

# *Preface*

When the last edition went to press, the nation was on a war footing, raising profound questions about whether the principles and practices associated with due process of law are an impediment to security or a condition of liberty. Even as a new administration looks to strike a different balance in foreign and domestic policy between security and liberty, the constitutional and practical questions about bringing due process to life for those who turn to the law to vindicate their rights remain as pressing as ever. Thus in the case that opens the book, traditional principles of due process meet arguments of exigency, national security, and executive authority.

As before, we begin with constitutional due process, not only to frame the principal themes of the course, but to lay a proper foundation for the study of jurisdiction. There is no better place to start because the study of due process invites sustained reflection about the enduring values that define procedural law: the belief in the power of rules to constrain government decision makers and fellow citizens; the commitment to equal access to law; the peculiarly American zest for adversarial exchange; and the belief in meaningful participation in decisions affecting one's substantive legal rights. With this grounding in procedural first principles, we turn to old chestnuts and new developments in each stage of the modern litigation process.

We have extended treatment of the pleading process in the new edition, primarily because the Supreme Court has intervened in new and surprising ways to enhance the power of judges to dispose of cases early in litigation, before either side knows much about the facts. Although the effects of this development remain uncertain—indeed, there is new litigation before the Supreme Court to clarify the scope of changes to the pleading process—the development is of a piece with general trends in the law of procedure evincing judicial skepticism about the kinds of litigants and disputes that belong in court. We live in an era in which full adversary litigation is both more important and more uncommon than ever. We have structured the new material to highlight and provoke reflection on this seeming contradiction.

We also have addressed the much-discussed style changes to the Federal Rules of Civil Procedure. The restyled rules took effect on

December 1, 2006, with the Advisory Committee promising that the amendments were stylistic only. For those of us in practice long enough to have developed a practitioner's sensitivity to the nuances of the old language, the changes have in some respects been jarring, and there is of course concern about whether and to what extent they will produce new interpretations of the rules and bring new consequences. For the new student of procedure, however, the changes can be learned as any rule change is learned—using precedent and principle to give meaning to new language. For that reason, rather than anticipate substantive changes the courts have yet to find, we include a comprehensive Appendix to support side-by-side comparison of the new and old rules.

We also have deepened coverage of cases and readings on Rule 11 sanctions, sanctions in discovery practice, and the increasingly difficult and important issues surrounding the preservation, storage, and disclosure of digital data. Discovery now dominates modern law practice, and the development of digital data, metadata, and new means of storage and recovery, among other technological advances, has complicated nearly all the traditional burdens and opportunities of discovery practice. Finally, we have continued to expand the treatment of emerging doctrines governing the burgeoning transnational litigation attendant on the growth of a global economy.

As with the third edition, increases in the discretion of the trial judge over both litigants and the jury have caused us to retain our coverage of some old favorites, including extended treatment of the 1986 trilogy of summary judgment decisions by the Supreme Court, *Walker v. City of Birmingham* on pre-judgment remedies and contempt, and discussion of the inherent powers doctrine. We canvass recent efforts by Congress and the Supreme Court to clarify the scope of federal jurisdiction, and to charge lower federal courts with the task of managing increasingly complex, multiparty litigation. And throughout the text we have sought to place greater emphasis on empirical studies of the practical consequences of procedural change, as well as the relationship between procedural rules and both ethical and social understandings of the lawyering role.

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Thanks to all for the inspiration.

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