

MANNING THE COURTHOUSE GATES: PLEADINGS, JURISDICTION, AND THE NATION-STATE

Margaret Y.K. Woo*

ABSTRACT

While civil procedure reforms are often said to be based on concerns of efficiency and economy, This article argues that civil justice reforms are also part of any nation's project of national identity and state building. A robust civil justice system is a statement of national progress and reforms to the system are less a reflection of a "civil justice crisis," and more a result of political bartering and debates about a nation's identity. This can be seen in European countries' recent efforts to coordinate procedural systems even as they are called to define themselves as member states of the European Union. As this article will document, this is similarly true in China and in the United States, where civil procedure reforms have matched critical stages of state building and national expansion. But interestingly, this article concludes that despite the different polity of the two countries, recent changes in civil procedures may be similarly counter-productive to the raison d'être of the procedures sought to be reformed, rather than supportive of their ideals. The effect of these changes, in the case of the United States can be counter-democratic, and in China, counter-harmonious.

* * *

[Legal procedure is a] ritual of extreme social significance. If we can appreciate the meaning of this ritual in the case of our own and even one other community, we obtain a remarkable insight into the fundamental and largely unformulated beliefs accepted by, and acceptable to, these societies; we begin to understand their collective and perhaps contrasted social sense of what is just and fair.¹

© 2015 Margaret Y.K. Woo

* Margaret Y.K. Woo is professor of law at Northeastern University School of Law. She wishes to thank Stephen N. Subrin, Richard Marcus, and Judith Resnik, and the participants of the *Through a Glass Starkly: Civil Procedure Reassessed*⁷ conference held at Northeastern University School of Law, April 12-14, 2014, for their thoughtful comments.

¹ C.J. Hamson, *In Court in Two Countries: Civil Procedure in England and France*, TIMES (London), Nov. 15, 1949, at 5.

INTRODUCTION

It is my great pleasure to write in appreciation of my friend and colleague Steve Subrin. Professor Subrin's scholarly contributions to the field of American civil procedure are substantial and well known. Through his detailed analysis of legal history, he uncovered much about the drafting and the evolution of the federal rules of civil procedure. In focusing on the historical and social derivation of the federal rules, Professor Subrin truly understood what the noted anthropologist Clifford Geertz has observed about law; that is, "law . . . work[s] by the light of local knowledge."² In other words, law is embedded in the culture of place and time. In order to understand law, one must not simply know the rules, but also their derivation, the choices they represent, the policies behind them, and how they actually operate in practice.

But perhaps lesser known is Professor Subrin's comparative and global interest.³ In the years 2000 to 2002, Professor Subrin and I participated in an academic exchange with German and Chinese civil procedure scholars. At the time, Chinese reformers were avidly looking abroad for different models in their efforts to improve China's civil justice system. With the support of the Ford Foundation,⁴ we delivered a series of lectures that explored the pros and cons of the American adversary system and explained the sometimes arcane technicalities of American civil procedure in its social and historical context. Our lectures eventually led to the publication of *Litigating in America: Civil Procedure in Context*,⁵ which was translated into Chinese and published and distributed widely in China. Throughout this project, we attempted to address the "whys" rather than the "hows" of American civil procedure.

This article arises in part from that project and from Professor Subrin's argument that we are now witnessing a fourth era in American civil procedure, an era that is characterized by a loss of both orality and trial.⁶ We need to understand this new era from a comparative and global perspective. What can we learn from the experiences of other systems? Rather than assuming universal

² CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 167 (1983).

³ See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

⁴ Founded by Edsel Ford and Henry Ford in 1936, the Foundation is a globally oriented private foundation with the goal of advancing human welfare. See FORD FOUNDATION, <http://www.fordfoundation.org/> (last visited May, 13, 2015).

⁵ STEPHEN N. SUBRIN & MARGARET Y.K. WOO, *LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT* (2006).

⁶ According to Subrin & Main, there have previously been three eras in American civil procedure: the first era begins with the country's founding; in the middle of the nineteenth century, the introduction of code pleading launched the second era; and the third era commenced in 1938 with the Federal Rules of Civil Procedure. See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014).

answers, can we understand our choices more fully by reference to other systems?⁷

Indeed, from China to the United States, civil procedure reform is the mantra of the day.⁸ Civil justice reforms are attributed to perceived increases in caseload, overburdened judges, and delayed justice. As a whole, tactics to address this “crisis” have focused on efficiency and economy and include such methods as increased case management, encouragement of alternative dispute resolution, and greater pressure on parties to move the case along or face penalties.⁹ So, if there is a fourth era in civil procedure, as Subrin and Thomas Main argue, how has this fourth era been uniquely American and how has each nation responded to this global trend?

While civil procedure reforms are often said to be based on concerns of efficiency and economy, I would argue that civil justice reforms are also part of any nation’s project of national identity and state building. A robust civil justice system is a statement of national progress and reforms to the system are less a reflection of a “civil justice crisis,” and more a result of political bartering¹⁰ and debates about a nation’s identity. This can be seen in European countries’ recent efforts to coordinate procedural systems even as they are called to define themselves as member states of the European Union.¹¹ As this article

⁷ There are a few excellent comparative studies of civil procedure by American legal scholars. See Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT’L & COMP. L. REV. 1 (2011); Richard Marcus, ‘American Exceptionalism’ in *Goals for Civil Litigation*, in GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS 123 (Alan Uzelac ed., 2014); S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue*, 88 NOTRE DAME L. REV. 899 (2012).

⁸ This can be seen in civil procedure reforms in the Netherlands, Austria, Germany, France, England, and China.

⁹ Thus, for example, Lord Justice Woolf was appointed in 1996 to review the rules and procedure of the civil courts in England and Wales with the expressed aim of improving access to justice and lowering the cost of litigation. Lord Justice Woolf’s recommendations resulted in a revision of English civil procedure rules in 1999. See TAMARA GORIELY, RICHARD MOORHEAD & PAMELA ABRAMS, MORE CIVIL JUSTICE? THE IMPACT OF THE WOOLF REFORMS ON PRE-ACTION BEHAVIOUR (2002), available at http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/MoreCivilJustice_R43Report_v1.pdf; see also CIVIL LITIGATION IN CHINA AND EUROPE: ESSAYS ON THE ROLE OF THE JUDGE AND THE PARTIES (C.H. van Rhee & Fu Yulin eds., 2014).

¹⁰ Of course, the historical fact that the rulemaking process is one of political bartering has been documented by Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998) and Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597 (2010). The controversial Class Action Fairness Act of 2005 presents the more recent example of politics and rulemaking. See Stephen B. Burbank, *The Class Action Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

¹¹ The European Union’s efforts to harmonize domestic procedural law for its member states proved to be controversial, as member states remained loyal to its nationalistic features. To date, apart from the fundamental fair process guarantee contained in Article 6 of the Europe-

will document, this is similarly true in China and in the United States where civil procedure reforms have matched critical stages of state building and national expansion.

And so, this article takes a comparative look at how civil procedure reforms have added to the national identity of these two countries—China and the United States. But interestingly, this article concludes that despite the seemingly different polity of the two countries, recent changes in civil procedures may be similarly counter-productive to the *raison d'être* of the procedures sought to be reformed, rather than supportive of their ideals. In both the United States and China, reforms to the sufficiency of the complaint standard and the changing role of judges have resulted in the closing of the courthouse gates. These recent changes have added to greater centralized state authority as judges dispose of cases at an early stage and litigants' voices and disputes are left to be resolved outside the courthouse gates. The effect of these changes, in the case of the United States may be counter-democratic, and in China, counter-harmonious.

I. COURTS AND THE NATION-STATE

As Martin Shapiro so aptly pointed out, courts legitimize governments.¹² They funnel disputes back to the state and in the process validate the state's assertion of power. Consistent with this idea, challenges to court judgments are addressed internally through a hierarchical appeals process, which reaffirms successive applications of state authority. Challenged judgments get reviewed by the state and are processed upwards through the court system. Social discontent is contained within the system and without resort to protesting in the streets.¹³ Even contests to governmental action can be channeled into judicial

an Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union, harmonization of civil procedure rules is rather limited and focused expressly on international cases, leaving purely national cases outside the discussion. See C.H. van Rhee, *Harmonisation of Civil Procedure: An Historical and Comparative Perspective*, in *CIVIL LITIGATION IN A GLOBALISING WORLD* 39 (X.E. Kramer & C.H. van Rhee eds., 2012). Similarly, Japan's 2003 reforms, which focused on reducing delays and increasing participation, resulted in more case management and the introduction of lay jurors to important criminal cases. These reforms also coincided with Japan's economic crisis, and their combined psychological effect on Japanese citizens resulted in the birth of a new nationalism. See Eugene A. Matthews, *Japan's New Nationalism*, *FOREIGN AFF.*, Nov.–Dec. 2003, at 74.

¹² According to Shapiro, it is a reciprocal dependency in which courts derive legitimacy from the political system (rather than from some abstract prototype model of courts) and the political system in turn derives some of its legitimacy from the courts. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 17–18 (1986); see also Strong, *supra* note 7 (examining the effort to develop a Europe-wide approach to collective actions).

¹³ See Charles Epp's argument that the ascendancy of civil rights and liberties has rested on the democratization of access to the courts. CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 5 (1998). In China, the language of rights has lent support to peaceful resistance even as access to courts is often denied. See KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA*, at xiii (2006).

institutions that affirm the legitimacy of the state even as they resolve the dispute.

In the common law world, courts even have the opportunity to interpret and change laws with published judicial opinions that serve as legal authority applicable to the next new set of facts. In the constant reapplication and reinterpretation of law to new facts as brought and argued before the court by private litigants, voices of ordinary citizens are incorporated into the enforcement and application of law. Across the board and top down, social norms are adjusted to a more nuanced populist parameter.

And so, the growth of courts is often synonymous with the assertion and growth of governmental powers. What varies in different legal systems is the extent to which ordinary citizens can shape and control their disputes in court. In other words, in the courthouse, the delicate balance between state authority and private citizens plays out over and over again. Such a balance requires the mediation of civil procedure rules, which distribute power between the trinity of judges, lawyers, and litigants, and the rules vary depending on the particular polity. And jurisdictional rules in delimiting the physical and legal borders of the court call forth even more starkly the tensions between national borders and authority, as well as national and state borders and authorities.

A. *Courts and U.S. Federalization*

Thus, in critical periods of U.S. federalization and national state building, the jurisdiction of U.S. federal courts has expanded to empower the courts. This meant the expansion of U.S. federal courts domestically as well as internationally. As documented by many of the scholars here, the twentieth century saw the global growth of federal courts both jurisprudentially as well as physically in the assertion of U.S. legality. This was done through both enlarging subject matter jurisdiction to empower federal judicial authority over a panoply of subject matter disputes and easing personal jurisdiction requirements to empower judicial authority over defendants based on “minimum contacts” with the forum state.

As has been so carefully documented by Judith Resnik, such expansions occurred after the critical nation-building periods of the Civil War, the New Deal, and the civil rights era of the 1960s.¹⁴ Thus, for example, in the 1860s and 1870s after the divisive Civil War, the U.S. Congress deployed the federal courts as an instrument of central control over state authorities by authorizing the federal judiciary to hear cases that included civil rights, habeas corpus, and other claims arising under general “federal question” jurisdiction.¹⁵ As pointed

¹⁴ See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934 (2000) (“[T]he beginnings of the twentieth century brought widespread interest in professionalization, nationalization, and reorganization.”).

¹⁵ Indeed, the fear of the federal courts by Anti-Federalists was such that the original “federal question” jurisdiction was not granted until 1875 and it was passed only as “sneak” legis-

out by Frankfurter and Landis, while Congress had extended the removal jurisdiction of the inferior federal courts whenever sectional opposition to national policy was reflected by the state judiciary, it was the nationalism produced post-civil war that set the stage for the passage of an Act which can be regarded as the “culmination of a movement . . . to strengthen the Federal Government against the states.”¹⁶

The growth of the federal judiciary’s docket continued on through the New Deal as Congress used the federal courts to craft and implement national agendas in response to the economic crisis posed by the Great Depression.¹⁷ This was again true after the height of the civil rights movement when race relations threatened to divide the country. Street protests were funneled to the courts and since 1974, 474 jurisdictional grants expanded the workload and jurisdiction of the federal courts.¹⁸

Similarly, the expansion of personal jurisdiction moved U.S. courts’ “long arm” reach over out-of-state defendants from a physical presence requirement solely to one that includes “minimum contacts.”¹⁹ This has essentially allowed American courts to extend their jurisdictional reach over defendants as long as the defendant’s conduct giving rise to the controversy can be said to be “directed” at the forum state.²⁰ This “minimum contacts” standard, along with the “tag jurisdiction” of physical presence,²¹ allows U.S. courts to assert unusual power over out-of-state defendants when such contacts would not typically serve as the basis of jurisdiction for courts in other countries. This “minimum contacts” requirement marks the U.S. courts as uniquely expansive in the world for the assertion of personal jurisdiction over defendants.²²

Even recent efforts to harmonize civil procedure have not brought the United States in step with the rest of the world. The latest ALI/UNIDROIT Principles on Transnational Civil Procedure, drafted by the American Law In-

lation as it was in the form of a bill to amend the removal statute. James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942). It was with such casualness that the federal courts ceased to be limited to diversity jurisdiction to become “primary and powerful reliances for vindicating every right given by the Constitution, the laws and treaties of the United States.” *Id.* at 643 (quoting FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1927)).

¹⁶ *Id.* at 645 (quoting FRANKFURTER & LANDIS, *supra* note 15, at 65 n.34).

¹⁷ See Resnik, *supra* note 14, at 958.

¹⁸ *Id.* at 956 (citing Administrative Office of the U.S. Courts, Revision of List of Statutes Enlarging Federal Court Workload (Sept. 18, 1998) (memorandum) (on file with the Harvard Law School Library)).

¹⁹ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny cases studied in every American civil procedure class.

²⁰ See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 103 (1987).

²¹ See *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990).

²² Thus, for example, one of the fundamental principles of personal jurisdiction in the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters is the use of domiciliary nexus as the basis for assertion of jurisdiction. See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 128 (1992).

stitute, rejected the expansive personal jurisdiction approach of the U.S. courts and adopted instead a requirement of “substantial contact” between the forum state and the party and/or the transaction or occurrence in dispute.²³ Substantial connection was further defined to be where a substantial part of the event giving rise to the dispute occurred and/or where an individual defendant habitually resides, or where a jural defendant has received its charter of organization or has its principal place of business.²⁴ These ALI/UNIDROIT Principles follow the rule of most other nations that required “substantial” contacts in a particular jurisdiction before the assertion of that court’s jurisdiction.²⁵ For example, for cases before the European Court of Justice, personal jurisdiction over defendants is based on domicile, or in a contract case, the place of performance; and in tort, the place where the harmful event occurred or may occur.²⁶ Indeed, it is only in recent years that the U.S. Supreme Court has issued decisions that rein in and clarify the potentially expansive scope of personal jurisdiction, bringing it slightly more in line with the rest of the world.²⁷

Perhaps less known than the growth of jurisdiction is the physical establishment of courts abroad by the United States during periods of globalization and colonization. For example, around the turn of the century, the United States established in China the United States Court for China.²⁸ Physically located in

²³ See ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 2.1.2 (2004), available at <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf>.

²⁴ See *id.* The American Law Institute, a prestigious organization of elected scholars, lawyers, and judges, sponsors the drafting of model codes that governments of different countries might wish to adopt. More recently they have engaged scholars to draft model procedural rules for international disputes, primarily meant to apply to “business disputes” and not tort actions.

²⁵ The Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters laid down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in all European Union countries. Council Regulation 44/2001, 2000 O.J. (L 12) (EC), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001R0044>.

²⁶ *Id.* arts. 2, 5, 10.

²⁷ See, e.g., *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). In these decisions, the U.S. Supreme Court rejected broad applications by state courts of the “stream of commerce” theory of personal jurisdiction, which would subject manufacturers of goods to jurisdiction in any state where their goods are used or purchased.

²⁸ While not an Article III court, the U.S. Court for China had every appearance of any other federal court. Up until two days before its establishment, the court was referred to as the “U.S. District Court for China,” and the U.S. Court of Appeals referred to the jurisdiction of the U.S. Court for China as the “District of China.” For excellent studies of the U.S. Court for China, see Tahiri V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 *BUFF. L. REV.* 923 (2004) and TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013).

the consular building in Shanghai,²⁹ the U.S. Court for China based U.S. jurisdiction simply on the fact that the defendant in the dispute was an American citizen.³⁰ Direct appeals of this court's decisions went directly to the Ninth Circuit Court of Appeals with further appeals to the U.S. Supreme Court.³¹

Unabashedly, Congress aimed to create in the U.S. Court for China a vehicle for promoting American interests abroad and to cure the corruption that had infested American consular officers in China.³² For thirty-seven years from its creation in 1906, to its dismantlement in 1943, the U.S. Court for China heard a wide variety of cases from debt to contracts to divorce.³³ Its expansive jurisdiction extends to any cases involving U.S. citizens and even U.S. non-citizen nationals who originated from U.S. territories such as the Philippines and Guam.³⁴ Its stated goals were to provide a model of rule of law for the Chinese and to establish law and order for the American population in China. More accurately perhaps, in the words of veteran China lawyer Norman Allman, it was a construction of an "America in China."³⁵

Importantly, balanced against this generous grant of jurisdiction to the federal courts was the redistribution of power to party litigants through liberal pleadings and greater party autonomy as authorized by the Federal Rules of Civil Procedure. As so carefully documented by Professor Steve Subrin, the drafters of the 1938 Federal Rules of Civil Procedure were dominated by such thinkers as Roscoe Pound and Charles Clark whose expressed goals were to lower the barriers to the courthouse, to make filings easier and simpler, and to value equity over the rigidity of common law.³⁶ Their idea was that the parties

²⁹ Act of June 30, 1906, Pub. L. No. 59-403, 34 Stat. 814 (creating a United States Court for China and prescribing the jurisdiction thereof). For an excellent article discussing how the U.S. Court for China negotiated local law, see Lee, *supra* note 28.

³⁰ Act of June 30, 1906 § 4, 34 Stat. at 815.

³¹ *Id.* § 3.

³² See EILEEN P. SCULLY, *BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA 1844-1942*, at 105-06 (2001); see also Lee, *supra* note 28, at 940, 957.

³³ The laws the court applied were a patchwork of federal legislation, common law, and statutes of Alaska and the District of Columbia as well as the municipal guidelines of the International Settlements in China and finally, at times, Chinese law with regards to real property. See Lee, *supra* note 28, at 1020-23, 1028.

³⁴ The Act of June 30, 1906 § 2, 34 Stat. at 815, provided that the jurisdiction of said court shall in all cases be exercised in conformity with treaties and laws of the United States then enforced. Extraterritorial jurisdiction in China was first granted to the United States by the Treaty of Wanghai in 1845 and followed by Treaty of Tientsin in 1860, giving the United States the right to try cases against its citizens in China.

³⁵ NORWOOD F. ALLMAN, *SHANGHAI LAWYER* 83-97 (1943). See generally LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006).

³⁶ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

to a lawsuit must control the litigation and have reasoned participation in it.³⁷ The expansion of federal court authority was thus matched by the ability of private citizens to use the courts.

And so, the concept of a simple “notice” pleading served as the standard for the American complaint and answer since the enactment of the Federal Rules.³⁸ Rule 8’s simple requirement that the pleader make “a short and plain statement of the claim showing that the pleader is entitled to relief” meant that all but the most vexatious and empty complaints got a day in court.³⁹ A complaint needed to do little more than give the defendant notice of the nature of the claim against him or her. On the few occasions when the drafters thought it would help to have more specificity in the pleadings, they so stated, as in Rule 9’s requirement for greater specificity in cases of fraud or mistake.⁴⁰ Otherwise, the “notice” pleading standard allowed all but the most frivolous cases to be filed and heard in court.

The general concept was that a pleading was not the appropriate battleground for ferreting out the details and merits of a case. As noted by Charles Clark, the principal drafter of the federal rules,

I think you will see at once these pleadings follow a general philosophy which is that detail, fine detail, in statement is not required and is in general not very helpful. . . . [I]f any of you feel you need more information to develop your case, if you need more information from your opponent, we have provided for that . . . in the section on Deposition and Discovery.⁴¹

Pleadings should ordinarily not serve as a means of disposing of cases “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴² Rather, it was expected that discovery and other pretrial procedures would flesh out both claims and defenses and identify the disputed facts.⁴³ For Clark, the 1938 Federal Rules were designed to enable judges to forge law in new fields but with the aid of creative lawyers and private citizens who would bring to the courts complex

³⁷ Party-controlled litigation is the foundational characteristic of the adversary system. See SUBRIN & WOO, *supra* note 5, at 22; see also Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34, 45 (Harold J. Berman ed., rev. ed. 1971).

³⁸ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 1201 (3d ed. 2015).

³⁹ FED. R. CIV. P. 8(a)(2).

⁴⁰ For example, Rule 9(b) states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” In other words, with the exception of fraud or mistake and a few other exceptions, the norm under the federal rules is that averments do not have to be stated with particularity. FED. R. CIV. P. 9(b).

⁴¹ SUBRIN & WOO, *supra* note 5, at 103 (first and second alterations in original) (quoting Charles E. Clark, *Comments, Proceeding of the Institute at Washington, D.C. on the Federal Rules of Civil Procedure* 33–44 (American Bar Association 1938)).

⁴² Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

⁴³ *Id.* at 47–48.

cases for resolution.⁴⁴ The preference was to open the courthouse gates and render access to justice easy for ordinary citizens.

In the United States, liberal pleading requirements were maintained because of the belief in a procedural system in which “the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.”⁴⁵ Notice pleading was premised on the philosophy that pleading requirements should act as guides, not barriers, to the court system. Pleadings were not expected to further the development of the case any more than merely giving general notice to the defendant of the nature of the suit against her.⁴⁶

In the United States then, the gatekeeping mechanism to weed out frivolous claims was relegated to a point in time later in the litigation when litigants used discovery to unearth the evidence. Except in the most egregious cases that did not survive a motion to dismiss, a judge’s dispositive role did not enter the picture until both parties had had a chance to pursue their version of events beyond the pleadings phase.⁴⁷ The result was that, in the American system, judges had little presence in the lawsuit until well after litigation had begun. With the emphasis on the pre-trial stages of investigation and discovery, it was the lawyers and clients, and not judges, who controlled the pace and tenor of litigation.

Liberal pleadings balanced the power of private litigants against the broad jurisdiction and powers of federal courts to satisfy democratic concerns about participation and fears of abuse of government authority. Liberal pleading gave private litigants great access to the courts to seek enforcement of legal norms and to rein in unbridled state powers. Broad discovery gave power to the ordinary litigant to shape, develop, and prove his case. It was this combination of broad jurisdictional authority for the courts, liberal pleadings, and broad discovery for litigants that transformed the U.S. federal courts into a site for social norm contentions and federal judges into adjudicators “rendering justice,”⁴⁸ rather than simply gatekeepers. It was also this delicate balance that helped to shape the country’s national identity as a powerful central government within a democratic polity.

⁴⁴ Subrin, *supra* note 36, at 973–74; *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

⁴⁵ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) (citing Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 318–19 (1938)).

⁴⁶ *See Conley*, 355 U.S. at 47–48.

⁴⁷ Estimates of the percentage of cases decided during the pleadings phase in the 1990s ranged from 2 percent to 6 percent of all federal civil cases. For information about the theory of modern pleading, *see* CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 456, 467–68 (5th ed. 1994).

⁴⁸ An example is the work and activism of federal judge Jack Weinstein. *See* JEFFREY B. MORRIS, *LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN* (2011).

B. Courts and the Market Economy in China

A similar (but also contrasting) story may be told of civil procedure and law reforms in post-Mao China. Indeed, law and procedure were featured in every stage of China's transition from a planned to market economy. Civil procedure remains part and parcel of China's state building, containing within each new version provisions that reflect national goals and reforms.

The idea that law and procedure could ensure stability and predictability necessary for a market economy compelled the reinstatement of legal institutions and procedures that were dismantled in China during the decade of the Cultural Revolution.⁴⁹ This first wave of nation-building efforts for the post-Mao regime had the stated goal of opening up to the west and resuscitating its struggling economy. The result was the dramatic growth of the Chinese economy to its present day global dominance.

Western observers, however, had higher hopes for law and, more specifically, equated law and the rule of law with democracy.⁵⁰ Western reformers hoped that a free market economy and predictable legal institutions would lead to a democratization and liberalization of the Party regime.⁵¹ The Chinese state, however, had different goals. Law was instrumental in encouraging economic growth, and economic growth and rising living standards were in turn necessary to sustain the legitimacy of the nation state, which, in China, meant the continuing dominance of the Chinese Communist Party state.⁵²

Indeed, China's approach to development has consistently entailed strong state involvement in "guiding," if not directing, the process. The visible hand of the government and hence, the Chinese Communist Party, has been more important than the invisible hand of the markets. Rejecting the "big bang" approach to market transformation,⁵³ China kept top-down control to initially loosen limited private economic activities to take place in the countryside, then allowed private and foreign enterprises to operate "outside the plan," before

⁴⁹ For a nice summary of the legislation enacted to promote China's market economy, see Donald C. Clarke, *Legislating for a Market Economy in China*, 191 CHINA Q. 567 (2007).

⁵⁰ See, e.g., Larry Diamond, *The Coming Wave*, J. DEMOCRACY, Jan. 2012, at 5, and the work of the other scholars contained in that volume, including Francis Fukuyama and Minxin Pei.

⁵¹ See SAMANTHA F. RAVICH, MARKETIZATION AND DEMOCRACY: EAST ASIAN EXPERIENCES (2000); Larry Diamond, *Why East Asia—Including China—Will Turn Democratic Within a Generation*, ATLANTIC (Jan. 24, 2012), <http://www.theatlantic.com/international/archive/2012/01/a/251824/>. For a contrary prediction, see AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003) and Jonathan Perraton, *Joseph Stiglitz's*, Globalization and Its Discontents, 16 J. INT'L DEV. 897 (2004).

⁵² Minxin Pei, *Is CCP Rule Fragile or Resilient?*, J. DEMOCRACY, Jan. 2012, at 27.

⁵³ The "big bang" approach is generally associated with the transitional experiences of Poland and Russia in which economic reforms were rapidly installed through drastic price decontrol and privatization of state-owned properties. See Jeffrey D. Sachs, *Privatization in Russia: Some Lessons from Eastern Europe*, AM. ECON. REV., May 1992, at 43; see also JEFFREY SACHS, POLAND'S JUMP TO THE MARKET ECONOMY (1993).

tackling the dismantling of state-owned enterprises.⁵⁴ The government used sequenced pressure upon those enterprises to change their operating procedures without initially facing full market exposure, not to mention privatization.⁵⁵ Even today, China's economy, while predominantly organized by markets rather than by central bureaucratic planning, is still subject to substantial state guidance, subsidy, and involvement.⁵⁶ And so, while China has enacted a new Property Law that, for the first time, theoretically protects private property rights,⁵⁷ there remain major realms in which key features of capitalism are missing. Thus, for example, rights to land are still limited to long-term leases for the use of land, rather than full ownership, and global companies in major sectors such as energy and finance remain primarily state owned (controlled).⁵⁸

At every stage, Chinese legal reforms matched steps in the country's economic conditions. Law was used to sustain the market economy; the market economy led to economic prosperity; and economic prosperity bolstered the reigning authoritarian regime.⁵⁹ China can be said to exemplify the new notion of an "Asian development or regulatory state," characterized by a powerful

⁵⁴ For comprehensive readings on China's economic reforms, see BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* (2007); *GROWTH WITHOUT MIRACLES: READINGS ON THE CHINESE ECONOMY IN THE ERA OF REFORM* (Ross Garnaut & Yiping Huang eds., 2001).

⁵⁵ See Thomas G. Rawski, *Implications of China's Reform Experience*, 144 *CHINA Q.* 1150 (1995); Yingyi Qian & Chenggang Xu, *Why China's Economic Reforms Differ: The M-Form Hierarchy and Entry/Expansion of the Non-State Sector*, 1 *ECON. TRANSITION* 135 (1993).

⁵⁶ The Chinese government's continued involvement in its economy has led some to argue against granting China "market economy treatment" at the World Trade Organization. In particular, critics point to state subsidies that lower domestic costs artificially, and domestic prices directed by government agencies and policies, a finding that is supposed to expire fifteen years from the date China joined the WTO. See Matthew Dalton, *Malmstrom: No Automatic Market Economy Status for China in 2016*, *WALL ST. J., REAL TIME BRUSSELS* (Dec. 11, 2014, 11:14 AM), <http://blogs.wsj.com/brussels/2014/12/11/malmstrom-no-automatic-market-economy-status-for-china-in-2016/>.

⁵⁷ Joseph Kahn, *China Approves Law That Protects Private Property*, *N.Y. TIMES* (Mar. 15, 2007), <http://www.nytimes.com/2007/03/16/world/asia/16iht-web-0315china.4927191.html>.

⁵⁸ Land continues to be owned by the state and purchasers trade only in the rights to use the land for a term up to seventy years. What happens to the buildings on the land after seventy years is still unclear. Are the land-use rights automatically renewed/extended for several decades, or must a land transfer fee based on the land prices of the time be paid, or what will happen?

⁵⁹ This source of non-democratic legitimacy can be termed performance legitimacy, meaning that the government's first priority should be the material wellbeing of the people. This idea has long roots in China, and the Chinese Communist Party derives much, if not most, of its legitimacy from its ability to provide for the material welfare of its citizens. Recent studies, however, found that while performance is the strongest element, political trust is becoming more moderate, suggesting the growing importance of political relative to economic performance. Neil M.I. Munro et al., *Does China's Regime Enjoy 'Performance Legitimacy'? An Empirical Analysis Based on Three Surveys from the Past Decade* (Aug. 19, 2013) (unpublished paper presented at Am. Political Sci. Ass'n 2013 Annual Meeting), <http://ssrn.com/abstract=2302982>.

state apparatus directing and overseeing long-term economic planning.⁶⁰ In this sense, China challenges the neoliberal economic prescriptions and the arguable resultant liberal legalism that is favored by the United States and global institutions such as the International Monetary Fund and the World Bank.⁶¹ Despite the successful economic growth and the enactment of numerous formal laws, neither the courts nor the judiciary in China can be said to be autonomous or independent from the party state.

Structurally, today's Chinese legal system is based on a civil law model and the inquisitorial system, borrowed from the German system.⁶² Internally, however, China's courts retain aspects of its centuries-long tradition as a bureaucratic empire bolstered by a modern socialist legality.⁶³ Compared to U.S. courts, Chinese courts have limited authority, and, according to many observers, judges who are more bureaucratic actors (much like a civil servant) within a tightly party-controlled hierarchy than independent adjudicators. This treatment of the judiciary as a bureaucracy rather than as an independent institution is not only consistent with China's socialist dictates but also with its historical tradition of developing a centralized bureaucracy to govern its homogenous population.⁶⁴

Law continues to be a key instrument for each new phase of China's economic development, with legal reforms developing as "socialist rule of law with Chinese characteristics."⁶⁵ Two key moments marked China's transition

⁶⁰ See ALICE H. AMSDEN, *THE RISE OF "THE REST": CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES* (2001). Japan and Korea are probably the best examples of Asia's distinctive state-led development. See Mark Beeson, *Developmental States in East Asia: A Comparison of the Japanese and Chinese Experiences*, *ASIAN PERSP.*, vol. 33, no. 2, 2009, at 5.

⁶¹ See WORLD BANK, *WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET* 87–97 (1996); ASIAN DEVELOPMENT BANK, *LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK* (2001). For a good critique of some of the aid programs in the United States, see THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (1999).

⁶² See Margaret Y.K. Woo, *Justice*, in *HANDBOOK ON CHINA'S GOVERNANCE AND DOMESTIC POLITICS* 53–66 (Chris Ogden ed., 2013).

⁶³ See generally STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999); CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

⁶⁴ Francis Fukuyama, *The Patterns of History*, *J. DEMOCRACY*, Jan. 2012, at 14.

⁶⁵ The most recent declaration of support for "socialist rule of law with Chinese characteristics" is the Decision Concerning Comprehensively Promoting Governing the Country According to Law issued by the 4th Plenum of the 18th Central Committee of the Chinese Communist Party on October 23, 2014. See *Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding* (中共中央关于全面推进依法治国若干重大问题的决定) [*Decision Concerning Comprehensively Promoting Governing the Country According to Law*], PEOPLE.CN (Oct. 29, 2014), <http://politics.people.com.cn/n/2014/1029/c1001-25926893.html>. A translation of the decision can be found at *CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward*, CHINA COPYRIGHT & MEDIA (Oct. 30, 2014), <https://chinacopyrightandmedia.wordpress.com>

from a planned to market economy—the 1978 Plenum of the Chinese Communist Party and then-Premier Deng Xiaoping’s Southern Tour in 1992. Chinese court reform and civil procedure rule amendments followed each of these events, with a third cycle commencing in the last few years as the latest reiteration of civil justice reforms in China.⁶⁶

More specifically, a national civil justice conference was also held in 1978 and 1979, after the launch of Deng’s economic reforms. Jiang Hua, then-President of the Supreme People’s Court (“SPC”), spoke of the necessity and legitimacy of civil justice to China’s development.⁶⁷ After the conference, Chinese legal reformers enhanced their efforts at procedural and institutional change. The SPC decreed that Chinese courts should “further improve the work of trying civil cases, protect the civil rights and interests of citizens and legal persons according to the law, and promote the just, safe, civilized, and healthy development of society.”⁶⁸

One of the first codes promulgated along with economic reforms was the Chinese Civil Procedure Code enacted first for trial implementation in 1982 and then formally in 1991.⁶⁹ While it is generally said that China prefers infor-

/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/.

⁶⁶ Another way of marking Chinese court reforms is by the promulgation of Supreme People’s Court’s Five Year Court Reform Plans beginning in 1999: Outline of the Court’s Five Year Program for Reform of the People’s Courts, Reform Plan I (1999–2003), Reform Plan II (2004–2008), Reform Plan III (2009–2013), and Reform Plan IV (2014–2018). See Renmin Fayuan Wu Nian Gaige Gangyao (人民法院五年改革纲要) [Five-Year Program for Reform of the People’s Courts] (1999) [hereinafter First Five-Year Court Reform Program], available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=23701; Renmin Fayuan di Er ge Wu Nian Gaige Gangyao (人民法院第二个五年改革纲要) [Second Five-Year Program for Reform of the People’s Courts] (2005), available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=66296; Renmin Fayuan di San ge Wu Nian Gaige Gangyao 2009–2013 (人民法院第三个五年改革纲要 2009–2013) [Third Five-Year Program for Reform of the People’s Courts 2009–2013] (2009), available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=114912; Renmin Fayuan di Si ge Wu Nian Gaige Gangyao 2014–2018 (人民法院第四个五年改革纲要 2014–2018) [Fourth Five-Year Program for Reform of the People’s Courts 2014–2018] (2015) [hereinafter Fourth Five-Year Court Reform Program], available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=243720.

⁶⁷ See *Minshi Shenpan Gongzuo Tongdeng Zhongyao* (民事审判工作同等重要) [Civil Trial Is Equally Important], available at <http://www.geilibook.com/book/2441/157831.html> and <http://www.geilibook.com/book/2441/157832.html>.

⁶⁸ *Id.*, translated in Margaret Y.K. Woo, *Contesting Citizenship: Marriage and Divorce in the People’s Republic of China*, in *SEX AND SEXUALITY IN CHINA* 62, 75 (Elaine Jeffreys ed., 2006).

⁶⁹ *Zhonghua Renmin Gongheguo Minshi Susong Fa* (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991) [hereinafter China Civ. P. Law of 1991], translation available at <http://www.china.org.cn/english/government/207339.htm>. The 1991 Civil Procedure Law was amended in 2007, and again in 2012. See Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai “Zhonghua Renmin Gongheguo Minshi Susong Fa” de Jueding (全国人民代表大会常务委员会关于修改《中华人民

mality over formal legal process and values substantive over procedural justice,⁷⁰ China nevertheless recognized the need to establish some procedural structure to ensure stability and predictability. As will be discussed below, these procedural rules were often structured even more to support China's national goals of development and later, harmony.

Under the 1991 Chinese Civil Procedure Law, territorial jurisdiction was limited to the defendant's domicile or residence, where the tort was committed, or where the contract was to be performed.⁷¹ As for the complaint's requirements, Article 110 specified that a claim must state the name and address of parties, the claim, and the facts on which it was based.⁷² Nevertheless, the Chinese judge retained tremendous discretion in determining whether or not to accept a case.

Historically, as in the inquisitorial and civil law tradition, the Chinese civil procedure code placed primary responsibility on judges to conduct investigation, which included the duty to review complaints for conformity before the case could proceed.⁷³ And so, while complaints must follow a set form as prescribed by Article 110, the complaint was also expected to include any evidence, an identification of the sources of the evidence, and the names and addresses of witnesses.⁷⁴ The court could then assess, perhaps even shape, the complaint at the filing stage to ensure that foundational evidentiary support was met for each claim, and docket it or reject it within seven days.⁷⁵

If the complaint were accepted, a chief judge or associate chief judge would sign to confirm case acceptance and issue a Notice of Case Acceptance

共和国民事诉讼法》的决定) [Decision of the Standing Committee of the National People's Congress on Amending the "Civil Procedure Law of the People's Republic of China"], available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=98762.

⁷⁰ See, e.g., SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST-MAO CHINA (1985) (positing Chinese culture as preferring informality over formality, duty over rights, and the collective over the individual).

⁷¹ China Civ. P. Law of 1991, *supra* note 69, arts. 22, 24, 29.

⁷² Article 110 of the 1991 Civil Procedure Law of the People's Republic of China states:

A statement of complaint shall clearly set forth the following: (1) the name, sex, age, ethnic status, occupation, work unit and home address of the parties to the case; . . . (2) the claim or claims of the suit, the facts and grounds on which the suit is based; and (3) the evidence and its source, as well as the names and home addresses of the witnesses.

China Civ. P. Law of 1991, *supra* note 69, art. 110.

⁷³ In Germany, the sense of social duty has led to reliance of the judge in shaping complaints. Pleading requirements thus reflect the power dynamics between judge, litigant and lawyer, and the differences in the relationship between citizens and the state. See Peter Gottwald, *Civil Justice Reform: Access, Cost, and Expedition. The German Perspective*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 207 (Adrian A.S. Zuckerman ed., 1999).

⁷⁴ China Civ. P. Law of 1991, *supra* note 69, art. 110.

⁷⁵ *Id.* art. 112.

to be sent to the parties.⁷⁶ If rejected, the court was expected to issue a ruling containing an explanation of the reason for the refusal, and its ruling could be appealed.⁷⁷ Once accepted, the complaint and accompanying evidences would be forwarded to the head of the adjudication tribunal, who would then designate a lead judge, secretary, and if a collegial panel, other members of the panel that would hear the case. Traditionally, the lead judge was responsible for the delivery of complaints and additional investigation of the case, and any substantial and procedural matter that may arise in the case.

The Chinese judges' responsibility to assess the case at the complaint stage could be said to be part and parcel of the inquisitorial system's traditional focus on judicial control rather than on control by the parties as in the adversary system. It is further bolstered by the Chinese socialist principle under which a judge is obligated "to seek truth from facts, and correct error whenever discovered."⁷⁸ It is based on belief in an objective truth rather than a legal truth and that the litigation should end with a determination of who was truly at fault rather than who had proven their case.⁷⁹ Under this approach, the court is responsible for collecting, investigating, and confirming the evidence to unearth the truth. It then rests on the court to investigate, shape, and control the course of the litigation.

The establishment of this complaint system marked the first stage in post-Mao legal development. The early 1990s marked another spurt of economic development, beginning with the Resolution on Marketization of the Fourteenth National Congress of the Chinese Communist Party.⁸⁰ Then-Premier Deng Xiaoping, in the wake of a "southern tour" during which he saw the residual poverty that existed in rural areas of China, determined that further acceleration of market reforms was necessary.⁸¹ During this second stage of economic de-

⁷⁶ Wang Yaxin & Fu Yulin, *China: Mainland. Efficiency at the Expense of Quality?*, in *CIVIL LITIGATION IN CHINA AND EUROPE: ESSAYS ON THE ROLE OF THE JUDGE AND THE PARTIES* 11, 14 (C.H. (Remco) van Rhee & Fu Yulin eds., 2014).

⁷⁷ China Civ. P. Law of 1991, *supra* note 69, art. 112.

⁷⁸ "Seeking Truth from Facts" is a key element of Maoism, first quoted by Mao Zedong and later promoted by Deng Xiaoping as a central ideology of socialism with Chinese characteristics. This goal is codified in China Civ. P. Law of 1991, *supra* note 69, arts. 2, 7.

⁷⁹ China Civ. P. Law of 1991, *supra* note 69, art. 2; *see also* Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & P. 393, 400-01 (2004).

⁸⁰ Zhonggong Zhongyang Guanyu Jianli Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti de Jueding (中共中央关于建立社会主义市场经济体制若干问题的决定) [National Congress of the Chinese Communist Party Resolution on Establishment of a Socialist Market Economic System] (Nov. 14, 1993), *available at* http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=7590.

⁸¹ *See* JIANG ZEMIN (江泽民), Jiakuai Gaige Kaifang He Xiandaihua Jianshe Bufa Duoqu You Zhong Guo Tese Shehui Zhuyi Shiye de Geng Da Shengli (加快改革开放和现代化建设的步伐夺取中国特色社会主义事业的更大胜利) [ACCELERATING THE REFORM, THE OPENING TO THE OUTSIDE WORLD AND THE DRIVE FOR MODERNIZATION, SO AS TO ACHIEVE GREATER SUCCESSES IN BUILDING SOCIALISM WITH CHINESE CHARACTERISTICS] (1992), *translation available at* http://www.bjreview.com.cn/document/txt/2011-03/29/content_363504.htm.

velopment, China deepened market reforms and also encouraged the use of the courts. By now, not only was law important for economic development, but it was also needed to deal with the increased corruption and “local protectionism” of provincial governments.⁸² The central government in Beijing hoped that courts, prompted by disgruntled litigants challenging governmental actions, could assist in reining in local bureaucrats and help to increase development.⁸³

During this period, Chinese reformers experimented with the adversary system and acted to promote limited judicial independence. Chinese reformers wavered between promoting judges as adjudicatory officers and relying on them as bureaucratic actors; between giving greater power to litigants to shape their litigation and placing that responsibility primarily on judges. In 1997, the Chinese Communist Party at its Fifteenth National Congress reiterated what was to be the first ten-year target for national economic and social development with a basic strategy of “managing state affairs according to law” and “build[ing] a socialist country ruled by law.”⁸⁴ In the area of civil procedure, this meant that it was the litigants who must bear the burdens of pleading and proof.⁸⁵ No longer was legal informality tolerated as China proclaimed itself as “a country ruled by law,”⁸⁶ and it rested on litigants to prove their cases.

In June 1998, the SPC promulgated the Several Rules on Civil and Economic Trials, which placed burdens of providing proof on the parties rather than on judicial investigation and allowed for limited discovery. The SPC also set a goal of establishing an open and public trial system in an effort to legitimize the work of the courts through increasing transparency. These reforms were bolstered by the Court’s Five Year Reform Program (1999–2003), which placed emphasis on improvement of the court process and the judiciary as in,

⁸² Thus, the First Five Year Court Reform Plan targeted local protectionism as one danger to “socialist rule of law.” First Five-Year Court Reform Program, *supra* note 66.

⁸³ Ren Jianxin (任建新), Supreme People’s Court President, Address Before the Fourth Session of the Eighth National People’s Congress: Zuigao Renmin Fayuan Gongzuo Baogao 1996 Nian (最高人民法院工作报告1996年) [Supreme People’s Court Work Report, 1996] (Mar. 12 1996), available at http://www.npc.gov.cn/wxzl/gongbao/2000-12/07/content_5003526.htm.

⁸⁴ See JIANG ZEMIN (江泽民), GAOJU DENG XIAOPING LILUN WEIDA QIZHI, BA JIANSHE YOU ZHONGGUO TESE SHEHUI ZHUYI SHIYE QUANMIAN TUIXIANG ERSHIYI SHIJI (高举邓小平理论伟大旗帜, 把建设有中国特色社会主义事业全面推向二十一世纪) [HOLD HIGH THE GREAT BANNER OF DENG XIAOPING THEORY, ADVANCEMENT OF THE CAUSE OF BUILDING SOCIALISM WITH CHINESE CHARACTERISTICS INTO THE 21ST CENTURY] (1997), translation available at <http://www.china.org.cn/english/features/45607.htm>.

⁸⁵ See Guanyu Minshi Jingji Shenpan Fangshi Gaige Wenti de Ruogan Guiding (关于民事经济审判方式改革问题的若干规定) [Several Rules on the Reform of Civil and Economic Trials] (promulgated by the Sup. People’s Ct. Judicial Comm., July 11, 1998) (clarifying parties’ burdens of proof, the trial function, and the judicial panel’s responsibilities), available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=20233; see also Jiang Wei (江伟) & Wu Zeyong (吴泽勇), *Zhengju Fa Ruogan Jiben Wenti de Fazhexue Fengxi* (证据法若干基本问题的法哲学分析) [A Jurisprudential Analysis on Several Basic Issues of Evidential Law], 2 ZHONGGUO FAXUE (中国法学) [CHINESE JURISPRUDENCE] 24, 45–46 (2002).

⁸⁶ See Jiang Wei & Wu Zeyong, *supra* note 85.

for example, establishing a National Judicial Exam and heightened qualifications for judicial officers.⁸⁷

But, it turned out that the efforts to establish greater legal formality and placing burdens of proof for the parties only added greater barriers to justice, absent adequate legal assistance. The number of Chinese lawyers, then and now, remains small relative to the population, and most Chinese lawyers gravitate towards the urban rather than rural areas.⁸⁸ Where previously lawyers had been state cadres employed by the government, the new private lawyers, then and now, steered towards the more profitable practice of corporate and business law.⁸⁹ In some rural areas, lawyers and even judges who are legally trained remain rare. The effect was that the Chinese legal market increased the disparity between rich and poor in terms of access to justice.⁹⁰

Added to this picture was the increasing number of disputes that naturally occurred with economic development. Faced with increased workload as well as professional incentives, many Chinese judges retreated behind a veil of legal technicality.⁹¹ Rather than face reversals that could result in lower pay and diminished promotion prospects, Chinese judges preferred to have cases go away rather than adjudicate them.⁹² Burdened with the obligation to assess the complaint at an initial stage, but relieved of the obligation to investigate, Chinese judges retained great discretion in accepting or not accepting cases and preferred to deny acceptance of troublesome or political sensitive cases, often without offering litigants a chance to argue otherwise.⁹³

In 1998, in an effort to regularize the filing process, Xiao Yang, the then-President of the Supreme People's Court, ordered a separation of functions (filing, adjudicating, and supervising) and that every court establish a case filing division separate from the trial division.⁹⁴ But the case filing division was to be staffed by judges, generally on a rotational basis, and retained substantial control in determining whether or not to accept a case. The case filing tribunal was responsible for the more routine tasks of examining and registering cases and appeals, delivering the complaint and other litigation documents, appointing a presiding or responsible judge and other members of a collegial panel, fixing

⁸⁷ First Five-Year Court Reform Program, *supra* note 66.

⁸⁸ See generally Fu Yulin, *Dispute Resolution and China's Grassroots Legal Services*, in CHINESE JUSTICE, *supra* note 63, at 314.

⁸⁹ Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 AM. J. SOC. 352, 365, 371 (2007).

⁹⁰ Fu Yulin, *supra* note 88, at 314.

⁹¹ See Sida Liu, *With or Without the Law: The Changing Meaning of Ordinary Legal Work in China, 1979–2003*, in CHINESE JUSTICE, *supra* note 63, at 234.

⁹² See Carl Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, in CHINESE JUSTICE, *supra* note 63, at 58.

⁹³ See Nanping Liu with Michelle Liu, *Justice Without Judges: The Case Filing Division in the People's Republic of China*, 17 U.C. DAVIS J. INT'L L. & POL'Y 283, 284–65, 287–88 (2011).

⁹⁴ See First Five-Year Court Reform Program, *supra* note 66.

the date of court sessions, issuing notices, and preserving property and evidence before trial, but it also took on the more substantive tasks of mediating, handling objections to jurisdiction, and assessing the evidence submitted by the parties.⁹⁵ The adjudication panel theoretically would not have access to a case file until the case was cleared by the case filing tribunal.

The underlying purpose of this reform was to increase efficiency in scheduling a case for substantive hearing only when it was ready and to ensure greater impartiality of judges by isolating the trial judge from the case. But the continued control and discretion retained by the case filing division in reviewing and refusing to accept complaints was such that reformers urged the substitution of a registration system for complaints rather than a filing system that allowed for substantive reviews.⁹⁶ Notably, this registration system was not fully adopted until 2015.

As the reality of greater legal formality without greater legal representation led to greater dissatisfaction with the Chinese courts, litigants flocked to file letters and petitions of appeal to governmental agencies, and sometimes, to the streets.⁹⁷ Concerned with threats of social instability because courts were not able to “end the disputes,” the Chinese government launched the next set of policy and reforms. This time, the emphasis was on preserving social harmony.⁹⁸ Rather than increasing access to the courts, as discussed below, the latest set of Chinese legal reforms appeared to close the courthouse gates, even as judges were asked to multi-track litigation, to mediate cases, and to “end” disputes, rather than adjudicate them, in an effort to preserve harmony.⁹⁹

⁹⁵ See Zuigao Renmin Fayuan Guanyu Renmin Fayuan Lian Gongzuo de Zhanxing Guiding (最高人民法院关于人民法院立案工作的暂行规定) [Interim Provisions of the Case Filing Division of the Supreme People's Court] (promulgated by Sup. People's Ct., Apr. 21, 1997), available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=17120.

⁹⁶ A case registration system was established this year by the Supreme People's Court. See Guanyu Renmin Fayuan Tuixing Lian Dengji Zhi Gaige de Yijian (关于人民法院推行立案登记制改革的意见) [Opinion on the Implementation of the People's Courts Reform of the Case-filing Registration System] (promulgated by Sup. People's Ct., Apr. 1, 2015, effective May 1, 2015) [hereinafter Case-Filing Registration System], available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=246925.

⁹⁷ Carl F. Minzner, Xinfang: *An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 103–05 (2006).

⁹⁸ See *China Publishes 'Harmonious Society' Resolution*, CHINA.ORG.CN (Oct. 19, 2006), <http://www.china.org.cn/english/2006/Oct/184810.htm> [hereinafter *Harmonious Society Resolution*].

⁹⁹ See Zuigao Renmin Fayuan Guanyu Jinyibu Jiaqiang Sifa Jianyi Gongzuo Wei Goujian Shehui Zhuyi Hexie Shehui Tigong Sifa Fuwu de Tongzhi (最高人民法院关于进一步加强司法建议工作为构建社会主义和谐社会提供司法服务的通知) [Opinion of the Supreme People's Court, Regarding the Next Step Towards Litigation Development According to Socialist Principals and Harmonious Society] ¶2 (2007) [hereinafter Next Step], available at http://law.chinalawinfo.com/fulltext_form.aspx?Db=chl&Gid=91949.

II. CLOSING THE COURTHOUSE GATES

Indeed, a comparative look at the latest trends in both countries reveals strategies with a similar result of closing the courthouse gates.¹⁰⁰ Interestingly, however, both responses may undermine the *raison d'être* of the procedures being reformed. In the case of the United States, recent reforms in civil procedure to discourage litigation may have the effect of decreasing democracy. In the case of China, similar reforms to channel litigation away from the courts may have the effect of increasing disharmony.

A. *Changing U.S. Pleadings Standards*

As so accurately documented by scholars in this volume, including Subrin,¹⁰¹ Stephen Burbank and Sean Farhang,¹⁰² Jeffrey Stempel,¹⁰³ and Linda Mullenix,¹⁰⁴ civil justice reforms in the United States have meant changes in summary judgment standards, discovery rules, and greater case management, all of which have led to a problematic decrease in the trial rate in the United States. Scholars argue that this has resulted in a democratic crisis because, “[s]ince the founding of our country, trials in open court resulting in decisions by either a judge or a jury have been thought to be constitutive of American democracy.”¹⁰⁵ The focus of these concerns is the absence of trials and deter-

¹⁰⁰ In Japan, the latest civil procedure code was adopted and became effective on January 1, 1998. A main objective of the new code was the improvement of issue-identifying procedures. These procedures included stricter pleadings requirements as well as an improved plenary hearing held quickly after the complaint to identify the real issues as early as possible. The reforms attempted to maintain respect for the parties’ intentions while expanding the courts’ powers. In Japan, the Japanese court has been given power to order a preparatory plenary hearing in order to identify and clarify the issues in the case. At this hearing, the Japanese court has the power to require presentation of evidence on matters of fact and law, and preliminary documents are formally exchanged. The judge may, prior to holding plenary hearings, assign the case for oral proceedings preparatory to plenary hearings or require preparation by written documents only. At the “preparatory proceedings” the judge records all the alleged facts, issues, and proposed evidence. After the preparatory proceeding, no further allegations or evidence can be introduced except in limited situations. At this early meeting, settlement is attempted. If the case cannot be settled, then the conference concentrates on refining and focusing the issues so that the later plenary hearing (the main oral proceeding) will be more effective. Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 691 (1998).

¹⁰¹ Steve Subrin, *Reflections*, 15 NEV. L.J. 1689 (2015).

¹⁰² Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015).

¹⁰³ Jeffrey W. Stempel, *The Irrepressible Myth of Burnham and Its Increasing Indefensibility After Goodyear and Daimler*, 15 NEV. L.J. 1203 (2015).

¹⁰⁴ Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455 (2015).

¹⁰⁵ Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 400–01 (2011) (56 percent of all 12(b)(6) motions were granted to dismiss complaints for insufficiency after *Iqbal*, with 60 percent in constitutional civil rights cases, and a 60 percent decrease in cases going to trial over the past to 30 years ago).

minations by juries—symbols of participation and democracy. This era of dramatic decreases in trials is what Professors Subrin and Main called “the fourth era of civil procedure.”¹⁰⁶

While this “fourth era” is problematic in its decreased focus on trials, equally problematic is its focus on the process of disposing cases at the early stages of pre-filing and filing of complaints. While the trial event is important in ensuring transparency and publicity¹⁰⁷ and its deprivation is cause for alarm, the deprivation of court access at the complaint stage is similarly—and maybe even more—critical. Closing the courthouse gate decreases democratic participation when litigants’ voices are filtered out of the court system from the start. Making initial judgments to turn away cases at the complaint stage deprives citizens the opportunity to do the needed discovery under the procedural rules and undermine facts in the possession of opposing parties, and importantly, to participate in defining how norms are to be applied.

Indeed, varying Supreme Court doctrines in recent years have restricted access to courts.¹⁰⁸ As of 2008, federal judges manage dockets of approximately three hundred cases per year, with less than 5 percent going to trial. The other 95 percent of disputes are diverted to mandatory arbitration, settlement conferences with a magistrate judge or district judge who work to settle cases, summary bench trials, directed pre-trial verdicts, and dismissal of complaints for insufficiency or implausibility. Despite the seemingly benign focus on efficiency and conserving judicial resources, scholars are finding that the increase in pre-trial dispositions with earlier and steeper procedural hurdles often results in negative consequences for plaintiffs.

But to my mind, of all the procedural changes, the greatest concern is created by judicial reforms at the front end, rather than the back (trial) end of the court process. There have been numerous procedural reforms, but none more problematic than narrowing pleading requirements.¹⁰⁹ The reason is that pleading rules distribute power between litigants and judges, individuals and the state. Pleading rules may vary depending upon the role civil litigation serves in a particular system at a particular juncture—be it private conflict resolution, social control, or democratic participation. In the United States, the liberal plead-

¹⁰⁶ Subrin & Main, *supra* note 6.

¹⁰⁷ See Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public’s Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015).

¹⁰⁸ See Helen Hershkoff et al., Joint Comments on Proposed Amendments to Federal Rules of Civil Procedure (Feb. 5, 2014), available at <http://www.afj.org/wp-content/uploads/2014/02/Professors-Joint-Comment.pdf>; see also Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010).

¹⁰⁹ In the procedure war, a focus on everything might mean a focus on nothing and a focus on pleadings is where we should concentrate our attention. While trials in the open are constitutive of democracy (because of the participation of juries and the transparency they generate), I find equally important the participatory democracy generated by access to the courts and the deprivation of that participation by the “plausibility” pleadings requirement.

ings rules encompassed in the original Federal Rules of Civil Procedure meant access to courts and an opportunity for ordinary citizens to participate in the application of top-down norms. In allowing the control of the lawsuit to rest with private litigants, liberal pleading is one way to balance against concentrated state power, even as the federal courts grew.

By providing formal mechanisms and routes of redress, courts can protect individuals' rights from arbitrary infringement and create a stable social order for democratic growth. Liberal pleading rules empower private citizens to invoke state mechanisms in their disputes, and also allow judges to block arbitrary assertions and denial of state powers and assistance. Admittedly, while stricter pleading rules can serve as a bulwark against anarchy by their limitations on private parties,¹¹⁰ more liberal pleading rules represent greater trust of private litigants and invite their voices into the legal system.

Yet, in recent years, the philosophy of allowing liberal pleadings has changed. Federal district courts have been told by the Supreme Court to become more aggressive gatekeepers, clearing dockets without the opportunity for discovery or trials.¹¹¹ While in the past, the gatekeeping function of district judges was limited to an initial determination of "jurisdiction, ripeness, mootness, political questions, immunity, abstention," and a determination of whether the complainant has articulated "any" grounds for relief, the Supreme Court has now turned district judges into gatekeepers, with heightened pleading standards in a variety of settings. The Supreme Court's *Iqbal*, *Twombly*, and *Dukes* decisions have dismissed cases with an early initial assessment of the "plausibility" of the plaintiff's claims and requests for class certification.¹¹²

This narrowing of the pleadings requirement is problematic not only because it can deprive private litigants of their rights of action, but also because as an institutional barrier, it closes off the courthouse gate at such an initial stage that it prevents participation, a component of democracy. While trials ensure greater transparency and publicity, complaints are the entry to the courthouse itself and denial means the denial of access to the entire court process. Unlike the "notice" pleadings standard, which was relatively clear in deeming all complaints sufficient so long as they provided notice to the defendant of the underlying disputes, the present new standard of "plausibility" is highly discretionary and places broader authority and control in the hands of federal judges. The present pleading standard of "plausibility" gives judges greater discretion in deciding what goes in and what goes out, discretion that can be based on

¹¹⁰ See Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3, 10 (2003).

¹¹¹ See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (discussing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 679, (2009)); see also Burbank & Subrin, *supra* note 105, at 400.

¹¹² *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541, 2547 (2011); *Ashcroft v. Iqbal*, 556 U.S. 662, 670 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

judges' personal conceptions of the plausibility of plaintiff's version of the facts and, more problematically, can be tainted by judges' political orientations and agendas. Rather than limiting the power of the judge, the new "plausibility" pleading standard expands the power of judges and takes away from the power of the litigant to have his case heard.¹¹³

Given the context of broad federal court jurisdiction, empowering judges to assess the complaint under such a discretionary standard could mean greater state control in deciding what comes in and what stays out of court.¹¹⁴ As documented by Judith Resnik in her seminal article *Trial as Error*, the federal judiciary developed as an institution with a judicial platform that promotes its importance, and by lobbying Congress to broadly define its own role.¹¹⁵ It may be that federal courts are now seeking greater control of their docket by taking the authority to assess cases at the pleading stage through the more flexible plausibility standard.

And along with the changing pleadings standards, the role of federal judges has also changed.¹¹⁶ Rather than adjudicating issues based on the evidence presented by the parties, federal judges are now expected to be managers with an eye toward assessing rather than adjudicating disputes, and defining what constitutes a cause of action without going through the legislative process. This is all done without giving litigants a chance to conduct discovery and unearth the evidence to sustain their complaints, and less time to argue their case before a judge. This decrease in face-time has led commentators, such as U.S. District Judge William Young, to bemoan the lack of interchange between judges and litigants and juries:

More than two-thirds of the 94 federal district courts reported fewer hours in the courtroom in Fiscal Year (FY) 2012 than they did four years earlier. Total courtroom hours nationwide dropped more than 8 percent during that same timeframe. Moreover, during that span, some district courts averaged fewer than

¹¹³ According to some observers, the "plausibility" standard casts the judge into the fact-finding role of the civil jury. See Carrington, *supra* note 10, at 651.

¹¹⁴ By contrast, both Germany and Austria focus on case management as their strategy for combating delays and inefficiencies. In both countries, a civil case starts with the filing of a lawsuit and an examination by the court as to whether all the procedural prerequisites are fulfilled. While the German model adheres to the motto *ne eat iudex ultra petita partium* (the parties control the subject matter) in civil proceedings, and a plaintiff must state specific relief based on particular facts, and must disclose relevant facts, it is only at a later preparatory hearing in open court, at which the attorneys orally present their clients' allegations, arguments, and prayers for relief, that the court will review the complaint. But even in Germany, the trend has been towards greater judicial control and greater specificity.

¹¹⁵ See Resnik, *supra* note 14, at 980, 995.

¹¹⁶ For a succinct analysis of how the role of judging has changed in recent years, see Elizabeth M. Schneider, *Jeffrey B. Morris, Leadership on the Federal Bench: The Craft and Activism of Jack Weinstein*, 64 J. LEGAL ED. 339 (2014) (book review).

200 total courtroom hours per judge per year, the equivalent of less than one hour per judge per day.¹¹⁷

Rather than providing a public forum, courts are now resolving cases on paper and often outside the presence of litigants or jurors.

Expanding jurisdiction and resting greater authority on judges to decide the sufficiency of a complaint foster top-heavy state control of litigation. Discretion in retaining or rejecting the case lies largely with the court's subjective sense of what is "plausible." Of course, under the adversary system, the judge cannot sua sponte dismiss a claim, but the reality of the "plausibility" standard is that dismissal will depend on the judge's discretion even before a plaintiff has a chance to develop his claim. While judges have a role in preventing private parties from abusive use of court powers, that role arguably can be sufficiently satisfied with better case management and enforcement of Rule 11 mandates on responsible and ethical lawyering.¹¹⁸ Cutting off cases at the filing stage with such an indeterminate standard undermines the concept of civil litigation as democratic. Ordinary citizens have less opportunity to bring to court cases that would invite debate and discussion of the application of disputed norms.

B. *Recent Chinese Procedural Reforms*

The Chinese story is slightly different and yet all too similar. While law may be used to promote "socialism with Chinese characteristics," rather than democracy, recent changes to civil procedure in China also narrow entry to the courts and, in so doing, challenge the underlying goal of the system itself, with the most recent goal being to promote social harmony and stability.

In the race to achieve global parity with other developed nations, China has also added to its great internal inequality.¹¹⁹ As the world's second largest economy, China now has a Gini coefficient for income inequality of 42.1, an index that is higher than that of the United States at 40.8, but lower than the index for South Africa at 63.1.¹²⁰ Vast gaps exist in China between the urban rich and the rural poor and between men and women workers. Home to one in five of the world's women, China nevertheless ranked 69 of 135 countries in the Global Gender Gap Index 2012, below the United States at 22 but ahead of Japan at 101.¹²¹

¹¹⁷ Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. 243, 247 (2013).

¹¹⁸ See FED. R. CIV. P. 11, 16.

¹¹⁹ Edward Wong, *Survey in China Shows a Wide Gap in Income*, N.Y. TIMES, July 20, 2013, at A9.

¹²⁰ See *Income Gini Coefficient*, U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORTS (2013), <http://hdr.undp.org/en/content/income-gini-coefficient>.

¹²¹ WORLD ECONOMIC FORUM, THE GLOBAL GENDER GAP REPORT 2014 54, 56 (2014), available at http://www3.weforum.org/docs/GGGR14/GGGR_CompleteReport_2014.pdf. China's ranking dropped to 87 in 2014. *Id.* at 54.

With disparity has come greater unrest, as Chinese citizens have taken to the courts problems ranging from land confiscation to inadequate social security to labor and employment disputes. From 1991 to 2010, the number of civil first instance cases accepted by the Chinese courts increased at an annual rate of more than 10 percent.¹²² Faced with rising caseload and more complex cases, overworked Chinese judges would sometimes avoid cases and fail to docket them at filing.¹²³ When litigants fail to get satisfaction from the courts, they took to the streets and the number of protests increased.¹²⁴

To counter the greater discontent in the general population, then-President Hu Jintao and the CCP in 2006 formally endorsed a political doctrine that called for the creation of a “harmonious society” (*héxié shèhuì*).¹²⁵ It is a policy that signals a movement away from sole reliance on economic reform to solve worsening social tensions and, to some critics, towards an avenue to maintain stability at all costs.¹²⁶ Notably, the call for “socialist harmonious society” comes at a time when China is striving to achieve international prominence and state building.¹²⁷ According to some, the call for harmony also reflects a return to traditional Confucian values and a national emphasis on “order over freedom, duties over rights, and group interests over individual ones.”¹²⁸

It is within this context of addressing problems of social instability, nation-building, and public dissatisfaction with the work of the courts that recent civil justice reforms in China must be understood. As mentioned above, with growing social unrest and discontent, China saw an increase in letters of complaint, as well as rising numbers of petitions (a method of seeking review of cases after final appeals).¹²⁹ Government officials attributed this rise in petitions to the courts’ inability to resolve disputes, as well as increased corruption and graft in the courts.¹³⁰ Concerned that the courts were unable to contain social discord and fearing a loss of legitimacy for the party state, the Chinese government equated improved legal work with greater consideration of the social and political context of cases and commenced another round of judicial reforms.¹³¹

¹²² Cai Yanmin, *Case Management in China’s Civil Justice System*, in *CIVIL LITIGATION IN CHINA AND EUROPE*, *supra* note 76, at 39, 40.

¹²³ Liu & Liu, *supra* note 93, at 317, 330.

¹²⁴ See O’Brien & Li, *supra* note 13, at 1–2.

¹²⁵ *Harmonious Society Resolution*, *supra* note 98.

¹²⁶ Maureen Fan, *China’s Leadership Declares New Priority: ‘Harmonious Society’*, *WASH. POST*, October 12, 2006, at A18.

¹²⁷ See *Harmonious Society Resolution*, *supra* note 98.

¹²⁸ See SHAO-CHUAN LENG & HUNGDAH CHIU, *supra* note 70, at 123.

¹²⁹ Minzner, *supra* note 97, at 104–05.

¹³⁰ *Id.* at 152.

¹³¹ See *China to Launch Education of “Socialist Concept of Rule of Law”*, *PEOPLE’S DAILY ONLINE* (Apr. 14, 2006, 8:55 A.M.), http://english.peopledaily.com.cn/200604/14/eng20060414_258297.html (stating socialist rule of law is the building of a socialist harmonious society); see also *Next Step*, *supra* note 99.

Beginning in the mid-2000s, China initiated the first sets of major amendments to the Chinese civil procedure code since its enactment.¹³² Amendments to the 1991 Civil Procedure Code were enacted in 2007 (effective in 2008) and but most comprehensively in 2011 (effective in 2012). Both sets of amendments simultaneously empower and limit the courts. They empower the courts vis-à-vis the litigants but limit the court vis-à-vis the party state. They provide greater authority to courts to streamline cases but also ensure greater oversight of courts by other judicial institutions.

The resultant procedural amendments retreat from the move toward an adversarial process and return to an emphasis on judicial control of litigation and the encouragement of mediation. Under the call of “harmonious society,” the recent civil procedure amendments retain the judge’s discretion to not accept cases, reemphasize mediation over adjudication, and establish a multi-tracked case management system to divert cases.¹³³

Under these amendments, Chinese courts continue the rule that the judge must decide whether or not to accept the case within seven days.¹³⁴ Article 108 of the 2008 Amendments again requires that a complaint meet four conditions—a qualified plaintiff; a definite defendant; specific claims, facts, and causes of action; and that the complaint fall within the scope of acceptance for civil actions by the people’s court and within the jurisdiction of the people’s court where the suit is filed.¹³⁵ All four conditions, but in particular the condition requiring “specific claims, facts, and causes of action,” are left undefined, with interpretation resting in the discretion of the court. Since it is not obligatory for defendants to file a statement of defense, the plaintiffs must satisfy the judge, rather than the defendant, that they have enough evidence to get the case docketed. Significantly, the rules do not provide an opportunity for the plaintiff to respond or argue his case. It is simply when the judge is satisfied with the complaint that the complaint is served on the defendant. Thereafter, the case filing division will also attempt to mediate the case.¹³⁶

¹³² Zhonghua Renmin Gongheguo Guowuyuan Xinwen Bangongshi (中华人民共和国国务院新闻办公室) [Information Office, State Council of the People’s Republic of China], *Zhongguo de Sifa Gaige* (中国的司法改革) [*China’s Judicial Reform*] (White Paper, Oct. 9, 2012), available at http://www.gov.cn/jrzq/2012-10/09/content_2239771.htm, translation available at http://china.org.cn/government/whitepaper/2012-10/09/content_26733726.htm.

¹³³ Cai Yanmin, *supra* note 122, at 40–41, 45–46.

¹³⁴ Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 2012, effective Jan. 1, 2013) [hereinafter Current China Civ. P. Law].

¹³⁵ Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective Apr. 1, 2008), available at <http://www.lawinfochina.com/display.aspx?lib=law&id=19>.

¹³⁶ Stage 1 of any litigation in China is: The plaintiff files the claim, and the court examines the writ and decides whether or not it will proceed with the claim. If the court decides to dismiss the claim, the plaintiff can appeal this decision. Stage 2: The court serves the writ on

Both because of the piling up of cases and limited judicial resources, the case filing division has the incentive to avoid controversial cases that will consume a great deal of judicial time and energy. This discretion has led courts to deny acceptance to cases that they view as troublesome and politically sensitive. Thus, for example, in 2009, concerns that cases brought against a company for contaminated milk powder would result in further instability led courts to deny acceptance of such cases without explanation.¹³⁷ Some courts, such as the Higher People's Court of the Guanxi Autonomous Region, even issued directives stating that certain categories of cases (land and labor disputes) would not be accepted temporarily.¹³⁸ At one point, even the Supreme People's Court instructed lower courts not to accept certain civil cases, including those challenging controversial property confiscation and compensation.¹³⁹

In the latest round of amendments to the Civil Procedure Code in 2012,¹⁴⁰ Chinese scholars thus urged the establishment of a registration system to replace the present case filing system. A registration system would have the court check a filed complaint only for technical format rather than examine it for compliance with substantive requirements.¹⁴¹ The final 2012 Amendments, however, did not include the replacement of the case filing system with the registration system. It did, however, add a provision to new Article 123 which states that "The people's court . . . must protect the parties' legal right in bringing litigation . . . [and] accept lawsuits filed in conformity [with these rules]."¹⁴²

the defendant, and the defendant may defend within fifteen days after receipt of the writ. The defendant has a right of defense, which may be waived by the defendant. Stage 3 is the trial, including submissions by the parties, cross-examination and closing submissions. The court also attempts mediation. Stage 4: The court pronounces its judgment. All of this can be done within six months. See Wang Yaxin & Fu Yulin, *supra* note 76, at 13.

¹³⁷ See Xin Fei, Chinese Courts Delay Admission of Lawsuits Against Sanlu, EPOCH TIMES, (Nov. 4, 2008), <http://www.theepochtimes.com/n2/china-news/sanlu-melamine-china-law-suits-6672.html>.

¹³⁸ *Guangxi Fayuan Bu Shouli 13 Lei Anjian Sheng Gao Yuan Cheng You Guoqing Jueding* (广西法院不受理13类案件 省高院称由国情决定) [*Guangxi Court Rejects 13 Categories of Cases: the Provincial High Court Claims Social Conditions*], SINA, (Aug. 24, 2004), <http://news.sina.com.cn/c/2004-08-24/14093481688s.shtml>.

¹³⁹ *Zuigao Renmin Fayuan Guanyu Dangshiren Da Bucheng Chaiqian Buchang Anzhi Xieyi Jiu Buchang Anzhi Zhengyi Tiqi Minshi Susong Renmin Fayuan Yingfou Shouli Wenti de Pifu* (最高人民法院关于当事人达不成拆迁补偿安置协议就补偿安置争议提起民事诉讼人民法院应否受理问题的批复) [Reply on Whether the People's Court Shall Accept the Civil Litigation on the Dispute Over Compensation and Relocation Where the Parties Concerned Failed to Reach an Agreement of Compensation and Relocation Regarding House Demolishment and Relocation] (Aug. 11, 2005), available at http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=59600.

¹⁴⁰ See Current China Civ. P. Law, *supra* note 134.

¹⁴¹ *Minshi Susong Fa Xiuding: Lian Dengji Zhidu Baohu Dangshiren Suquan* (民事诉讼法修订: 立案登记制度保护当事人诉权) [*Amendment to the Civil Procedure Law: Case Registration System Protects Rights to Trial*], SOHU (Dec. 5, 2006), <http://news.sohu.com/20061205/n246805990.shtml>.

¹⁴² See Current China Civ. P. Law, *supra* note 134, art. 123.

However, the requirement that a complaint include “specific claims, facts, and cause or causes” remains in place without clarification. This has led scholars such as Nanping Liu to criticize the case filing system and conclude that the “case filing division is a gatekeeper that the Chinese leadership employs to keep things that embarrass it out of its courts.”¹⁴³ Indeed, it was only in 2015 that the Supreme People’s Court finally issued an opinion that specifically addressed the problem of case filing.¹⁴⁴ Under this SPC Opinion, cases meeting the statutory condition shall be accepted for registration on the spot.¹⁴⁵ Where decisions cannot be made on the spot regarding whether a case meets the statutory condition or not, its acceptance for registration or not shall be decided within a time limit set by law.¹⁴⁶ It is as yet unclear what effect this SPC Opinion will have in light of the other changes in the civil procedure code.

Indeed, viewing litigation as potentially vexatious, the most recent 2012 Amendments now impose on Chinese litigants a requirement of good faith. To address an overburdened judiciary, the amendments also encourage greater management of cases through a multi-track system under which cases may be processed through one of several different tracks—simplified procedure, ordinary procedure, or mediation. The decision on how to track the case is not a matter of party’s choice but rather, subject to the judge’s control. According to Chinese scholar Cai Yanmin, overburdened Chinese judges have expanded the use of simplified procedures and also increasingly pressed parties to reach settlements, and steer cases towards mediation.¹⁴⁷

At the beginning of 2011, the Supreme People’s Court even created a specialized case management office in each court charged with supervising the daily affairs of the trial committee and case quality evaluation.¹⁴⁸ Indexes weigh completion of cases heavily and courts able to finalize and mediate a higher number of cases are given a higher grade in the assessment. New judicial supervision provisions were also added to empower procurators (prosecutors) at the same level in addition to higher levels of state procurators, to supervise the work of the courts.¹⁴⁹ This is another way in which Chinese courts’ authority is restrained vis-à-vis the state, but empowered vis-à-vis litigants.

But so far, the recent amendments to China’s civil procedure rules have not achieved the goal of promoting harmony. While the amendments may have succeeded in decreasing the case docket by creating additional avenues for case

¹⁴³ See Liu & Liu, *supra* note 93, at 342.

¹⁴⁴ Case-Filing Registration System, *supra* note 96.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Cai Yanmin, *supra* note 122, at 46–47.

¹⁴⁸ The Supreme People’s Court has published guidelines to improve the case management system. See Zuigao Fayuan Fabu Zhidao Yijian Wanshan Anjian Zhiliang Pinggu (最高法院发布指导意见完善案件质量评估) *The Supreme Court Issued Guidance to Improve the Case Management System*, ZHEJIANG PROVINCIAL DEV. & REFORM COMMISSION (June 25, 2012), http://www.zjdpc.gov.cn/art/2012/6/25/art_791_77413.html.

¹⁴⁹ See Current China Civ. P. Law, *supra* note 134, arts. 209–11.

resolution, and refusing some litigants entry to the courts, petitions and complaints about the courts continue. It was and is still quite common for litigants to contest final judgments through judicial supervision procedures and by petitioning through letters and visits to state offices. In 2010, over one million concluded cases were further challenged by letters, visits, and petitions.¹⁵⁰ Some scholars have termed this “informed disenchantment,” as litigants’ disenchantment grows with their greater experience with the courts.¹⁵¹ Without a full opportunity to be heard, Chinese litigants are extremely dissatisfied not only with the outcomes but also with the judicial process itself.

Finally, and significantly, the most recent (2014–18) Five Year Reform Program for People’s Court as promulgated by the Supreme People’s Court also signals efforts to centralize cases and reassert central government control.¹⁵² This reaffirms China’s continuing emphasis on nation-building, as captured by the present Chinese leader Xi Jinping’s proclamation of the “Chinese Dream” as the great rejuvenation of the Chinese nation (that of a strong China, a civilized China, a harmonious China, and a beautiful China).

And so, under the goal of “maintaining the unity of the nation’s laws,” the Supreme People’s Court has established circuit divisions that will handle major civil commercial and administrative cases that cross administrative regions.¹⁵³ So far, two circuit court divisions have been established with one sitting in Shenzhen, Guangdong Province with its circuit jurisdiction covering the three provinces/regions of Guangdong, Guangxi, and Hainan, and the second circuit court division in Shenyang, Liaoning Province with its circuit jurisdiction covers the three provinces of Liaoning, Jilin, and Heilongjiang. These circuit court divisions are permanent divisions of the Supreme People’s Court with the same subject matter jurisdiction as the Supreme People’s Court and its judgments, rulings, and decisions are considered to be those of the Supreme People’s Court. Importantly, these circuit court divisions will also handle petitions and visits to the Supreme People’s Court within their circuit region.¹⁵⁴

Interestingly, this is not unlike the historical circuit courts in the United States (composed of two Supreme Court Justices and a district judge of the district) that rode the circuits to hear cases before their abolishment in 1891 with the establishment of the intermediate court of appeals.¹⁵⁵ Like their U.S. coun-

¹⁵⁰ Wang Yaxin & Fu Yulin, *supra* note 76, at 31.

¹⁵¹ See Mary E. Gallagher & Yuhua Wang, *Users and Non-Users: Legal Experience and Its Effect on Legal Consciousness*, in CHINESE JUSTICE, *supra* note 63, at 204.

¹⁵² Fourth Five-Year Court Reform Program, *supra* note 66.

¹⁵³ See Zuigao Renmin Fayuan Guanyu Xunhui Fating Shenli Anjian Ruogan Wenti de Guiding (最高人民法院关于巡回法庭审理案件若干问题的规定) [Supreme People’s Court Provisions on Several Issues Regarding Trial of Cases in Circuit Court Divisions] (Jan. 28 2015), available at <http://www.court.gov.cn/fabu-xiangqing-13148.html>, translation available at <http://chinalawtranslate.com/en/spccircuitcourts/>.

¹⁵⁴ See *id.* art. 9.

¹⁵⁵ See *History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/courts_supreme.html (last visited June 25, 2015).

terparts, these circuit court divisions of the Supreme People's Court will also "ride circuits" and travel within their circuit region to try cases and receive petitioners. It is an effort to centralize and unify otherwise diverse geographic regions by bringing the most powerful and highest court to the districts. As in the United States, it is the hope that these justices on circuit will become a crucial link between citizens and the judicial branch—as these justices will learn the diversity of the local conditions and citizens will gain greater confidence in the judiciary.¹⁵⁶

Additionally, the (2014–2018) Five Year Reform Program also anticipates experimenting with the establishment of lower trial courts with jurisdiction that will cross administrative regions that will be apart and separate from the present provincial court structure. The idea is that these courts will hear cross-jurisdictional cases such as environmental protection, food/drug safety, and enterprise bankruptcy and will remove these cases from provincial bias and "local protectionism."¹⁵⁷ It is unclear whether these new lower trial courts that will cross administrative regions will replace the circuit courts. But it is a step-by-step approach to consolidation into a central court system that will hopefully reduce local provincial influences and corruption. Such reform proposals spell perhaps a "fourth era of procedural reform" for China as well.

CONCLUSION

Legal procedure is not simply the practical way of securing the rule of law and ensuring the enforcement of substantive rights. Legal procedure also reflects our collective sense of justice. As enactments of the state, procedural requirements are also symbolic messages from the state. How the courthouse gates are manned, in the instance of the United States and China, reflects greater national goals and the role of courts within those goals.

As the first threshold in the legal process, pleading rules restrict or empower courts in determining how a dispute is to be framed and what goes in and what stays out. As such, these rules inherently carry with them decisions about power distribution. In determining who has the obligation to do what in a litigation, procedural rules and statutes distribute power among parties, lawyers, and judges, as well as among different branches of government, state and national governments, rich and poor, corporations and individuals. Understanding the role of courts then must also mean understanding the effect (intended or otherwise) of the procedural rules and statutes on power distribution. In both China and the United States, the power of litigation has shifted toward judges and away from litigants.

¹⁵⁶ Bruce A. Ragsdale, *The Federal Courts in Our Constitutional Democracy: A History of the Federal Judiciary*, INSIGHTS ON LAW & SOC., Fall 2011, at 4, 5, available at http://www.americanbar.org/publications/insights_on_law_and_society/12/fall/the_federal_courts_in_our_constitutional_democracy.html.

¹⁵⁷ See Fourth Five-Year Court Reform Program, *supra* note 66.

In the United States, lawsuits are valued as participatory justice. Some values served under this concept of participatory justice include enabling greater public knowledge on policy issues; forging the community development of norms; bringing outside voices into the application of top-down policies; and momentarily altering configurations of authority, as well as operating as a leveler between defendants and plaintiffs. It may be said that the American legal system would prefer the doors be open to ordinary litigants because they are who should set and enforce the social norms. If civil litigation is expected to enable the participatory voices of “private attorney generals,” then there may be greater tolerance for allowing broad pleadings and in waiting for evidence to come out later. This was indeed the case for much of the last one hundred years in America. As Marc Galanter puts it, the United States legal system is characterized by “soft, pluralized, participative, and expensive law, with more lawyers who play a more central and expansive role.”¹⁵⁸

By contrast, lawsuits in China are strictly for individual dispute resolution, and on a societal level, to preserve harmony and prevent social instability. Rather than serving as a site for rearranging social norms, litigation is used to channel social dispute and maintain stability. Unlike the United States, China may not want a civil justice system that is open to new and diverse claims, but rather, a system that provides predictability for business and commerce and is not swamped with frivolous claims. And so, the system has always had more restrictive requirements for its pleadings and placed obligations on judges to assess the claim at an initial stage of litigation. Even a short experiment with the adversary system resulted in a return to state control of litigation as the Chinese state seeks to ensure greater harmony in its population.

However, both countries’ goals for civil litigation may not be met as access to the courthouse gate is diminished. The requirement of “plausibility” that places such discretion on American judges, along with broad jurisdiction, means that federal judges now have an unusually expansive reach to decide which cases and whose cases are heard. In China, these powers have always been retained by judges, and recent efforts to streamline cases have only increased their authority. The resultant limits on access to courts and reduced control over lawsuits by litigants can cause a reduction of democracy in the United States as litigants’ voices are filtered out in the restructuring of norms, and disharmony in China as litigants’ voices are filtered out, leading to greater dissatisfaction and instability. Thus, Subrin and Main’s fourth era of civil procedure in the United States may also have great resonance with Chinese civil procedure reforms, as, in the end, both entailed an unintended undermining of both countries’ goals for their legal systems.

¹⁵⁸ Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 680 (1994).

