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COMMENTARY

REHNQUIST OR RORTY?

*Carl Tobias**

It's obvious why the United States Supreme Court cannot be bothered with procedural minutiae, such as properly cross-referencing Federal Rule of Civil Procedure 4(j) in its proposal to revise Rule 15(c)(3).¹ The Court has been entirely too busy of late dismantling, through procedural means, the substantive statutory edifice, characterized as "social legislation," that Congress carefully constructed in the 1960s and 1970s.² The Court has narrowly applied procedural requirements across a broad spectrum. This encompasses the Federal Rules of Civil Procedure, substantive measures' procedural provisions that govern, for instance, intervention and proof burdens, and procedural prescriptions, principally in Title 28 of the United States Code. Illustrative are numerous opinions of the Supreme Court's 1988 Term,

* Professor of Law, University of Montana. Thanks to Peggy Sanner for valuable suggestions, to Cecelia Palmer and Charlotte Wilmerton for processing this piece, and to the Harris Trust for generous, continuing support. Errors of substance or procedure are mine.

1. This is a postmodern response to Gene Shreve, *Eighteen Feet of Clay: Thoughts on Phantom Rule 4(m)*, 67 IND. L.J. 85 (1991).

2. See, e.g., Consumer Product Safety Act, 15 U.S.C. §§ 2051-83 (1982); National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331-34 (1982). See William Lilley III & James C. Miller III, *The New "Social Regulation,"* 47 PUB. INTEREST 49 (Spring 1977) (social legislation). See generally Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 284-85 (1989) [hereinafter Tobias, *Public Law Litigation*]. Examples of opinions that procedurally dismantle are *Lorance v. AT&T, Inc.*, 490 U.S. 900 (1989), and *Marek v. Chesny*, 473 U.S. 1 (1985). See generally Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933 (1991) [hereinafter Tobias, *Discretion*]; Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223, 229-30 (1991) [hereinafter Tobias, *Certification*].

in which the Court interpreted various procedural provisions in ways that disadvantaged the intended beneficiaries of social legislation.³

If the Court's preoccupation seems an implausible explanation, consider its recent activities from a different perspective. Perhaps phantom Rule 4(m) was the Supreme Court's first foray into postmodern absurdity. After all, the Court's allusion to phantom Rule 4(m) is arguably no more absurd than many of its recent opinions. Take, for instance, the decisions of the Court that have read out of civil rights legislation, clearly meant to remedy discrimination, any congressional intent that the judiciary facilitate discrimination victims' vindication of fundamental civil rights.

Another example is the Court's insistence that Congress legislate with careful, all-encompassing attention to detail and clairvoyant foresight into every contingency.⁴ The absurdity of imposing these unattainable standards is illustrated by the Court's own inability to accomplish even the ministerial task of affixing correct letters to the rule revisions that it proposes. Perhaps Justice Scalia has been reading his Derrida after all,⁵ although he apparently has not been reading his Oliver Wendell Holmes, who said:

A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind The major premise of the conclusion expressed in a statute . . . may not be set out in terms but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it,

3. See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). See generally Theodore Blumoff & Harold Lewis, *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990); Carl Tobias, *Civil Rights Procedural Problems* 3-4, 6-9 (1991) (unpublished manuscript, on file with the author).

4. For example, Justice Scalia has been the foremost proponent of a new "plain meaning" rule, which he applies to demand that Congress legislate with blinding clarity and minute specificity. See, e.g., *Sable Communications v. FCC*, 492 U.S. 115, 133 (1989) (Scalia, J., concurring); *Blanchard v. Bergeron*, 489 U.S. 87, 97 (1989) (Scalia, J., concurring). Compare Justice Scalia's dissent in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476, 2487 (1991), with the majority opinion in *Mortier*. See generally Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.

5. "The Justices have not been reading their Derrida. Indeed, despite the lengthy importunings of legions of law professors, the Justices have been neglecting to read not only Derrida, but Foucault, Gadamer, Rorty, and Heidegger as well." Schauer, *supra* note 4, at 231.

and therefore we shall go on as before.⁶

Justice Scalia also seems to have disregarded a related Holmesian admonition regarding "concessions to the shortness of life."⁷

But why should observers take seriously any of the tasks, particularly statutory interpretation and rule revision, that the modern Supreme Court undertakes? It could be contended that the Court does not take very seriously its major task of construing congressional enactments and discerning congressional intent, as the Justices go about undermining two decades of substantive legislation.

It might also be argued that Congress does not take seriously its responsibility to monitor judicial application of the mandates in statutes that it has enacted. Congress has been too preoccupied with minor problems, such as balancing the budget and debating the President's power to conduct hostilities on foreign soil, to address the substantive difficulties that the Court has created, much less to treat its procedural foibles. To be sure, Congress has taken certain corrective action, such as its recent passage of the Civil Rights Act of 1991, which remedied some substantive complications that resulted from the notorious 1988 Term.⁸ Even that statute, however, did not rectify many procedural problems that the Court's ungenerous interpretations have imposed.⁹

Congress' relative inactivity at least has afforded the benefit of leaving essentially intact nearly all of the social legislation that it had enacted during the 1960s and 1970s. But apparently oblivious to the potential implications of its actions, Congress recently seems to have joined forces with the Supreme Court. Congress, in passing the Civil Justice Reform Act of 1990,¹⁰ could well facilitate the additional erosion by the judiciary of litigants' vindication of the very rights that earlier Congresses had clearly intended to promote in enacting social legislation.¹¹

6. *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.).

7. *See Reeve v. Dennett*, 11 N.E. 938, 943-44 (Mass. 1887).

8. Pub. L. No. 102-166, 105 Stat. 1071. *See generally* Tobias, *supra* note 3.

9. *Marek v. Chesny*, 473 U.S. 1 (1985), typifies this ungenerous construction. *See infra* note 14. *See generally* Tobias, *supra* note 3.

10. Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (1990)).

11. For example, the Civil Justice Reform Act specifically authorized federal judges to employ certain practices, such as assertive case management and summary jury trials, that have considerable potential for abuse when used against litigants, such as civil rights plaintiffs, who have limited resources. *See* 28 U.S.C. § 473(a) (1990). *See generally* Tobias, *Discretion*, *supra* note 2, at 942-43. Cases that illustrate this potential for abuse are *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985); *Lockhart v. Patel*, 115 F.R.D. 44, 45-46 (E.D. Ky.

Finally, neither the Supreme Court nor the Congress, in discharging inter-branch, cooperative responsibilities to revise the civil rules under the Rules Enabling Act, has evinced great solicitude for certain litigants, such as civil rights plaintiffs, whom Congress meant to vindicate these rights.¹² Indeed, each branch exhibited a distinct lack of concern for those parties in adopting the 1983 amendment to Rule 11, which covers sanctions.¹³ A similar error was only narrowly averted with the defeat of later attempts to change Rule 68, governing settlement offers.¹⁴

So much for all of this pedestrian, doctrinal stuff, even if it involves the deficiencies of two of the preeminent institutions that purportedly make the United States the greatest democracy in the world. On to what is truly significant—legal scholarship.

Professor Shreve's postmodern plaint is intriguing. After all, he was one of the first legal scholars to train the insights of jurisprudence on civil procedure.¹⁵ Not content to rest on his laurels as a prescient proceduralist, Shreve now challenges readers to consider

1987).

12. See 28 U.S.C. §§ 2071-74 (1989) (Rules Enabling Act). See generally Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Linda Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991). See Tobias, *Public Law Litigation*, *supra* note 2, at 339 (neither evinced great solicitude). See generally Tobias, *Discretion*, *supra* note 2, at 961.

13. Rule 11 apparently has disadvantaged civil rights plaintiffs more than any other federal court litigants. See Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1991); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988-89) [hereinafter Tobias, *Civil Rights*]; see also Georgene Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988). See generally Stephen Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989). The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recently issued a preliminary draft of a proposal to amend Rule 11, which may ameliorate its adverse effects on these plaintiffs. See Preliminary Draft of Proposal to Amend Federal Rule of Civil Procedure 11, 137 F.R.D. 53, 74 (1991). See generally Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. No. 4 (Mar. 1992).

14. See Stephen Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 424 (1986); Tobias, *Public Law Litigation*, *supra* note 2, at 310-13. *Marek*, 473 U.S. 1, apparently has had effects—such as depleting the pool of civil rights lawyers willing to assume the risk of not recovering attorneys' fees when they pursue civil rights cases—similar to those that the aborted rule revision efforts could have had. See generally Laura Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. L. & SOC. CHANGE 575 (1986); Tobias, *supra* note 3, at 4-5.

15. See Gene Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 NW. U. L. REV. 894, 894-95 (1980); see also GEOFFREY HAZARD JR., RESEARCH IN CIVIL PROCEDURE (1963); Shreve, *supra* note 1, at 90 n.28 and accompanying text. See generally Linda Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 OHIO ST. L.J. 803 (1989).

whither procedure scholarship. The issues that he raises are compelling and defy easy resolution.

As one who may have dwelt too long in the nether regions by pursuing doctrinal procedure scholarship¹⁶ (and by writing west of the Hudson), I could be the wrong person to address these issues. I am, however, contemplating several courses of action, which proceduralists and other legal scholars might or might not find responsive.

I may continue attempting to persuade federal judges of the errors of their ways, although thus far the judiciary has displayed nearly total disinterest in everything I have suggested. I could take the recent advice of a former colleague. This person urged that I simply add a "jurisprudential twist" to my work, a technique that he may have employed with resounding success by placing two pieces in elite journals.¹⁷ Perhaps I will follow the example of another former colleague who has written jurisprudential theory with the most recidite. That individual, who last year authored his first doctrinal piece ever, recently signed a contract with a major law publisher to write a treatise.

I may also take the advice of Gordon Liddy, that pre-modern prankster, who recommended making a virtue out of a necessity. Liddy followed his own suggestion, capitalizing on Watergate notoriety to command substantial fees for lecturing on the campus speaking circuit. Perhaps I shall just look on the bright side of things: postmodernism has liberated legal scholars, enabling us to write almost anything, even pieces that are fun. Our work can now be about Posner or Picasso,¹⁸ Scalia or Scarlatti,¹⁹ Weinstein or Wittgenstein.²⁰ My next effort could be titled *Procedure and Power*, with apologies to Foucault, or *Procedural Paradigms*, with apologies to Kuhn. We're all postmodernists now.²¹

16. See, e.g., Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415; Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745 (1987); Tobias, *Civil Rights*, *supra* note 13.

17. Did you really think that I would divulge the identity either of the colleague or of the journals?

18. See Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

19. See Sanford Levinson & Jack Balkin, *Law, Music and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

20. See Dennis Patterson, *Good Faith, Lender Liability, and Direct Acceleration: Of Llewellyn, Wittgenstein and the Uniform Commercial Code*, 68 TEX. L. REV. 169 (1989).

21. Cf. Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (we're all realists now). See also N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A*