous. See, e.g., Britton & Mayson et al. v. Criswell, 63 Miss. 394, 1885 WL 3079 at *3 (1885) (“How facts are, or are to be proven, is a matter of adjective, as contra-distinguished from substantive, law, is a mere matter of legal procedure.”); U.S. v. Cupp, 24 App. D.C. 143, 1904 WL 10079 at *3 (App. D.C. 1904) (“What is the legal significance of the word ‘procedure’? The law ‘defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is ‘substantive law.’ So far as it provides a method of aiding and protecting, it is ‘adjective law’ or procedure.”) The term adjective law still enjoys some attention. See, e.g., Robert J. Pushaw The Inherent Powers of Federal Courts and the Structural Constitution, 86 IOWA L. REV. 735 (2001) (referring to “adjective law” throughout).
11 Main, supra note 4, at 454.
12 Main, supra note 4, at 454.
13 Main, supra note 4, at 454-455. See also 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 559 (1895) (explaining that, within this system “the whole fate of a lawsuit depends upon the exact words that the parties utter when they are before the tribunal”).
14 2 POLLOCK & MAITLAND, supra note 13, at 612.
15 S.F.C. MILSON, HISTORICAL FOUNDATIONS OF THE COMMON LAW 59 (“There was no substantive law to which pleading was adjective.”) (2d ed. 1981). See also Main, supra note 4, at 456 (“The principles of the common law had not been mapped out in the abstract, but instead grew around the forms by which justice was centralized and administered by the Law courts.”); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 3 (1952) (“Procedure belongs to the institutions of earliest development…. At a time when substantive legal conceptions are visible only in the faintest of outline, procedure meets us as a figure already perfected and exact.”); 2 POLLOCK & MAITLAND, supra note 13, at 559 (“Our forms of action are not mere rubrics nor dead categories; they are not the outcome of a classificatory process that has been applied to pre-existing materials; they are institutes of the law; they are, we say it without scruple, living things.”); R. ROSS PERRY, COMMON LAW PLEADING 3 (1887) (“It may be thought these are extravagant expressions of men who were educated to see excellence in anything that was technical and abstruse. When Littleton says that the law is proved by the pleading, and when Coke adds, approvingly, ‘as if pleading were the living voice of the law itself,’ they are not using mere figures of rhetoric.”); JOSEPH H. KOFFLER & ALISON REPPY, COMMON LAW PLEADING 65 (1969) (“The Law was required to express itself through the Limited System of Writs and Forms of Action sanctioned by precedent.”).
Accordingly what we might today refer to as a substantive law of, say, torts, could only be explained through the actions of trespass, case and trover. 16 “[O]ne could say next to nothing about actions in general, while one could discourse at great length about the mode in which an action of this or that sort was to be pursued and defended.” 17 The substantive law was subsumed within the procedural form. 18 Hence the familiar words of Sir Henry Maine that English “substantive law has at first the look of being gradually secreted in the interstices of procedure.” 19

Meanwhile, in the traditional courts of Equity, there were no procedural rules and, instead, an all-encompassing substantive mandate. 20 There were no writs, forms of action, nor emphasis upon the formation of a single issue. 21 Indeed, animated by the juristic principles of discretion, natural justice, fairness and good conscience, the essence of a jurisprudence of Equity was somewhat inconsistent with the establishment of formal procedural rules. 22 Hence the characterization of Equity as “loose and liberal, large and vague.” 23 A broad substantive mandate dominated the jurisprudence of Equity in much the same way that procedure captured the jurisprudence applied in the Law courts. But in neither Law nor Equity was there meaningful appreciation of the separability of substance and procedure.

16 See Main, supra note 4, at 456 (citing Koffler & Reppy, supra note 15).
17 MILLAR supra note 15, at 3-4 (quoting 2 POLLOCK & MAITLAND, supra note 13, at 562).
18 See George Palmer Garrett, The Heel of Achilles, 11 Va. L. Rev. 30, 31 (1924-1925) (suggesting that the common law “became so interested in forms that they allowed the substance to escape”).
20 Main, supra note 4, at 454. The word “traditional” is an important qualifier in this discussion. As I have chronicled elsewhere, Equity began to experience a process of systematization in the early seventeenth century. See Thomas O. Main, ADR: The New Equity, 74 U. Cin. L. Rev. 329, 383 (2005).
21 Main, supra note 4, at 454. See also EDWIN B. MEADE, LILE’S EQUITY PLEADING AND PRACTICE § 95, at 59 (3d ed. 1952):
In the equity procedure one encounters no bewildering rules as to the name or classification of the particular suit, or according to the nomenclature at law, “forms of action.” When from an investigation of the law and facts, counsel has determined that the client has a good cause for equitable relief, he is saved the problem of wasting brain-sweat in deciding whether he shall sue in debt, assumpsit, or covenant, in trover or replevin, in trespass vi et armis or trespass on the case. He simply decides to file a “bill in equity.”
22 See Main, supra note 4, at 458 (citing Roscoe Pound, The Decadence of Equity, 5 Colum. L. Rev. 20, 20 (1905)).
For centuries in England the separate systems of Law and Equity had been both rivals and partners. But by the middle of the 18th century, a profound transformation was underway; among other changes, both systems were incorporating key components of the other. Law was absorbing many of the best practices of Equity. Meanwhile, Equity was becoming systematized by rules and processes. 

Very importantly, the words substance and procedure offered a vocabulary for explaining this phenomenon. With each system looking increasingly like the other, “differences between the systems were viewed as merely procedural.” Blackstone wrote:

Such then being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief.

The perception that parallel court systems were applying substantially similar substantive rules of law under different procedural schemata led inevitably to the ultimate merger of law and equity. The merger of law and equity, on one hand, and the emergence of a substance-procedure duality, on the other, thus presented interlocking narratives: a purely procedural merger of Law and Equity purported to leave the grand substantive jurisprudence of both systems intact. Put another way: the words substance and procedure helped explain how the merger of law and equity could be an ambitious yet also safe reform.

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24 Main, supra note 20, at 375.
25 Main, supra note 20, at 375-389; Bryant Smith, Legal Relief Against the Inadequacies of Equity, 12 Tex. L. Rev. 109 (1934) (tracing key elements of reforms in both systems to the middle of the 18th century).
26 Main, supra note 20, at 376-383.
27 Main, supra note 20, at 384-385.
28 Main, supra note 20, at 386.
29 3 BLACKSTONE, supra note 5, at *436, at 272.
30 Main, supra note 4, at 464.
31 A central theme of the merger of law and equity—in state courts in the mid-19th century and in federal courts in 1938—was this notion of a purely procedural merger.
It is no coincidence that the categories of substance and procedure surfaced during the Enlightenment, when scientists and philosophers sought to understand all of the world around them by categorizing it. The capacity to distinguish between and among things became an integral part of intelligibility. And the Enlightenment epistemology produced particularly binarist thinking such as subject/object, culture/nature, mind/matter, and rational/irrational. A substance/procedure antinomy likewise resonated, especially for Blackstone, a law professor at Oxford who wrote his Commentaries for instructional purposes (as opposed to law reform).

But rather than remaining in the ivory tower for maturation and refinement, the categories of substance and procedure were put to immediate use—as foundational legal infrastructure. Quite unfortunately, consciousness of the substance-procedure antinomy happened to coincide with the formation of new systems and courts in the nascent United States of America. This distinction between matters substantive and procedural offered a tempting and accessible conceptual structure for a system of jurisprudence that was being built from scratch. The First Congress, for example, passed a statute providing that the new federal courts would, in cases at law, generally follow the “modes of process” of the state in which the court sat. The Second Congress prescribed a distinctive court procedure for equity cases. Other statutes recognizing a substance-procedure distinction soon followed.

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34 Id.
35 See generally WILFRID PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 308-309 (Oxford 2008) (associating Blackstone with other contemporary political philosophers). See also Main, supra note 4, at 459, 461 (citing Alan Watson, Comment, The Structure of Blackstone’s Commentaries, 97 YALE L.J. 795, 810 (1988)).
36 Id., supra note 4, at 463.
37 The early courts were unable and unwilling to replicate the English system in full. On the Law side, there were not enough sophisticated lawyers, clerks, and libraries to sustain such a system; and Equity’s association with the royal prerogative invited some resistance. See Subrin, supra note 32, at 927-928.
38 Act of September 29, 1789, ch. XXI, §2, 1 Stat. 93, 93.
39 Act of May 8, 1792, ch. XXXVI, §2, 1 Stat. 275, 276.
40 See generally 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 509-551 (1971) (discussing the process acts of the 1780s and 1790s); HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17-18, 581-586 (1963) (discussing the repeated pattern of state law governing unless superseded by federal law in the process and conformity acts of the 1700s and 1800s); Subrin, supra note 32, at 930, n.114; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 56-57 (Touchstone 2d ed. 1985) (chronicling early American civil procedure); JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES (7th ed. 1930) (reprinting and discussing the 1822, 1842, 1866, and 1912 equity rules).
This process of codification converted a substance-procedure antinomy into a substance-procedure dichotomy. Before this legislation, substance and procedure represented conceptual opposites—substantive laws detailed the rights and responsibilities of the parties, and procedures prescribed the vindication of those rights and the fulfillment of those responsibilities. That antinomy revealed the diverse purposes and functions that for centuries had been seamlessly integrated (in concept as well as nomenclature) in a corpus of laws. Antinomy is an especially apt descriptor of the relationship between substance and procedure because these concepts are not only counter-terms or antonyms, but are also paradoxically yoked.\(^\text{41}\) Each is extraordinarily difficult to define without also defining the other.\(^\text{42}\) Yet the substance-procedure antinomy invited a more nuanced and sophisticated appreciation for laws’ multiple intentions and meanings.

But the law did not codify this new consciousness; it codified a dichotomy. As a dichotomy, substance and procedure were still conceptual opposites; but dichotomies are characterized by mutually exclusive and mutually exhaustive categories. The exclusive disjunction had severe consequences: lost was the conceptual possibility for laws that belonged in both categories or in neither category. As antinomy the counter-terms substance and procedure were more localized, open-ended, and did not contain this sense of closure; laws could be both substantive and procedural, or could be neither substantive nor procedural.\(^\text{43}\) But with codification as a dichotomy, this heterogeneity was lost.

\(^{41}\) To be clear, while antinomy and antonym share an etymological root, they have slightly different meanings. While antonyms are opposites, antinomy captures the more complex idea that the two terms have some relationship that constitutes a paradox or some unresolvable contradiction between two opposing but equally valid conclusions.

\(^{42}\) See, e.g., John Salmon, \textit{JURISPRUDENCE} § 172 (9th ed. 1937):

Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated. Procedural law regulates the conduct of affairs in the course of judicial proceedings; substantive law regulates the affairs controlled by such proceedings.

\(^{43}\) See more generally Raia Prokhovnik, \textit{RATIONAL WOMAN: A FEMINIST CRITIQUE OF DICHTOMY} 24-25 (Manchester Univ. Pr. 2002)
Further, a dichotomy is not simply a neutral division of an otherwise all-encompassing descriptive field. “Dichotomous thinking necessarily hierarchizes and ranks the two polarized terms so that one becomes the privileged term and the other its suppressed, subordinated, negative counterpart.” Indeed, the inferiority of procedure to substance is a familiar refrain. In the 18th century, Bentham degraded procedure—suggesting even the term adjective law implied too much influence for procedure. Then in the nineteenth century, David Dudley Field undertook to refine the machinery of procedure. At the turn of the twentieth century Thomas Shelton analogized procedure to “a clean pipe, unclogged artery, clear viaduct, or bridge.” Decades later, Charles Clark drafted rules to be a handmaid rather than a mistress. And as a contemporary example, one of my colleagues, a property professor, teaches his students that procedure is like the player piano to substantive law’s musical compositions. That substance and procedure are frequently defined with metaphors may be some evidence that the terms lack innate definition.

II. DICHOTOMY IN DISARRAY

What started as the germ of an idea about different intentions and meanings for laws—substantive mandates, on one hand, and the procedural mechanics of enforcement, on the other—spread like a virus. And the legitimacy of a substance-procedure dichotomy is now largely presumed. Today, for example, a Federal Rule of Civil Procedure is not a valid procedural rule under the Rules Enabling Act.
if it abridges, enlarges or modifies a substantive right.51 In diversity cases, the Erie doctrine requires federal courts to apply state substantive law and federal procedural law.52 Closely related to the vertical choice of law context in Erie is the horizontal choice of law; a court usually applies the procedural law of the forum even when it applies the substantive law of another jurisdiction.53 The retroactivity of a congressional statute, administrative regulation, or court ruling can also turn on the substance-procedure classification.54 Whether fundamental or artificial, the distinction that separates substance from procedure is consequential.

Now more than two hundred years after it was introduced, the dichotomy is entrenched, if not also reified. Because the stakes of litigation are high, there is often much debate about whether something is substantive or procedural. Is a law requiring plaintiffs to disclose their name in a complaint substantive or procedural?55 Is a law requiring certain types of claims to be submitted to non-binding mediation substantive or procedural?56 (What about compulsory arbitration?57) Is prejudgment interest a matter of substance or procedure?58 (And is it necessarily

the same answer for post-judgment interest? Many doctrines have long been difficult to classify as either substantive or procedural: statutes of limitation, testimonial privileges, fee-shifting statutes, burdens of proof, the availability of equitable relief and other remedial matters. Judges forced to characterize these issues as either substantive or procedural are confronted with a choice that is not only vexing, but consequential. Indeed, the fate of cases can turn on the resolution of each of these. And for better and worse, the answers to these questions in any one case can be so contextualized that they have little or no precedential effect on subsequent cases.

Two centuries of jurisprudence exploring the substance-procedure dichotomy can be summarized as efforts either to divine or to define the line of separation. With the former approach, popular in the 19th century, the exercise assumed that there was some pre-existing line separating substance from procedure—and that that line could, through careful analysis, be revealed. This was the “brooding omnipresence” theory of law at work. In its purest manifestation,
this approach denied that economics, culture, or psychology played any role in the judicial process of discovering the applicable law and applying it to individual cases. The law, like science, developed and improved as judges made new discoveries and got progressively closer to “truth.”

This approach supplied certainty and formalism for what it lacked in nuance and reason.

Beginning shortly after the turn of the 20th century, the early legal realist movement suggested that there was no pre-existing line, but rather merely a decision that needed to be made about where the line would be drawn. This realization, in turn, prompted acceptance of the notion that the line could be drawn in different places, depending upon the purpose for drawing it in any given instance. After all, in the language of the 1920s, a word like “substance” or “procedure” is (to borrow from Justice Holmes) but the “skin of a living thought.” A functional approach purported to offer sufficient flexibility to consider all of the variables implicated in any particular application of the substance-procedure distinction. But of course flexibility cannot be achieved without severely compromising the values of predictability and uniformity.

As Professor John Hart Ely observed, “We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure.” Some other characterizations of the state of the doctrine are less forgiving. Professor Risinger has suggested that “organized confusion is the official doctrine.” My personal favorite is counsel

conceived as a “brooding omnipresence” of Reason, of which decisions were merely evidence and not themselves the controlling formulations. Accordingly, federal courts deemed themselves free to ascertain what Reason, and therefore law, required wholly independent of authoritatively declared State law...

326 U.S. 99, 101-102 (1945). In Southern Pacific Co. v. Jensen, Justice Holmes wrote “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some state...” 244 U.S. 205, 222 (1917). See generally PURCELL, supra note 65, at 181-182.


69 See Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 Yale L.J. 333, 335-336 (1933) (arguing that the line between substance and procedure could only be drawn with knowledge of the purpose of the line-drawing). See also Hanna v. Plumer, 380 U.S. 460, 471 (1965) (“The line between substance and procedure shifts as the legal context changes.”).

70 Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.) (“A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”)

71 Risinger, supra note 1, at 190, 201 (suggesting that one commentator’s functional definition is another’s ‘linguistic relativism’ or ‘an abdication of analysis.”).


73 Risinger, supra note 1, at 202.
offered by Professor Herbert Goodrich in his 1927 Handbook on the Conflict of Laws: “The distinction is made by courts, and the lawyer must figure it out as best he can.”

The line between substance and procedure is often described with unflattering adjectives such as “vague,” “unpredictable,” “imprecise,” “amorphous,” “unresolvable,” “unclear,” “chameleon-like,” “murky,” “blurry,” “hazy,” and “superbly fuzzy.”

The cause of this instability is no mystery. The assumption that categories of substance and procedure are mutually exclusive and exhaustive simply seems to defy reality. It is quite obvious that certain procedural rules, such as burdens of proof and the class action device, have a substantive orientation. Likewise, certain substantive statutes, such as the statute of frauds and strict liability, have a procedural core. Even at the macro level, problems are manifest: some laws (e.g., statutes of limitations) are routinely classified as substantive for Erie purposes yet are procedural for conflict of laws analyses. The result can be a federal court deferring to the court of the state in which it sits (because a doctrine is substantive) but not then deferring to the state which created the cause of action (because the same doctrine is procedural and forum law governs).

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73 Goodrich, supra note 65, at 159.
75 See generally supra note 63; Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 216 (2004) (“The parol evidence rule has the form of a rule of evidence but it functions as a substantive rule of law.”)
77 See Guaranty Trust Co. v. York, 326 U.S. 99 (1945) (applying state statute of limitations in Erie context); Wells v. Simons Abrasive Co., 345 U.S. 514 (1953) (recognizing that state could apply its own statute of limitations to a foreign substantive right, implicitly labeling the statute of limitations as procedural). See also Seamon, supra note 60, at 91-92.
78 Lea Brilmayer & Ronald D. Lee, State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws, 60 Notre Dame L. Rev. 833, 848-849 (1985) (quoting Sampson v. Channell, 110 F.2d 754 (1st Cir.) under Erie, federal court bound to apply the law of burden of proof
This jurisprudence is largely ad hoc because the categories of substance and procedure were unclear when codified and have not crystallized since. Of course, some laws are both substantive and procedural; and some laws may be neither. The situation approximates that which might result if, after a couple of decades of appreciating the tension between efficiency and fairness, all laws were to be classified as promoting one or the other. Consideration of such a duality (like consideration of a substance-procedure antinomy) could be constructive, stimulating, and revealing. But codifying a dichotomy and forcing one label or the other on all laws—and attaching consequences to that label—would be rash, if not also preposterous and dangerous.

Importantly, at the time of its codification, the substance-procedure dichotomy might have appeared more mature and developed than it was. The substance-procedure dichotomy has frequently been confused with the “right-remedy distinction,” which has much deeper historical roots. The right-remedy distinction was developed by continental theorists—perhaps as early as the thirteenth century—in the context of international law. The right-remedy distinction separates the underlying substantive right from the range of available remedies to rectify it. In the vernacular of the substance-procedure dichotomy, both the substantive right and the range of remedies typically would be labeled substantive. And what Blackstone or Bentham labeled adjective or procedural would have been part of the remedy so far as the right-remedy distinction was
concerned. The right-remedy distinction had defined “right” so narrowly that there was very little subtlety or nuance to that traditional test. For this reason, a substance-procedure dichotomy may have appeared as an obvious, perhaps even timeless construct when it was codified. But that was a mirage.

Unfortunately the substance-procedure dichotomy was allocated a heavy jurisprudential load before it was ready to bear that structural weight. It should come as no surprise, then, that the contours of the substance-procedure dichotomy remain undefined, if not in outright disarray.

### III. Procedure as Substance

This Part could be neatly summarized with the simple declaration: procedure is power. All informed observers of the litigation process should already understand the substantive capacity of procedure.

Procedure is an instrument of power and social control. Procedures alter the conduct of groups and individuals, and thus can prefer some over others. And procedure can, in a very practical sense, negate, resuscitate, or generate substantive rights. The argument that procedure is substantive presents in two basic forms. The classic version is that procedure has substantive qualities because it affects the outcome of cases. A more contemporary version is that procedural reformers have a substantive agenda. Both versions are verifiable.

No procedural decision can be completely neutral in the sense that it does not affect substance. If procedures are to serve any purpose at

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83 Risinger, supra note 1, at 192-194.
84 Risinger, supra note 1, at 198.
87 THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE* 1 (Thomson/West 2006).
89 See Solum, supra note 75, at 196-202; Stephen B. Burbank, *Ignorance and Procedural Reform: A Call for a Moratorium*, 59 Brook. L. Rev. 841, 846 (1996) (“We … know the difference between the inevitable non-neutrality of procedure and the notion that the rulemakers are or might as well be animated by an overtly political agenda.”).
all, they will affect litigation behavior, and create new winners and new losers. When the discovery rules were adopted in 1938 they were expected to make a trial less about sport and ambush, and more about truth and evidence.\textsuperscript{91} This presupposed that those rules would change the results in many cases.\textsuperscript{92} In this vein, procedure is \textit{substantive} in that it is \textit{not unimportant}, as the subordinate role assigned to it by the substance-procedure dichotomy would suggest.

Procedural rules can also change how certain substantive laws are (or are not) enforced. To this end, scholars have analyzed the substantive capacity of numerous procedural devices and doctrines including, among many others, pleadings,\textsuperscript{93} sanctions,\textsuperscript{94} summary judgment,\textsuperscript{95} joinder,\textsuperscript{96} evidence (e.g., \textit{Daubert}),\textsuperscript{97} discovery,\textsuperscript{98} case


management, bifurcation, and class actions. The bulk of this literature has documented how so-called procedural reforms have intentionally, relentlessly, and quite successfully weakened civil rights and discrimination laws. Other substantive areas that have been examined in some depth include antitrust, corporate law and securities regulation, racketeering, and environmental protection.

The perception that procedure is relatively insignificant can be exploited. Indeed, “[s]ometimes substantive decisions are disguised as
process.”\textsuperscript{107} This subterfuge is dangerous because procedural reforms can have the effect of denying substantive rights without the transparency, safeguards and accountability that attend public and legislative decision-making.\textsuperscript{108} This literature is aptly if crudely captured in a nutshell by Representative John Dingell, who said in a Congressional hearing: “I’ll let you write the substance … you let me write the procedure, and I’ll screw you every time.”\textsuperscript{109} I do not mean to suggest that procedure is the tool only of scoundrels. Indeed, the Federal Rules of the Civil Procedure themselves were the product of New Deal legislation that promised access to courts for immigrants, women, labor and others who would be able to take advantage of its liberal measures.\textsuperscript{110} And of course not all procedural changes with substantive consequences are part of some broader political agenda.\textsuperscript{111}

All this is a familiar story. And only the broadest summary of this literature is necessary to remind that procedural means can achieve substantive ends, whether or not intended. As the substance-procedure metaphors mentioned above imply: adjectives can pervert the meaning of sentences, pipes can leak, handmaids can become mistresses, and player pianos can be so out of tune that the music is unrecognizable.

IV. PROCEDURE IN SUBSTANCE

In this Part I expose more fissures in the substance-procedure dichotomy. I demonstrate that substantive law is neither aprocedural nor trans-procedural, but rather is constructed with a specific procedural apparatus in mind to vindicate the rights created or the responsibilities assigned by that substantive law. Whether consciously or subconsciously, the drafters of substantive law embed an associated procedure.

\textsuperscript{107} Schneider, supra note 97, at __.
\textsuperscript{110} See Subrin, supra note 32, at 944-948 (documenting the Federal Rules’ reliance on New Deal principles, including access to the legal system); Stephen N. Subrin, The New Era in American Civil Procedure, 67 A.B.A. J. 1648, 1649-1651 (1981) (arguing that the creation of uniform federal rules with liberal pleading requirements and discovery provisions expanded the role of the federal government and facilitated public litigation);
Substantive law relies on procedure to effectuate the substantive mandate. Substantive law without any procedure at all would be a vain and hollow thing.\textsuperscript{112} Although some substantive laws may be merely aspirational or symbolic,\textsuperscript{113} it is surely true that “[t]he best laws in the world are meaningless unless they can be meaningfully enforced.”\textsuperscript{114} To borrow a useful phrase often invoked in another procedural context, substantive law without procedural law would be a “castle in the air.”\textsuperscript{115} As castles in the air are seldom built, substantive law would seldom be constructed without some procedure to vindicate that law.\textsuperscript{116} Because substantive law requires procedure, it is not aprocedural.

Nor is substantive law trans-procedural. Substantive law would be trans-procedural only if the rights established and responsibilities assigned in the substantive law could be fulfilled and realized in any procedural system. Consideration of a simple, stylized example will illustrate how substantive law cannot be trans-procedural.

Assume that the legislature of the State of Maine has promulgated a statute to protect vulnerable franchisees from abuse by franchisors. This is a simple statute, nicknamed the FPA (Franchisee Protection Act), with four elements constituting a new private cause of action. Imagine that the FPA is unequivocally “substantive” as that term is ordinarily used; the FPA does not prescribe any special pleading, joinder, discovery, or other procedural rules within its text.

When drafting legislation like the FPA, legislators must balance a number of competing priorities. Of course more protections for franchisees can discourage franchisors from investing in Maine businesses. The legislation would reflect these compromises and the desired level of deterrence.\textsuperscript{117} The substantive core of that legislation


\textsuperscript{114} Jean R. Sternlight, \textit{Dispute Resolution and the Quest for Justice}, 14 No. 4 DISP. RES. 12, 12 (2008).

\textsuperscript{115} FREDERIC WILLIAM MATILAND, EQUITY AND THE FORMS OF ACTION 19 (A.H. Chaytor ed. 1909) (referring to a system of Equity without a complementary system of Law).

\textsuperscript{116} See Mauro Cappelletti & Bryant G. Garth, \textit{Policies, Trends and Ideas in Civil Procedure} in \textit{INTERNATIONAL ENCYCLOPAEDIA OF COMPARATIVE LAW} Vol. XVI Civil Procedure 14 (Mauro Cappelletti, ed., 1987) ("Procedural law therefore is necessarily interdependent with substantive law, and neither is of much value without the other.").

\textsuperscript{117} My assumption is only that the legislation has some objective. Whether the goal is ambitious or mere window-dressing doesn’t change the analysis at all; either way, there is some desired outcome.
would be embodied in the four elements of the cause of action, and those elements could be more or less exacting in their terms. By exacting, I mean that the wording of each substantive element of a cause of action can be calibrated—dialed-up or dialed-down—to require more or less of a showing in order for the plaintiff ultimately to prevail. For example, under the FPA, franchisee plaintiffs might have to demonstrate an injury that is (“dialing” from high to low:) severe, significant, substantial, or actual; or the statute could presume injury and require no showing whatsoever.

Each substantive element of the cause of action under the FPA constitutes another “dial.” An element of scienter, for example, could impose liability when the defendant franchisor acts intentionally, wrongfully, in bad faith, negligently, not in good faith, and so on. A third element could enumerate the prohibited acts in more or less detail. And fourth, an element of causation could be more or less demanding.

The calibration of all four of these substantive elements would reflect the desired level of deterrence. But the level of deterrence, in fact, achieved will be influenced by the procedural system that hosts litigation filed under that statute. To identify just a few examples:

· Onerous filing fees, complex pre-filing requirements, and heightened pleading standards can discourage the filing of even meritorious claims.\textsuperscript{118}

· Class actions will facilitate the filing of claims that would not otherwise be pursued.\textsuperscript{119}

· The availability vel non of discovery will determine the evidence available to the parties, and thus potentially influence the outcome of the suit.\textsuperscript{120}

· Rules of evidence will determine what factfinders consider when evaluating the merits of the substantive claim.\textsuperscript{121}

Procedural systems can vary in important ways—the amount of time between filing and trial, a judge’s authority to enforce court orders

\textsuperscript{118} See supra note 93.
\textsuperscript{119} See supra note 101.
\textsuperscript{120} See supra note 98.
\textsuperscript{121} See supra note 97.
(through contempt or otherwise), the availability of appeals—and these and countless other procedures associated with enforcement will affect the level of deterrence, in fact, achieved.

If the FPA is drafted in contemplation of a procedural system with onerous filing fees, complex pre-filing requirements, and heightened pleading standards, the elements of the cause of action will incorporate that assumption. And if that law is enforced instead in a procedural system with easy access, simple filing requirements, and a liberal pleading standard, there will be over-enforcement of the intended mandate.

If the FPA is drafted in contemplation of a procedural system that does not have a class action device, the elements of the cause of action will incorporate that assumption. For example, to ensure the desired amount of litigation, the statute might provide for presumed or punitive damages. But if that law is enforced instead in a procedural system with a class action device, then again, there would be over-enforcement of the intended mandate.

If the FPA is drafted in contemplation of a procedural system that facilitates broad discovery, the elements of the cause of action will incorporate that assumption. If plaintiff must prove the defendant’s intent, for example, the assumption that plaintiff would have access to the defendant’s employees for questioning and defendant’s documents for inspection would be essential. If the same proof were required in a procedural system with no discovery, then of course the substantive mandate would be under-enforced.

To compensate for these procedural differentials and to achieve the desired enforcement, the elements of the cause of action would be calibrated differently. “Substance and procedure are intimately related. The procedures one uses determine how much substance is achieved.”122 And because there are procedures (or combinations of procedures) that would require different substantive law to achieve the same net result, substantive law is not trans-procedural.

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122 Frank Easterbrook, Substantive Due Process, 1982 SUP. CT. REV. 85, 112-13 (“Substance and procedure are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained.”) See also Robert Cover, Violence and the Word, 95 YALE L.J. 1601 (1986).
Because substantive law is neither apriori procedural nor trans-
procedural, exactly which procedural system(s), then, is the Maine
legislature contemplating when it drafts the FPA? One possible
answer would be Maine’s state court procedure; a second would be
Maine’s federal court procedure; a third answer could be some
composite of these (and/or other familiar, perhaps even anticipated
procedures). We would not know the answer, and of course that
answer could vary not only from legislature to legislature and
legislation to legislation, but even from legislator to legislator.

Whichever of these three assumptions informs the legislative
drafting, the substantive law is not drafted in a vacuum. Whatever this
built-in procedural expectation, it would be some parochial
assumption. And parochial it should be; the situs of most of the
litigation under the FPA would be Maine state and federal courts.

In most cases, a parochial assumption will be either correct or
“close enough.” Often, a Maine state court would be both the
presumed and the actual forum for litigation under the FPA. If instead
the parochial assumption was some composite of Maine federal and
state procedures, there will be some mismatch between the presumed
and the actual because no forum with such procedures exists;
however, if the actual forum was a Maine federal court, then
presumably any mismatch under these circumstances would be
modest. Substantial differences between state and federal procedures
of course would exacerbate the consequences of a mismatch.\footnote{For a discussion of efforts that would encourage states to deviate more dramatically from the federal model, see Koppel, supra note 98; Symposium Journal on State Civil Procedure, 35 West. St. U. L. Rev. 1-304 (2007). For historical perspective on this phenomenon, see Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America 177-199 (Oxford 1992).}

Occasionally the parochial assumption will be spectacularly
wrong: when the substantive law is litigated in a forum with
procedures dramatically different than those contemplated by the
drafters of the substantive law. The FPA could be applied by a French
court, for example, in litigation involving The Body Shop, a franchise
of L’Oreal, a French company.\footnote{For an overview of the French legal system generally and civil procedure in particular, see Christian Dodd, The French Code of Civil Procedure in English (Oxford 2006); Peter F. Schlosser, Lectures on Civil-Law Litigation Systems and American Cooperation with those Systems, 45 U. Kan. L. Rev. 9 (1996).} Or the FPA could be applied by a
Japanese court in litigation involving the Japanese franchisor Kumon Math & Reading Centers. Importantly, differences in procedural law from country to country are “much greater” even than differences in substantive law. And these procedural differences can dramatically affect the enforcement calculus.

Critical mismatches are not limited to cases involving the application of foreign substantive law by domestic courts. Procedural variation even among American state courts could be—and historically has, at times, been—significant. “Procedural diversity is built into the federal structure of fifty state judicial systems, which are natural laboratories for … experimentation.”

For example, “most states have charted their own paths toward civil discovery reform, paths that diverge from each other and from the federal rules.”

Different discovery rules alone can affect the outcome of a case. But state procedures can also vary as to pleadings, class

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127 See supra notes 118-121 and accompanying text.

128 One of the most significant procedural reforms in American procedural history started in the state courts. See Millar, supra note 25, at 52 (“The first quarter of the nineteenth century had not long passed before a pronounced movement for reform on a wide scale had made its appearance.… Its principal theater was the State of New York.” See also Subrin, supra note 32, at 931-943; Subrin, supra note 46.

129 Koppel, supra note 98, at 1175.

130 Koppel, supra note 98, at 1173. See also Seymour Moskowitz, Rediscovering Discovery: State Procedural Rules and the Level Playing Field, 54 Rutgers L. Rev. 595, 613 (2002): Justice Brandeis praised the ability of states to be ‘laboratories’ in which experiments in the law might be conducted. Procedural rules illustrate this. Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation.

131 See generally Elizabeth A. Rowe, When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine, 7 Tul. J. Tech. & Intell. Prop. 167, 202 (2005) (“One of the important ways in which the process can affect the outcome is through discovery.”). This is not to suggest that more discovery necessarily helps plaintiffs. See Judith A. McKenna & Elizabeth C. Wiggins, Empirical Research on Civil Discovery, 39 B.C. L. Rev. 785, 796 (1998) (discussing empirical studies finding that the more days plaintiff spent in discovery, the lower their recovery was relative to expectations, while the number of days spent in discovery for defendants was independent of the amount they were ultimately liable to pay); David M. Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 110-116 (1983) (finding that increased lawyer time spent on discovery was associated with decreased measures of success for plaintiffs).

actions,\textsuperscript{133} juries,\textsuperscript{134} summary judgments,\textsuperscript{135} alternative dispute resolution,\textsuperscript{136} early incentives for settlement,\textsuperscript{137} case management,\textsuperscript{138} and every other conceivable device.\textsuperscript{139} Because procedure matters,\textsuperscript{140} these mismatches, which lurk in all situations where the procedure that is applied varies from that which was contemplated by the drafters of the substantive law, matter too. Procedural systems are not fungible.\textsuperscript{141}

Mismatch scenarios are commonplace. In virtually every instance of alternative dispute resolution, for example, there is a mismatch; the substantive law is applied in a setting with different procedural accoutrements. And there is a mismatch with every diversity case in


\textsuperscript{137} Sherman, supra note 136, at 1583-1587.

\textsuperscript{138} Sherman, supra note 136, at 1555-1556, 1562-1570.

\textsuperscript{139} See also Paul D. Carrington, Teaching Civil Procedure: A Retrospective View, 49 J. LEGAL EDUC. 311, 329-330 (1999) (urging law teachers and lawyers to take advantage of states as laboratories for procedural experimentation).

\textsuperscript{140} See supra notes 85-111, and accompanying text.

\textsuperscript{141} International efforts to harmonize various substantive laws could suggest otherwise. After all, these model acts purport to work with the procedures of civil law, common law, or even radically different legal systems. The Convention on the International Sale of Goods (CISG)—one of the most successful harmonization initiatives—is in force in 71 very different countries, including Argentina, China, France, Israel, Syria, the U.S., Uzbekistan, and Zambia. See Peter Huber, Some Introductory Remarks on the CISG, 6 INTERNATIONALES HANDELGRECHT 228, 228 (2006) (“It is therefore fair to say that the CISG has in fact been one of the success stories in the field of the international unification of private law.”)

Importantly, however, these model laws tend to focus exclusively on transnational relationships. The CISG, for example, alters only the domestic law governing transnational contracts. See Art. 1, CISG The narrow focus is significant because the forum for the resolution of a transnational dispute is most likely an international arbitral forum. Thus the anticipated procedural forum, while not parochial, is no less predictable. Joseph M. Lookofsky, Consequential Damages in CISG Context, 19 PACE INT’L L. REV. 63 (2007) (“Most CISG cases are decided by arbitrators . . . “); Avery W. Katz, Remedies for Breach of Contract Under the CISG, 25 INT’L L. & ECON. 378, 384 (2005) (“Most CISG disputes . . . are heard by private arbitral tribunals.”)

Further, many unification initiatives have modest substantive consequences in practice. First, the text of the CISG, for example, allows nations to make reservations, and about thirty percent of the signatories have opted out of certain provisions. See Art. 92 et seq CISG. Second, because “the CISG uses general standards rather than precise rules,” there is much variation in how subsequent interpreters apply its terms. Paul B. Stephon, Does the CISG Fill a Much-Needed Gap?, 101 AM. SOCIETY INT’L L. PROC. 414, 415 (2007). See also Larry D’Matteo et al., The Interpretive Turn in International Sales Law: Analysis of Fifteen Years of CISG Jurisprudence, 24 NW. J. INT’T L. & BUS. 299 (2004); Ole Lando, CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law, 53 AM. J. COMP. L. 379 (2005). And finally, the CISG expressly allows to opt out of its specific provisions. Art. 6, CISG. Accordingly, the entire domain of the CISG is contracts voluntarily entered into by parties with alternatives.

See also infra note 179.
federal court, every federal law action that proceeds in state court, and with every application by one court of any other jurisdiction’s substantive law. Even when litigation takes place in the very forum anticipated by the drafters of the substantive law, there would be a mismatch if the procedure had changed since the substantive law was promulgated.\textsuperscript{142}

This argument echoes many of the themes introduced by the scholars whose “procedure-as-substance” work is summarized in Part III \textit{supra}. Like them, I am illustrating the power of procedure. But it is also important to see how my point differs from theirs. Those scholars focus on how procedure is \textit{introduced} at the enforcement stage to undermine substantive rights. I am emphasizing that an anticipated procedure may \textit{not be introduced} at the enforcement stage, and that its absence could affect substantive rights.\textsuperscript{143} The associated procedure should remain hinged to the substantive law.

To a very limited extent, my argument is something of a rejoinder to theirs. After all, in circumstances where the procedure applied by the enforcing court \textit{matches} the procedure anticipated by the drafters of the substantive law, then the substantive mandate would not be undermined by it—even when those procedures appear to dilute the substantive mandate. For example, a heightened pleading standard for civil rights cases does not undermine substantive law that was drafted in anticipation of a heightened pleading standard. Indeed, to apply a liberal pleading standard to that law instead could lead to over-enforcement of the substantive mandate.

But this rejoinder is of little consequence because (1) most of their procedure-as-substance criticism, in fact, targets genuine mismatches (with new procedures applied to older substantive laws); and (2) even if the enforcement procedure in fact matches what was anticipated, there is still a manipulation of “procedure” to achieve a substantive goal. So long as there is some sense that procedure is less significant than substance (again, a byproduct of the substance-procedure dichotomy), procedural reforms can be implemented without the scrutiny and attention that are an integral part of substantive law-


\textsuperscript{143} Professor Adam Steinman has made a similar argument in suggesting that federal courts respect state summary judgment, class certification, and pleading standards \textit{See generally} Steinman, \textit{supra} note 132, at 282-301.
Accordingly, rather than allaying any of the concerns identified in the preceding part, the arguments asserted in this part complement and feed the basic critique: the substance-procedure dichotomy is fundamentally flawed.

A return to the player piano metaphor may be helpful here. The musical compositions that are substantive law are not written for all player pianos. A paper music roll prepared for the pneumatically-operated Pianola cannot be read by a Yamaha, which reads only magnetic tape. Other contemporary player pianos read computer disks. Your mother’s player piano is almost certainly not your son’s player piano. While one could always try to convert one format into another, we also know that even the most earnest translation will introduce variation. Substantive law is likewise being applied on unfamiliar platforms, but without even the effort to translate.

V. CONCEPTUAL POSSIBILITIES

The premise of a substance-procedure dichotomy is that substance and procedure are divisible. And the value of a substance-procedure dichotomy is that procedural systems are essentially fungible. But that premise of divisibility is dubious since we have long known that procedure is inherently substantive, and can now appreciate that substance is inherently procedural. Even worse, this substance-procedure dichotomy has a tremendous cost: systemic over- and under-enforcement of substantive law.

If simply offering a eulogy for the dichotomy would be a fitting conclusion, I would happily oblige. Indeed, there seems to be a rich genre of death-of-x scholarship, and I could end there. But this

144 Janet Cooper Alexander, Judges’ Self-Interest and Procedural Rules Comment on Macey, 23 J. LEGAL STUD. 647, 647 (1994)) (“Because procedural rules are so important to substantive rights, and because non-specialists usually pay little attention to procedural rules . . . it is important to be alert to the possibility that the people who ‘write the procedure’ may be acting in their own self-interest.”) (citing Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. LEGAL STUD. 627 (1993)).

145 This metaphor also evokes appreciation for the orchestral use of period instruments. See Academy of Ancient Music, http://www.aam.co.uk/ (last visited December 1, 2008).

146 I could learn from the best. My father, Rev. Stephen Main of Tucson, Arizona, performs approximately five funeral services per week. And he loves his job as much as I love mine.

147 See Grant Gilmore, THE DEATH OF CONTRACT (Ohio St. 1974). We sadists, Casandras, Chicken Littles, and drama queens of the academy have also indicated the death of causation, tort law, the rule against perpetuities, property law, criminal procedure, partnership, fiduciary duty, antitrust law, labor law, ADR, constitutional law, advocacy, international law, professional responsibility, equity, and even democracy. See Donald G. Gifford, The Death of Causation: Mass Products Torts’ Incomplete Incorporation of Social Welfare Principles, 41 WAKE FOREST L. REV. 943 (2006); Gary T. Schwartz, The Beginning and the Possible End of the Rise of Modern
dichotomy is the foundation for a number of core doctrines and it will not topple easily. Accordingly, if only for expository purposes, I wish to consider how profound skepticism of the substance-procedure dichotomy could inform our practice. I offer tentative sketches of three possible courses of action that we might pursue.

The first conceptual possibility is for us to admit that, because we have misunderstood the nature of a substantive right, it is impossible to apply some other jurisdiction’s substantive law. Accordingly we would abandon all of our choice of law doctrines. A strict lex fori regime, instead, would require the application of forum substantive and procedural law in all circumstances. Doing so would prevent the sort of geographic mismatch that can result when one court undertakes to apply the substantive law of some other state or country.

It is a tall order to expect a Maine court meaningfully to apply French law—or even Florida law. Perhaps “[c]ourts should not presume to speak for other jurisdictions in this manner” nor ignore the “express will” of their own legislature by applying some other law. Of course judges are also more familiar with forum law, making its application easier, less time-consuming, and much more efficient. Although a lex fori approach may seem radical, it has long been among the approaches in the conflict of laws canon, and it was the

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149 See Cramton, Currie & Kay, Conflict of Laws 303-305 (2d ed. 1975); McCaffrey & Main, supra note 126, at __. But see Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon C. Symeönides, Conflict of Laws 42 (3d ed. 2000) (“Ehrenzweig’s dream of lex propria in foro proprio is as remote today as it was during Ehrenzweig’s time.”). The most passionate advocate of a lex fori approach in conflicts doctrines was Albert Ehrenzweig. See generally Albert A. Ehrenzweig, The Lex Fori--Basic Rule in the Conflict of Laws, 58 Mich. L. Rev. 637 (1960); Albert A. Ehrenzweig, A Proper Law in a Proper Forum: A “Restatement” of the

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law in diversity cases in federal court for nearly a century before *Erie Railroad Co. v. Tompkins*. Even today, the administration of criminal law avoids conflict of laws analyses and substance-procedure mismatches.

Yet several doctrinal obstacles would thwart a strict lex fori approach. For example, this approach could not (without major reform) address the mismatches that occur when state-law cases are in federal court nor when federal-law cases are in state court. Moreover, this approach provides no solution for the mismatches that occur in ADR, where there is no forum substantive law for neutrals to apply. Nor would it address chronologic mismatches in any forum.

Even in those cases where it would be doctrinally feasible to undertake a strict lex fori approach, the new litigation dynamic could be problematic. Defendants would be particularly vulnerable to plaintiffs’ forum-shopping for favorable law. And while a court

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151 Compare *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) and *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Nevertheless, there were mismatches under *Swift* because federal procedure was controlled by the Conformity Acts, which required federal court procedure to conform to state court procedures. See generally Thomas O. Main, Symposium, *Reconsidering Procedural Conformity Statutes*, 35 WEST. ST. U. L. REV. 75, 85-87 (2007). Accordingly, even with a uniform substantive law for diversity cases, federal procedure varied from state to state.
152 See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. c (1971) (clarifying that criminal law not addressed in the Restatement). It is an overstatement to say that there are no conflicts issues in criminal law or that courts apply only forum law. Many of the problems of international criminal law are essentially matters of conflicts. See LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (Oxford 2006) (2003). State courts would also need to apply controlling federal law. Also, there are some secondary and collateral issues in criminal law, such as the construction of a defendant’s criminal history, that involve conflicts analyses. Compare Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005) and Dan Markel, *Connectedness and its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573 (2007). Further.
153 State cases are filed in federal court under the federal court’s diversity jurisdiction. Section 1332 of Title 28 provides federal jurisdiction over non-federal-law claims when there is diversity between the parties. And *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) reads (an unspecified provision of) the U.S. Constitution to require courts to apply substantive law in diversity cases. If one were committed to a comprehensive lex fori model the possible revisions to address this hurdle would include (1) eliminating diversity jurisdiction (which could be accomplished by legislative enactment alone); or (2) reversing *Erie* and reinstating the pre-*Erie* jurisprudence that allowed the application of federal (common) law in diversity cases. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).
154 Except when there is exclusive federal subject matter jurisdiction, federal causes of action can be filed in state court. In cases filed in state court the Supremacy Clause prevents a state from applying state law. U.S. Const. art. VI, cl. 2. If one were committed to a comprehensive lex fori model the possible revision to address this hurdle (absent Constitutional amendment) would be to give exclusive jurisdiction over all federal causes of action to federal courts.
156 This would include only the basic conflict of laws cases and, even among those, only those filed in state court. With a reversal of the Court’s holding in *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), the scope could include basic conflict of laws cases in federal and state courts.
157 For a discussion of the supposed evils of forum shopping see James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 355 (2008); Kevin M. Clermont & Theodore
could dismiss the case in circumstances where it was unwilling to apply its own law to the facts presented, this in turn could result in unfairness to plaintiffs who may be unable to file suit in the more appropriate forum.\textsuperscript{157}

A second conceptual possibility prescribes essentially the opposite of the first. Again we would admit that we have misunderstood the nature of a substantive right. But rather than retreat from our choice of law doctrines, we would expand them so that when courts apply another system’s law, the courts would apply \textit{all} of that other law—substance and procedure. This would prevent the sort of geographic mismatch that can result when a court combines the substantive law of some other state or country with its own procedural law.

This approach has fewer doctrinal complications,\textsuperscript{158} but even greater practical obstacles. Applying foreign substantive and procedural law with limited judicial resources, partial comprehension, and the vagaries of translation could lead to extreme inefficiencies, delays, and errors.\textsuperscript{159} There would be tremendous complexity in trying to distill another procedural system’s requirements about commencing an action, service, joinder, pre-trial dispositions, interim remedies,


\hspace{1em}$^{158}$ Some “procedural” law from another system could exceed the judicial authority of the forum court. That aside, the principal doctrinal hurdle regards the authority over court procedures. While most state constitutions give that authority to the courts, some include a role for the legislative branch. \textit{Compare} Ariz. Const. art. VI, § 5.5 (“The Supreme Court shall have ... Power to make rules relative to all procedural matters in any court”) with Vt. Const., ch. II, § 37 (“The Supreme Court shall make and promulgate rules.... Any rule adopted by the Supreme Court may be revised by the General Assembly.”). Authority over procedural rulemaking in federal court is likely an inherent judicial power under Article III of the U.S. Constitution, even though Congress has also purported to confer authority over procedural rulemaking to the courts. \textit{See} Burbank, \textit{supra} note 86, at 1119. If one were truly to pursue this line of reform, another issue to investigate would be whether a rule or state directing the application of foreign procedural law would be an impermissible delegation. \textit{See generally} Thomas O. Main, Symposium, \textit{Reconsidering Procedural Conformity Statutes,} 35 WEST. ST. U. L. REV. 75, 85-87 (2007).

\hspace{1em}$^{159}$ \textit{See generally} RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW (1998) (discussing the difficulty of applying foreign law); Richard Fentiman, \textit{Foreign Law and the Forum Conveniens,} in \textit{LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEIHREN} 275 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) (discussing the difficulty of applying foreign law as a factor in identifying the forum conveniens).
court management, discovery, experts, evidence, trial, sanctions, burdens of production and proof, specialized judges and courts, and so forth. Given that complexity, we would expect many courts to exercise their discretion to dismiss these cases on grounds of forum non conveniens. And as already explained, such dismissals, in turn, could result in unfairness to plaintiffs who may be unable to file suit in the other forum.

A more modest version of this approach could find much inspiration in the forms of action of the ancient Law courts. Indeed, those forms of action offered a frame that we would today call “procedure” upon which all of the “substantive” law was truly integrated. Maitland warned (promised?) that the forms of action would “rule us from their graves.” In a contemporary version of the forms of action, legislation could integrate the substantive mandate with procedures tailored for that claim. For example, when the Maine legislature drafted the FPA it could have included within the text a prescription for a heightened pleading standard, no class actions, limited and accelerated discovery, and other “procedural” mandates.

To a limited extent, this sort of integrated law-making is already happening. For example, many state statutes require plaintiffs asserting malpractice claims to submit, at a very early stage in the case, an admissible expert opinion to support the allegation of negligence. Other statutes require certain plaintiffs to go through methods of ADR or to submit to review boards before filing suit. Through legislation, the U.S. Congress has modified pleading standards and imposed exhaustion requirements for plaintiffs asserting

160 See supra note 157.
161 Id.
162 See supra notes 12-19, and accompanying text.
164 Maitland, supra note 115, at 296 (“The forms of action we have buried, but they still rule us from their graves.”)
165 For example, when the Maine legislature drafted the FPA it could have included within the text a prescription for a heightened pleading standard, no class actions, limited and accelerated discovery, and other “procedural” mandates.
166 See generally Subrin, supra note 32, at 2040 (detailing various efforts by states “to better mesh process and substance”).
certain types of claims. While most of this “statutory procedural law” does not integrate substance and procedure, it demonstrates the capacity of at least some legislatures to draft procedures to achieve a desired result. For this approach to minimize mismatches, enforcing courts would need to apply the statutory mandate, including those parts that would otherwise be labeled procedural. Because the legislature’s procedural assumption would be codified, this approach even addresses some of the problems associated with chronologic mismatches.

However, neither forms of action nor the most earnest effort to apply another jurisdiction’s procedural law could fully resolve the mismatch problem. Indeed, the more accurate the basic contention of this essay—that substantive law incorporates parochial assumptions—the more complicated and incomplete this particular approach. After all, legislative drafting incorporates assumptions not only about formal, stated procedures, but also non-formal procedures, and many other litigation realities—access (to courts and administrative agencies), cost (both the time and expense), the availability of legal representation (including legal aid, the contingency fee, and legal insurance), the quality of the decision-maker (the independence of the judiciary and elected judges), even the culture (social, political, and economic circumstances). Undertaking to apply another’s “procedural” law is unlikely ever to replicate the actual experience.

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170 See Burbank, supra note 85, at 1699-1703.

171 See generally Purcell, supra note 101, at 1900. Competence is an entirely separate question, of course. Although the Class Action Fairness Act could make anyone a skeptic of Congress’ aptitude for legislating procedure, see generally Stephen N. Subrin, Procedure, Politics, Prediction, and Professors: A Response to Professors Burbank and Purcell, 156 U. Pa. L. Rev. 2151, 2153 (2008); Burbank, supra note 86; Purcell, supra note 101; Subrin, supra note 32, at 996 (historical perspective on the merits of judicial versus legislative rulemaking), charges of incompetence are often intermingled with ideological disagreement. And those need not be untangled here.

172 Even under current *Erie* doctrine, procedure that is “bound up” with the state-created substantive right may be enforced. See Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 535 (1958). Similarly, when a state “has taken a rule of practice and substantially intertwined that rule with the basic right of recovery,” it can be applied. See Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 953 n.14 (8th Cir. 1973). Certain procedures could also be applied as “conditions” of the substantive right. See Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949).


174 See generally OSCAR G. CHASE, LAW, CULTURE, AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT (2005); Andrew J. Cappel, *Bringing Cultural Practice into law: Ritual and Social Norms*
The third conceptual possibility involves a different approach: procedure would be converted into a universal constant. If all procedural systems were identical, there would be no geographic mismatch when legislation drafted in one jurisdiction was enforced elsewhere—the embedded procedure would be a universal procedure.

The obvious obstacle to this approach is that procedural systems are too different and too deeply embedded in local political history and cultural tradition to expect anything resembling harmonization.175 As stated above, differences in procedural law from country to country are “much greater” even than differences in substantive law.176 That point deserves emphasis because it resonates with the themes presented here about the power of procedure.177 Remarkably, societies may be more likely to consider abandoning their own substantive regimes of commercial law or intellectual property,178 for example, than they would surrender their own procedure.179

That said, there is evidence of progressive procedural convergence.180 Outside the United States we have seen some countries broaden discovery,181 adopt class actions,182 and more

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175 See generally Geoffrey C. Hazard, Jr., From Whom No Secrets are Hid?, 76 TEX. L. REV. 1665, 1666-1669 (1998); Thomas D. Rowe, Jr., Authorized Managerialism Under the Federal Rules—and the Extent of Convergence with Civil Law Judging, 36 SW. U. L. REV. 191, 211-212 (2007); Kevin Clermont, Why Comparative Civil Procedure?, Foreword to KUO-CHANGHUANG, INTRODUCING CIVIL DISCOVERY INTO CIVIL LAW, at ix, xvi (2003) (“Procedure is surprisingly culture-bound, reflecting the fundamental values, sensibilities, and beliefs of the society.”); Oscar G. Chase, American “Exceptionalism” and Comparative Procedure, 50 AM. J. COMP. L. 277, 278 (2002) (“[C]ourt procedures reflect the fundamental values, sensibilities, and beliefs (the ‘culture’) of the collectivity that employs them”); Marcus, supra note 183, at 710 (“[P]rocedure is peculiarly parochial. Procedural characteristics and development may be singularly tied to “cultural” or governmental characteristics of a given nation…..”); Hein Kotz, Civil Justice Systems in Europe and the United States, 13 DUKE J. COMP. & INT’L L. 61, 71 (2003) (“[R]ules organizing constitutional, legislative, administrative, or judicial procedures are deeply rooted in a country’s peculiar features of history, social structure, and political consensus…..”).

176 Lowenfeld, supra note 126, at 652.

177 See supra note 85 et seq.


179 See supra note 126. To be clear, there are Principles of Transnational Civil Procedure that are the product of an effort for a universal set of procedures. See ALI/UNIDROIT Principles of Transnational Civil Procedure (Cambridge 2006). To my knowledge, no nation has adopted them. Importantly, however, even if adopted, these principles and rules would apply only to transnational commercial disputes. For the significance of such a narrow focus, see note 141.

180 See generally CHASE, supra note 175; Scott Dodson, The Challenge of Comparative Civil Procedure, 60 ALA. L. REV. 133 (2008) (reviewing OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 562 (West 2007); Hazard, supra note 175, at 1666-1668. See also ALI/UNIDROIT, Principles of Transnational Civil Procedure (Cambridge 2006); Rowe, supra note 175, at 204-205.

vigorously promote settlements.\textsuperscript{183} Meanwhile American procedure’s evolution moves toward heightened pleading standards,\textsuperscript{184} more limited discovery,\textsuperscript{185} more judicial involvement,\textsuperscript{186} and fewer jury trials—\textsuperscript{187}—evocative of traditional civil law systems. Indeed, differences between the civil law and common law systems are often caricatured and exaggerated.\textsuperscript{188} Yet procedural exceptionalism generally, and American exceptionalism in particular, will surely endure.\textsuperscript{189} Nevertheless, this conceptual possibility reminds us that the elimination of idiosyncratic and exceptional procedures can reduce the number and consequences of mismatches that can distort the substantive law.\textsuperscript{190}

None of the three conceptual possibilities is immediately practicable nor even, as it turns out, a complete solution to the mismatch problem. The only realistic solution may be some combination of the three. Specifically, first, our choice of law doctrines could express even greater humility and skepticism about


\textsuperscript{184} See Rowe, supra note 175, at 209-210; Richard L. Marcus, Putting American Procedural Exceptionalism into a Globalized Context, 53 AM. J. COMP. L. 709, 724-730 (2005).

\textsuperscript{185} See Dodson, supra note 180, at 144-145; Christopher M. Fairman, The Myth of Notice Pleading, 45 ARIZ. L. REV. 987, 1021-1059 (2003).

\textsuperscript{186} See Stephen N. Subrin, Discovery in Global Perspective: Are We Nuts?, 52 DEPAUL L. REV. 299, 301 (2002); Marcus, supra note 181, at 164-197.

\textsuperscript{187} See Rowe, supra note 175, at 195-196; Alfred W. Cortese, Jr. & Kathleen L. Blaner, Civil Justice Reform in America: A Question of Parity With Our International Rivals, 13 U. P.A. J. INT’L BUS. L. 1, 20 (1992); Linda S. Mullenix, Lessons from Abroad: Complexity and Convergence, 46 VILL. L. REV. 1, 13 (2001) ("[P]articularly in the realm of complex litigation, the American managerial judge has undertaken roles that are indeed converging with the civil law inquisitorial judge."); Tidmarsh, supra note 96, at 569; Dodson, supra note 180, at 148-149; See generally Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982).


\textsuperscript{189} See Marcus, supra note 183, at 712 (suggesting that the effigies of the common law and civil law systems “have always been overdrawn”); From the Editors, 56 J. Legal Educ. 477, 477 (2006) (“[C]ommon and civil law system differences are often exaggerated, as practices and rules are converging”). See generally Louis Del Duca, Developing Global Transnational Harmonizing Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence, 42 TEX. INT’L L.J. 625 (2007); HERBERT JACOB ET AL., COURTS, LAW & POLITICS IN COMPARATIVE PERSPECTIVE 3-6 (1996).

\textsuperscript{190} See generally Oscar Chase, American “Exceptionalism” and Comparative Procedure, 50 AM. J. COMP. L. 277 (2002).

\textsuperscript{158} For an argument in favor of procedural conformity between federal and state courts, see Main, supra note

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our ability to apply another jurisdiction’s substantive law. Substantive law has an embedded procedure that informed its construction. To unhinge that substantive law from its associated procedure risks mismatch.

Second, in circumstances where the application of another jurisdiction’s substantive law is unavoidable and necessary, we must be mindful that our doctrines have misunderstood the nature of a substantive right. Accordingly, those doctrines could encourage the incorporation of as much of the other jurisdiction’s law as reasonably possible, regardless of whether that law is “substantive” or “procedural.”

And third, we might find additional value in efforts to harmonize and approximate procedural systems. Typically, those efforts are championed with promises of efficiencies, simplicity, and uniformity. This essay suggests that such efforts are not only about procedure but also about ensuring the integrity of substantive law.

CONCLUSION

Although we have known that procedure is inherently substantive, we should now also appreciate that substance is inherently procedural. The construction of substantive law entails assumptions about the procedures that will apply when that substantive law is ultimately enforced. Those procedures are embedded in the substantive law and, if not applied, will lead to over- or under-enforcement of the substantive mandate.

Understanding that procedure is substantive, and that substance is procedural debunks two myths: first, that there is a substance-procedure dichotomy, and second, that procedure is the inferior partner. A substance-procedure antinomy that was introduced for teaching purposes was impulsively codified as a rigid substance-procedure dichotomy. Doctrines founded upon this false dichotomy are fundamentally flawed and vulnerable.