Sequential Progression of Dispute Resolution in Federal Courts

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Alexandra D. Lahav, *Procedural Design* (2017), available at SSRN.

An elegant logic seems to animate the intricate mechanics of civil procedure. To determine whether a requested remedy is appropriate, courts must identify the scope of a dispute, consider whether the law provides a potential basis for judicial action, resolve factual disagreements, apply the law to the facts, and reexamine that application when necessary. These abstract requirements manifest as an ostensibly sequential process of pleading, discovery, trial, and appeal, interspersed with dispositive motions.

In theory, each sequential stage of litigation incorporates data developed in prior stages, enabling courts to make progressively more informed decisions. Although a stage analyzed in isolation may appear to involve disjointed maneuvering, a broader choreography unites and structures all stages of a civil action. But what happens if the choreography unravels, jumbling the order of adjudication?

Alexandra Lahav's new article, *Procedural Design*, challenges tidy sequential accounts of civil adjudication. The article builds from an empirical observation to a normative conclusion. Empirically, Lahav observes that civil litigation in federal courts does not follow the "textbook" sequential progression that commentators often assume. Instead, "a federal lawsuit may proceed in almost *any* order" (emphasis in original). She then contends that this departure from presumed ideals requires rulemakers to articulate guiding principles for the progression of adjudication. The article suggests three normative approaches, although one need not agree with Lahav's typology of cures to accept her diagnosis.

The article's empirical claim rests on analysis of five "doctrines of disintegration" that erode the customary sequence of litigation. Three of these doctrines entail consideration of facts prior to discovery. For example, motions to dismiss for failure to state a claim invite speculation about the plausibility of factual allegations and in complex cases can address factually detailed *Lone Pine* filings. Likewise, class certification motions can lead to "a full blown trial at the commencement of litigation" on an incomplete yet functionally dispositive record. Even summary judgment motions, which seem to require significant fact development, are now often used to avoid discovery rather than as the culmination of discovery. The remaining two "disintegration" doctrines involve shifting legal inquiries away from the starting and ending points of a suit. Appeals are frequently available in the middle of a case rather than at the end, while inquiries into justiciability and jurisdiction can occur throughout a case rather than only at the beginning.

A theme unifying Lahav's examples is that the role of individual procedural devices evolves over time while the underlying systemic design remains static. Doctrinal evolution has many causes, including revised theories about the desirability of competing ends and the feasibility of proffered means. Procedures that seem misguided or wasteful in one era can appear prudent and efficient in another. Indeed, a recurring catalyst for change is a perception that prior procedures excessively accommodated weak claims or disfavored claimants. This perception raised the bar for pleading and class certification and lowered the bar for summary judgment and interlocutory appellate review.

Whatever the reason for doctrinal evolution, modern usage eventually diverges so far from what was originally expected that a rule no longer fits comfortably within the space for which it was designed. As more time passes, the accumulation of changes across multiple rules increases the system's drift from its original assumptions. No innovation is revolutionary on its own, but the aggregation of several innovations can challenge assumptions about the proper sequence of litigation.

Lahav contends that this “organized decay”—an evocative quote from Emily Dickinson—has gradually undermined procedural coherence for the past forty years. The consequences are pervasive because the transsubstantive aspiration of federal procedure enables new ideas to propagate across substantive boundaries. For example, there is a short road between holding that complex antitrust cases require relatively precise pleadings and extending the new rule to all civil actions. The consequences of travelling down that road might not be apparent to judges focused on immediate rather than systemic concerns. As Lahav notes, courts often implement “piecemeal reactions to the problems posed by the individual case” without “think[ing] about procedural design holistically.”

Lahav concludes by considering how a holistic approach to procedural design might address questions about sequencing. To test competing options, Lahav posits that a sound procedural regime must promote four goals: a “meaningful hearing,” “a fair chance of reaching the correct result,” “speed,” and making costs predictable while balancing costs against competing objectives. She then identifies three distinct approaches to sequencing and assesses each in light of the goals above.

First, rulemakers might attempt to restore the “textbook” order in which motions “are calibrated to the information available at the stage of the litigation in which they are brought.” This approach has both the benefits and costs of formality. The pretrial, trial, and appellate stages would coalesce in a way that is logically coherent and easily administered, yet potentially stifling and wasteful.

Second, at the opposite extreme, rulemakers could authorize “bespoke procedures.” Judges would tailor the sequence of motions to the perceived needs of a case without any effort to enforce a prescribed order. This system’s flexibility might be productive in some circumstances, but discretion could easily lead to uninformed, arbitrary, or inefficient decsionmaking.

Third, rulemakers could jettison transsubstantivity in favor of “subject specific procedure.” Just as common law courts in England applied distinct procedures to different writs, federal courts might develop unique procedures for different claims. Sequencing would vary depending on the type of claim being considered, but each sequence would be fixed (at least relative to the bespoke option). This hybrid of the textbook and bespoke approaches risks sharing the flaws of each: it may be both too flexible and too rigid. In addition, the administrative costs of creating and implementing myriad sets of rules—including concurrently in cases with multiple claims—might outweigh the marginal benefit of customization.

Lahav acknowledges that all three potential regimes in her typology have flaws. Her goal is not to identify an optimal approach to sequencing procedures, but to provide a framework for further study. She reveals a trend, raises concerns about its consequences, identifies categories of responses, articulates norms by which to test those responses, and provides a preliminary assessment of competing options.

The article raises numerous fascinating questions for scholars to consider. I will highlight three. First, to what extent have adventurous exercises in resequencing significantly altered outcomes in a material number of cases? The article focuses on identifying the theoretical implications of doctrinal changes and provides specific examples, but the practical scope of the problem is difficult to quantify. Second, did the “textbook” description of procedure describe an order that rulemakers never fully embraced? Concise textbook summaries of a complex procedural system inevitably gloss over nuances. Perhaps the conventional account of sequencing was always neater than the reality on the ground, such that modern departures are more incremental than they may seem. Third, is the problem that courts are departing from established norms, or that they are doing so in an ad hoc manner? The FRCP’s framers deliberately designed the rules to be pliant and entrusted them to a common law method of elaboration. The problems that Lahav identifies may be foreseeable consequences of how federal procedure develops, or a reason to rethink the rulemaking process.

Lahav’s rigorous and thoughtful article will be a rich source of insight for scholars addressing these and other questions about the design and implementation of procedural rules.

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