DEVELOPMENTS IN FEDERAL CIVIL PROCEDURE

Foreword

*Rex R. Perschbacher**

Hardly a week goes by now without some article,[1] speech[2] or news account[3] decrying the volume of litigation in our courts, questioning its causes, and deploring the resulting delays.[4] "Alternative dispute resolution,"[5] a term unheard of a decade ago, is suddenly everywhere and so hot a topic that it borders on faddism. Whatever its merits as a legal and cultural phenomenon, the public debate over mechanisms for dis-

---

* Acting Professor of Law and Director of Clinical Education, University of California, Davis. A.B. 1968, Stanford University; J.D. 1972, University of California, Berkeley.

[1] *E.g.*, *Reducing Court Costs and Delay*, 16 U. MICH. J.L. REF. 465 (1983); *see also* J. AUERBACH, JUSTICE WITHOUT LAW: RESOLVING DISPUTES WITHOUT LAWYERS (1983) (examining methods of dispute resolution other than litigation).

[2] Chief Justice Warren E. Burger, in his annual State of the Judiciary Address to the American Bar Association, asserted that the nation's lawyers were making the pursuit of justice too costly and time-consuming. He criticized the bar for failing to explore or promote less costly methods of resolving disputes outside of litigation. Speech by Chief Justice Warren E. Burger, American Bar Association (Feb. 12, 1984), *reported in* N.Y. Times, Feb. 13, 1984, at 1, col. 2. Judge Irving R. Kaufman of the Court of Appeals for the Second Circuit stated that a "virtual tidal wave" of cases has deluged the court system. He urged efforts to resolve civil matters outside of courtroom through negotiation, mediation and arbitration. Speech by Judge Irving R. Kaufman, Palm Beach Round Table (Feb. 11, 1983), *reported in* N.Y. Times, Feb. 11, 1983, at 8, col. 1. Judge Dorothy Nelson of the Court of Appeals for the Ninth Circuit echoed this warning, suggesting that alternatives to the court system were desperately needed. Speech by Judge Dorothy Nelson, School of Law Symposium Celebrating the 75th Anniversary of the University of California, Davis (Nov. 19, 1983).

[3] *E.g.*, Hiltzik, *The Litigation Explosion: Cures for Caseload Crisis Prove Elusive*, L.A. Times, Feb. 20, 1984, at 1, col. 4; *Problems of Lawsuits Plaguing Courts*, L.A. Times, August 9, 1983, at 1, col. 1; *cf.* Fried, *The Trouble With Lawyers*, N.Y. Times, Feb. 12, 1984, § 6 (Magazine), at 56.

[4] *But see Debunking Litigation Magic*, NEWSWEEK, Nov. 21, 1983, at 98 (questioning the existence of the litigation crisis).

[5] The Yale Law Journal used this term in connection with its influential set of essays examining this area. *See Dispute Resolution*, 88 YALE L.J. 905, 906 (1979).

pute resolution has the beneficial side effect of focusing attention on the courts as a mechanism for resolving disputes — the "traditional" system to which all else is alternative. In turn, more scholarly attention is directed to the rules governing judicial dispute resolution: for civil matters, civil procedure.

In his great treatise, *Civil Procedure*,[6] Fleming James, Jr. distinguished the rules of procedure from what were clearly the primary rules of substantive law. Procedure's existence, significance, and value all depended upon its ability to implement the rights and duties supplied by substantive law.[7] Today we should recognize that as a dispute-resolution technique, civil procedure has a value of its own and deserves its own scholarship.

The rules of civil procedure must constantly adjust to the conflicting demands of fairness and efficiency. Unless the rules are fair, and the disputing parties see them as fair, parties will not use the courts to resolve their disputes. Unless the rules work efficiently, the courts cannot resolve disputes.[8] The tension between these two concerns characterizes the most enduring issues in civil procedure. Under a single title, *Developments in Federal Civil Procedure*, this issue of the U.C. Davis Law Review features two major articles which demonstrate both the breadth of scholarly writing about procedure and the unifying role played by the tension between fairness and efficiency.

Professor Arthur F. Greenbaum's article, *Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition*, uses a question of federal appellate procedure — what is the preferred practice for cases that become moot on appeal (popularly referred to as the *Munsingwear* doctrine)? — to deal with one of civil procedure's most lively current topics: the preclusive effect of judgments. The burden of litigation at all levels of the judiciary has led to a search for better ways to avoid relitigation of claims and issues, and the means to escape the courts altogether. As a result, the use of the doctrines of res judicata and collateral estoppel has greatly increased, particularly since the Supreme Court's recent rejection of the mutuality rule.[9] At times this quest for efficiency has come at the expense of fair-

---

[6] F. JAMES JR., CIVIL PROCEDURE (1965).

[7] *Id.* § 1.1, at 2.

[8] In the second edition of *Civil Procedure*, Professors Fleming James, Jr. and Geoffrey Hazard, Jr. acknowledged the role (although they treat it as a secondary one) of procedural law as a dispute-resolution technique, and they note the possible conflict between fairness and efficiency in procedure. F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE § 1.1, at 2-3 (2d ed. 1977).

[9] Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (mutuality not required for

ness.[10] Professor Greenbaum has brought new and valuable insight into these doctrines by asking a simple, basic question: When an action becomes moot on appeal, when should the lower court judgment be vacated and when should it be left intact and the appeal dismissed?

Professor Greenbaum's article covers considerable ground. It considers mootness on appeal in connection with the federal versus state law question, known as the *Erie* doctrine;[11] the differences among the four forms of preclusion (collateral estoppel, res judicata, stare decisis, and law of the case); and the procedural distinctions arising from differing trial forums. Through rigorous, thorough analysis, his article carefully distinguishes preclusion of issues (collateral estoppel) from preclusion of claims (res judicata).

Modern developments have greatly enlarged the circumstances under which collateral estoppel can be invoked. Collateral estoppel has changed from a doctrine based on fairness principles to a tool for more efficient resolution of disputes. This transformation suggests greater caution in permitting judgments effectively unreviewed from supporting collateral estoppel. Claim preclusion (res judicata), on the other hand, which emphasizes finality over accuracy of decisionmaking, may be an appropriate effect even of a judgment mooted on appeal. The argument for caution is even stronger for the doctrine of stare decisis.

Professor Greenbaum's thesis goes beyond categorical solutions. He demands that we ask both how and why a judgment became moot while on appeal and what kind of preclusive effect is claimed for the judgment before deciding which appellate court procedure is appropri-

---

offensive use of collateral estoppel); Blonder-Tongue Laboratories, Inc. v. University of Illinois Found., 402 U.S. 313 (1971) (mutuality not required for defensive use of collateral estoppel).

[10] For some recent critical commentary on the expanding use of collateral estoppel, see Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383 (1983) (collateral estoppel of nonparties based solely on considerations of judicial economy and expense violates due process); Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422 (1983) (use of administrative determinations as collateral estoppel in later judicial actions must be restricted to avoid unfairness to the parties).

[11] The *Erie* doctrine takes its name from the Supreme Court decision, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Dean Ely persuasively argues that the doctrine involves three distinct inquiries under (1) the United States Constitution; (2) the Rules of Decision Act, 28 U.S.C. § 1652 (1976); and (3) and the Rules Enabling Act, 28 U.S.C. § 2072 (1976). *See* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974). Professor Greenbaum discusses the portion of the *Erie* doctrine involving application of the Rules of Decision Act. *See* Greenbaum, *infra*, text accompanying notes 265-96.

ate. He has taken a rule of procedure that is little more than an unexplained and unelaborated pronouncement by the Supreme Court — the *Munsingwear* doctrine — and used it to illuminate the appropriate roles for preclusion doctrines in the jurisprudence of dispute resolution.

In *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, Professor Richard A. Matasar continues his ambitious treatment of a vastly different area of civil procedure — the elusive federal court doctrines of pendent and ancillary jurisdiction.[12]

Only recently have the Supreme Court and scholarly commentators realized that these two doctrines may be aspects of a single principle encompassing the extra-statutory jurisdiction of the federal courts. Pendent and ancillary jurisdiction are historically distinct doctrines, each born of necessity but grown well beyond their roots. The underlying issue in each case is how far the federal courts should venture in resolving those disputes which extend far beyond the scope of their prescribed congressional jurisdiction. Unless federal courts possess the power to decide some issues of state law, their federal question jurisdiction would be limited to those few cases involved solely with federal issues. Such a rule would unduly restrict the availability of a federal forum for parties with federal claims.

Professor Matasar convincingly advocates the treatment of both pendent and ancillary jurisdiction as elements of one doctrine which he terms "supplemental jurisdiction." He is not alone in this view.[13] He demonstrates that both efficiency and fairness support this added element in federal jurisdiction. Professor Matasar rejects as false the assumption that ancillary jurisdiction is somehow more necessary than pendent jurisdiction. Both doctrines spring from necessity: federal courts must have pendent jurisdiction over state law aspects of federal question cases to function effectively as courts; they must also have ancillary jurisdiction so that all parties have a single forum to resolve their claims. At the same time, both doctrines promote convenience and efficient judicial administration of disputes. Finally, convenience promotes, and is a part of, fairness. Convenient procedural joinder rules supported by supplemental jurisdiction streamline federal litigation and

---

[12] *See* Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the* Gibbs *Test for Supplemental Jurisdiction*, 71 CALIF. L. REV. 1399 (1983).

[13] *See* authorities cited in Matasar, *infra*, note 239. The Supreme Court in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) referred to pendent and ancillary jurisdiction as "two species of the same generic problem."

protect parties who may find state courts employing rules of preclusion to aspects of their claims which they were unable to litigate in federal court.

Professor Matasar goes on to analyze and criticize the search by federal courts for congressionally imposed limits to pendent and ancillary jurisdiction. He criticizes the courts for focusing exclusively on convenience and efficiency as bases for supplemental jurisdiction. Their approach fails to acknowledge congressional desire to give litigants a free choice of a federal forum; it leaves out fairness. Courts consider fairness when exercising their discretion to entertain pendent and ancillary claims, but discretionary standards are not applied with consistency.

These two fine articles illustrate how thoughtful approaches can resolve seemingly persistent problems in civil procedure and reconcile the policy considerations underlying procedure as a system of dispute resolution. Both Professors Greenbaum and Matasar guide us expertly through the analysis of their issues — whether they be preclusive effects of mooted judgments or supplemental federal subject matter jurisdiction. Yet both authors recognize that their guidance goes only so far. Ultimately, the system's decisionmakers, lawyers and judges must apply these principles to cases at hand. In the end, it is they who ensure the efficiency and fairness of the system.