Chapter 11
United States: Harmonisation and Voluntarism. The Role of Elites in Creating an Influential National Model, the Federal Rules of Civil Procedure

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Abstract The starting place for any discussion of civil procedure in the United States is the Federal Rules of Civil Procedure ('FRCP'), rules first enacted in 1938 and made applicable solely to federal courts. Even though the adoption of these rules by state courts and state legislatures has never been mandatory, nonetheless the FRCP have to a great extent served as a highly influential model impacting the development of procedural law in all 50 states. Why is this so? Why did voluntary processes succeed in bringing about the harmonisation of procedural law in the U.S.? In part the answer is that the movement that produced the FRCP was not primarily an effort to bring about harmonisation; it was as much an effort at reform. In part the answer is that from the perspective of greater access to justice and greater likelihood of justice on the merits, the FRCP were an improvement over existing state law and practice. But neither of these two explanations is a complete answer. This chapter focuses on the powerful role of emerging elites that stood much to gain from the creation of a federal law of civil procedure and from its dissemination to state systems throughout the country. Three groups in particular gained much in stature: elite law schools, the emerging class of law firms seeking to practice law on a multistate basis, and federal judges. Based on the American experience, the insight potentially useful in evaluating other harmonisation movements, especially in the EU, is that harmonisation is most likely to go forward when determined and resourceful interest groups can identify clear gains to themselves from such a process.

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Contents

11.1 Introduction

The judicial system in the United States consists of two main components: the federal courts and the courts of the component states of the Union. The former, created by act of Congress in 1789,[1] possess limited jurisdiction and conduct their business with funds from the federal treasury.[2] The latter are creatures of state law, funded by state treasuries, and possessed of jurisdiction that is general. In the complex interaction between these court systems over a period of more than two centuries, one date stands out. That date is 1938. In that year the Federal Rules of Civil Procedure (FRCP) entered into force.[3] Before 1938, there was great variation in the procedural law applied by courts across the country. That variation reflected major differences in the histories, economies, geographies, and demographics of the many states that joined the Union at different times and for different reasons. The immediate impact of the FRCP was to bring uniformity to procedural law in

[1] The establishment of the lower federal courts (courts inferior to the U.S. Supreme Court) was accomplished by the Judiciary Act of 1789. Since then, Congress from time to time has altered the structure of the federal judiciary and created new, specialised federal courts, such as the U.S. Tax Court, which was created by statute in 1942.

[2] The jurisdiction of federal courts over cases and litigants is limited in the sense that these courts can adjudicate matters only when Congress has authorised them to do so and, further, only when that congressional action is consistent with the jurisdictional limitations in Article III of the Federal Constitution.

[3] The year 1938 is also the date of the U.S. Supreme Court's landmark decision in *Erie Railroad v. Tomkins*, 304 U.S. 64 (1938). *Erie* held that in cases arising under state common law but adjudicated in federal court, the court must apply the substantive law of the state in which it is geographically located. For federal courts sitting in such cases, *Erie* combines with the FRCP to create a regime in which there is uniformity in the application of procedural law but often major differences in the substantive result reached in one federal court as opposed to another.

one set of American courts, the federal courts. Since 1938, every federal district court in the U.S. has been required as a matter of federal law to apply the same basic set of rules in adjudicating civil actions.[4] The impact of the FRCP, however, has not been confined to this one set of tribunals. Soon after 1938, the influence of the FRCP spread beyond the federal judiciary. One state-court system after another adopted substantial parts of the new federal regime. By the 1950s, one could refer with accuracy on the international stage to an 'American approach' to civil justice[5]—a collection of practices, values, and assumptions common to all courts in the United States (federal and state), with minor differences in detail.

The goals of this Chapter are, first, to explain how the U.S. procedural landscape went from disorder to one basic approach in a matter of a few decades. Next it takes up some related questions: Why did harmonisation come about? How was this transformation engineered in the midst of a legal and political culture that always has been suspicious of federal meddling with state institutions, especially state courts? How was so significant a set of changes brought about in so many state court systems, even in the absence of federal legislation mandating this result?

It turns out that these questions do not convincingly lend themselves to one answer. The movement that began in the early 1900s and resulted in the FRCP was propelled forward by more than one engine. To be sure, many lawyers at the time understood the project as an exercise in harmonisation. But for others, it was primarily an effort at procedural reform,[6] and for still others, the main goal was elevating the stature and effectiveness of federal courts by freeing them from subservience to state procedural law. A large literature exists on each of these perspectives on the federal rules project. The present work will not re-plough familiar ground. The focus here is limited to the role that specific interest groups played in the transformation in American procedural law from the 1920s to the 1950s. Of particular interest are the motivations that led these interest groups to support this endeavour and the benefits that accrued to them as a result. Finally, the main point is to distil from this inquiry insights that may be useful in predicting

[4] The most recent two decades, however, has witnessed a proliferation of 'local rules' promulgated by the courts of specific federal districts. These rules do not void or qualify the FRCP. Typically they add detail and specificity. For example, a local rule might require that the parties engage in mediation before proceeding to trial, even though the FRCP contain no such requirement. Most importantly, for present purposes, local rules differ substantially from one federal district to another. See Carrington 1996.

[5] The U.S. became a member of the Hague Conference on Private International Law in 1964 even though that organisation came into existence much earlier, in 1893. See http://www.hcch.net/index_en.php?act=states.details&sid=76 (last consulted at 5 June 2011). The relatively late date of U.S. entry into the organisation is explained in large part by the common understanding in the U.S. until the World War II era that the federal government might lack authority to compel changes in state law with respect to civil procedure and conflict of laws. See Dubinsky 2008, 301, 309–17. Some regard U.S. participation in international treaty making as a means of overcoming these constitutional and political constraints. See Clermont 1999.

[6] See, e.g., Mitchell 1949; Rosenberg 1989, 2197–98; Weinstein 1989.

which coalitions and which harmonisation efforts in other societies are likely to succeed.

Three groups of lawyers in particular were at the centre of what might be called the civil procedure revolution in the United States. These groups were: elite university-affiliated law schools and the scholars on their faculties; America's emerging class of national law firms in search of lucrative opportunities to manage litigation on a nationwide basis, and judges on the federal bench, who in applying the new FRCP had opportunities to write seminal opinions on procedural law.

Although it is always risky business to study the experiences of one society for the purpose of making recommendations regarding another, the Chapter concludes with some insights into the enterprise of global procedural harmonisation based on the American experience. These insights relate to a subject often overlooked in the existing literature—the relationship between harmonisation, legal education, and the maturation of the American legal profession during a formative period.

11.2 Harmonisation and Voluntarism

Voluntary adoption of model instruments has been the dominant mechanism for the harmonisation of procedural law in the U.S. Few in number are the instruments of federal law (statutes, treaties, regulations) that operate directly on state courts and bring about uniformity or harmonisation by compulsion. The absence of compulsory instruments at the federal level is a product of constitutional tradition[7] and political pragmatism; among the quickest ways to losing political power in the United States is to advocate an expanded role for federal authority at the expense of state and local governance.[8]

In the absence of federal legislation that is binding on state court systems, harmonisation in the field of civil procedure moves forward by a different means: the promulgation of an influential federal model followed by voluntary adoption of

[7] By longstanding constitutional understanding, each of the component states of the U.S. possesses a core of sovereignty that is highly resistant to the effects of federal lawmaking.

[8] Of course, the extent to which this conventional wisdom has proven true varies from one historical period to another. Two exceptions in particular warrant mention. Acting pursuant to the treaty power, the federal government ratified the Hague Service Convention and the Hague Evidence Convention. Both treaties have some impact on procedural practice in state courts, though the impact has been minimised by case law suggesting that litigants in U.S. courts—state or federal—rarely are required to make use of those treaties. See *Société Nationale Industrielle Aérospatiale v. US District Court*, 482 U.S. 522 (1987) (rejecting interpretation of Hague Evidence Convention requiring 'first resort' to the treaty by U.S. litigants seeking access to evidence located outside the U.S.); *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694 (1988) (holding that Hague Service Convention is not the exclusive method of service of process on a foreign corporation with a wholly-owned subsidiary located in the U.S.).

substantial parts of that model by the country's component states.[9] Admittedly, such an engine can yield unpredictable results; only rarely are state authorities under an obligation to act in sync with sister states or with the federal judiciary in civil procedure.[10] Despite the foregoing, there exists today much similarity in the rules of civil procedure throughout the United States. A civil jury trial in state court in Iowa is much like one in federal court in Florida. Joinder of parties and consolidation of claims is common in all judicial systems in the U.S. The right of litigants to pursue pre-trial discovery of documents and testimony (even from non-parties) is extensive everywhere in the U.S., at least when compared to evidence gathering in other countries. The approach to the financing of litigation—contingency fee agreements, presumptions against shifting attorneys' fees, very little public funding—varies only marginally as one moves from one state to another. Thus the State-to-State and State-Federal similarity in procedure that took hold after 1938 is quite substantial.

Before examining in detail the forces that have brought about this similarity, it is worthwhile to pause briefly to appreciate the magnitude of the harmonisation that has been was accomplished. The United States is a large and diverse country. Geography and history vary tremendously from region to region and from State to State. In sparsely populated Montana, simply travelling to court can mean traversing long distances in harsh weather conditions. In Rhode Island, no part of the state is further than 100 kilometres from any other part. The economy of Delaware is dominated by being the place of incorporation of many of America's largest corporations. The economy of Hawaii is dominated by tourism. The economy of California is extraordinarily diverse. Before entering the Union, many states had common-law legal systems that could be traced to Great Britain. For other States, the British influence was modest. Some States were once independent republics. Others entered the Union as conquered territories. The ethnic and racial mix of the population in Florida bears little resemblance to that in Alaska. The copyright and trademark litigation that is common in California is rare in South Dakota.[11]

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[9] By comparison, there is no well-developed federal model for choice-of-law rules. The resulting absence has led to a kind of 'anarchy.' See Symeonides 1997, 1248. A look today at state and federal statutory and case law in the area of choice of law reveals much disagreement from one jurisdiction to another and much unpredictability within individual jurisdictions. See Symeonides 2006 (describing the intellectual movement that uprooted the traditional foundations of conflict of laws in the U.S. and ushered in several different policy-based, multi-factored approaches).

[10] This statement comes with some important caveats. The federal constitution imposes some minimum standards in terms of the process owed to litigants. These constitutional minimum standards trump inconsistent state law. See US Const, Amend. 14 (no 'State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'). In a few situations, the Federal Constitution requires that state courts must defer to one another or cooperate with one another. See, e.g., US Const, Article IV, s. 1 ('Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state').

[11] There are large differences from one region of the U.S. to another in terms of the industries that predominate. The nature of civil disputes in different regions of the country can be quite

The proportion of foreign litigants appearing in court in New York greatly exceeds that in Kansas.

Pointing out such differences serves to make intelligible something that foreign observers may find elusive: The extraordinary thing about civil procedure in the United States is not that there are differences in procedural law from one state system to another. The extraordinary thing is that there is so much Federal-State and State-to-State similarity. The extent of harmonisation that has taken place is so large that a lawyer from Massachusetts can relocate to Utah and, within a short period of time, be adept at representing clients in Utah courts. It will not be difficult for such a person to master the relatively minor differences between the procedural rules in Utah and those in Massachusetts or those in the federal system. There will be little if any subtle disadvantage or discrimination against the transplanted attorney by virtue of dialect, education, or legal culture.

For similar reasons, the in-house legal department of a Delaware corporation is fully able to supervise the company's litigation on a nationwide basis. It can do so by retaining a number of regional or local law firms that will appear in court and sign pleadings under the coordination of the client's legal department. In the case of companies that repeatedly find themselves in litigation, for example insurance companies, it is not unusual for the in-house legal department to do a large portion of the drafting and legal research required by a given case. Typically, over time, the company will have filed dispositive motions and discovery requests in many cases. A set of discovery documents used in a case in North Carolina can be revised in a minor way and then used in a different case that is pending in Nevada. Minor differences in procedural laws of these two jurisdictions likely will not pose an obstacle to doing much of the work of litigation through a centralised process that promotes cost-saving and consistency in the legal positions taken by the client nationwide. In many cases, the role played by local counsel is quite minor.[12] In contrast, the role of large multistate law firms can be quite large, at least for clients that choose to have small internal legal departments and rely on one or more large law firms to coordinate litigation across the country.[13]

(Footnote 11 continued)
different in terms of the demands made on judicial resources, the importance of preliminary relief, the relative importance of common-law development as opposed to statutes, and so forth. It is difficult to think of another country with so varied and regionalised an economy, one yielding such large differences in the types and volume of litigation before local courts in different parts of the country.

[12] This would not be true in the small percentage of cases that proceed to jury trial. Only a small proportion of lawyers in the U.S. have extensive experience in conducting civil jury trials, and the ability to perform well in a jury trial in federal court in Chicago does not necessarily translate to the ability to win a jury trial in state court in rural Arkansas. For the small percentage of high value cases that go to juries for resolution, the skills and judgment of the local lawyer selected to try the case are invaluable. Few lawyers with such a mix of skills and experience are found in the in-house legal department of a major corporation.

[13] State-to-State differences in procedural law sometimes, however, can be pronounced and outcome determinative. For example, states differ from one another and from the federal system

11.3 Model Creation

Because compulsory processes play very little role in the harmonisation of procedural law in the U.S., it pays to be clear at the outset about what is meant by voluntary pathways to harmonisation. Specifically, voluntary harmonisation as practiced in the U.S. usually consists of four distinct processes: model-creation, competition, voluntary adoption, and experimentation.

Model-creation: This refers to the process of investing substantial resources and research in creating a set of procedural rules of limited application. That is, the legal act bringing the model rules into being imposes those rules in a limited number of forums or with respect to a limited number of cases. Lack of constitutional authority or political will prevents the legislature from mandating application of the rules across the board.

Competition: The component States in the U.S. compete with one another as forums for dispute resolution. One engine of this competition is concurrent jurisdiction—instances in which more than one court possesses authority to adjudicate the same or substantially the same matter. Under these circumstances, litigants have a choice of forum and can be expected to exercise that choice to their advantage.[14] If there is a widespread perception that procedural rules in Michigan, for example, are antiquated or unpredictably idiosyncratic, then litigants, especially repeat litigants, may seek to avoid Michigan state courts.[15] Indeed, their aversion to Michigan procedure may result in avoiding Michigan in other ways: steering clear of Michigan's substantive law, avoiding transactions connected to Michigan, including those that would result in capital investment in Michigan or job creation in Michigan.[16]

(Footnote 13 continued)
in terms of the ease or difficulty of obtaining class certification, a prerequisite to proceeding with group litigation. But such differences rarely are so pronounced or unexpected as to present a barrier to a large organization's ability to monitor and coordinate litigation on a nationwide basis for purposes of consistency and cost efficiency.

[14] This extensive choice of forum results from the expansive U.S. approach to adjudicative jurisdiction. A defendant may be sued in the State of its incorporation or the State where it maintains its principal place of business or in any state with which it maintains 'continuous and systematic contacts' or in any state for which there exists 'minimum contacts' among the defendant, the forum, and the acts or omissions giving rise to the claim. Thus concurrent jurisdiction among multiple courts typically exists to a greater extent in the US than in other countries. Concurrent jurisdiction also results from the existence of two largely parallel court systems existing within every state: the state court system and the federal courts located within the same state. It is often the case that the parties can bring their case to either the state courts of Alabama, for example, or the federal courts located in Alabama.

[15] They might seek to do so, for example, through choice-of-forum clauses, *forum non conveniens* motions, or arbitration agreements.

[16] Of course, attracting litigation has its ups and downs. Suits with little connection to Michigan can take an unjustified toll on the state's budget or cause delays for all cases in the system. On the other hand, litigation can be regarded as a revenue-generating activity. The New York legislature came to the latter conclusion when it adopted a statute directing New York courts not to apply the

Voluntary adoption: Competition can accentuate the influence of a model law. Absent competition, a court or legislature re-examining the State's procedural laws might regard the main inquiry to be whether the model is an improvement over existing law and whether the proposed model is superior to the alternatives. In the presence of competition, however, a decision maker will broaden the inquiry: will the state suffer disadvantage if its courts are out of step with those of other states or with those of the federal government?

Experimentation: By adopting a model, a State does not commit itself to march lockstep with other states indefinitely. In a federal system operating under a 'laboratories-of- democracy' culture,[17] grassroots reform is always nipping at the heels of uniformity. Changes in technology can render established procedures anachronistic. A political community's expectations of its justice system may change.[18] States may respond to these changes differently. The threat of competition may curb a particular community's inclination to depart from the status quo, but then again it may not. Instead, experimentation may lead to the creation of a new model that, through competition, may lead to a new harmonized equilibrium.[19]

From the 1920s to the 1950s, the combination of these processes produced substantial harmonisation of the law of civil procedure across the U.S. Despite subsequent periods of experimentation, a substantial degree of unity has held. At the beginning of this period, States differed markedly from one another. In terms of pleadings, for instance, state laws varied from rigid common-law pleading, to code pleading,[20] to something resembling notice pleading.[21] States also differed from one another in their treatment of claims sounding in equity, with some having merged law and equity and some having maintained a separation of law and equity. In terms of pre-trial practice, some state systems had broadened

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doctrine of *forum non conveniens* to dismiss high-dollar litigation filed in New York pursuit to New York choice-of-forum and choice-of–law clauses. See New York Gen. Oblig. Law section 5-1402.

[17] The phrase belongs to Justice Louis Brandeis. See *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (Brandeis, J., dissenting). The phrase has been quoted countless times and has come to stand for the proposition that one strength of federal systems is that reform and change can proceed in a bottom-up rather than a top-down manner.

[18] See Dubinsky 2004, 1152, 1171–74 (examining the growth in expectations in the 1990s that litigation in US courts could have a positive impact on the protection of human rights in other countries); Chayes 1976, 1281 (demonstrating a major shift in expectations in the US regarding the remedial powers of courts and the elaboration of public values through civil litigation).

[19] Consider, for instance, those state court systems in the US that were in the vanguard of phasing out paper and ushering in electronic storage and transmission; e.g., electronic filing, electronic signatures on pleadings, electronic discovery. Those states broke with the communal status quo but in doing so became attractive to certain categories of litigants.

[20] See Subrin 1988, 327–38 (describing the key features of the Field codes introduced in the latter half of the 19th century).

[21] See Oakley and Coon 1986, 1367.

pre-trial access to information beyond what was typical of common law courts in England. In other States, litigation was still geared toward resolution by jury trial, with significant potential for surprise evidence at trial. More generally, these detailed variations were a reflection of a wider divide, a divide between procedural systems that leaned toward procedural justice and those that leaned in the direction of affording litigants a resolution on the merits. The former tended to include many procedural traps for the unwary, rigidity in the application of rules, and avenues for a skilful lawyer to prevail over a less skilful one. The latter tended to incorporate the influence of populism, a desire for simplicity, and what some might label an inclination toward rough justice.[22]

11.4 From the Conformity Act to the Federal Rules of Civil Procedure

The differences in state procedural laws described above yielded two types of variation. The first was a variation from one state court system to another. The second was a difference in procedure from one federal court to another. The latter consequence resulted from an 1872 federal statute, the Conformity Act,[23] which until 1938 mandated that federal trial courts follow the procedural rules in effect in state courts in the state in which the federal court was located. So, for example, prior to the entry into force of the FRCP, a federal district court located in Montana looked to the Montana Code of Civil Procedure for rules on pleading. It also turned for guidance to the case law of the Montana state courts on how to interpret the state rules. What it did not routinely consult were cases decided by federal courts in other parts of the country. Although these were sister courts when it came to interpreting federal statutes, the rulings of such courts on procedural law were of little value because, under the Conformity Act, other federal courts applied a different set of procedural rules.[24] Under these circumstances, it was not unusual for two cases very similar on the facts to turn out differently based on differences

[22] See Subrin 1988, 311, 319 ('The American nineteenth-century codification movement was rooted in part in lay dissatisfaction with the complexity and technicality of law and antagonism to the legal profession.').

[23] This result was dictated by the Conformity Act of 1872, 17 Stat. 196 (1872), under which the 'pleadings, and forms and modes of proceeding' in federal district court were to conform to those 'existing at the time in like causes in the courts of record of the State within which such circuit or district courts' are located. This result did not apply to actions in equity or admiralty nor did the 'modes of proceeding' encompass state rules of evidence.

[24] An important exception was admiralty cases. Federal courts applied the federal procedural law governing actions in admiralty and maritime law. For reasons beyond the scope of the present work, admiralty and maritime matters are singled out in the Constitution, and disputes in these areas have always been regarded as implicating uniquely federal interests in ways that other civil matters do not.

in procedural law applied by two different federal courts, even if the claim arose under the same substantive federal law.

The impact of this absence of a federal code of civil procedure at this time was visible not only in case reports. Also impacted was the organization of the American legal profession. In the era of the Conformity Act, it was all but impossible for an individual lawyer to appear before courts in more than one state.[25] The risk of losing a case through ignorance of an idiosyncratic rule in an unfamiliar forum was substantial. It was even rare for a partnership of lawyers to expand across state boundaries. The size of law firms was small. Not until the 20th century were individual law firms regularly retained to handle a large percentage of the legal work of one of America's large corporations.[26]

Efforts were launched at the end of the 19th century to bring some unity to procedural law across the country. These efforts took two forms. The first involved reforming existing state procedural laws and harmonizing differences among them. The second project was creating a single set of rules applicable in all federal courts. The latter proved to be the route to success.

11.5 The FRCP and Interest Groups

Enactment of the FRCP and the spread of its influence on state courts owed much to the persistent efforts of three groups of lawyers: attorneys at law firms at the vanguard of multistate legal practice, law professors at a small group of university-affiliated law schools on the verge of elevating those institutions above the rest, and judges on the federal bench. Each group had much to gain from replacing a chaotic patchwork of state approaches with a more unified national framework.

11.5.1 The Transformation of American Legal Education and the Emergence of Elite Law Schools

During the period in which civil procedure was being transformed from a series of local and idiosyncratic practices to a field of law in the contemporary sense, a second transformation was also under way. This second transformation concerned key aspects of legal education: the content of what a future lawyer needs to study,

[25] Partly this was due to restrictive bar admission rules. Some of that restrictiveness may have been justified because differences in law and practice from one state court system to another were large.

[26] See Earle 1963, 155–85 (describing the growth of Shearman and Sterling in the 1910s); Swaine 1946 (summarizing law firm's early work for U.S. Steel Corp., International Harvester, Pennsylvania Railroad and other industrial giants).

the setting in which teaching takes place, and the relationship between law teaching and other activities, such as legal scholarship and law reform.

When serious proposals were first floated to address the chaotic state of civil procedure in the United States, it was apparent to some in legal academia that opportunities would be forthcoming for civil procedure scholars to participate in the process. Some individuals and institutions were better positioned to take advantage of this opportunity than were others. Those best positioned were scholars at university-affiliated law schools that already had begun the process of thinking of law and the legal profession in national terms. As early as the turn of the 20th century, a few law schools had embarked on this process by attracting students from all parts of the country, by teaching a curriculum centred on national trends[27] and emerging areas of federal law, and by encouraging faculty members to pursue scholarship of national significance.

11.5.2 The Emergence of an Educational Hierarchy

The most familiar aspects of contemporary legal education in the U.S. have been in place for approximately 50 years.[28] These include the expectation that the faculty will be made up predominantly of scholars and not practitioners, that the curriculum will be taught with reference to national trends rather than local law, and that the method of instruction will be analytical and not purely descriptive. Another familiar aspect of contemporary legal education is stratification. Some institutions are regarded as more prestigious and influential than others. A disproportionate share of the most influential scholarship is produced by the faculties of a relatively small number of elite law schools.[29] The graduates of these same schools go on to fill an extraordinarily disproportionate share of the available law teaching positions across the country. These same law schools also tend to be well off financially, and they enjoy great success in attracting bright students from all parts of the country. After graduation, these individuals claim a disproportionate share of the country's best legal jobs.

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[27] For example, by instructing students on developments in contract law in state courts across the country rather than by focusing only on cases decided in the local jurisdiction.

[28] This is not to say that legal education has been static. Among the more important developments since the 1950s: movement away from strict Socratic teaching, widespread adoption of some form of clinical education, internationalization of the curriculum, proliferation of co-curricular activities, and receptivity to interdisciplinary work.

[29] See Shapiro 2009.

11.6 Legal Education a Century Ago

The landscape of legal education was quite different in the 19th century. There was no clear hierarchy and little uniformity. Some institutions of higher education were well known, but even these had faculties too small to exert substantial impact on the law or on American society. Referring to the period before Christopher Columbus Langdell initiated a new method of instruction that transformed the law school classroom, Oliver Wendell Holmes, Jr. described his education at Harvard Law School in the 1860s as essentially a waste of time.[30]

In the late 1800s it was not clear that the future of legal education in the United States lay with private university-affiliated law schools. These institutions faced competition. Many judges and prominent lawyers had entered the profession through apprenticeship.[31] Others had attended some courses informally only to move on without earning a degree.[32] By the turn of the century, additional paths to a legal career opened up. Independent law schools increased in number to fill the country's need for more lawyers and to offer a path into the profession for those without a college degree.[33] State-supported universities offered a state-specific legal education under a faculty of former practitioners less concerned with scholarship than with teaching, administration, and the activities of the state and local bars.[34]

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[30] Holmes 1870, 177 ('So long as the possession of a degree signified nothing except a residence for a certain period in Cambridge or Boston, it was without value. The lapse of time insured its acquisition. Just as a certain number of dinners entitled a man in England to a call to the bar, so a certain number of months in Cambridge entitled him to the degree of Bachelor of Laws.'). Though the foregoing was from a note that was unsigned at the time of publication, it was later identified as being authored by Holmes. See White 1993, 197–198.

[31] See Chroust 1965, 173–76; White 1976 (among the highly influential judges of the late 19th century who learned the law by serving as apprentices were Thomas Cooley and John Marshall Harlan I).

[32] Roscoe Pound belongs in this category. Pound studied for one year at Harvard Law School before returning to Nebraska and sitting for the bar. After some years in private practice, Pound returned to Harvard, became dean and one of the most influential public intellectuals of his day. See Tidmarsh 2006, 513.

[33] In contrast, in 1875 Harvard began requiring as a condition of admission that applicants possess either an undergraduate degree or command of Latin. See Urofsky 2009, 26–27. Independent law schools typically drew their primarily part-time faculty mainly from the local bar. Their library collections were small, practical, and local in focus.

[34] One measure of the fluidity of entry into the legal profession in the 19th and early 20th centuries can be gathered from the biographies of justices of the United States Supreme Court. In the year 1911, among the justices were one who had studied law in his father's law office, two who had started law school but had not completed their studies, and six who had attended six different law schools, some of which were affiliated with universities and some of which were not. Just one, Charles Evans Hughes, had devoted part of his career, two years, to academia. By comparison, all nine of today's Supreme Court justices attended either Harvard Law School or Yale Law School. Among the justices are four (Breyer, Ginsburg, Kagan, and Scalia) who spent a substantial part of their careers as law professors.

So, in the early decades of the 20th century, a thin tier of law schools (Chicago, Columbia, Harvard, Michigan, Minnesota, Pennsylvania, Virginia, Yale) found themselves in an influential position in American legal education,[35] but hardly a secure one. They were becoming national and scholarly in their orientation. They were relatively free of parochial demands by state legislatures. They were succeeding in attracting talented students from far away. Not until the 1930s and 1940s, however, did these law schools move from being influential to being dominant. Not until then did they shift from operating with many constraints and facing competition from alternative pathways to the bar, to being in a position to set the agenda for legal education in the United States. Their faculty and graduates were an important part of the Progressive Era and, later, at the centre of the legal developments of the New Deal. One factor contributing to this change in status—critical for purposes of the present paper—was growth in the volume, variety, and complexity of national law[36] in the early decades of the 20th century.[37] A prime example of federal-law-creation that enhanced the status of these already leading law schools was the project to create a national set of procedural rules.

Even before the drafting process began, the project received support from the upper echelons of academia. In an address at the American Bar Association Convention of 1906, Roscoe Pound of Harvard called for a turn away from the existing formalism and gamesmanship in civil procedure.[38] William Howard Taft of Yale urged the ABA to come out in support of a national procedural law. He also supported a central role for the ABA in accrediting law schools, a position that would exclude some of the independent law schools in particular.[39] When the time

[35] Robert Swaine, in his three-volume history of Cravath, Swaine & Moore, summarised the firm's hiring policies in the decades preceding and following the turn of the century: 'The firm has taken most of its associates from the law schools of Harvard, Yale, and Columbia, although in the decade preceding World War II, when the number of men taken into the office greatly increased, there was a conscious effort to take at least one man a year from other law schools of high repute, such as Pennsylvania, Cornell, Virginia, Michigan, and Chicago.' See Swaine 1948. Swaine states that when these guidelines were put in place in the late 19th century, they 'were regarded as somewhat eccentric' but that they became 'commonplace' among Wall Street law firms by the 1940s. *Id.* at 3.

[36] By 'national law' I mean not only federal law but also codifications like the Uniform Commercial Code and laws that were the product of national harmonisation efforts, like the various Restatements of private law subjects.

[37] Until then, relatively little of American law was federal. All but a small portion of contemporary federal statutory law and regulations dates from the New Deal and later.

[38] See Pound 1964, 273 (text of the address that Pound delivered in 1906). John Henry Wigmore said of Pound's speech that it 'struck the spark that kindled the white flame of high endeavour, now spreading through the entire legal profession.' Wigmore 1937, 1568.

[39] Another national organisation, the Association of American Law Schools (AALS), founded in 1900, also took as one of its mandates standardizing the content and format of legal education, a task that in practice involved marginalizing apprenticeship. The first president of AALS was James Bradley Thayer of Harvard. In the organization's early years, the AALS presidency was held by individuals from a very small circle of university-affiliated law schools: Columbia, Harvard, Iowa, Michigan, Wisconsin, and Yale. All of these institutions had a stake in

arrived to begin concentrated work on what would become the FRCP, four spots on the advisory committee were assigned to academic participants. What was needed from such participants was knowledge of a number of state systems, a substantial time commitment, the ability to work on the project without remuneration, access to extensive library collections, and the wherewithal to travel extensively to public meetings at which the draft rules would be vetted. Familiarity with British procedure and access to the assistance of bright and unpaid law students or graduate fellows were also desirable.

Few law schools in the early 1900s were in a position to support the efforts of faculty members wanting to participate in such an endeavour. Four law schools, however, were in such a position: from Yale came Charles Clark, the principal draftsman of the FRCP. The University of Michigan contributed Edson Sunderland. Armistead Dobie was on the faculty of the University of Virginia, and Wilbur Cherry came from the University of Minnesota. Each of these individuals worked strenuously and over an extended period of time, first in advocating in favour of the need for a uniform set of federal procedural rules, then in drafting and defending the rules prior to their enactment, and then in producing scholarly work interpreting the rules after they had become law and maintaining that state court systems should follow the federal lead. No doubt each of these men held a genuine conviction that the federal court system and the country would be better off as a result of harmonisation and reform. There is also no doubt that the careers of each of these law professors benefitted enormously from their work on the FRCP. Their law schools benefitted also.

After joining the federal rules project in the 1920s, Charles Clark became dean of Yale Law School in 1929. His position as the principal draftsman of the Rules and one of their main defenders greatly elevated his status. Previously, he had been an important scholar. By the 1940s, he was essentially the dean of American civil procedure. He served as president of the Association of American Law Schools (AALS) in 1933[40] and became a judge on what was at that time the nation's second most important federal court. As a judge, Clark wrote seminal opinions interpreting and applying the FRCP. He continued to serve on the advisory committee, and he continued to speak and write in support of the rules.[41] Clark also continued to teach at Yale, and his junior colleague, William Moore, became

(Footnote 39 continued)
marginalising apprenticeship and other non-university paths to legal education. See Association of American Law Schools Archives, available at http://www.library.illinois.edu/archives/aals/; 'What is AALS?' available at http://www.aals.org/about.php (last consulted in July 2011) ('At the time the AALS was created, many lawyers entered the legal profession without a law school education. From the beginnings to this day, the AALS has worked to improve the quality of legal education.').

[40] See AALS, Academic Freedom and Academic Duty vi, *available at* http://www.aals.org/am2012/2012program.pdf (last consulted in July 2011).

[41] See e.g., Clark 1947 (advocating 'notice pleading' and referring to the 'complete reform of civil practice in the courts of the United States and of several of the states).

the next great Yale scholar in civil procedure,[42] a tradition at Yale that continues to the present.[43]

Like Clark, Armistead Dobie became dean of a leading law school, the University of Virginia, during his service on the federal rules advisory committee. Dobie brought Harvard's case method from New England to the South in the 1920s, and his nationally well-received scholarship in federal civil procedure[44] played an important role in elevating the University of Virginia from a regionally important law school to a nationally important one.[45] Like Clark, Dobie then moved from academia to the federal bench, where he served as a judge on the U.S. Court of Appeals for the Fourth Circuit.

From his work on the FRCP, Edson Sunderland became a central academic figure in transforming the procedural system in the state of Michigan along the lines of the new federal regime.[46] From the FRCP, he moved on to serve as a reporter for the influential American Law Institute's Restatement of the Law of Judgments. Like Clark, Sunderland authored an important text on code pleading used in law schools nationwide. Like Clark and Dobie, he served as President of AALS.[47]

Wilbur Cherry was the fourth civil procedure professor on the advisory committee. Like Clark, Dobie, and Sunderland, Cherry also became president of AALS.[48] After enactment of the FRCP, Cherry went on to spend the lion's share of his professional life writing about the federal law of civil procedure.

The careers of other supporters of the FRCP took off as well. Roscoe Pound's ABA speech earned him a national reputation.[49] Soon thereafter he became president of AALS,[50] the dean of Harvard Law School, a personification of legal academia, and one of the most influential public intellectuals of his generation.[51] William Howard Taft became President of the United States and then Chief Justice of the U.S. Supreme Court.

The key point in all this is that the movement to create an American law created the opportunity for a group of law schools to become a national elite, and those law

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[42] *Moore's Federal Practice,* now in its third edition and consisting of 33 volumes, is an essential civil procedure treatise found in every law school library.

[43] Subsequent Yale scholars in civil procedure include Geoffrey Hazard and Owen Fiss.

[44] See, e.g., Dobie 1939, 261; Dobie 1944, 513; Dobie 1945, 784.

[45] See Bryson 1979, 197–202.

[46] See Honigman 1959, 13 ('More than any other individual, Professor Edson R. Sunderland has had a tremendous impact upon the Michigan law of procedure.').

[47] He served in 1930. See Academic Freedom and Academic Duty, supra. Sunderland also authored an important history of the ABA.

[48] He did so in 1939. See Academic Freedom and Academic Duty, supra.

[49] According to a Harvard colleague, Pound's 'national' reputation as a reformer in the field of civil procedure was established as a result of that speech. See Scott 1965, 1568.

[50] He served in that capacity in 1911.

[51] See Tidmarsh 2006, 513. Pound's scholarly work remains among the most cited of any American law professor. See Shapiro 2000, 409.

schools seized that opportunity. It is not that the Yale Law School of the 1880s was an unimportant place. Influential scholarship and people had come from Yale in the 19th century, but the Yale Law School of the 1930s was a far more important place. Faculty scholarship and graduates of Yale were at the centre of the New Deal. Individual faculty members had seen the benefits of a national legal culture, but their enthusiasm for national law was also motivated by the opportunities afforded to the individuals and the institutions that were at the vanguard of the transformation taking place. Thus the relationship between the two trajectories—the movement from local to national law and the movement from egalitarianism to elitism in legal education—was not merely one of correlation. The growth in national law contributed to the stratification of American legal education, and the prospect of stratification contributed to key academic support for the creation of national law.

11.7 Multistate Law Firms

Until the 20th century, law practice in the United States was the preserve of solo practitioners and small law firms.[52] Civil litigation centred on pleadings and trials and not, as today, on pre-trial discovery and dispositive motions. The local character of legal culture—the importance of local bar associations and local standards of law practice—fit into a wider ocean of localism characteristic of 19th century America.[53] The obstacles to one individual or even one law firm appearing in the courts of more than one county, much less more than one state, were formidable. For a lawyer representing an out-of-state company in Virginia, mastery of the ins and outs of Virginia's procedural law was critical. Some of that procedural law was not readily available in libraries in other states. Just as important from a client's perspective was knowledge of the personalities on the local bench, the customs that were not written down in law books and, of course, the kind of rhetoric that would persuade a local jury. Each of these was likely to be at least as important as a detailed knowledge of the substantive law governing a case. In short, straying outside one's region or even outside one's state in connection with law practice was unusual.[54]

These powerful forces tipping the scales in favour of localism changed in the aftermath of the Gilded Age[55] and the increase in interstate business and personal wealth generated during that time period. For the company with much interstate

[52] See Menkel-Meadow 1994, 621.

[53] See Hulsebosch 2002, 1049 (variation in state procedures and juries rendered American private law an unusual quilt that frustrated commercial expectations).

[54] Cf. Ely and Bodenhamer 1986, 539 (arguing that regionalism was important in shaping southern law before 1900).

[55] The period from the end of the Civil War to the turn of the 20th century saw a tremendous increase in industrial and agricultural production and the accumulation of vast personal fortunes

business, it became desirable to have a law firm in Manhattan, Chicago, or San Francisco and to centralise the management of all the company's litigation, without regard to state boundaries.

Localism had its benefits, at least for some. Members of the local bar enjoyed a monopoly in practicing in local courts and a considerable home-field advantage in federal courts. Even in those rare instances in which a lawyer from another vicinity could appear in a case in rural Virginia for instance,[56] he did so at his client's peril. Certainly this was so in terms of presenting a case to a jury, which was drawn from a local jury pool,[57] but it also was true of pre-trial practice. A seasoned attorney who had appeared in state courts for years knew the ins and outs of the state procedural code. That lawyer not only knew the procedural code and the case law but also the manner in which judges in a particular locale were inclined to interpret procedural laws—whether, for instance, they were likely to apply procedural rules strictly or, rather, were disinclined to allow technicalities to get in the way of justice on the merits. Indeed, for more than a few of the country's great 19th-century lawyers the path to the national stage was laid through years of local practice.[58]

Localism, however, was not good for everyone. Large commercial and financial interests disliked the unpredictability of local procedure and local justice. So did the emerging group of expanding law firms based in major cities and aspiring to represent the country's industrial companies on a nationwide basis. An attorney from a firm in Philadelphia might have had fancy educational credentials and a wealth of legal knowledge, but he could easily stumble into procedural traps for the unwary in another state. A local lawyer in Virginia was more familiar with common law pleading than a lawyer from a Wall Street firm and also far more likely to know what to expect from a local judge with respect to pleading, admissibility of evidence, the appropriate scope of cross examination, the form of jury instructions, and so forth. In other words, at a time when the country lacked national rules of procedure and a truly national culture, a member of the local bar enjoyed considerable autonomy and sources of remuneration. Both were eyed with envy by lawyers in New York. The latter were becoming prosperous by

(Footnote 55 continued)
by such individuals as Andrew Carnegie, Andrew Mellon, J.P. Morgan, and John D. Rockefeller through industries such as banking, petroleum, and railroads.

[56] Liberal practices regarding *pro hac vice* admission (permitting a lawyer not a member of the local bar to appear in a single case) did not become common until after World War II. See Marks 2009, 1135, 1136.

[57] Juries in federal cases are drawn from a geographically larger jury pool.

[58] Daniel Webster's political career was launched in substantial part from his highly successful law practice in Portsmouth, New Hampshire in the early decades of the 19th century. The foundation of Abraham Lincoln's political career was in winning friends and admirers in the many rural parts of Illinois where he rode circuit. In 1855, Lincoln, who was self-taught, said the following about the future of law practice in Illinois: '[T]hese college-trained men, who have devoted their whole lives to study, are coming west, don't you see? And they study their cases as we never do.' See Stephenson 1926, 118.

representing the nation's leading railroads, banks, and industrial giants on non-litigation matters but realised that they could become wealthier still by playing a larger role in defending litigation on a nationwide basis. Doing so required a change in their relationship with local counsel. Rather than play a minor role in interfacing with local counsel in Kentucky on behalf of a Connecticut insurance company, the company's principal outside counsel in New York wanted local counsel to be relegated to a minor role, at least in the pre-trial stage. From the former's point of view, the ideal result would be for the lawyers in Kentucky to do little more than file the papers drafted in lower Manhattan.

With the turn of the century, localism receded in much of the country. Contributing factors included large-scale immigration,[59] widespread circulation of print media,[60] and the emergence of a national popular culture.[61] In the world of lawyers and judges, localism was also undercut by the wide dissemination of state statutory law and case reports.[62]

With the growth in interstate and inter-regional business, the differences among state procedural law came to be seen less as a natural part of the landscape and more as an impediment to the ambitions of people of commerce and the lawyers seeking to represent them with respect to their growing interstate operations. These new interstate opportunities for lawyers are crucial to understanding one important constituency that supported the harmonisation of civil procedure and the resulting stratification of the American bar caused in part by this development.[63]

The law firms that served as principal advisors to major banks, railroads, and insurance companies could become much more affluent than other lawyers. The ticket to financial success was in becoming the principal legal advisor to sizeable clients with interstate operations and nationwide ambition—Standard Oil,

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[59] After the depression of the 1890s, immigration increased markedly. Kraut 1982. From 1860 to 1880, about 2.5 million Europeans immigrated to the United States. In the 1880s, the number jumped to 5.25 million. Another 16 million immigrants entered during the next quarter century, with 1.25 million in 1908 alone. *Id*; see also US Bureau of the Census, US Dep't of Commerce, Statistical Abstract of the United States, 10 Table 5 (118th ed. 1998), available at http://www.census.gov/prod/www/abs/statab.html; US Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Part I, 105–09 (Series C 89–119) (1975), available at http://www.census.gov/prod/www/abs/statab.html (last consulted August 2011).

[60] Dryer 2008, 541 (in the early twentieth century, the price of newspapers dropped considerably, and news became a commodity widely consumed by the general American public); see also Berger 1951; Roberts 1977.

[61] Among the major contributors to that national culture were radio, motion pictures, sports, and widely-distributed consumer products. See Pendergrast 1993; May 1983; Friedman 2004, 319, 323–24.

[62] In 1879, the West Publishing Company began to publish volumes containing state-court opinions from around the United States.

[63] See Auerbach 1976, 23. Auerbach argues that at the turn of the century, precursors to the modern corporate law firms arose to accommodate powerful commercial interests. These firms, Auerbach maintains, were 'edging to the pinnacle of professional aspiration and power' during this period and, together with corporate directors, formed a symbiotic elite which consolidated institutional control for their mutual benefit. *Id*. at 22.

J.P. Morgan, Penn Central Railroad—companies that, along with the men who ran them, generated an expanding need for legal services in many areas of law, such as corporate law, antitrust, and litigation. Great financial reward was to be had for law firms able to become indispensable to these clients. There was just one catch: in the absence of a significant body of national law, the wealth had to be shared with local lawyers around the country serving as local counsel to these emerging powerhouse law firms in Manhattan, Chicago and elsewhere. A brilliant lawyer in Philadelphia could not take full control over all litigation for an interstate railroad if cases in different states were substantially different from one another.[64] The principal law firm for a major bank could not even handle all debt collection work.[65] It was no accident that many of the individuals who led harmonisation efforts in the early 20th century were from prestigious big-city law firms. They had so much to gain. A uniform set of federal procedural rules served not only the interests of their clients, it also served their personal interests. The shift from localism to national standards in both procedural law and substantive areas of law was one factor that boosted the profitability of large law firms and catapulted some of their lawyers to positions of national prominence.[66]

In short, it was clear from early proposals for a project to create a federal procedural law that such a set of rules would create winners and losers in the American bar. The winners would be lawyers in comparatively large firms serving large corporate clients with significant interstate operations. Some of the FRCP's most important supporters were elite lawyers fitting this description. The losers were likely to be the many lawyers whose only attraction from the viewpoint of the country's powerful business enterprises was their mastery of an arcane and local legal regime. With the doors to federal court truly open after 1938,[67] that mastery was considerably less valuable.

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[64] See *Report of the Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 419 (1896).

[65] In terms of judgment collection, it was not until the 1930s that the Full Faith and Credit Clause of the US Constitution was interpreted as imposing a nearly ironclad obligation on state courts to recognise the civil judgments of courts from other states. See *Baldwin v Iowa State Traveling Men's Ass'n*, 283 US 522 (1931) (rejecting jurisdictional challenge to enforcement of sister-state judgment) ('Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties.'). Before then, a judgment debtor could avail itself of many exceptions and procedural delay tactics to make the collection task of a judgment creditor difficult.

[66] Large American law firms first emerged in New York City. See Wald 2008, 1803, 1806. Initially, these law firms recruited young men who had attended elite colleges and elite law schools—Harvard, Yale, or Columbia. Swaine 1948, 748 (stating that 85 per cent of Cravath partners graduated from Harvard, Columbia, or Yale law schools as of 1948).

[67] Open in the sense of applying a transparent and nationally applicable set of procedural rules and generating a case law that was widely disseminated and analysed.

11.8 The American Experience and Europe Today

What does the American experience mean for others? Of course this is a quintessential comparative-law question, and like most questions in that discipline, the answer is likely to be that some facets of the experience in Society A are informative with respect to the problems of Society B, but some aspects of Society A's experience are unique to Society A. This contribution will conclude by making some general observations in this regard with specific attention to harmonisation in Europe.

With the benefit of hindsight, it is clear to most observers, including this one, that the harmonisation of procedural law that took place in the United States from the 1920s to the 1950s was a welcome development. Among the effects of harmonisation was a strengthening of the national economy and the initiation of reforms that made legal systems across the country more equitable. Another enormously useful result was the elevation in the stature of the federal bench. By the 1950s, that elevation in stature would prove essential as American society looked to the federal courts to resolve seemingly intractable political and social issues that no other institution seemed capable of tackling.[68]

Hopefully what is clear from what has been said earlier in this Chapter, however, is that harmonisation of procedural law in the US did not come about solely because it was a good idea. In law, as in most areas of human endeavour, there are many good ideas that never happen because those ideas lack a constellation of individuals and interest groups committed to making them happen. The proposal to create a uniform set of procedural rules for federal courts in the United States made it onto the national agenda because specific individuals (e.g., Pound, Taft), specific organisations (e.g., the ABA), and specific economic interests (e.g., large-scale American business) put it on the agenda. From there, the project proceeded through the drafting and vetting phase because specific people on the advisory committee (e.g., Clark, Sunderland) laboured long and hard in what they saw as the national interest and in what surely turned out to be in their own interest and the interests of the elite university law schools of which they were a part. Once enacted at the federal level, the FRCP then exerted a powerful influence on state procedural law throughout the US for more than a generation. It did so in part because federal judges were now in command of an important new body of law, because their written opinions in this area were more widely circulated than those of state judges, because federal judges were in possession of more resources to write careful procedural-law opinions than were state judges, and because the new

[68] See, e.g. *Brown v Board of Education of Topeka*, Kansas, 347 US 483 (1954) (racial desegregation of public schools); *Roe v Wade*, 410 US 113 (1973) (limitations on the power of state governments to legislate in ways that interfere with personal privacy and reproductive freedom); *Zorach v Clauson*, 343 US 306 (1952) (the nexus between religion and state-funded schools).

field of federal procedure presented an opportunity for individual judges on the federal bench to establish a national reputation for themselves.

Is the situation in Europe today at all similar to that in the US several generations ago? Is there a comparable set of interest groups? Are similar incentives in place? The answer to these questions would seem to be at least a qualified yes.

To even the casual observer of legal education in the EU over the last two decades, a striking development has been the Europeanization of legal education. Not only has the teaching of EU law affected universities everywhere, so also have exchange programs for faculty and students. A generation ago, a faculty member at a university in the UK could rest on being an expert in the British law of civil procedure and private international law. Increasingly, that is becoming no longer tenable. It is rare to read the work of a British scholar in these fields without seeing frequent references to EU-wide legislation and case law and references to approaches in continental Europe. A generation ago, some of the most highly regarded universities in Europe played a minor role in fostering European integration. That is not true today. European legal academia today is experiencing at least a variation on what beset legal academia in the US during a crucial period in the early 1900s: Universities compete with one another as never before for prolific faculty members and for students. Universities at the vanguard of European integration in fields such as civil procedure have much to gain in terms of EU funding and in terms of placing their graduates in prestigious positions in the EU Commission and in EU-wide law firms and industry. As one surveys the landscape of scholars passionately devoted to EU-wide codification projects, it is hard not to conclude that many stand to reap much in career advancement from the acceleration of the EU enterprise. In other words, just as an academic elite was critical to the harmonisation of procedural law in the US, so an academic elite in Europe could be critical to the transformation of procedural law in Europe.

The same appears to be true of the legal profession. The past two decades have witnessed a large volume of cross-border mergers and acquisitions among law firms. Not long ago, small law firms in Germany were overwhelmingly the norm, and a non-national's admission to the bar was one of the four freedoms that was more theoretical than real. In the last two decades, however, there has been an acceleration in the development of large, trans-European law firms capable of servicing the needs of their clients in many European countries. This is most clearly so in the areas of European competition law, banking law, pharmaceuticals, and transportation. It is not yet fully true of litigation. Although some firms based in Europe have the capacity to participate in or monitor litigation in more than one EU country, major differences among procedural regimes still pose an obstacle to the kind of centralization of litigation management that long has been typical in the U.S. For this reason, some of Europe's larger law firms stand to gain much from a series of harmonisation measures in civil procedure that would enable them to fill this need of their clients.

As for judges, there are differences, of course, between judges in the EU and federal judges in the United States. Most obviously, the numbers are drastically different. By virtue of executive federalism, most of EU law is enforced by

Member State authorities, and most actions that require some interpretation of EU law are initiated in the courts of EU Member States. The parties to such actions must comply with the procedural law of the national legal system in which they find themselves, subject to the ECJ's formula that national procedural law must not discriminate on the basis of nationality or residence and must not make it impossible in practice to attain a remedy for the violation of rights conferred by the EU treaties or EU legislation.[69] In practical terms, this means that given the current structure of the EU judicial system, there is less opportunity for judges on the EU level to play the leading rule in authoring opinions interpreting a new body of EU law in the realm of procedure. A second consideration is that opinions of the ECJ and the Court of First Instance are unsigned.

Neither of these obstacles is insuperable. The courts of the EU, and individual judges, have in the past been instrumental in bringing about harmonisation in other areas of EU law, such as EU constitutional law and the application of the Brussels and Rome Conventions.

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[69] See in particular ECJ 9 March 1978, Case C-106/77, ECR 629 *(Administration delle Finanze dello Stato v. Simmenthal Spa*) and ECJ 19 June 1990, Case C-213/89, ECR I-2433 (*Regina v. Secretary of State for Transport, Ex Parte Factortame, Ltd. and Others*), see generally Dubinsky 1994, 325–336.

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