CIVIL PROCEDURE

A MODERN APPROACH

Third Edition

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American Casebook Series®

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Preface

A new edition for the new millennium! In this third edition, we have retained the framework of the second edition, which was well-received by its users. The second edition followed the basic structure of the first edition, with the addition of a new chapter on expanded use of court-annexed dispute resolution techniques.

The third edition includes new materials to reflect the ever-changing face of this subject within the existing framework of the book. Thus, it includes reference to the pending amendments to the discovery provisions of the Federal Rules of Civil Procedure, which should go into effect on December 1 unless Congress takes action to delay or alter them. In addition, it includes a new case on the personal juridisdictional issues presented by interaction over the Internet. It also includes, of course, new Supreme Court decisions on topics previously covered using older cases. All in all, we believe that it provides an entirely up-to-date and comprehensive treatment of the subject.

An enduring reality for civil procedure teachers is the fact that many students perceive this to be the most difficult and least comprehensible course in their first-year curriculum. To a considerable extent, students' difficulty stems from the fact they have not encountered these issues before. Students have usually had some personal experience with the subject matter covered in torts, contracts, and even property courses, and most have some attitudes about criminal law and constitutional law (a subject in the first-year curriculum in many law schools). Few, however, have been personally involved with the intricacies of court rules and procedures. Although issues in substantive law courses relate to "real life" situations, issues of procedure may seem to involve only technical matters that students just beginning the study of law may find difficult to appreciate. For many, developing a taste for procedure has to be a gradual process; the reality that it will become second nature to many when they are in practice is likely to provide cold comfort at the outset.

This book is premised on the belief that a taste for civil procedure is worth cultivating and that students should find the study of civil procedure more challenging and rewarding than they might have expected. These subjects are basic, although unfamiliar. The procedure governing a trial or other dispute resolution process provides the ultimate context for enforcing substantive rights in society, and it is a commonplace that bears repeating that procedure is often critical to the outcome of a case. The initial impression of some law students that civil procedure is a rote-like study of precise rules should give way to an appreciation that procedure, no less than substantive law, is a complex subject that defies a simplistic approach. The perpetual tension between certainty and flexibility

in the law is no less important in matters of procedure, and problems of generality and ambiguity are as inconsistent in procedure as they are in substantive law. Similarly, the impression that procedure does not go to the "heart" of what the law really is needs to be tempered with the realization that procedural rules do indeed reflect fundamental value judgments and social policies. The manner in which society chooses to resolve its disputes, and its notion of what constitutes procedural fairness, bear directly on social choices about the conduct we want to encourage or discourage and on the allocation and distribution of resources.

We have chosen the subtitle "A Modern Approach" not only in recognition of the advent of a new millennium, but also in the belief that this casebook has a focus that puts a distinctive cast on the subject of civil procedure. Recent and ongoing developments have had a significant impact on the way we resolve disputes in this country. It is not so much that the basic procedural rules and mechanisms have been materially altered as that the way they are applied in dispute resolution processes has been affected. To mention only a few of the developments and their impacts on procedure:

• New and often more complex causes of action created by courts and legislatures demand more satisfactory ways to reach a resolution of the dispute;

• New causes of action and our strong societal impulse towards resolving disputes through litigation have resulted in serious court-crowding and delay;

• For a generation, the high cost of legal services has prompted experiments with ways to cut costs and time in lawsuits with alternative dispute resolution methods;

• Broader standards of legal responsibility and liability have enlarged the number of parties in suits and complicated the procedural posture;

• The influence of such disciplines as economics, social science, and psychology has resulted in a more sophisticated approach to procedural issues involving questions of allocation of resources, fundamental fairness, and analysis of competing considerations in dispute resolution.

• Technological developments increasingly offer the possibility of very different methods of presenting evidence at trials and in the form of dispute resolution that could depart markedly from the Anglo-American trial format.

This book attempts to reflect the impact of these kinds of contemporary developments without losing sight of the fact that much of civil procedure still concerns traditional rules and mechanisms and time-honored policies. Modern civil procedure has fortunately not been called upon to reinvent the wheel. In order to understand the contemporary "system" of civil procedure, students must still acquire a sense of its historical development, the traditional interrelationship of procedural devices, and

the proper interaction of doctrine and policy. Thus history, doctrine, and key precedents remain an important part of this casebook.

The book also proceeds on the recognition that students cannot cover or absorb all the ramifications of recent developments in a first-year course. Thus the assumption is that there will be upper division offerings in complex litigation, federal courts, alternate dispute resolution, conflicts of law, and the like to reinforce and build on the teachings of the introductory course.

The book roughly follows the chronological order of a lawsuit—proceeding from the initial complaint and pleadings to appeal and the binding effect of a judgment. The chapters on jurisdiction and the choice between state and federal law (the *Erie* problem) follow the chapters on trial preparation and trial in the belief that students are better able to handle the conceptual complexities of these matters once they have an appreciation of the adjudication process. The first two chapters, however, deviate from the generally-chronological order of presentation, providing an overview of the policies and features of our adversary system (Chapter I) and of the remedies available in civil litigation (Chapter II). These materials introduce the students to the basic policies and process values that recur again and again in the study of procedure and, we hope, provide a touchstone of practicality in introducing students to the remedies that are the "be all and end all" of dispute resolution.

We think this book offers some distinctive approaches that are not as comprehensively treated in other civil procedure casebooks. These include:

• A continuing reexamination of the policies and mechanisms of our American adversary system, including criticisms of the system and the procedural innovations (such as sanctions and early-decision devices) that attempt to remedy the shortcomings;

• A reflection, through choice of cases and descriptive material, of the impact that the development of public law and complex litigation has had on procedure;

• Treatment, both in an introductory chapter on remedies (Chapter II) and in a separate chapter on judicial supervision of pretrial and promotion of settlement (Chapter VII) of the developing processes and techniques of alternative dispute resolution;

• Examination of the new management techniques of trial courts, including the devices (such as docket and trial-preparation trial control, discovery, and use of surrogate judicial personnel) and the strengths and weaknesses of such responses;

• Use of interdisciplinary materials reflecting practices in other countries and various states to introduce the student to alternative ways of dealing with various procedural issues.

We hope that a student will come away from this course with a sense of the process called civil procedure, with an appreciation of both its

strengths and weaknesses and the range of other solutions that are possible in particular solutions. We have put some emphasis on practice materials in the belief that one must be able to work effectively with the Federal Rules of Civil Procedure and the various doctrines to claim a mastery of civil procedure. But we also try to ensure that the practice materials always force the student to think about the policies underlying the practice and to relate it to the general process themes of the book.

Finally, some comments on format: We have tried to make this text accessible to students by editing out unimportant materials and by minimizing the use of asterisks to indicate those omissions. Whenever we have deleted material from a case or other source, we have indicated that omission either by a bracketed summary of the omitted material or by asterisks. Where quoted material includes deletions by the court or other primary source, there is a conventional ellipse rather than asterisks. We have not indicated the deletion of case and source citations, and have made some effort to remove unimportant citations. We have omitted footnotes from cases and source materials unless they seemed to add something of use, and have retained their original numbering for footnotes we have not deleted.

Throughout the book, we have included substantial notes and questions because we believe they shed light on the principal cases and provide important backup information and citations for those who wish to pursue a matter further. The questions we have asked fall basically into three categories: (1) questions that ask the student to ascertain the answer from the applicable rule or statute; (2) questions, often leading questions, that challenge or provide new perspectives on the assertions made in the principal cases; and (3) questions that invite reflection on the underlying process issues we have tried to raise throughout the book. We hope that students will quickly learn to identify the different types of questions and to appreciate the different mental activity called for by them.

We are indebted to many people for their help and guidance during the years we have been working on this book and the previous editions. Most of all, we want to thank our families for their understanding of the demands of the project, and particularly our spouses, Caren Redish, Andrea Saltzman, and Alice Sherman, for their advice, help, and patience. We also want to thank the many research assistants who have helped out on this edition: Justin Heather (Northwestern), Kevin O'Brien (Hastings), Ronald Scalise (Tulane), and Zora Shaw (Northwestern).

Professor Laurens Walker of the University of Virginia Law School collaborated with Professor Sherman on an early version of portions of these materials. His contributions are gratefully acknowledged.

We are also indebted to the copyright holders identified below for permission to reprint excerpts from the following copyrighted materials (listed in the order they appear in the book):

RICHARD MARCUS
MARTIN REDISH
EDWARD SHERMAN

April, 2000

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Table of Cases

The principal cases are in bold type. Cases cited or discussed in the text are roman type. References are to pages. Cases cited in principal cases and within other quoted materials are not included.