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CIVIL PROCEDURE
Theory and Practice

*Second
Edition*

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Civil Procedure: Theory and Practice

Second Edition

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To my father, Alfred Silberman (1914-1996), who made all things possible for me.
I wish he could have seen this book.

— *L. J. S.*

To my father, Victor Stein, whose passion for justice and reverence for the rule of
law drew all his children to follow his path.

— *A. R. S.*

To Samuel Emerson Wolff, born December 22, 2005, with the hope that fairness
and justice will expand and thrive in the world he is entering.

— *T. B. W.*

PREFACE

The first-year course in civil procedure presents a great challenge for both teacher and student. Unlike most of the first-year courses — contracts, torts, and criminal law — with which students have some familiarity, students approach civil procedure with little context. Concepts of jurisdiction and summary judgment seem completely foreign to many students. In addition, civil procedure is the classic “seamless web”; in order to understand any piece, you must understand the whole. Thus, it is imperative for the teacher to find a way to give students a feel for the interrelationship of various pieces of a litigation as each individual unit is examined.

The teacher must also battle potential misconceptions about a course in “procedure.” Students often think that procedure is just about learning a series of mechanical rules against which the important policy disputes of substantive law are played out. Students are surprised to discover that procedure issues also turn on deep and interesting conceptual questions and that arguments about procedure are often the critical turning point in the outcome of litigation.

Procedure is, in fact, one of the best vehicles for developing the full range of reasoning skills and perspectives critical to the discipline of law. In certain areas, such as personal jurisdiction and the *Erie* doctrine, the development of the case law is a paradigmatic exercise in legal process. Students in the course are also introduced to a broad range of legal sources. Aside from reading cases, students grapple with rules, statutes, and constitutional provisions, and must master the interpretive techniques unique to each. Consideration of lawyering strategy is a constant undercurrent. Understanding why the parties have sued in a particular court or framed the complaint in a particular way requires a thorough integration of theory and practice, doctrine and policy.

We appreciate the enormous challenge of putting together a book that can meet all of these objectives. We have produced a book with significant links to the rich tradition of casebooks that precede it, but with a modern pedagogy and distinctive focus. In particular, we have tried to provide a direct and clear treatment of fundamental principles. For each topic, we provide introductory material that the students and teacher can use as a starting point, and from there we explore more difficult issues through the cases and questions. We rarely ask a question without providing at least the beginning of an answer. We eschew the traditional approach of providing a principal case for every important issue. Instead, we make extensive use of notes and questions to provide wide coverage and depth. Much of this material is self-explanatory and does not always require class time to review. Each principal case has been selected because it provides a rich teaching opportunity. Cases are carefully framed to give students a sense of where each case fits in and why it has been assigned. We make explicit the relationship of a principal case to the other cases that precede and follow it.

A substantial amount of the material is presented outside of the case method altogether. Chapters 1 and 5 are designed around actual litigation documents. Global and policy perspectives are explored throughout the book. Unlike some

approaches that merely expose the students to these sources by way of supplement or example, these materials are integrated into the structure of the book.

We begin in Chapter 1 with an overview of the entire litigation process. This approach enables the student at the outset to see how various pieces of the puzzle fit together and to gain an introduction to relevant terms and concepts. Not only do we provide a detailed summary of the stages of litigation, but we also take the reader through an actual case, illustrated with actual court documents. The case resulted in the landmark Supreme Court ruling on libel, *New York Times v. Sullivan*. It is, we think, a particularly engaging and self-explanatory introduction to how procedure works on the ground. We also provide an exercise in “Reading a Civil Procedure Case,” in which we make explicit many of the traditionally unstated assumptions about why and how we read judicial decisions.

From there we move in the first several chapters to the important federalism doctrines that form the core of most procedure courses: personal jurisdiction, subject matter jurisdiction, and the *Erie* doctrine. These beginning chapters not only serve as an important illustration of case law methodology but also allow us to emphasize the strategic choices that lawyers face every day in a federal system. That perspective is also characteristic of the later chapters on preclusion, remedies, and class actions. We consistently address the question of why the law matters to the parties and their lawyers. In addition, we pursue broader questions of policy and expose the students to contrasting state practices and international perspectives.

Perhaps the most innovative chapter of the book is the one on pleading, discovery, and adjudication, in which an actual case forms the centerpiece of the chapter. Each of us, having taught various procedure courses for many years, is familiar with the attempts of many teachers to supplement the casebook with simulations and litigation documents. Our approach integrates these materials into the structure of the chapter. We have combined all of the elements of an adjudication into a single chapter and use a single product liability case as a teaching tool throughout. We provide a succinct but comprehensive presentation of the law and explore how those legal concepts apply to the case at hand. Students have the opportunity to see the actual court documents while they attempt to apply the rules and doctrine. They gain a good sense of how the legal concepts work, and they develop the critical skills of fact management and strategic judgment.

Notwithstanding the depth and sophistication of the material, our adopters have found that the book works well in a wide range of contexts. Many of our adopters have used the book in four- or five-hour, one-semester courses, while others have had the luxury of a full year, six-hour course. The book seems to work equally well in both settings.

NEW TO THE SECOND EDITION

We are delighted to present the second edition of **CIVIL PROCEDURE: THEORY AND PRACTICE** and welcome our new co-author Tobias Wolff, Professor of Law at the University of California at Davis.

This edition incorporates important developments in the law of procedure, includes a new chapter on remedies, and expands our consideration of international and comparative perspectives. The core structure and pedagogical assumptions of the first edition are unchanged.

The most significant change in this edition is our new chapter on the law of remedies and provisional relief, Chapter 6. This chapter gives a rich but concise account of the standards for granting equitable relief. It then examines the different forms of equitable relief that a litigant can seek during a lawsuit — temporary restraining order, preliminary injunction, permanent injunction — and explores the impact that each can have on the litigation process. Finally, it treats the subject of provisional relief — attachment, garnishment — synthesizing the Supreme Court's pronouncements in this field to provide a solid understanding of the practical and constitutional concerns associated with *ex parte* or pre-litigation court orders. For teachers who wish to examine these materials in more depth, the chapter also includes some discrete and easily separable discussions of the major schools of thought on the proper role of equity courts, drawing upon materials from law and economics and from the law of public institutions and the structural injunction.

The timing of this edition has been fortuitous. We have been able to incorporate a number of very recent, significant developments in the law of procedure. In some cases the material in the casebook has been significantly restructured around those developments.

- The personal jurisdiction chapter now includes expanded coverage of the jurisdictional implications of defamation and electronic communications, as well as more in-depth consideration of global and comparative perspectives.
- The subject matter jurisdiction chapter has been significantly reworked to take account of the Supreme Court's decisions in *Grable* and *Allapattah*, as well as new federal statutes affecting jurisdiction in class actions and multistate controversies.
- Chapter 5, Anatomy of a Litigation, now includes significantly expanded coverage of the right to jury trial, and judgments as a matter of law, including new principal cases on these topics. We have also provided a new discussion of discovery in the international context.
- The preclusion chapter incorporates several major developments from the last five years. It includes a new section on the doctrine of judicial estoppel, which the Supreme Court formally recognized for the first time several years ago. For those teachers who cover interjurisdictional

preclusion issues, the chapter also provides a thorough discussion of the *Semtek* case and the preclusive effect to be afforded to the judgments of federal courts sitting in diversity.

- We have made major additions to the sections of Chapter 8 dealing with class actions and complex litigation. We provide a thorough discussion of the Class Action Fairness Act of 2005 and explore some of its likely implications for the future of class action litigation. We have also replaced the *Castano* case with the more recent opinion of the Seventh Circuit in the *Bridgestone/Firestone* litigation, a change that provides the opportunity to explore more recent developments in nationwide class action practice. Chapter 8 also offers a comprehensive treatment of the Multiparty, Multiforum Trial Jurisdiction Act.

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The first edition of this book was in development for more than a decade. Acknowledgment of everyone who contributed to that effort would run longer than the text. Several, however, stand out: Sam Estreicher at New York University; Pamela Karlan at Stanford University; and Tobias Wolff at the University of California at Davis, now a co-author on the second edition. Other colleagues provided invaluable feedback and advice: Steve Burbank, Perry Dane, Roger Dennis, Michael Dorf, Rochelle Dreyfuss, Jay Feinman, Larry Kramer, Leo Levin, Andy Lowenfeld, Burt Neuborne, Jack Sabatino, Beth Stephens, and Bob Williams. We are also grateful for the heroic efforts of scores of research assistants at NYU and Rutgers, without whom the book would not have been completed — in particular: Helena Almeida, Susan Ciallella, Vangie Cooper, Michael Jordan, Llen Oxman, Eric Posmantier, Tracy Siebold, Chris Svoboda, and Terry Wit. Richard Kelsey, secretary, was instrumental in ensuring that the work was converted into a formal manuscript.

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Linda J. Silberman
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April 2006

SPECIAL NOTICE

We have edited cases and articles for the sake of smoother reading. Deleted material is indicated by ellipses, except for deleted footnotes. Footnotes that were not eliminated retain their original numbers; asterisks indicate editors' footnotes.

Civil Procedure: Theory and Practice

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