

Substance, Procedure, and the Interdependence of Gatekeeping Standards Across Multiple Stages of Litigation

Author : Allan Erbsen

Date : November 20, 2013

Louis Kaplow, [Multistage Adjudication](#), 126 *Harv. L. Rev.* 1179 (2013).

Legal reasoning is often a reductive enterprise that enables lawyers to address a difficult question by posing a series of constitutive questions. Dissecting vexing problems into more manageable components fosters analytical precision. But precision comes with a risk of overlooking connections between seemingly discrete issues. Each isolated inquiry may develop a life of its own that obscures their collective interdependence.

This phenomenon of distorting problems by isolating them is evident in the legal academy's approach to the study of procedure and the judiciary's approach to resolving disputes. Law schools generally do not offer courses in "procedure," focusing instead on subsidiary fields such as criminal procedure, administrative procedure, and civil procedure. Within each field, coverage further dissolves into distinct topics. Students may occasionally explore "civil procedure" in the abstract, but more often will study narrower subjects such as pleading, discovery, and summary judgment. Scholarship often mirrors these divisions, coalescing into distinct literatures analyzing discrete aspects of litigation. Judicial opinions likewise rarely consider procedure as an undifferentiated whole. Instead, decisions address motions tailored to particular phases of litigation.

The urge to simplify complex problems—such as how to manage adjudication—by dividing, categorizing, and rearranging their components is understandable and often unavoidable, but creates a risk of essentialism. If pleading and summary judgment are distinct topics in casebooks, law review articles, and judicial opinions, one can be lulled into believing that they are completely distinct concepts. Likewise, if civil procedure and administrative procedure are separate courses, and if both are separate from torts and contracts, one might assume that the values and aspirations animating each subject do not overlap. Lawyers may conclude that procedural problems are fundamentally different than substantive problems and that evaluating the sufficiency of a pleading presents fundamentally different issues than evaluating a motion for summary judgment.

Commentators have long recognized and attempted to combat the allure of essentialism in efforts to structure legal analysis of complex questions. Louis Kaplow's article *Multistage Adjudication* is a fascinating addition to that literature and a welcome contribution to discourse about the optimal form and function of rules governing adjudication.

Kaplow contends that standards used to winnow claims as adjudication progresses through multiple stages must recognize the interdependence of each stage and the overlapping goals of substantive and procedural rules. Rulemakers should not rely on traditional doctrinal boundaries, but must instead rethink the path of adjudication from beginning to end with an eye toward the substantive ideals that procedures implement. The article considers several types of formal and informal adjudication in widely varying settings, ranging from civil and criminal litigation in courts, to investigations by law enforcement agencies and regulators, to administrative review of licensing applications and proposed mergers. From Kaplow's perspective, the objectives and features of adjudication transcend doctrinal categories and institutional contexts that typically limit comparative analysis. This insight is itself a helpful reminder that common themes permeate distinct forms of adjudicatory procedure. But I will focus here on civil litigation, to which Kaplow devotes his most sustained and detailed scrutiny.

The article defends and builds on three central premises. First, civil cases on a path to final judgment must transit multiple gateways where judges have discretion to either terminate the case or allow it to continue. For example,

judges can grant or deny a motion to dismiss, for summary judgment, or for judgment as a matter of law. Second, termination/continuation decisions occur under conditions of uncertainty, but judges acquire progressively more information as a case advances through successive gateways. Third, the existence of uncertainty requires judges at each gateway to balance competing risks linked to the social costs of erroneous decisions. Premature termination of strong claims undermines the deterrent force of substantive laws by signaling that an obligation or entitlement may be difficult to enforce. But allowing weak claims to continue imposes needless litigation costs. Misplaced costs in turn chill protected conduct by signaling that legal immunities may be ineffective, leading prospective defendants to mitigate exposure to meritless claims by modifying their behavior.

These foundational observations draw from existing scholarship, but Kaplow blends them into two original contributions that entail rethinking the relationship between ostensibly distinct types of rules. He defends his conclusions in great detail with many subtle nuances and caveats. The simplified account in this review focuses on his basic argument.

Kaplow first concludes that standards governing termination/continuation decisions at each gateway should be interdependent. This interdependence arises because the marginal effect on deterrence or chilling that is appropriate at any given gateway is a function of how much deterrence and chilling occurs at the others. From an *ex ante* perspective, actors considering the probability of being correctly sanctioned or improperly subjected to prolonged litigation must consider the aggregate affect of screening standards at all gateways. Standards governing each gateway must account for the others to ensure that the aggregate effect is optimal. Likewise, the value of producing additional information by allowing a case to continue in part depends on how later stages will assess that information. The decision to allow a case to continue (e.g., by denying a motion to dismiss) might hinge on predictions about what will happen at the next stage (e.g., discovery) and how events at that stage will influence application of later screening standards (e.g., summary judgment). These interdependencies suggest that a rulemaker choosing between a relatively strict or lenient standard for termination/continuation decisions cannot focus solely on the supposedly essential characteristics of a particular litigation stage. Instead, whether a screening rule should be strict or lenient depends in part on the strictness or leniency of prior and subsequent screening rules.

A second conclusion is that termination/continuation standards elide categorization as either substantive or procedural. At each gateway, a court's analysis of how screening standards affect deterrence and chilling will depend on the content of claims and defenses. Relevant factors include the difficulty of proving various kinds of claims and the importance of preventing or protecting various types of conduct. A screening rule therefore might seem to be transsubstantive because it applies in all civil cases, yet may include factors that lead to varying outcomes in different contexts. Standards for assessing these factors have both substantive and procedural characteristics because they influence *ex ante* behavior while managing adjudication. Likewise, screening standards that overtly retreat from pure transsubstantivity by emphasizing context-specific factors—such as the heightened pleading requirement in the Private Securities Litigation Reform Act—can be conceptualized as creating substance-sensitive procedural law or process-sensitive substantive law. Either way, distinctions that Kaplow treats as “semantic[]” should not distract from the underlying problem, which is the difficulty of crafting screening standards that optimally balance deterrence, adjudication costs, and chilling.

Kaplow is candid about the limits of his analysis. His goals are “clarifying thought, expanding perspective, and raising alternatives rather than establishing correct legal interpretations or advocating particular reforms.” The ambitious scope of his project leads him to rely on simplifying assumptions. The ensuing crisp formulas abstract away the practical challenges of drafting broadly applicable rules and applying them to the messy and uncertain facts of individual disputes. Moreover, Kaplow's assumption that substantive and procedural law share a single goal of maximizing social welfare leads him to omit other potentially relevant goals, including promoting values addressed in the literature on “procedural justice.” (The word “justice” is notably missing from the 120-page article.) These additional values might be important in their own right, or as new factors in a social welfare calculus that Kaplow limits to only three variables: deterrence, chilling, and adjudication costs. Rulemakers might therefore agree with Kaplow's conclusions that gatekeeping standards should consider substantive and procedural factors and should be interdependent, yet question whether his criteria for optimizing those standards are complete.

Limits aside, Kaplow's analysis is pathbreaking. Discourse about gatekeeping often bogs down in the perceived idiosyncrasies of distinct litigation stages. Kaplow shows that the relevant context is the act of gatekeeping itself and that many of the relevant inquiries transcend traditional doctrinal categories. His nuanced account of how rulemakers should define and implement these inquiries invites rethinking of hotly contested questions such as how to assess the sufficiency of a pleading, when to allow discovery, and whether to grant summary judgment. The article is thus an innovative catalyst for multiple literatures.

Cite as: Allan Erbsen, *Substance, Procedure, and the Interdependence of Gatekeeping Standards Across Multiple Stages of Litigation*, JOTWELL (November 20, 2013) (reviewing Louis Kaplow, *Multistage Adjudication*, 126 **Harv. L. Rev.** 1179 (2013)), <https://courtslaw.jotwell.com/substance-procedure-and-the-interdependence-of-gatekeeping-standards-across-multiple-stages-of-litigation/>.