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Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial

Amalia D. Kessler

OUR INQUISITORIAL TRADITION: EQUITY PROCEDURE, DUE PROCESS, AND THE SEARCH FOR AN ALTERNATIVE TO THE ADVERSARIAL

Amalia D. Kessler†

American lawyers think of our legal system as firmly adversarial. Yet—as Professor Kessler demonstrates—as late as the nineteenth century, Anglo-American courts of equity employed a mode of procedure, which like that of the courts of continental Europe, derived from the Roman-canon tradition and thus was significantly inquisitorial. Moreover, she argues that, contrary to our tendency to view inquisitorial procedure as unfair, equity procedure was deeply committed to due process. Professor Kessler suggests, however, that some of the worst abuses of modern litigation—and, in particular, our discovery practice—can be traced to the ill-considered way in which inquisitorial devices were imported into a common-law-based adversarial framework. By rediscovering our lost inquisitorial history, she argues, we can learn how our botched marriage of inquisitorial and adversarial traditions resulted in much of the inefficiency and unfairness of modern civil litigation, and we can begin self-consciously and systematically to develop the inquisitorial framework necessary to remedy our adversarial excesses.

To facilitate procedural reform, Professor Kessler challenges our conception of inquisitorial procedure as alien to and incompatible with our commitment to due process. She begins by discussing modern, largely unsuccessful efforts to remedy adversarial unfairness and inefficiencies. She then describes traditional equity procedure, thus showing that inquisitorial approaches to adjudication are a well-established feature of our inherited legal culture. Professor Kessler argues that equity's quasi-inquisitorial approach prioritized what she identifies as the truth-seeking function of due process, while also fulfilling what she calls the negative, state-checking function of due process. Next, she analyzes how, over the course of the nineteenth century, equity's quasi-inquisitorial tradition, which emphasized written and secrecy-oriented

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procedures, gradually gave way to oral and adversarial procedures mirroring those of (and increasingly borrowed from) the common-law tradition. Then, she describes how this transformation in equity procedures led in the early twentieth century to a reconfiguring of the inquisitorial master as a trial master. She suggests that the subsequent rise of increasingly complex litigation during the second half of the twentieth century, and especially the structural injunction suit of the Civil Rights era, led to a re-emergence of the master's inquisitorial role, but that scholars have mistakenly viewed this role as a new phenomenon. Professor Kessler then posits that much of the inefficiency and unfairness of modern civil litigation—and, most especially, of the pretrial discovery process—results from integrating equity procedures into an adversarial context that permits parties to abuse powerful devices that were once controlled by the courts. Finally, she points to recent French procedural reforms to suggest that we can adopt more inquisitorial procedures without violating the core values of due process.

INTRODUCTION

> [Y]our . . . brief . . . bring[s] into . . . focus a . . . structural objection, which is to say [that] someone who has served as an investigator may not be appointed a Special Master . . . . [A] judicial officer with investigative responsibilities . . . [is,] dare we say, [a] French approach.
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> —Judge Ginsburg, Oral Argument, *Cobell v. Norton*[1]

On April 24, 2003, the D.C. Circuit heard oral argument on the defendants' petition for a writ of mandamus in the long-running, highly contentious case of *Cobell v. Norton*,[2] a class action for an accounting brought against the Secretaries of the Departments of the

1 Transcript of Proceedings at 25–26, Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) (No. 02-5374).

2 334 F.3d 1128 (D.C. Cir. 2003).

Interior and Treasury by individual Native American beneficiaries of a trust of which the United States is the fiduciary.[3] The petition challenged the district court's appointment of a Special Master-Monitor to oversee the government's compliance with a court order directing it to rectify breaches of trust obligations.[4] According to the defendants, the Monitor was serving an impermissible investigatory role.[5] The D.C. Circuit agreed and granted mandamus, explaining that "the district court's appointment of the Monitor entailed a license to intrude into the internal affairs of the Department [of the Interior], which simply is not permissible under our adversarial system of justice . . . ."[6] Such an investigatory role exceeds the traditional limits on judicial officers in our adversarial system—namely, that they are to serve as neutral umpires and thus have no independent knowledge of the facts.[7] Indeed, Judge Ginsburg's statement in oral argument that "a judicial officer with investigative responsibilities . . . [is,] dare we say, [a] French approach"[8] suggests that the very concept of an investigatory judicial role is positively un-American.

While the investigatory magistrate is a French approach, it is also, despite our deep-rooted assumptions to the contrary,[9] not un-American. American lawyers, like Judge Ginsburg, think of our system as firmly adversarial, committed to norms of fairness that have never meant much in the dark inquisitorial world of continental Europe. Yet the truth is that inquisitorial procedure is neither alien to our traditions nor inherently unfair.[10] As late as the nineteenth century, Anglo-American courts of equity (from which, in fact, masters originally emerged) employed a mode of procedure, which like that used in the courts of continental Europe,[11] derived from the Roman-canon tradition and thus was significantly inquisitorial. And while today we tend to view inquisitorial procedure as necessarily unfair—indeed, the word "inquisitorial" itself conjures images of torture and burning stakes[12]—recovering our lost inquisitorial tradition may offer our best chance to provide meaningful due process in the modern world of civil procedure.

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3 *See id.* at 1133.

4 *See id.*

5 *See id.* at 1140.

6 *Id.* at 1143.

7 *See id.* at 1142.

8 *See supra* note 1 and accompanying text.

9 *See, e.g., Cobell*, 334 F.3d at 1142.

10 *See infra* Part III.

11 *See, e.g., infra* Part VII.

12 *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 237–38 (1940) (commenting on the "secret inquisitorial processes" that resulted in "mutilated bodies along the way to the cross, the guillotine, the stake and the hangman's noose").

As this Article shows,[13] our legal system only became fully "adversarial" in the relatively recent past. It was over the course of the nineteenth century that equity came to embrace the oral, adversarial method of the common law, such that—even prior to the merger of law and equity in 1938[14]—our procedural framework became entirely adversarial. Yet many inquisitorial devices survived, even after 1938. Indeed, as this Article argues, some of the worst abuses of modern litigation—and in particular, our discovery practice—can be traced to the ill-considered way in which inquisitorial devices were imported into a common-law-based adversarial framework after 1938.[15] Having since forgotten equity's quasi-inquisitorial tradition,[16] we have mistakenly come to view our legal tradition as exclusively adversarial and tend to regard all inquisitorial modes of procedure as alien.

The time may have come, however, to rediscover our lost inquisitorial past. Understanding our history will permit us to diagnose our ailments and thus to recognize that—particularly when it comes to discovery—our system is the product of a botched marriage between inquisitorial and adversarial traditions. In addition, rediscovering our past will enable us to see the virtues of inquisitorial procedure. Over the last several decades, the growing burden of complex litigation in an adversarial procedural framework has generated widely recognized inefficiencies and unfairness. These problems push us to search for non-adversarial alternatives—including inquisitorial modes of procedure, such as the investigatory master in *Cobell*.[17] Our ability to deploy inquisitorial procedure as a remedy for the excesses of the adversarial has been stymied, however, by an unnecessary, adversarial ideology, based on a false reading of our own history. As a result, instead of self-consciously and systematically reflecting on the structure and nature of inquisitorial procedure, we have engaged in ad hoc and often confused tinkering.[18] Here, developments in the role of the master—one of the focuses of this Article—are representative of broader procedural trends.

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13 *See infra* Parts III, IV.

14 *See* FED. R. CIV. P. 1; Rules Enabling Act, 28 U.S.C. § 2071 (2004) (first enacted in 1934).

15 *See infra* Part VI.

16 This Article uses the term "quasi-inquisitorial" to describe the mode of civil adjudication in traditional equity courts because parties initiated litigation in these courts, whereas in the pure model of inquisitorial adjudication, the court initiates the lawsuit. But while traditional equity procedure differed from truly inquisitorial adjudication in this key respect, it was, in many other ways, similar. In particular, the court, rather than the parties, bore significant responsibility for gathering evidence and for determining the sequence and nature of the proceedings. *See infra* Part II.

17 *See* Cobell v. Norton, 334 F.3d 1128, 1142 (D.C. Cir. 2003) (No. 02-5374).

18 *See infra* notes 32–56 and accompanying text.

By recovering our forgotten, quasi-inquisitorial equity tradition, this Article seeks to challenge our adversarial self-conception—our assumption that inquisitorial procedure is entirely alien to our legal tradition and incompatible with our commitment to due process—and thereby to facilitate our ability to undertake meaningful, inquisitorial procedural reform. The Article proceeds as follows.

Part I frames the Article's historical analysis by describing how the complexity of modern litigation and the limits of adversarial procedure have led to a number of recent efforts to identify alternatives to the adversarial in both civil and criminal procedure. One such alternative is inquisitorial procedure. But despite the widely bemoaned problems with adversarial procedure and the failure of such nonadversarial alternatives as the Alternative Dispute Resolution movement to remedy unfairness and inefficiencies, our turn towards the inquisitorial has been hindered by our adversarial self-conception. As a result, our use of inquisitorial procedure has been largely unacknowledged, insufficient, and confused.

Part II sets forth equity's traditional, quasi-inquisitorial framework as it existed through the early nineteenth century—a framework derived from the Roman-canon tradition, in which masters ensured that witness testimony was taken from written interrogatories on an ex parte, secrecy-oriented basis. Deployed for centuries within courts of equity, inquisitorial procedure is thus a well-established feature of our inherited legal culture.

Part III argues that our due-process rights to notice and a hearing serve three distinct functions: a positive, political function designed to engage the litigant qua citizen in an important governmental institution for deciding rights; a negative, state-checking function designed to deter arbitrary state action; and a truth-seeking function, designed to ensure that the parties convey relevant information to the court. While the common-law, adversarial framework prioritizes the positive, political function of due process above all other due-process values, equity's quasi-inquisitorial tradition prioritized truth-seeking—a goal it pursued, in part, by deploying masters to take witness testimony outside the parties' presence and to keep it confidential. But critically, while equity lacked the common law's positive, political conception of due process, it was as committed as the common law to the negative, state-checking conception.

Part IV analyzes the gradual collapse of equity's quasi-inquisitorial tradition from about the early to mid-nineteenth through the early twentieth centuries, under the pressure of an increasingly triumphant oral and adversarial common-law tradition. This shift from written and secret to oral and adversarial procedures undermined the foundations of the master's traditional inquisitorial role. Yet, the master

was retained—thus raising the very difficult question of how inquisitorial procedural devices should operate within an adversarial framework.

Part V describes the efforts of jurists in the late nineteenth and early twentieth centuries to reconfigure the master's role to make it compatible with the new oral, adversarial framework of adjudication. As part of these efforts, the inquisitorial master was reconfigured as a trial master, whose function was to preside over hearings in the place of the judge. Shortly thereafter, in a related attempt to merge the inquisitorial and the adversarial, discovery appeared in the Federal Rules of Civil Procedure as an ill-conceived adaptation of inquisitorial process.[19] Over the last half-century or so, the rise of complex litigation has necessitated a return to the inquisitorial master, who is now asked to serve a pretrial managerial and post-trial investigatory role. Having, however, forgotten our equity tradition, scholars today mistakenly assume that the original, and thus legitimate, role of the master is as a trial master, and that the inquisitorial functions of the master are totally new.[20]

Part VI suggests that our failure to remember our quasi-inquisitorial equity tradition—and in particular, the way in which we made the transition from our divided law/equity past to today's adversarial framework—may help explain both many of the widely bemoaned ailments of our current procedural system and our apparent difficulty remedying these ailments. The problems with our current adversarial framework stem, in part, from our transfer to the parties control of powerful and costly equity devices (such as the master) that courts once controlled in a quasi-inquisitorial system. And yet, the obvious solution—restoring greater court control—has proven very difficult (indeed, largely inconceivable) because the triumph of the adversarial framework has led us to view inquisitorial procedure as alien and unfair.

Part VII concludes with a brief excursus on how French civil procedure—which also derives from the Roman-canon tradition, and thus was once very similar to the procedure applied in equity courts—has dealt with similar problems stemming from the rise of modern, complex litigation. In particular, it considers how French civil procedure has augmented the court's inquisitorial fact-finding authority to serve the goal of truth-seeking, while simultaneously strengthening its commitment to the *principe du contradictoire*—a doctrine that is the functional equivalent of our negative, state-checking conception of due process, and to this end, guarantees the right to notice and a hearing. The French example thus suggests a variety of lessons for

19 *See* FED. R. CIV. P. 26–37 (2003).

20 *See infra* notes 54–57, 346–48 and accompanying text.

our procedural system's reform. Most importantly, the French example illustrates that it is possible to adopt more inquisitorial procedures while protecting due process.

I
THE LIMITS OF ADVERSARIAL PROCEDURE AND THE SEARCH FOR AN ALTERNATIVE

Everywhere there are signs of dissatisfaction with adversarial procedure and of a growing interest in finding workable alternatives.[21] One of these alternatives—indeed, in historical and comparative perspective, our primary available alternative—is inquisitorial procedure.

The models of adversarial[22] and inquisitorial systems of justice are precisely that—models to which no actual legal system precisely corresponds, since all legal systems combine both adversarial and inquisitorial elements.[23] Nonetheless, such models are useful as Weberian ideal types for facilitating comparative analysis, and thus directing attention towards the latent tendencies within any actual legal system.[24] The adversarial and inquisitorial models are distinguished primarily by whether the parties or the court control three key aspects of the litigation: initiating the action, gathering the evidence, and determining the sequence and nature of the proceedings.[25]

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21 *See infra* notes 32–33 and accompanying text.

22 As developed by continental—especially German—comparative jurists in the late nineteenth and early twentieth centuries, the classical distinction is between inquisitorial and *accusatorial* procedural models, rather than between inquisitorial and *adversarial* ones. *See, e.g.*, ARTHUR ENGELMANN, A HISTORY OF CONTINENTAL CIVIL PROCEDURE 3–81 (Robert Wyness Millar trans. & ed., 1927) (describing the history of civil procedure in English and continental systems). The term "adversarial," however, seems more appropriate (especially in writing for a predominately American audience) as it better captures how we Americans conceive of our own procedural system, and thus, our legal culture. *See, e.g.*, Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 283–84 (2002) (describing the adversarial system as reflecting America's "competitive individualism").

23 There has never been a truly inquisitorial model of civil adjudication in the Western legal tradition—if only because, in both the Anglo-American and continental legal systems, the parties themselves have always borne primary responsibility for initiating the private, civil lawsuit. *See* ENGELMANN, *supra* note 22, at 11–21. At the same time, as this Article suggests, the pressures of fact-finding are such that even the most adversarial legal systems must provide at least some measure of judicial involvement in the process of gathering evidence, and thus contain at least some inquisitorial features. *See id.* at 23–27.

24 *See* H.H. Gerth & C. Wright Mills, *Introduction* to FROM MAX WEBER: ESSAYS IN SOCIOLOGY 3, 59–61 (H.H. Gerth & C. Wright Mills trans. & eds., 1946) (discussing Weber's concept of the "ideal type").

25 As discussed in the classic work, *A History of Continental Civil Procedure*, the distinction between the inquisitorial and accusatorial models encompasses at least seven different aspects of the litigation: (1) whether the court or the parties determines the litigation's scope and content; (2) whether the court or the parties initiates the litigation and takes the actions needed to move it forward; (3) whether the litigation is composed of discrete stages, and whether steps not taken at a particular stage are thereafter precluded; (4) whether the value of the proof is fixed formally, by rule, or determined rationally, by free

In the adversarial model, the parties are responsible for initiating and conducting the litigation.[26] They gather all the evidence and present it orally, in open court, subjecting witnesses to examination and cross-examination, and the court serves as a neutral umpire, deciding the questions of fact and law raised by the parties.[27] In addition, the parties bear primary responsibility for determining the sequence and manner in which evidence is presented and legal issues are argued.[28] In contrast, in the inquisitorial model, the court itself initiates the litigation and undertakes significant responsibility for gathering evidence, not just for ruling on the conclusions that should be drawn from it.[29] Such evidence, including witness testimony, is taken outside the courtroom by a judge or court-appointed commissioner, and a written record is then submitted to the court as the basis for its judgment.[30] Furthermore, the court is largely responsible for determining the sequence and manner in which issues of fact and law are considered and decided.[31]

Our current procedural framework is, of course, adversarial. But adversarial procedure alone does not work—and, indeed, the more committed a legal system becomes to adversarial procedure, the more likely it is to embrace parallel non-adversarial alternatives. Consider here some familiar and distressing developments in criminal procedure. As John Langbein[32] and William Stuntz[33] have suggested, adversarial procedure is so slow and expensive that routine functioning of the criminal justice system has required the adoption of alternative procedural forms—including, but not limited to, plea bargaining.[34]

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evaluation of the judge; (5) whether proceedings are conducted in writing or orally, and whether proof is written or oral; (6) whether the court deals directly with the parties and witnesses, or indirectly through some intermediate agency; and (7) whether proceedings are conducted in public, or in secret. *See* ENGELMANN, *supra* note 22, at 3–81. Since many of these seven aspects of litigation strongly correlate with one another, it seems easier, for the sake of clarity, to distinguish adversarial from inquisitorial procedure by focusing on the following three aspects: initiating the action, gathering the evidence, and determining the sequence and nature of the proceedings. It should be remembered, however, that—as this Article's discussion of the equity tradition's emphasis on, *inter alia*, writing and secrecy makes clear—these three aspects of litigation do tend to encompass others.

26 *See* ENGELMANN, *supra* note 22, at 19.

27 *See id.* at 25–26.

28 *See id.* at 25.

29 *See id.* at 21, 26.

30 *See id.* at 51–53; MICHAEL R.T. MACNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 165–68 (1999).

31 *See* ENGELMANN, *supra* note 22, at 22–27.

32 *See, e.g.*, John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979).

33 *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

34 Plea bargaining is, of course, in a certain sense adversarial, in that it consists of an adversarial negotiation between prosecutor and defendant. *See, e.g.*, John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 8 (1978). This form of adversarial proce-

In Langbein's words, "As the death grip of adversary procedure has tightened around the common law criminal trial, trial has ceased to be workable as a routine dispositive proceeding"; thus, "[o]ur criminal justice system has become ever more dependent on processing cases of serious crime through the nontrial procedure of plea bargaining."[35] Likewise, Stuntz has persuasively argued that the high degree of protection afforded defendants by constitutional criminal procedure is tolerated by the criminal justice system only because a wide variety of institutional mechanisms serve to mask its significant costs—largely by avoiding the need to hold adversarial trials in which such procedure must be applied.[36] Among the mechanisms he discusses is prosecutorial discretion, which permits the prosecutor to focus more energy on pursuing those not likely to advance strong procedural claims—namely, those too poor to afford effective counsel.[37] Of course, none of these alternative, non-adversarial procedures were self-consciously embraced as part of a sustained effort to remedy the problems with adversarial procedure, and there is good reason to doubt that we would have chosen these particular alternatives had such a self-conscious effort been made.

While there are great differences between the criminal and civil justice systems, adversarial procedure has proven increasingly unworkable in the civil context as well. The last half-century or so has witnessed the rise of increasingly large and complicated civil lawsuits, which have greatly added to the burden on the court system. Such complex litigation has multiplied the opportunities and incentives for parties to manipulate costly procedural devices to overwhelm the adversary in a financial war of attrition. Devices such as discovery and expert testimony often bear little relationship to their supposed purpose of truth-seeking. Instead, they serve as weapons for wearing down the other side, thereby ensuring the victory of litigants who are wealthy enough to make repeated motions for production and to find experts willing to testify to any claim.[38]

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dure, however, departs significantly from the in-court adversarial trial that is our standard of adversarial justice—not least in that, even though the judge must ultimately decide whether to accept the plea agreement, the negotiation itself takes place outside the courtroom in circumstances that ensure the prosecutor maximal control. *See id.* at 8–9, 18.

35 Langbein, *supra* note 32, at 204; *see also* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 18–19 (2003) [hereinafter LANGBEIN, ORIGINS] (describing plea bargaining as "entail[ing] the surrender of the defendant's right to trial in exchange for a lesser sanction"); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 121 (1992) (characterizing plea bargaining as the "ordinary dispositive procedure of American criminal justice").

36 *See* Stuntz, *supra* note 33, at 3–6.

37 *See id.* at 28.

38 Criticism of adversarial procedure is extensive. One of the primary complaints is that it wastes public and private resources and fails to facilitate truthful fact-finding. *See, e.g.*, John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823,

The search for alternatives to adversarial procedure has manifested itself differently in the civil context than it has in the criminal. Criminal cases, unlike civil ones, are not legally susceptible to private dispute-resolution mechanisms, and to dispose of them, the state must therefore finance both the court system and the prosecution. Accordingly, alternatives to adversarial criminal procedure have taken the form of procedural devices that operate within the public judicial system, but which generate cost-savings for both the court and the prosecution. Plea bargaining, for example, takes place within the public judicial system in that it requires a public prosecutor to charge the crime and negotiate the plea and a judge to accept the plea agreement, but as compared with a trial, it saves the court and the prosecution a great deal of time, and thus money.[39]

In contrast, in the civil justice system—where the litigants are most often private parties, the public interest is less acute, and disputes are fully susceptible to resolution outside the public judicial system—the pressure to find alternatives to adversarial procedure has weighed less heavily on the state. The private sector has therefore played a larger role in the search for alternatives to adversarial civil procedure and bears significant responsibility for the development of one of the primary alternatives attempted—namely, the Alternative Dispute Resolution (ADR) movement.[40] ADR adheres to the party control that characterizes adversarial procedure,[41] but it does so largely outside the public judicial system, thus avoiding the full panoply of often costly and wasteful procedural devices, such as discovery.[42] Despite the importance of private initiative in the emergence of this

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831–32, 836 (1985). Another primary complaint is that by placing so much power in the hands of the parties (and thus in those of their lawyers), adversarial procedure denies equal access to justice because many cannot afford lawyers. *See, e.g.*, David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 211–13 (2003) (identifying several reasons why low-income people have unmet legal needs); *see also* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 94–99 (1949) ("[T]he advantage in litigation is necessarily on the side of the party that can 'purchase justice.'").

39 *See supra* notes 32–36.

40 *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System*, 108 PENN. ST. L. REV. 165, 170–73, 181–82 (2003) (describing how the "Community Justice Movement" first embraced ADR in the 1960s and early 1970s in an effort to empower the disempowered, and how business groups came to lend their support in the 1980s in the hope that ADR would save time and money).

41 It is interesting to note, in this context, the observation that the French legal system has eschewed ADR precisely because it "prefers to bureaucratize the handling of cases, rather than to abandon it to others or to the parties themselves." ANTOINE GARAPON & IOANNIS PAPADOPOULOS, JUGER EN AMÉRIQUE ET EN FRANCE 120 (2003).

42 Whether ADR does, in fact, save money is one of many ongoing disputes to which ADR has given rise. *See, e.g.*, Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 930–32 (2002) (suggesting that ADR's primary effect has been to redistribute costs in ways that favor the elite).

movement, many courts seeking to conserve resources have proven only too happy to jump aboard by, for example, directing that the parties submit to mediation.[43] Nonetheless, even such court-directed ADR operates significantly outside the public judicial system.

In the civil context, however, as in the criminal, there are indications of efforts to develop non-adversarial alternatives that operate within the public judicial system.[44] Although these various efforts have failed to form any kind of unified, identifiable movement along the lines of ADR, they can together be characterized as inquisitorial.[45] The inquisitorial alternative, like traditional adversarial procedure and unlike ADR, continues to embrace the public judicial system as the appropriate forum for dispute resolution. This alternative, however, seeks to transfer control of the litigation from the parties to the court, and thereby avoid the destructive incentives inherent in a party-controlled, adversarial contest. Thus, the last several decades have witnessed a progressive attempt to augment judges' power in managing the discovery process by, *inter alia*, encouraging them to hold pretrial conferences in which the scope, nature, and timing of discovery are set forth in a plan, whose implementation the court can then regulate and enforce.[46] Likewise, as is the focus of this Article, federal courts

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43 *See* Hensler, *supra* note 40, at 172–73, 177, 185; *see also* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105–315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658) (requiring every federal district court to implement an ADR program).

44 *See, e.g.*, Lois Bloom & Heleu Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 513–14 (2002) (noting that "[c]ommentators recognize . . . that the formal ideal of adversarial justice does not accurately describe the U.S. court system as it operates in practice," and that such commentators not only "question the bright line distinction between adversarial and inquisitorial justice, but they also emphasize the 'many nonadversarial elements [that] have become important parts of the American adjudicatory system'" (citations omitted)).

45 *See* Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1210–11 (asserting that "there have been, and still are, substantial so-called inquisitorial elements" in the American procedural system, including, for example, an Article III judge's right to "appoint an expert witness, examine such a witness himself, and then inform the jury that the witness was court-appointed").

46 *See* Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler*, A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation, 73 TEX. L. REV. 1627, 1632–33 (2002) (describing how in 1983 Federal Rule of Civil Procedure 16 was revised to require mandatory pretrial scheduling in most cases; how in 1990 Congress enacted the Civil Justice Reform Act, in which it endorsed judicial management of the pretrial phase; and how in 1993 Rule 16 was amended further to elaborate on what must occur at pretrial); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937–43 (2000) [hereinafter Resnik, *Trial as Error*] (describing the rise of managerial judging, beginning gradually in the 1920s and accelerating in the 1950s); *see also* FED. R. CIV. P. 16 advisory committee's note (1993) (explaining that the purposes of several amendments to Federal Rule of Civil Procedure 16 were to "call attention to the opportunities for structuring the trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to

seeking to increase their control over the fact-finding process have employed pretrial managerial masters to supervise discovery, and post-trial investigatory masters to monitor the judgment's implementation.[47]

Critically, just as in criminal procedure, our turn toward the inquisitorial in civil procedure has been unacknowledged rather than self-conscious, and thus far from ideal. First, it has been insufficient.[48] Given that ADR has not proven to be the panacea for which many had hoped,[49] the time has come to begin seriously considering the inquisitorial alternative—namely, a systematic effort to increase the court's control over litigation as a means of remedying the excesses of adversarial procedure. But we have been hindered in our ability self-consciously to embrace inquisitorial procedures as correctives to the adversarial framework's excesses, in no small part because we mistakenly assume that our legal tradition is exclusively adversarial, and that inquisitorial procedure is therefore necessarily incompatible with the due-process values that we hold dear.[50] Thus, rather than undertaking a comprehensive program of procedural reform, we have resorted to ad hoc tinkering.[51]

Second, to the extent that we have adopted inquisitorial procedures, we have done so in a largely confused fashion. Having failed self-consciously to embrace inquisitorial procedure, we have failed to address the key question of how to ensure that such procedure is made compatible with our current adversarial framework. Thus, for example, anxiety that certain aspects of the master's inquisitorial role—such as the authority to undertake ex parte communications—might be impermissible in an adversarial context has manifested itself in recent amendments to Federal Rule of Civil Procedure 53.[52] This

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facilitate settlement or to provide for an efficient and economic trial"); FED. R. CIV. P. 16 advisory committee's note (1983) (noting that "pretrial conferences may improve the quality of justice rendered in the federal courts," and that Rule 16 was "extensively rewritten and expanded to meet the challenges of modern litigation" by mandating a pretrial scheduling order, and by encouraging scheduling and pretrial conferences).

47 *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 9A FED. PRAC. & PROC. CIV.2d § 2601 (Supp. 2004) (noting that a substantial revision of Rule 53, which went into effect on December 1, 2003, reflects courts' "increased employment [of masters] in a variety of pre-trial and post-trial functions").

48 This is, of course, in contrast to the criminal justice system, where our failure self-consciously to embrace our need for inquisitorial procedure has led to too much (of the wrong kind of) inquisitorial procedure. *See supra* notes 32–37.

49 *See* Hensler, *supra* note 40, at 194–95 (stating that "there is little evidence" that ADR saves time and money).

50 *See* Rosen, *supra* note 45, at 1210 (arguing that "significant reform of aspects as (apparently) fundamental as the adversarial and jury systems are not incompatible with the basic Anglo-American jurisprudential spirit").

51 *See, e.g.*, Resnik, *Trial as Error*, *supra* note 46 (describing various procedural changes implemented over a number of years).

52 *See infra* Part VI.

rule, which governs masters, now vacillates between seeking to forbid such communications in their entirety and permitting them without limit.[53]

This Article leaves to another day the vast normative project of devising an inquisitorial program of reform. Instead, it focuses on history, setting out to recover our forgotten equity tradition. Because our sense of history shapes our sense of the possible, history can offer the best antidote to the dangerous tendency to view reform—precisely because it changes the status quo—as "alien." Accordingly, the history offered by this Article aims to dispel the myths that our legal culture is exclusively adversarial and that inquisitorial forms of procedure are necessarily unfair.

As argued below, Anglo-American courts of equity drew on the same Roman-canon tradition that underlies the continental European legal systems, and for this reason, they were for centuries in many key respects inquisitorial.[54] Scholars have missed a large part of this story because they have tended to presume that Anglo-American procedure is necessarily adversarial, and thus misread events that pre-dated the formal merger of law and equity in 1938. In fact, however, equity's quasi-inquisitorial tradition remained in place through the nineteenth century until it collapsed at century's end under the growing sway of the common law's oral, adversarial framework.[55] It is thereafter that we came to conceive of our legal tradition as exclusively and necessarily adversarial—a self-conception that has proven so powerful that today hardly anyone seems to recall equity's very different, significantly inquisitorial procedural mode. Pursuant to this adversarial self-conception, we tend to equate due process with adversarial procedure,[56] but the equity tradition teaches that inquisitorial modes of procedure can be fully consistent with due process.[57]

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53 *See infra* notes 379–96 and accompanying text.

54 *See infra* Part II.

55 *See infra* notes 281–85 and accompanying text.

56 For example, Supreme Court cases regarding the procedures that a government agency must apply to terminate an individual's benefits in accordance with due process take the adversarial trial as the standard of fairness, such that tbe question becomes to what extent it is permissible to depart from this standard. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (suggesting that the balancing of governmental and private interests in *Goldberg v. Kelly*, 397 U.S. 254, 266–71 (1970), was weighted very heavily toward the private, in that the "Court held that a hearing closely approximating a judicial trial is necessary"). The tendency to equate due process with the adversarial is also apparent in the context of criminal procedure, where police action has been held to offend due process on the grounds that it is unduly inquisitorial. *See, e.g.*, Rogers v. Richmond, 365 U.S. 534, 541, 447–49 (1961) (holding that involuntary confessions are disallowed under the Due Process Clause of the Fourteenth Amendment because "ours is an accusatorial and not an inquisitorial system").

57 *See infra* Part III.

In outlining the historical developments that led to our current procedural framework, and thus to our adversarial self-conception, this Article focuses in particular on one procedural device, whose evolution is representative of these broader developments: the master. Originating in the English Chancery Court, masters were an integral component of equity's quasi-inquisitorial mode, responsible for assisting the court by, *inter alia*, taking witness testimony outside the courtroom on an ex parte, secrecy-oriented basis.[58] When, over the course of the nineteenth century, we abandoned equity's quasi-inquisitorial framework in favor of the oral, adversarial framework of the common law, the master's traditional ex parte fact-gathering role became anathema. Thus, in the late nineteenth century, masters were reconceived as trial masters, whose function it was to oversee an adversarial hearing in place of the judge.[59] But over the last half-century or so, the rise of new kinds of complex litigation—most notably the institutional reform suits of the Civil Rights era[60]—have encouraged a reemergence of the master's inquisitorial role.[61]

Judges now appoint pretrial masters to undertake an active, managerial role in the discovery process. These masters encourage the parties to formulate fair and efficient discovery plans, and seek to prevent and resolve discovery-related disputes.[62] In addition, judges delegate post-trial masters to monitor the implementation of consent decrees and structural injunctions, a task which may require them to undertake their own investigations, often on an ex parte basis.[63]

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58 *See infra* notes 192–203 and accompanying text.

59 *See infra* Part V.

60 *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 309–10 (1998).

61 *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298–1302 (describing several problems that judges seek to avoid by "increasingly resort[ing] to outside help" such as masters).

62 *See* Wayne D. Brazil, *Authority to Refer Discovery Tasks to Special Masters: Limitations on Existing Sources and the Need for a New Federal Rule*, *in* MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS 305, 319–32 (1983) [hereinafter MANAGING COMPLEX LITIGATION] (discussing cases where the courts appointed masters to oversee the discovery process).

63 *See generally* James S. DeGraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 800–03 (1991) (discussing the complex and lengthy post-trial phase of institutional reform litigation, and critiquing the ad hoc fashion in which federal district court judges delegate authority to masters appointed to assist in this phase); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753, 753–54 (1984) (noting that "[i]nstitutional reform litigation has compelled courts to struggle with the problems of implementing their innovative and allegedly unprecedented decrees," and discussing courts' use of special masters as a method to "increase the likelihood of successful implementation"); Vincent M. Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 U. TOLEDO L. REV. 419, 419–23 (1979) (discussing masters as one of the instruments that federal courts use to help them perform their duties in institutional reform litigation).

These two functions that masters are now being asked to serve call, respectively, for a great deal of managerial and investigatory involvement in the litigation. Thus, they fall outside the traditional role judicial officers play in an adversarial system—the role of neutral umpire.[64] Masters serving these roles are commonly said to be performing a new "managerial" function—one that arose in the Civil Rights era, and that is distinct from the traditional adversarial judicial function.[65] But as these roles provide the court with significant authority in determining the sequence and nature of the proceedings as well as in the gathering of the evidence, they can also be viewed as a form of inquisitorial procedure. That we have not viewed them as inquisitorial, but have instead deemed them to be an entirely novel managerial procedural form, is itself an indication of the extent to which we have forgotten our inquisitorial tradition.[66]

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64 In addition, of course, masters are serving a wide variety of other functions. Indeed, federal courts employ masters for so many different purposes that a comprehensive list is near impossible. The Supreme Court, for example, regularly appoints masters to preside over trials in cases that come within its original jurisdiction. *See* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 627 (2002) (describing how the Supreme Court "delegated the bulk of its responsibilities in [such cases] to appointed Special Masters, who were to issue subpoenas, rule on motions, obtain witness testimony, collect evidence, and, in some cases, preside over trials"). And federal district courts appoint masters to review documents for privilege, *see* United States v. Stewart, No. 02 CR. 396 JGK, 2002 WL 1300059, at *1 (S.D.N.Y. June 11, 2002), to serve as neutral scientific advisors, *see In re* Hanford Nuclear Reservation Litig., 292 F.3d 1124, 1138 (9th Cir. 2002), to provide expert testimony, *see* Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000), to award damages, *see* United States v. Washington, 157 F.3d 630, 656 (9th Cir. 1998), to undertake competency hearings, *see* United States v. Jones, 87 F.3d 954, 955 (7th Cir. 1996), to serve as mediators, *see* Reynolds v. Rick's Mushroom Serv., Inc., No. Civ.A. 01-3773, 2004 WL 620164, at *8 (E.D. Pa. Mar. 29, 2004), and to provide accountings, *see* General Motors Corp. v. Devex Corp., 461 U.S. 648, 650 (1983).

In fact, according to a Federal Judicial Center study on special masters:

> Modern uses of special masters . . . covered a full spectrum of civil case management and fact-finding at the pretrial, trial, and posttrial stages . . . . Judges appointed special masters to quell discovery disputes, address technical issues of fact, provide accountings, manage routine Title VII cases, administer class settlements, and implement and monitor consent decrees, including some calling for long-term institutional change.

THOMAS E. WILLGING ET AL., SPECIAL MASTERS' INCIDENCE AND ACTIVITY: REPORT TO THE JUDICIAL CONFERENCE'S ADVISORY COMMITTEE ON CIVIL RULES AND ITS SUBCOMMITTEE ON SPECIAL MASTERS 4 (2000). For concerns regarding the use of masters in managing the discovery process, *see generally* Brazil, *supra* note 62, at 305 ("Over the years since the adoption of the Federal Rules of Civil Procedure, federal courts have appointed special masters to perform a wide range of quasi-judicial services during the discovery stage of civil actions.").

65 *See* FEELEY & RUBIN, *supra* note 60.

66 This is not to suggest that there are no differences between masters' modern managerial role and their traditional quasi-inquisitorial role, described below in Parts II and III. Clearly, there are differences—in no small part because the structural injunction whose implementation modern, post-trial masters are asked to oversee is a development of the last several decades. Furthermore, there are good reasons—not least of which is our re-

The one substantial empirical study of masters in recent years confirms the growing importance in complex litigation of the master's pretrial managerial and post-trial investigatory roles.[67] Undertaken by the Federal Judicial Center and issued in 2000, this study was commissioned by the Judicial Conference Advisory Committee on Civil Rules, which sought to determine whether and how to amend Rule 53.[68]

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flexive revulsion for any procedure termed "inquisitorial"—to prefer the designation "managerial." But if one applies the traditional adversarial/inquisitorial typology, it is clear that modern masters evince many of the characteristics associated with the inquisitorial model.

67 *See* WILLGING, *supra* note 64, at 9. This study is plagued by certain empirical difficulties, since, as the authors recognize, the available data permit few firm conclusions. But to the extent that the conclusions are subject to challenge, it is primarily in that they may understate the extent of special master activity. For example, the study acknowledges that it may well "understate[ ] special master activity," because, *inter alia*, "[i]t would be extremely difficult to design research to uncover special master appointments that were not recorded on docket sheets, and [the study was] unable to do so within the available time." *Id.* at 13 n.9. Likewise, the study garnered much of the more interesting, detailed data from interviews with judges, attorneys, and masters involved in cases in which masters were appointed, but "[t]he cases selected for interviews . . . [we]re not necessarily representative of [the study's] sample or of the universe of special master activities." *Id.* at 15. Finally, while the study does not identify this problem, there is good reason to doubt the interviewees' forthrightness. To the extent that masters undertake activities of questionable legitimacy—such as ex parte communications in service of post-trial investigation—it is unlikely that they or the judges appointing them would be particularly anxious to discuss these. *See id.* at 46–49. And while, in theory, the lawyers involved might be more willing to do so, they might also hesitate to make comments that might be seen as critical of judicial officers. See the fascinating discussion by Robert McLean—one of the defense attorneys in the massive AT&T antitrust litigation—of Geoffrey C. Hazard, Jr. and Paul R. Rice's piece, in which the latter describe their role as court-appointed masters in the same AT&T litigation. Geoffrey C. Hazard, Jr., & Paul R. Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers, in* MANAGING COMPLEX LITIGATION, *supra* note 62, at 77–111; Robert D. McLean, *Pretrial Management in Complex Litigation: The Use of Special Masters in* United States v. AT&T, *in* MANAGING COMPLEX LITIGATION, *supra* note 62, at 275–92. In contrast to Hazard and Rice, who wholeheartedly praised the virtues of informal, ex parte communications, *see* Hazard & Rice, *supra*, at 91–93, McLean argues that "[t]his ex parte contact by the parties with the special masters, . . . while never actually abused by either side, had clear potential for abuse . . . ." *See* McLean, *supra*, at 278. Likewise, he concludes that "although no problems ever became apparent, in camera reports by the special masters to the judge . . . caused some uneasiness, in part because such contacts occasionally put the special masters in the position of representing to the judge the positions of the parties on pending issues." *Id.*

68 Many federal courts rely on their inherent powers to appoint officers designated "monitors" or "court monitors," rather than Rule 53 "masters." The decision to appeal to the courts' inherent powers, rather than to Rule 53, appears to stem, in large measure, from concern that certain uses of masters—in particular, pre- and post-trial uses—are not authorized by Rule 53. *See, e.g.*, DeGraw, *supra* note 63, at 808–10 (suggesting that courts appeal to inherent powers "[t]o avoid the restrictions imposed by [*inter alia*] Rule 53"); Levine, *supra* note 63, at 761–63 (suggesting that the fact that courts appeal to inherent powers "may reflect a dissatisfaction with the adequacy of [R]ule 53"). It remains to be seen whether the December 2003 amendments to Rule 53, which expressly authorize pre- and post-trial uses of masters, will result in increased reliance on the rule and decreased appeals to inherent powers. *See* WRIGHT & MILLER, *supra* note 47. Whatever the formal basis of their appointment, and whatever their name, today's monitors and masters both derive from the centuries-old historical figure of the master in the English Court of Chan-

The study found that "the incidence of special master consideration, appointment, and activity was rare,"[69] but the Advisory Committee "found this level of activity sufficient to warrant drafting another proposal to revise Rule 53."[70] As for those suits in which masters were appointed, the study determined that these were "primarily . . . high-stakes cases that were especially complex."[71] Furthermore, "the combined number of pretrial and posttrial appointments was approximately equal to the number of appointments directed toward trial activities . . . ."[72]

The study concluded that the increased reliance on masters to serve managerial and investigatory roles in complex litigation stems, at least in part, from the existing constraints on other judicial officers (namely, judges and magistrates) within our adversarial legal system.[73] In particular, half of the pretrial masters who were interviewed "thought that a magistrate judge could not have performed the master's duties because they required knowledge and expertise about complex technical issues not possessed by most magistrate judges,"[74] who, pursuant to prevailing adversarial norms, are generalist judicial officers lacking expertise. Likewise, "[n]one of the special masters who performed posttrial functions [reported] that a magistrate judge could have performed their roles, such as . . . monitoring compliance with consent decrees."[75] In sum, masters are now serving managerial and investigatory roles that are not within a traditional adversarial model of adjudication—and, indeed, masters are serving these roles precisely because judges and magistrates, as adversarial judicial officers, cannot comfortably do so.[76]

The use of masters to serve managerial and investigatory roles has not escaped notice, but these roles have been widely described as entirely novel, rather than as recent exemplars of a longstanding inquisitorial tradition.[77] Yet, while the pre- and post-trial stages of complex litigation are clearly new developments, the inquisitorial judicial role for which they call—and which masters are being asked to serve—is

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cery. *See* JOHN G. HENDERSON, CHANCERY PRACTICE WITH ESPECIAL REFERENCE TO THE OFFICE AND DUTIES OF MASTERS IN CHANCERY, REGISTERS, AUDITORS, COMMISSIONERS IN CHANCERY, COURT COMMISSIONERS, MASTER COMMISSIONERS, REFEREES, ETC. 146–47 (1904) (giving an account of the various terms used in federal and state courts to describe the function of "masters," including commissioner, clerk, auditor, register, and referee).

69 WILLGING ET AL., *supra* note 64, at 76.

70 *Id.* at 3.

71 *Id.* at 12.

72 *Id.* at 4.

73 *Id.* at 5.

74 *Id.* at 10.

75 *Id.*

76 *See id.*

77 *See infra* notes 346–54 and accompanying text.

not. Judicial involvement in managing the litigation (particularly discovery) and in undertaking significant responsibility for fact-finding (including ex parte investigations) is a well-established, longstanding feature of Anglo-American legal culture—a feature of equity's forgotten, quasi-inquisitorial tradition, in which masters played a critical part.[78]

Having forgotten this history, we have, ironically, returned to the inquisitorial master, but have failed to recognize that this is what we have done. The price of our forgetfulness has been high. As in the case of our use of inquisitorial procedure more broadly, our use of the inquisitorial master—precisely because it is unacknowledged—appears to be both insufficient and confused. But before considering how this is so, it is necessary to begin, in Part II, by rediscovering how equity's traditional, quasi-inquisitorial procedural framework functioned.

II
AN OUTLINE OF EQUITY'S QUASI-INQUISITORIAL PROCEDURAL TRADITION

As a complete account of the history and development of the equity tradition would far exceed the scope of these pages, this Article provides more of a sketch than a portrait and confines itself primarily to the nineteenth- and twentieth-century developments that shaped our modern procedural framework.[79] Nonetheless, as the English

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78 *See infra* notes 89–91 and accompanying text.

79 The equity tradition depicted below is necessarily something of an ideal type. *See supra* note 24 and text accompanying notes 22–24. This is because, even after the initial issuance of the Federal Rules of Equity in 1822, federal courts sitting in equity retained a great deal of discretion in regulating procedure. And, more importantly, the process of transformation from a written, secretive mode of procedure to an oral, adversarial one had already begun as of the first decades of the nineteenth century. 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 267, at 254 (16th ed. 1899). Thus, much of the case law and treatise literature dating back to the founding of the United States captures a system that was already in the process of imploding. For example, Simon Greenleaf, the author of one of the premier nineteenth-century treatises on the law of evidence, wrote that it was "difficult[,] . . . if not impossible, to prepare a complete system of the law of evidence in equity, adapted alike to all the States in the Union," because equity procedure varied greatly between the states and was changing rapidly. *Id.* Many of these changes resulted from the fact that equity courts were embracing the oral, adversarial mode of gathering and presenting witness testimony, but to varying degrees:

> In some [states], the witnesses may be examined in court, *viva voce*, as at law; in others, the testimony is always taken in writing, either in open court, by the clerk or the judge, or in depositions, after the former method. In the latter case, however, there is this further diversity of practice, that, in some States, the parties may examine and cross-examine the witnesses, *ore tenus*, before the magistrate or commissioner; in others, they may only propound questions in writing, through the commissioner; in others, they may only be present during the examination, and take notes of the testimony,

Court of Chancery was the birthplace of equity[80]—and of the master—some exploration of its origins is necessary to place later developments in proper context.

Relatively little is known about the early development of Chancery jurisdiction, but it is clear that the court had deep roots in the Roman-canon tradition.[81] As its name suggests, Chancery originated as the jurisdiction of the chancellor, who served as keeper of the great seal, which was used to authenticate royal documents, including the writs that authorized litigants to proceed before the common-law courts.[82] By the late thirteenth century, many litigants began directly petitioning the king, rather than the common-law courts—perhaps because their claims did not fall within the established and increasingly rigid common-law writs.[83] In the fourteenth century, as such petitions become more numerous, the king's council began delegating them to individual councilors. From these delegations there arose a variety of courts, including that of the chancellor—namely, the Chancery.[84]

Petitions thus delegated by the king's council and later addressed directly to the chancellor came to constitute the "English Side" of Chancery jurisdiction—thus designated because these petitions were written in English, and to distinguish them from those addressed to Chancery's "Latin Side," which concerned matters that arose from the chancellor's administrative work.[85] While petitions on the English Side were initially formulated as appeals to the chancellor's conscience, and the chancellor was thus relatively unrestrained by formal doctrine in his effort to do justice, Chancery jurisprudence became increasingly formalized with the passage of time.[86] By the early seventeenth century, it had developed into an entirely separate institutional and doctrinal system of justice known as equity.[87]

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but without speaking; while in others, the parties are still excluded from the examination.

Id. While Greenleaf focused here on differences between various state equity courts, the transformation he detailed from a written, inquisitorial to an oral, adversarial mode of adjudication was also experienced in federal equity courts (in part, no doubt, because of related state-court developments). *See infra* Parts II, III.

80 *See* ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 23–26 (1952).

81 *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 106 (4th ed. 2002).

82 *See id.* at 99.

83 *See id.* at 98.

84 *See id.* at 98–99.

85 *See id.* at 100–01. For example, the Latin Side addressed questions relating to royal grants. *See id.*

86 *See* D.E.C. Yale, *Introduction* to LORD NOTTINGHAM'S MANUAL OF CHANCERY PRACTICE AND PROLEGOMENA OF CHANCERY AND EQUITY 16–17 (D.E.C. Yale ed. 1965).

87 *See* BAKER, *supra* note 81, at 105–11; MACNAIR, *supra* note 30, at 15–40. Aside from the Chancery Court, there were several other courts that together came to constitute the equity system, including most importantly the Star Chamber, but also the Court of Re-

Until Henry VIII broke with the Catholic Church in the early sixteenth century, many chancellors continued to be leading ecclesiastics—often bishops or archbishops—trained in the law of the Church, and not in the common law.[88] As the chancellor was the Chancery Court's only judge, he greatly needed assistance, and turned for help to his clerical staff—particularly, the twelve *clerici ad robas*.[89] In the thirteenth century, these clerks aided the chancellor in both his administrative and judicial duties.[90] From the fourteenth century onward, however, as the English Side of Chancery emerged and the judicial workload became increasingly heavy, the clerks began to focus primarily on assisting with this litigation. By the late fifteenth century, they came to be known as masters.[91]

At least through the fifteenth century, masters, like chancellors, were largely clerics.[92] Through the early seventeenth century, and then again from 1633 through the English Revolution of 1640, they were almost all doctors of law, trained in the Roman-canon law rather than in the common law.[93] Because masters were trained as civilians, the Chancery Court's reference of a case to a master continued, as of the early seventeenth century, to be described as a "'reference to the Doctors.'"[94]

Although the early chancellors and, for a longer period, masters, were trained in the Roman-canon law, the effect of this training on the development of equity doctrine and procedure is not entirely clear. Indeed, the extent to which equity was influenced by the Roman-canon tradition has been a subject of longstanding controversy,

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quests and the Court of Wards. *See* MACNAIR, *supra* note 30. Of these various courts, only Chancery would survive the constitutional crisis of the 1640s. *See id.* at 33.

88 *See* BAKER, *supra* note 81, at 99; 6 SIR JOHN BAKER, THE OXFORD HISTORY OF THE LAWS OF ENGLAND, 1483–1558, at 180 (2003) [hereinafter BAKER, OXFORD HISTORY].

89 *See* BAKER, *supra* note 81, at 100; BAKER, OXFORD HISTORY, *supra* note 88, at 182. These twelve were called *clerici ad robas* because they received liveries of robes. *See* BAKER, *supra* note 81, at 100.

90 *See* BAKER, *supra* note 81, at 100; EDMUND HEWARD, MASTERS IN ORDINARY 1–4 (1990).

91 *See* BAKER, *supra* note 81, at 100.

92 *See* HEWARD, *supra* note 90, at 11.

93 *See* BAKER, OXFORD HISTORY, *supra* note 88, at 183; *see also* BRIAN P. LEVACK, THE CIVIL LAWYERS IN ENGLAND, 1603–1641: A POLITICAL STUDY 16–34 (1973). During the first three decades of the seventeenth century most masters were common lawyers, but in 1633 the Privy Council declared that at least eight of the eleven masters must be civilians. *See* MACNAIR, *supra* note 30, at 32. Thereafter, and until the English Revolution, only civilians were named masters. *See id.* Indeed, one anonymous master, writing in the late sixteenth or early seventeenth century, was of the view that masters "were [once] called *clerici*, because they were auntientlie all of them cleorrgie men." *A Treatise of the Maisters of the Chauncerie* (thought to have been written at some point between May 1596 and July 1603), *in* FRANCIS HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 291, 297 (1787) [hereinafter *Treatise of the Maisters*]; *see also* HEWARD, *supra* note 90, at 1.

94 MACNAIR, *supra* note 30, at 32.

not only among later historians, but also among early-modern contemporaries.[95] This controversy was fueled by the struggle between civilians and common lawyers for control of various judicial institutions—a struggle that finally culminated with the triumph of the parliamentarians and their common-lawyer allies in the English Revolution.[96]

While the controversy concerns the influence of the Roman-canon tradition on both the substantive and procedural law of equity, the primary points of dispute have been about substantive law.[97] Regarding equity procedure, it is widely agreed that the parallels with the Roman-canon tradition are quite strong.[98] From very early in the Chancery Court's history, masters who assisted the chancellor in adjudicating disputes drew upon a set of procedures for procuring witness testimony that closely resemble—and, indeed, appear to have derived at least partially from—those of the Roman-canon tradition.[99] In sum, an examining officer appointed by the court took witness testimony outside of the parties' presence on the basis of written interrogatories prepared by the parties, and the recorded narrative of such testimony was then kept secret until all witnesses had been examined.[100] Before detailing this procedure, and considering the role of the master in relation to it, it is necessary briefly to examine how the system of eq-

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95 *See* Charles Donahue, Jr., *The Civil Law in England*, 84 YALE L.J. 167, 167–70 (1974) (reviewing BRIAN P. LEVACK, THE CIVIL LAWYERS IN ENGLAND, 1603–1644: A POLITICAL STUDY (1973)).

96 *See* BAKER, OXFORD HISTORY, *supra* note 88, at 179–82; Donahue, *supra* note 95, at 173–74; Yale, *supra* note 86, at 7–8.

97 As of the late fourteenth century, masters sometimes joined the chancellor on the bench when he tried matters of maritime, martial, and ecclesiastical law—all of which drew heavily on the Roman-canon tradition. *See* HEWARD, *supra* note 90, at 9, 11. And according to an account by an anonymous master writing at some point between 1596 and 1603, masters through the mid-sixteenth century regularly attended sessions of the House of Lords so that they could provide advice regarding matters of civil and canon law:

> The reason of ther attendance there I take to be . . . [that the Lords may be]. . . informed by the masters of the chauncery (of which the greattest number have alwaies bene chosen men skillful in the civill and canon lawes) in lawes that they shall make touchinge forraine matters, whowe the same shall accorde with equitie, *jus gentium*, and the lawes of other nations.

Treatise of the Maisters, *supra* note 93, at 309. It remains far from clear, however, that the civil law had much direct influence on the development of the substantive law of equity, or on the development of English law more generally. *See* BAKER, OXFORD HISTORY, *supra* note 88, at 180–81.

98 *See* BAKER, *supra* note 81, at 103; BAKER, OXFORD HISTORY, *supra* note 88, at 180.

99 Even as concerns equity's procedural (rather than substantive) law, the extent of the resemblance to the Roman-canon law—and the extent to which such resemblance is due to a direct borrowing of Roman-canon procedure on the one hand, or to fortuitous parallel development on the other—have been subjects of some dispute. *See* JOHN P. DAWSON, A HISTORY OF LAY JUDGES 153–782 (1960). Nonetheless, most scholars agree that, at a minimum, Chancery's "written procedure, as developed since the late fourteenth century, had a Romano-canonical inspiration." BAKER, OXFORD HISTORY, *supra* note 88, at 180.

100 *See infra* Parts II, III.

uity and its personnel (including masters) made its way to the "new world."

The English equity system was well-established by the early seventeenth century, when the first English colonies were founded in North America.[101] Although equity was relatively slow to take hold in the new colonies,[102] some type of chancery court had been established in each of the thirteen colonies as of 1776.[103] But with the American Revolution, there reemerged a longstanding association between equity and tyranny that had first been forged in the crucible of the English Revolution.

In seventeenth-century England, the conflict between parliamentarians and royalists manifested itself in an institutional struggle between courts of common law, on the one hand, and those courts associated with the Roman-canon tradition (namely, equity and ecclesiastical courts), on the other. Parliamentarians embraced the common-law courts as bastions of England's ancient constitution, and thus, of its citizens' immemorial, customary rights, including rights to sovereignty.[104] They depicted the equity and ecclesiastical courts, in contrast, as emanating from the royal will and tending towards popish subservience, and warned that these institutions promoted (royal and popish) tyranny.[105]

The various equity courts of early-modern England initially arose, like Chancery, when petitions directed to the king were delegated to individual members of the king's council, who eventually came to form their own separate courts.[106] Whereas Chancery had emerged as a separate court, distinct from the king's council, by the fifteenth century, the other conciliar courts, including Star Chamber, Requests, and Admiralty, did not do so until the sixteenth century—and thus they, even more than Chancery, continued to be closely associated

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101 James R. Bryant, *The Office of the Master in Chancery: Colonial Development*, 40 AM. BAR. ASS'N J. 595, 595 (1954).

102 This is likely because equity focused on more complex legal arrangements than were usually needed in the relatively undeveloped colonial societies, *see id.*, and because, for many colonial transplants, there remained lingering associations between equity and tyrannical rule. *See infra* notes 104–20 and accompanying text.

103 *See* Bryant, *supra* note 101, at 598.

104 *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 17 (2d ed. 1987); *see also* Yale, *supra* note 86, at 8 (noting an alliance between common lawyers and Parliament).

105 *See* R. H. HELMHOLZ, ROMAN CANON LAW IN REFORMATION ENGLAND 52 (1990) (stating that even as early as Elizabeth's reign in the sixteenth century, many Englishmen—and not just common lawyers—had come to view the Roman-canon law as a "dangerous popish relic"); LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND 162–63 (1977); Bernadette Meyler, Substitute Chancellors: The Role of the Jury in the Contest Between Common Law and Equity 1–11 (Sept. 1, 2003) (unpublished paper, on file with the author).

106 *See* BAKER, *supra* note 81, at 117–24.

with and deemed institutional embodiments of the royal will.[107] Since the monarchy in the 1630s turned to the Star Chamber to prosecute highly unpopular cases of sedition and ecclesiastical offenses, it—of all the equity courts—came to be particularly hated and feared.[108] But in the view of the parliamentarians, many of whom were also Puritans, the ecclesiastical courts also posed a great threat.[109] Especially loathsome was the Court of High Commission, which was established in the 1580s as a forum in which the king, as head of the Church of England, could exercise jurisdiction in criminal matters.[110] As a criminal court operating largely under the king's thumb and employing Roman-canon procedure, the Court of High Commission was widely viewed as a spiritual counterpart to the Star Chamber and, thus, was also despised.[111]

Particularly after Charles I married a French Catholic, and rumors of a possible return to Catholicism spread, fear of royal tyranny came to merge with fear of popish tyranny, and judicial institutions associated with the Roman-canon tradition came to be viewed as a potential weapon in a royalist and popish plot to dominate England.[112] To a significant extent, this parliamentarian and Puritan viewpoint prevailed, and in 1641, the English Revolutionaries dismantled the Star Chamber and other conciliar courts, as well as the Court of High Commission; a few years later, they abolished the other ecclesiastical courts.[113] While the Court of Chancery survived, it was—and long continued to be—tarred by the conceptual link forged in the revolutionary era between courts drawing on the Roman-canon tradition and the perceived threat of tyranny.[114] When, more than a century later, the American Revolutionaries rose up against what Thomas Paine described as "the remains of monarchical tyranny,"[115] they un-

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107 *See id.* at 117.

108 *See id.* at 119.

109 *See id.* at 131; BRIAN P. LEVACK, THE CIVIL LAWYERS IN ENGLAND, 1603–1641: A POLITICAL STUDY 157 (1973).

110 *See* BAKER, *supra* note 81, at 131.

111 *See id.* at 131.

112 *See generally* CAROLINE M. HIBBARD, CHARLES I AND THE POPISH PLOT 19–37 (1983) (describing anti-Catholicism during the time of Charles I and fears that he, and England as a whole, might be susceptible to conversion).

113 *See* BAKER, *supra* note 81, at 213.

114 The Barebone Parliament of 1653 voted to abolish Chancery after just one day of debate, and D.E.C. Yale has suggested that the only reason why Chancery in fact survived was that "the incompetence of Parliament prevented them legislating at all." Yale, *supra* note 86, at 14–15.

115 THOMAS PAINE, COMMON SENSE AND OTHER WRITINGS 9 (Gordon S. Wood ed., 2003).

surprisingly reverted to the link between equity and tyranny forged by an earlier generation of revolutionaries.[116]

This reversion was facilitated by the fact that during the colonial period, royal governors often appointed judges, who were thus generally associated with monarchical control.[117] In addition, from the revolutionary perspective, the very structure of and justification for courts of equity—the commitment of adjudication to a judge, rather than to a jury of one's peers, and the discretion granted judges (at least in theory) in administering procedure and ordering relief—seemed to validate and encourage the exercise of arbitrary power.[118] Such distrust of equity manifested itself in section 30 of the Judiciary Act of 1789,[119] where Congress declared that federal courts must adopt the common-law method of presenting testimony orally in the courtroom, thus eschewing the equitable tradition of gathering testimony through pre-prepared, written interrogatories and then concealing it from the parties: "[T]he mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law."[120]

With the gradual subsiding of revolutionary fervor in the years after 1776, traditional equitable practice quietly resurged. It is likely that, given the longstanding divide between law and equity, litigants demanded claims and remedies that were traditionally available only in equity and were therefore associated with equity's distinctive modes of pleading and proof.[121] Accordingly, on April 29, 1802, Congress enacted legislation providing that, in those states where courts permitted practitioners to rely on testimony taken in the traditional, equitable way—namely, through out-of-court, ex parte examination—

116 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 54–55 (2d ed. 1985); Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 288–89 (1927).

117 *See* Joseph H. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 22 (1923).

118 As French Enlightenment thought heavily influenced the American revolutionary generation, it is probable that colonial America's distaste for equity also stemmed in part from contemporary French reformers' complaints about the arbitrariness of judicial decision-making. For an overview of the French experience, see ISSER WOLOCH, THE NEW REGIME: TRANSFORMATIONS OF THE FRENCH CIVIC ORDER, 1789–1820s, at 297–320 (1994).

119 An Act to Establish the Judicial Courts of the United States, ch. 20, § 30, 1 Stat. 73, 88 (1789) [hereinafter Judiciary Act of 1789]; *cf.* Meyler, *supra* note 105, at 23–28 (discussing how the Judiciary Act of 1789 provided for Supreme Court review of lower-court decisions by means of writ of error, rather than appeal, and how this helped mitigate fears that the new Supreme Court resembled the English Court of Chancery, and thus might become the arm of an overly powerful centralized government).

120 Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88 (1789).

121 Furthermore, as North-American society grew increasingly complex, pressure to draw upon the relatively more complex claims and remedies that equity afforded surely grew as well.

federal courts sitting in equity could do the same, despite Section 30 of the Judiciary Act of 1789: "[I]n all suits in equity, it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions."[122] This return to the equitable tradition of written, ex parte testimony was enshrined in Rules 25 and 28 of the first edition of the Federal Rules of Equity,[123] issued by the U.S. Supreme Court in February 1822.[124] These Rules provided that the regular, established mode for procuring witness testimony in equity cases was before court-appointed officers designated to take and record the testimony outside the courtroom.[125]

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122 An Act to Amend the Judicial System of the United States, ch. 31, § 25, 2 Stat. 156, 166 (1802). This 1802 statute specified that federal courts choosing to rely on depositions were to ensure that these were "taken in conformity to the regulations prescribed by law for the courts of the highest original jurisdiction in equity . . . in that state in which the court of the United States may be holden . . . ." *Id.* Accordingly, the statute's authorization to rely on depositions did not "extend to the circuit courts which may be holden in those states, in which testimony in chancery is not taken by deposition." *Id.* Given the Jeffersonian commitment to state, as opposed to federal, power, this effort to recognize the continuing force of equitable tradition had the added virtue of bringing federal equity practice in line with that of the states.

123 Rule 25 provided that "[t]estimony may be taken according to the acts of Congress, or under a commission." FED. R. EQ. 25 (1822), *in* THE NEW FEDERAL EQUITY RULES 40 (8th ed. 1933) [hereinafter NEW FEDERAL EQUITY RULES]. Rule 28 provided that "[w]itnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause . . . ." FED. R. EQ. 28 (1822), *in* NEW FEDERAL EQUITY RULES, *supra.*

124 Congress first authorized the Federal Rules of Equity in an act which permitted "such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning" the "forms of writs, executions and other processes." An Act for Regulating Processes in the Courts of the United States and Providing Compensations for the Officers of the Said Courts and for Jurors and Witnesses, ch. 36, § 2, 1 Stat. 275, 276 (1792).

125 Such testimony before court-appointed officers (namely, commissioners or masters) was permitted only after the cause was deemed "at issue"—that is, after both parties had filed their pleadings. *See* JOHN MITFORD & SAMUEL TYLER, MITFORD'S AND TYLER'S COURT OF CHANCERY 458–59 (1876). As the pleading process could be lengthy, Congress enacted statutes—identified in Federal Rule of Equity 25—that afforded special measures for recording testimony before the cause was at issue in cases where a witness might not be available at a later date. Like the normal mode of procuring testimony, these measures—providing for depositions *de bene esse* (in anticipation of future need) and *in perpetuam rei memoriam* (for preserving a record of the matter)—also relied on court-appointed officers to take and record testimony outside the courtroom. Depositions *de bene esse* were available when the witness

> live[d] at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient or very infirm.

REV. STAT. § 863 (1873–74). To obtain such a deposition, the deposing party had only to give notice to the opposing party. *Id.* Like depositions *de bene esse,* those *in perpetuam rei memoriam* were designed to preserve testimony deemed at risk of loss, but they addressed

It is important to emphasize that "deposition," as used in the equity tradition (and thus in Congress's statute of April 29, 1802), meant "examination," and thus differs from the procedural device enshrined in the modern Federal Rules of Civil Procedure.[126] In a modern deposition, parties take testimony themselves in oral, adversarial fashion. Its primary purpose (unless the deponent is unavailable at the time of trial) is not to bring witness testimony before the court—a function served, instead, by in-court trial testimony—but rather to assist the parties in the discovery process. In the modern deposition, in fact, parties often gather testimony that cannot later be admitted at trial. In contrast, in the equity tradition, the term "deposition" referred to testimony taken outside the parties' presence by a court-appointed officer, based on written interrogatories. And this ex parte procedure was the primary vehicle for bringing witness testimony before the court. The rise of the modern deposition, whose origins have remained something of a mystery—and, in particular, the way in which the equity deposition was transformed into the modern deposition—is described below.[127]

As of the early nineteenth century the modern deposition had yet to arise. Congress's effort in 1789 to reject equity's longstanding tradition of gathering witness testimony in writing and outside the courtroom had failed, and federal courts rapidly returned to an equity tradition inherited from England and dating back in North America to the early seventeenth century.[128] Indeed, the link between the federal equity system and its English ancestor was enshrined in Rule 33 of the Federal Equity Rules of 1822. This rule specified that "[i]n all cases where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery of England."[129] Likewise, nineteenth-century American treatises on equity practice, many of them revisions of leading English materials, reinforced the traditional, quasi-inquisitorial English model of equity.[130]

What, then, was the equitable procedure embraced by both the English Chancery Court and American federal courts sitting in equity? The suit commenced when the plaintiff filed a bill of complaint,

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situations that could not be foreseen and were thus available broadly "to prevent a failure or delay of justice." REV. STAT. § 866 (1873–74). However, the decision whether to permit depositions *in perpetuam rei memoriam* lay entirely in the court's discretion. *See id.*

126 *See* FED. R. CIV. P. 30; FED. R. CIV. P. 32.

127 *See infra* Part IV.

128 *See supra* notes 101–05 and accompanying text.

129 FED. R. EQ. 33 (1822), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 42.

130 *See, e.g.*, 2 EDMUND ROBERT DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY (1871); MITFORD & TYLER, *supra* note 125. Both were originally English treatises modified to reflect American practice, and were reissued in several editions.

which required the defendant to appear and file an answer under oath.[131] Thereafter, if the plaintiff sought to deny the defendant's factual assertions and to require that these be proved, he would file a "replication," or reply. The case was then deemed "at issue," and the parties could begin examining witnesses.[132] A party seeking testimony filed written interrogatories with the court, which in turn appointed an officer to present the interrogatories to the witness.[133] The officer recorded the testimony—in the form of a narrative, rather than as a verbatim transcript of questions asked and answered—and transmitted this record back to the court.[134]

Both the English Court of Chancery and American courts of equity typically distinguished between testimony taken locally, when the witness resided in the vicinity of the court, and that taken when the witness lived at some distance.[135] In England, two permanent employees of the Chancery Court, known as examiners, took local testimony.[136] They received interrogatories for the examination and cross-examination of witnesses, examined and cross-examined the witnesses, and certified their depositions.[137] If the witnesses resided outside of London, however, the court appointed private individuals, designated "commissioners," to take the testimony on a case-by-case basis—presumably because it was inefficient to require the busy examiners to travel to the witnesses.[138]

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131 *See* MITFORD & TYLER, *supra* note 125, at 63–66. That the defendant was required to answer under oath distinguished equity from common law (where parties could not serve as witnesses) and was widely viewed as one of equity's greatest virtues. *See* MACNAIR, *supra* note 30, at 58; MILLAR, *supra* note 80, at 206–07.

132 MITFORD & TYLER, *supra* note 125, at 458. The first stage of litigation in which a master was likely to be involved—and the least significant for purposes of this study—was the pleading stage. At this point, the court regularly called upon masters to ensure that pleadings were proper and complete, so that the case could be put at issue and proceed to discovery. A defendant might challenge the plaintiff's bill on grounds that it contained impertinent or scandalous material, or a plaintiff might challenge the defendant's answer on grounds of insufficiency. In such cases, the court typically referred the challenges to the master for resolution. *See* MURRAY HOFFMAN, THE OFFICE AND DUTIES OF MASTERS IN CHANCERY AND PRACTICE IN THE MASTER'S OFFICE 312 (1824). Under the master's guidance, the pleadings would then be amended until they passed muster and the case was deemed at issue. *See* WILLIAM HEATH BENNET, A DISSERTATION ON THE NATURE OF THE VARIOUS PROCEEDINGS IN THE MASTERS' OFFICE IN THE COURT OF CHANCERY 33–35 (1834); HOFFMAN, *supra*, at 312.

133 *See* MACNAIR, *supra* note 30, at 167.

134 MITFORD & TYLER, *supra* note 125, at 459.

135 *See id.* at 429–30.

136 *See id.*; BAKER, OXFORD HISTORY, *supra* note 88, at 185.

137 *Id.* at 429.

138 *See* 2 DANIELL, *supra* note 130, at 1197 (noting that an out-of-town commission still required the permission of a master). Until the late sixteenth century, the court generally designated local notables, including priests (usually an abbot or bishop) to serve as commissioners. *See* MACNAIR, *supra* note 30, at 174. Thereafter, however, the court began to rely on the parties themselves to nominate the commissioners. *Id.* at 175.

In the United States, the mode of taking witness testimony varied somewhat between states, and between the different United States circuit courts.[139] Nonetheless, the procedure and personnel were largely identical in function, if not in name, to those employed in the English Court of Chancery. For instance, many American courts referred to individuals who took the testimony of witnesses residing near the court—the analog of the English Chancery's examiners—as "standing commissioners" to distinguish them from mere "commissioners," who were appointed on a case-by-case basis and directed to travel to the witness.[140] As described in Mitford and Tyler's *Pleadings and Practice in Equity*:

> In some of the United States, courts of equity appoint officers called standing commissioners, corresponding with examiners in the English Court of Chancery. And the same courts also issue special commissions, as is done in England, when the examination of witnesses cannot be conducted before the standing commissioners, as when the witnesses to be examined are not within the jurisdiction of the court, or there are other difficulties in examining them before the standing commissioners.[141]

Overall, however, as annotators of the 1933 Federal Equity Rules concluded, "The practice of appointing masters and examiners follow[ed] the English practice."[142]

Once all testimony and documentary evidence was gathered, the parties presented it at a hearing, after which the judge would either enter a final decree, resolving the dispute, or an interlocutory decree, ordering further proceedings.[143] Further proceedings might be necessary to resolve disputed questions of fact and were often referred to a master,[144] whose fees were to be paid by the litigants.[145]

Masters reported on a wide variety of questions. As explained by Murray Hoffman, a master in the early nineteenth-century New York Court of Chancery: "In general there is no question of law or equity, or disputed fact, which a Master may not have occasion to decide, or

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139 *See* 2 DANIELL, *supra* note 130, at 1168 n.3 ("The Circuit Courts of the United States may appoint standing Masters in Chancery in their respective districts . . . and they may also appoint a Master *pro hac vice* in any particular case." (citing FED. R. EQ. 82 (1842)).

140 *See* MITFORD & TYLER, *supra* note 125, at 430.

141 *Id.* at 430.

142 NEW FEDERAL EQUITY RULES, *supra* note 123, at 137.

143 *See* MITFORD & TYLER, *supra* note 125, at 469–70.

144 *See id.* at 469.

145 *See* NEW FEDERAL EQUITY RULES, *supra* note 123, at 129–30 (discussing and collecting cases regarding the provision in Federal Rule of Equity 82 (1842) that "'[t]he compensation to be allowed to every master in chancery . . . shall be fixed by the circuit court, in its discretion, having regard to all the circumstance thereof, and the compensation shall be charged upon and borne by such parties in the cause as the Court shall direct'"); JOSEPH PARKES, A HISTORY OF THE COURT OF CHANCERY 449–51 (1828) (describing fees in the English practice).

respecting which he may not be called upon to report his opinion to the court."[146] Likewise, another leading equity treatise used in both England and the United States advised readers that "[t]he cases in which the Master may be directed to make inquiries into facts are so numerous and various in their nature, that it is impossible to point out the rules by which each inquiry is to be pursued in the Master's office."[147]

Whatever the nature of the master's inquiry—and settling an account between the litigants was probably the most common—the decree appointing the master typically provided him authority to determine whatever fact-finding was required in the case and to direct the necessary discovery, including ordering the parties and/or witnesses to produce documents[148] and to submit to examination under oath.[149] Thus, unlike what the common-law jury had long since become, the master was not simply a passive audience for whatever evidence the parties chose to present, but instead played an active, inquisitorial role in determining what evidence should be heard and which questions asked.[150]

As for how testimony was taken, if the parties or witnesses lived at some distance from the court, the master would resort to the standard method of appointing commissioners.[151] But if the witness resided in the vicinity of the court, the master himself would administer written interrogatories prepared by the parties (and any he might wish to ask), record a narrative of the testimony, and then transmit it back to the court.[152] Once the master collected all the evidence he deemed necessary, he wrote a report to the court, presenting his findings as directed in the order of reference.[153] It was a well-established doctrine of equity practice that, unless otherwise ordered by the court, the master was not to set forth all the evidence that he had considered.[154] Instead, he was simply to state his findings of fact, and the

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146 HOFFMAN, *supra* note 132, at xxi (emphasis removed from original). Hoffman's account of New York chancery practice is relevant to federal practice for a number of reasons, not least of which is that federal courts in New York relied on masters from the New York Court of Chancery through the first third of the nineteenth century. *See infra* note 249 and accompanying text.

147 2 DANIELL, *supra* note 130, at 1215.

148 HOFFMAN, *supra* note 132, at 9.

149 *See id.* at 13; BENNET, *supra* note 132.

150 *See* HOFFMAN, *supra* note 132, at 22 ("[I]nterrogatories may be framed by the Master."); *see also* FED. R. EQ. 62 (1912) ("The master . . . shall have full authority . . . to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other proceedings in the matters before him which he may deem necessary and proper . . . .").

151 *See* HOFFMAN, *supra* note 132, at 49.

152 *Id.* at 47–49.

153 *See* 2 DANIELL, *supra* note 130, at 1295.

154 *See id.* at 1299.

evidence on which they were based.[155] As suggested by the authority given masters to direct fact-finding themselves, as well as the long-standing requirement that they not set forth the evidence, the primary purpose of employing masters was to ease the court's burden in both assimilating large amounts of evidence and making complicated findings of fact. In the words of one late nineteenth-century American treatise-writer: "The object of a reference to a master is for the convenience of the court; to ascertain disputed facts, and to make computations which would take up too much of the time of the court."[156]

The belief that masters might assist in this way hinged, in large part, on the fact that equity courts gathered witness testimony in the manner described above.[157] Taking testimony outside the presence of the judge was thought to save the court a significant amount of time.[158] And while reading through large volumes of testimony would itself be time-intensive, the court directed the master to shoulder this responsibility.[159] Moreover, because the master had authority to order further fact-finding, the court could acquire the information it deemed necessary without depending on the parties to bring it forward.[160]

From the perspective of the common law and its commitment to presenting testimony in open court subject to adversarial cross-examination, equity's use of masters to ease the court's burden might seem to have been purchased at the cost of fairness. But, as argued in Part III, such a view would be mistaken.

III
EQUITY'S SECRECY-ORIENTED FRAMEWORK AND ITS COMMITMENT TO DUE PROCESS

The equity tradition reminds us that, contrary to the widespread assumption today, inquisitorial modes of adjudication are not entirely

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155 *See id.* at 1300 ("But although the Master does not, unless under special circumstances, detail the evidence upon which he proceeds in making his report, yet he generally refers to it, either in the body of his report, or in a schedule annexed to it." (citations omitted)). Likewise, Daniell's *Pleading and Practice* confirmed the same principle: "When the Master is directed to ascertain a fact, he must not content himself with stating these circumstances and leaving the Court to draw its own conclusion, but he must draw the conclusion himself . . . ." *Id.* at 1298 (citations omitted).

156 HENDERSON, *supra* note 68, at 163 (citations omitted).

157 This is an account of the theory underlying equity adjudication and not an empirical claim that the use of masters in this fashion did indeed result in the efficiency gains that such use was thought to entail. Indeed, mid-nineteenth century advocates for reform of equity ultimately concluded otherwise. *See* BAKER, *supra* note 81, at 111–15.

158 *See* HENDERSON, *supra* note 68, at 163.

159 *See id.* (explaining, *inter alia*, that the master was to provide "proper reference to the testimony of the witnesses" and to identify the location of the witnesses' testimony in the record).

160 *See id.*

alien to our legal culture. In so doing, it teaches us that adversarial procedure and due process are not synonymous.[161] There are, in other words, ways to ensure that due process is consistent with inquisitorial procedure—though, significantly, the inquisitorial and adversarial modes each emphasize different aspects of the values that we tend to associate with due process.[162]

How did the equity tradition employ inquisitorial modes of procedure in a manner that accords due process? To answer this question, we need to understand the purposes of due process. To reach this understanding, in turn, we must move beyond a narrow doctrinal conception of due process as a legal provision whose contours are defined entirely by the Fifth and Fourteenth Amendments to the U.S. Constitution,[163] and by a series of Supreme Court opinions interpreting these amendments.[164] Due process is, of course, this doctrine with which we are so familiar—a doctrine requiring notice and a hearing.[165] But to comprehend its meaning in our legal culture, we need to recognize that due process is more than a determination of the form in which litigation must proceed; it is also an expression of deeply rooted political values.[166]

From the perspective of the European civil-law tradition, Anglo-American legal culture is distinctively preoccupied with procedure. In sharp contrast to American law schools, which treat the study of procedure as a fundamental component of legal education, continental European law faculties deem procedure to be of negligible interest and focus instead on conveying abstract principles of substantive law.[167] As Mirjan Damaska has suggested, this difference in mentality makes it quite difficult for American and European lawyers to engage in legal discussion: "The Continental will seek the right solution; his counterpart will display a liberal agnosticism about 'right' answers, coupled with a procedural outlook."[168] Indeed, until the recent and dramatic expansion of the scope of Article 6 of the European Convention of Human Rights, which guarantees a right to a "fair hearing," proce-

161 *See infra* notes 459–66 and accompanying text.

162 *See infra* notes 181–91 and accompanying text.

163 *See* U.S. CONST. amend. V; U.S. CONST. amend XIV, § 1.

164 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

165 *See Mullane*, 339 U.S. at 313 (stating that despite the debates concerning the meaning of the Due Process Clause, "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case"); *see also* David D. Walter, Comment, *The Unconstitutional Seizure of Vehicles: Iowa Towing Statutes Collide with the Federal Constitution*, 73 IOWA L. REV. 495, 495 & n.2 (1988) (collecting cases).

166 *See infra* notes 170–86 and accompanying text.

167 *See* Mirjan Damaska, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PENN. L. REV. 1363, 1367–68 (1968).

168 *Id.* at 1375.

dure was a topic of relatively little interest among European legal scholars. That the expansion of Article 6 is currently of so much interest is due, in part, to the fact that it suggests that procedure is now recognized as fundamentally important in the civil-law world.[169]

Continental Europeans are correct that the Anglo-American devotion to procedure is distinctive, and this distinctiveness is explained largely by history—in particular, by the way in which procedural values were intimately linked to the uniquely English path to liberal, parliamentary government. Although a definitive history of due process in the Anglo-American tradition has yet to be written, it is clear that due process arose in the Middle Ages, in part as a limitation on monarchical authority.[170] As J.H. Baker has argued, a series of statutes beginning with the Magna Carta in 1215 provided that no Englishman was to be deprived of life, liberty or property without "due process of law."[171] This reference to "law" served as a guarantee of access to the common-law courts and thus as a check on the power of the monarchy to create new, alternative jurisdictions.[172] For centuries, common-law courts seized on the authority provided by such statutes to void judgments entered by their competitors.[173] But the principle of "due process of law" took on particular constitutional significance during the seventeenth-century conflict between the common-law courts (joined by their parliamentary supporters) and the various courts of the king's prerogative—namely, those courts, like Chancery, that began emerging in the fourteenth century around members of the king's council.[174] Thus, it was to the principle of due process of law—to the notion, in other words, that only the common-law courts could properly decide disputes—that Chief Justice Coke pointed in his famous statement to James I that even the king himself lacked authority to judge.[175] And likewise, it was to due process that Parliament turned in justifying its abolition of the Star Chamber.[176]

Due process thus arose not simply as a guarantee of a certain form of litigation, but also as a political bulwark deployed against the king by parliament and the common-law courts on behalf of claims to self-governance. It arose, in other words, as an expression of antimon-

169 GARAPON & PAPADOPOULOS, *supra* note 41, at 299; Serge Guinchard, *Vers une démocratie procédurale*, 1 JUSTICES 91, 91–109 (2000). That, as suggested by the expansion of Article 6, procedure is now becoming so important to Europeans is a fascinating example of convergence between the Anglo-American and civil-law traditions, and raises difficult and important questions regarding what accounts for such convergence.

170 *See* BAKER, *supra* note 81, at 97–98.

171 *See id.* at 97.

172 *See id.*

173 *See id.*

174 *See id.* at 107–08.

175 *See id.*; GARAPON & PAPADOPOULOS, *supra* note 41, at 203–05.

176 *See* BAKER, *supra* note 81, at 97–98.

archical, republican values and is intimately associated with the view of the Magna Carta as exemplifying an ancient constitutional tradition that guarantees core liberties—including political liberties.[177] From this history, we have inherited a vague but enduring belief that procedure is somehow fundamentally connected to political rights—a belief that continues to drive our sense that procedure is of key importance.[178] Indeed, it is this sense of the importance of procedure that Europeans, lacking the same history, have long found so very strange.[179] Thus, if we are to understand due process in the Anglo-American tradition, we must begin by recognizing its distinctively political valence. And we must recognize, furthermore, that this political valence was associated in particular with the common-law courts, as opposed to those of equity—as it was, in fact, deployed by the common-law courts in their seventeenth-century battles against equity.[180]

With this history in mind, it is possible to identify at least three distinct purposes of the due-process rights to notice and a hearing. All three of these purposes are evident to a greater or lesser extent in the current American conception of due process, and as discussed below, two of them are also key to the continental European understanding of the value of procedure. Having thus catalogued the purposes of due process, it will then be possible to consider in what ways equity's distinctive inquisitorial tradition implied an approach to due process that differs from ours in today's common-law-based, adversarial framework.

First, the due-process rights to notice and a hearing can be understood to serve as a kind of political guarantee of the individual's civic right to control a governmental institution that has significant power to define his rights and obligations vis-à-vis fellow citizens. Here, a procedural system that encourages individuals to use procedure to control the litigation is valued as an affirmation of civic-republican values of self-governance and associated dignitary interests.[181] Without attempting a full-scale narrative of the development of due process from the Magna Carta to the present, it seems clear nonetheless that this positive, political function of due process is directly rooted in the common-law tradition.[182] As described above, the com-

177 *See id.* at 97–98, 472–74.

178 For a discussion of the civic and dignitary values of procedure promoted by the concept of due process, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights–Part I*, 1973 DUKE L.J. 1153, 1172–76.

179 *See* Damaska, *supra* note 167, at 1374–75.

180 *See* BAKER, *supra* note 81, at 97–98, 472.

181 *See* Mashaw, *supra* note 178, at 49–52; Michelman, *supra* note 178, at 1172–76.

182 *See, e.g.*, BAKER, *supra* note 81, at 97–98.

mon-law courts and their parliamentary allies forged a conceptual link between common-law process (itself writ-based, and thus highly procedural) and civic-republican values.[183] Thus, not surprisingly, neither the equity tradition nor continental European procedure is characterized by this positive, political function of due process.

Second, the rights to notice and a hearing serve what we might call the minimalist, or negative, function of due process—that is, to protect the individual against arbitrary state action. Due process, in other words, provides a check against state power by prohibiting the court from acting against an individual without first hearing the individual whose interests are at stake.[184] This negative, state-checking function of due process is served simply by ensuring that court action is preceded by notice and a hearing, and does not require that the parties in any way control the process of adjudication. In contrast to the positive, political function of due process, this function is not unique to the common-law tradition. Thus, as discussed directly below and in Part VII, both Anglo-American equity and the French legal system treat the rights to notice and a hearing as a check against arbitrary state action.

Finally, there is a third, truth-seeking function of the due-process rights to notice and a hearing, which like the negative, state-checking function is evident not only in the common-law tradition, but also in the equity tradition and in continental European procedural systems. The rights to notice and a hearing help ensure that the court's adjudication will be based on the truth by providing a mechanism whereby the parties, as individuals likely to possess relevant information, are afforded the opportunity to convey this information to the court. While standard accounts of Anglo-American due process tend not to emphasize this truth-seeking function, it clearly exists as a structural matter and has been expressly recognized by the U.S. Supreme Court.[185] According to well-established doctrine, one measure of whether due process has been provided is whether the procedures afforded are ones reasonably calculated to arrive at truthful fact-finding: "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process . . . ."[186]

Although the due-process rights to notice and a hearing serve three distinct functions in the Anglo-American world, the triumph of adversarial procedure has resulted in a failure to distinguish clearly

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183 *See supra* notes 104–16.

184 *See* BAKER, *supra* note 81, at 97–98.

185 *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

186 *Mathews*, 424 U.S. at 344 (holding that one reason why an evidentiary hearing was not required to satisfy due process was because the inquiry in this case—whether to terminate disability benefits—turned largely on routine medical reports, and the risk of error in relying primarily on these reports was minimal).

among these functions. In adversarial procedure, as epitomized by the trial, it is the positive, political conception of due process—one that affords the parties the opportunity actively to deploy procedure and thereby control the litigation—that receives pride of place.[187] But this positive conception of due process naturally subsumes—and thus makes it quite difficult to identify—the separate negative and truth-seeking functions of due process. This is because, in the adversarial trial, it is necessarily the case that the court hears the parties and that the parties have the opportunity to convey relevant information. But adversarial procedure is not the only type of procedure that promotes these negative and truth-seeking functions of due process—nor is it necessarily the best.

In adversarial procedure, the positive, political function of due process as a means of civic engagement may be purchased at the cost of all other due-process functions, including truth-seeking. Our current adversarial approach to such procedures as discovery and expert testimony, for example, can be much more easily justified as vindicating an interest in having the litigants control the litigation than it can on truth-seeking grounds. Indeed, there is good reason to think that procedures relying exclusively on the parties to identify, present, and interpret the relevant facts may be the least likely to arrive at the truth—certainly less likely than inquisitorial procedures that rely more on the court.[188]

In contrast to our current, common-law-based adversarial procedure, equity's quasi-inquisitorial tradition placed the value of truth-seeking above any positive, political conception of due process. Indeed, in the logic of equity—and quite paradoxically from the common law's participatory and thus publicity-oriented perspective—the key to truthful adjudication was to limit party involvement by promoting secrecy in fact-finding.

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187 Of course, as a matter of doctrine, the Supreme Court has held that due process does not require a full-blown adversarial trial. *See supra* note 56. Yet, in so holding, the Court adopted the adversarial trial as the clear standard of due process, exploring, in essence, how far from this standard it is permissible to depart. *See id.*

188 *See* Langbein, *supra* note 38, at 824, 833. It must be recognized, however, that common-law adversarial procedure does have its own commitment to, and theory of, truth-seeking. In particular, oral, adversarial cross-examination is thought to elicit the truth by permitting the fact-finder to observe witness demeanor and thereby assess credibility. *See, e.g.*, Williamson v. United States, 512 U.S. 594, 598 (1994) (explaining that the prohibition against hearsay is related to the inability of the opposing party to cross-examine the declarant); CHARLES BARTON, AN HISTORICAL TREATISE OF A SUIT IN EQUITY, IN WHICH IS ATTEMPTED A SCIENTIFIC DEDUCTION OF THE PROCEEDINGS USED ON THE EQUITY SIDES OF THE COURTS OF CHANCERY AND EXCHEQUER, FROM THE COMMENCEMENT OF THE SUIT TO THE DECREE AND APPEAL 156–58 n.1 (1796) (asserting that the common law's oral, public approach to taking testimony is superior to equity's written, secret approach because "the very manner of the witness giving evidence is not unfrequently a sufficient indication of the truth or falsity of his testimony, an advantage entirely lost in the Courts of Equity").

Equity procedure was premised on the belief that it was less likely that witnesses would mistake someone else's testimony for their own, or be tempted to alter their testimony to make it consistent with that of others, if the witnesses were examined in private.[189] Furthermore, if it were determined that a witness had made a false statement in response to an interrogatory, the written, secretive mode of taking the testimony would indicate—in a way that a similarly false statement in response to oral cross-examination would not—that the witness's entire testimony should be disregarded as likely perjurious. As one treatise writer explained, in common-law "tribunals the witness is not only examined orally, but is subjected to a severe and rapid cross-examination, without sufficient time for reflection or for deliberate answers, and hence may often misrepresent facts, from infirmity of recollection or mistake."[190] In contrast,

> according to the course of chancery, the testimony of the witness is taken upon interrogatories in writing, deliberately propounded to him by the examiner, no other person being present; and where ample time is allowed for calm recollection, and any mistakes in his first answers may be corrected at the close of the examination, when the whole is distinctly read over him; there is ground to presume that a false statement of fact is the result either of bad design or of gross ignorance of the truth, and culpable recklessness of assertion; in either of which cases all confidence in his testimony must be lost, or at least essentially impaired.[191]

Equity courts developed an interlocking set of procedures intended to maintain the secrecy they deemed necessary to avoid error and fraud, and thereby arrive at the truth.[192] Witness testimony, as recorded by an examiner or commissioner prior to referring the case to a master, could not be revealed until the court ordered its publication,[193] and this order of publication would be entered only after all

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189 As R.H. Helmholz has observed, expositors of Roman-canon procedure throughout the Middle Ages and early-modern period who sought to defend the tradition of secret examination regularly cited the biblical story of Susanna and the Elders from the Book of Daniel:

> The Book of Daniel recounts that when Susanna resisted the advances of the elders, they resolved to revenge themselves by accusing her of adultery with an imaginary young man. After Susanna had been condemned to death in an open trial, Daniel intervened. He questioned the two elders separately about the supposed crime. One of them placed her action under a yew tree; the other under a clove tree. Thus was their perjury revealed and the life of an innocent woman saved. Proceduralists saw in this story clear support for their system of . . . canonical procedure.

R.H. Hemholz, *The Bible in the Service of the Canon Law*, 70 CHI.-KENT L. REV. 1557, 1573–74 (1995).

190 3 GREENLEAF, *supra* note 79, at 363.

191 *Id.* at 364.

192 *See* MACNAIR, *supra* note 30, at 166.

193 *See id.* at 167.

witnesses had been examined.[194] After the testimony was published, no further examinations were permitted, absent some showing of extraordinary circumstances.[195] In this way, each witness would be required to testify entirely from memory.[196]

One of the main reasons why equity traditionally relied on court-appointed officers to take testimony, rather than permitting the parties to do so themselves, was to guarantee its secrecy until publication.[197] If the parties or their counsel were allowed to undertake the examination themselves, the knowledge they gained might influence their litigation strategy, including the witnesses they chose to call and the interrogatories they put to them. Court-appointed officers, in contrast, lacked any personal connection with the parties and the litigation and thus were thought to have no incentive to promote the interests of either side. But although the court-appointed officers posed the questions, the parties themselves drafted written interrogatories and filed them with the court for use by the officer.[198] To ensure that the witness testimony thus taken did indeed remain secret until the court ordered it to be published, stringent requirements governed the sealing and filing of narratives recorded in the field.[199]

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194 *See id.* (noting that "[w]itnesses were not generally to be re-examined" after publication).

195 *See id.* at 169; BENNET, *supra* note 132, at 13.

196 *See* BENNET, *supra* note 132, at 13–14; MACNAIR, *supra* note 30, at 177; *see also* HOFFMAN, *supra* note 132, at 40–47 (describing how and when witnesses could be examined in New York's chancery court).

197 *See* MACNAIR, *supra* note 30, at 166–68.

198 *See id.* at 176. In permitting the parties to draft the interrogatories, equity deviated from a pure inquisitorial model; but in this respect, it was much like the systems of civil procedure that developed in continental Europe. In seventeenth-century France, for example, the parties identified the witnesses and submitted articles for their examination to court-appointed officers. *See* ENGELMANN, *supra* note 22, at 723. One suspects that this deviation from the pure inquisitorial model followed, at least in part, from the fact that the court-appointed officers had no knowledge of the case, and thus could not be charged with identifying witnesses and devising the questions to be posed.

199 See, for example, *Eiffert v. Craps*, 44 F. 164 (D.S.C. 1890), where the defendant moved to strike testimony taken by the plaintiff on the ground that the commission charged with taking the testimony had failed to transmit it back to the court in a manner ensuring that it would be seen by no one else prior to publication. In particular, the defendant complained that when the package with the testimony arrived at the courthouse, the clerk discovered that the envelope was open, "presenting the appearance of having been worn in the mail, the opposite corner of the envelope presenting the same appearance." *Id.* The court denied the defendant's motion to strike the testimony because it concluded that there was no indication that the rule of secrecy had been broken. *See id.* In the process, however, it acknowledged the well-established principle of equity jurisprudence that testimony taken on commission was to be kept absolutely secret until publication:

> This commission was issued under the authority of Eq. Rule 67, and is in accordance with the well-established rule of the court of chancery. The commissioners did their duty in all respects as to the certification and mailing of the package. There is no reason to suspect that the contents of the package were seen by any one. I am satisfied that the abrasion of the envelope occurred in the transmission in mailbags.

Within this framework, masters were legitimated and constrained by these fundamental structuring principles of secrecy. While they possessed the inquisitorial authority to require that evidence, including witnesses, be brought before them,[200] this authority was limited because masters had to abide by equity's well-established rules prohibiting repeat testimony—rules that limited which witnesses masters could call, as well as the questions they could pose on behalf of the parties or on their own initiative. The master who opted to take testimony himself was prohibited, like an examiner or commissioner, from questioning a witness who had been previously examined regarding the same facts.[201] Likewise, the master had to seek court authorization to examine any witness who had already testified concerning new facts, or to examine a new witness concerning facts about which another had already testified.[202] Furthermore, in drawing on the evidence necessary to write his report, the master relied, in part, on examinations undertaken prior to the order of reference, which had themselves been done in secret—namely, by examiners or commissioners who posed interrogatories outside of the parties' presence and concealed the recorded testimony until all examinations were completed and the court ordered publication.[203]

A classic account of these procedures designed to promote (pre-publication) secrecy, as well as of the rationale behind them, appears in the judicial opinions of James Kent, author of the famous *Commentaries on American Law*[204] and Chancellor of the New York Court of Chancery. Kent's influence was such that his opinions regarding equity practice were cited widely in both state and federal courts and played a leading role in the shaping of equity practice throughout the nation. As Kent explained in *Remsen v. Remsen*,[205] "[E]xaminations in

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Id.

200 Rule 77 of the Federal Equity Rules of 1842 confirmed the master's long-standing equitable authority

> to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

FED. R. EQ. 77 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 59.

201 HOFFMAN, *supra* note 132, at 41, 46; Remsen v. Remsen, 2 Johns. Ch. 495, 500 (N.Y. Ch. 1817).

202 *See* HOFFMAN, *supra* note 132, at 41–42.

203 *See* BENNET, *supra* note 132, at 10 (stating that the master may "establish any fact before him" by, *inter alia*, "reference to, and perusal of, any of the former proceedings in the cause, etc."); HEWARD, *supra* note 90, at 15 (stating that one "method of establishing the facts before a master" was through "all proceedings on the record such as office copies of the bill and answers, depositions and affidavits").

204 JAMES KENT, COMMENTARIES ON AMERICAN LAW (1836).

205 2 Johns. Ch. 495 (N.Y. Ch. 1817). *Remsen* was cited as authority regarding equity practice as far afield as Illinois and as late as 1904 (long after, as described below, equity

chief are not permitted, after publication"[206] because "there is very great danger of abuse from public examinations, by which parties are enabled to detect the weak parts of the adversary's case, or of their own, and to hunt up or fabricate testimony to meet the pressure or exigency of the inquiry."[207] In other words, once the court ordered publication of the testimony, it became part of the public record, and everyone—including parties and witnesses—was free to examine it. If these individuals were permitted to testify thereafter, they might modify their new testimony using the published transcript to ensure consistency or to explain away adverse statements.

Chancellor Kent thus embraced the logic of Lord Nottingham, Chancellor of the English Court of Chancery, who wrote about a century and a half earlier that permitting postpublication testimony created "a way . . . open to perjury . . . [whereby] the Court shall assist tampering and subornation."[208] Accordingly, Kent concluded that once the court ordered the publication of all testimony, further testimony before the master was not allowed, unless directed by the court and limited to issues about which the witness had not previously testified.[209]

Kent reaffirmed the key importance of these principles of secrecy several years later in *Field v. Schieffelin*,[210] where one of the defendants moved for leave to file a cross-bill (the equitable predecessor of the modern-day counterclaim).[211] Kent denied the motion and held that the defendant attempted to use "the cross-bill . . . to put in issue, and establish by proof, the very matters which have been already put in issue, and upon which proof had been taken and submitted to the judgment of the Court, and upon which its judgment has passed."[212] Allowing the defendant to relitigate issues of fact in this manner, he held, would run counter to the "well-established rule, that a cross-bill must be brought before publication has passed in the first cause, un-

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had undergone significant transformation). *See* Lumbard v. Holdiman, 115 Ill. App. 458, 463 (1904); *infra* notes 243–67 and accompanying text.

206 *Remsen*, 2 Johns. Ch. at 500.

207 *Id.* at 499–500.

208 Yale, *supra* note 86, at 112 (citation omitted).

209 *Remsen*, 2 Johns. Ch. at 500 ("It is also upon the same grounds, that a witness, who has been examined in chief before the hearing, cannot be re-examined before the master, without an order, and, then, not to any matter to which he had before been examined; and that a witness, once examined, before the master, cannot be re-examined, without an order." (citation omitted)).

210 7 Johns. Ch. 250 (N.Y. Ch. 1823). Like *Remsen*, *Field* was highly influential and was cited by the U.S. Supreme Court as late as 1902. *See* Bowker v. United States, 186 U.S. 135, 141 (1902).

211 *See Field*, 7 Johns. Ch. at 252; *see also* MILLAR, *supra* note 80, at 60 (discussing changes in equity procedure brought about by the Federal Equity Rules of 1912, including the substitution of the counterclaim for the cross-bill).

212 *Field*, 7 Johns. Ch. at 252.

less the plaintiff in the cross-bill will go to a hearing on the depositions already published."[213]

Relitigation, Kent concluded, was impermissible not as a matter of preclusion doctrine, but because it required the taking of new, postpublication testimony.[214] Accordingly, a postpublication cross-bill might be authorized if the original hearing resulted in a default judgment, and thus no testimony was ever taken, in which case "there can he no danger of abuse."[215] Likewise, an equity court might permit the defendant to file a cross-bill after testimony had been published, if he waived any demand to take additional testimony and instead agreed to rely solely on that already taken. Short of these two exceptions, however, once testimony in a case had been published, a cross-bill could not be used to secure further testimony, as this would run counter to equity's commitment to establishing witness veracity by means of secrecy. As Kent explained: "The object of the rule is to prevent the danger of perjury. It is founded in sound policy, and in a just sense and deep knowledge of the seductions of interest, and the force and influence of the passions."[216]

Federal case law from the same period fully embraced these principles of secrecy. For example, in *Gass v. Stinson*,[217] Justice Story held that once testimony had been made public, a party had to obtain the court's permission to undertake further examinations for the purpose of challenging the witness's competency or credibility.[218] A motion to take additional testimony for the purpose of challenging witness competency would be granted only "if the incompetency of the witness was [not] known before the commission to take his deposition was issued; for an interrogatory might then have been put to him, directly on the

213 *Id.*

214 Although beyond the scope of this Article, the bar on relitigation as a means of enforcing the rule against postpublication testimony raises the interesting possibility that preclusion doctrine, as practiced in courts of equity, initially served in part as a means of discouraging perjury rather than solely as it is used today—namely, to promote efficiency and finality.

215 *Field*, 7 Johns. Ch. at 253.

216 *Id.* at 252. Kent's prohibition on postpublication cross-bills as a means of preventing the taking of postpublication testimony was long-established equity practice. As explained by Lord Chancellor Nottingham, in describing English Chancery practice about a century and a half before *Field* was decided, "[A]fter the publication passed and copies of depositions taken, or any other notice had of the points examined to, there can be no new examination to the same matter neither directly nor indirectly. Therefore the defendant cannot exhibit a cross bill after publication, for that is indirectly to reexamine." Yale, *supra* note 86, at 111.

217 10 F. Cas. 70 (C.C.D. Mass. 1837) (No. 5,261).

218 *Id.* at 71.

point."[219] In contrast, the court usually granted motions to take additional testimony for the purpose of challenging witness credibility.[220]

Citing the authority of Lord Hardwicke, Chancellor of England in the mid-eighteenth century, Justice Story explained that one of the reasons why courts more easily grant postpublication motions to take testimony challenging witness credibility, as opposed to witness competency, is that "matters examined to in such cases are not material to the merits of the cause, but only relative to the character of the witnesses."[221] In permitting such examinations as to credibility, however, courts must be careful to ensure that "the interrogatories are confined to general interrogatories as to credit, or to such particular facts only, as are not material to what is already in issue in the cause."[222] Only in this way can the court "prevent the party under color of an examination to credit, from procuring testimony to overcome the testimony already taken in the cause, and published, in violation of the fundamental principle of the court, which does not allow any new evidence of the facts in issue after publication."[223] In sum, Justice Story reaffirmed the longstanding and fundamental tenet of equity jurisprudence that the veracity of witness testimony was to be ensured by maintaining the utmost secrecy.

By insisting that secrecy—and thus the parties' exclusion from key aspects of the adjudicatory process—was necessary to promote truth-seeking, equity clearly placed this goal above any positive, political conception of due process, pursuant to which procedure is valued as a mode of civic engagement. Indeed, as discussed above, this positive conception of due process appears to derive from the common-law tradition.[224]

As compared with the procedural systems that developed in continental Europe, however, equity was characterized by one distinctively English feature that was hard to reconcile with its quasi-inquisitorial approach to adjudication: Equity was understaffed. Indeed, the Chancery was a one-judge court.[225] The chancellor could, of course, rely

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219 *Id.*

220 *See id.* ("But where the objection is to credibility, articles will ordinarily be allowed to be filed by the court upon petition, without affidavit, after publication.").

221 *Id.*

222 *Id.*

223 *Id.*

224 *See supra* notes 181–87 and accompanying text.

225 As John Dawson brilliantly argues, the key distinguishing feature of English justice as a whole was its early and continued commitment to lay judges. Because the territory of England was unified at such a relatively early date, the English monarchy—then severely constrained by its technological and institutional limits—made the fateful decision to pursue centralization by drawing on local power structures. In developing a set of common-law courts beginning in the twelfth century, it continued the Germanic tradition of relying on members of the community to speak the law, because sending a judge from London into the countryside to gather and hear a jury was the easiest and most inexpensive means

on masters to provide key help in the fact-gathering process, and in fact the master's judicial role was created precisely because a single judge—especially in a quasi-inquisitorial procedural system[226]—could not possibly manage the entire caseload. But, as compared with the judicial assistants available to judges in the continental legal systems, there were relatively few masters in London[227] and the terms by which they were appointed and compensated appear to have been rather ad hoc.[228] Moreover, when witnesses outside of London were to be examined, Chancery simply appointed lay commissioners.[229]

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available to build a centralized judicial system. *See* DAWSON, *supra* note 99, at 128, 145-46. In Dawson's view, this tradition of relying on lay members of the community was established so early, and thus became so deeply ingrained, that movement towards a more professional judiciary—of the kind that subsequently emerged on the continent—proved essentially unthinkable in England, even when the means later became available. Thus, even while the English Side of Chancery that emerged in the fourteenth century came to embrace a quasi-inquisitorial mode of procedure, in which the court bore significant responsibility for gathering the evidence and determining the sequence and nature of the proceedings, it remained a one-judge court. *Id.* at 146–50.

226 Dawson argues that because Chancery "distributed to laymen all the functions that it could," it cannot properly be categorized as inquisitorial. *Id.* at 172. But setting aside questions of terminology, it is clear that Chancery procedure bore a striking resemblance to that employed in continental courts, though there were some notable differences—most importantly, Chancery's failure to develop a large professional staff. *See id.* at 153–54. And as Dawson asserts, in this respect, "[Chancery] followed the pattern of government that had been established in England centuries before." *Id.*

227 There appear to have been only twelve masters. *See* BAKER, *supra* note 81, at 100; HEWARD, *supra* note 90, at 1–2, 46. These masters, however, were themselves assisted by various kinds of clerks, about whom even less is known. *See* BAKER, *supra* note 81, at 100; BAKER, OXFORD HISTORY, *supra* note 88, at 182–86.

228 *See* DAWSON, *supra* note 99, at 159–63. Although the precise details are not clear, and at any rate varied somewhat over time, it seems that masters were chosen at the chancellor's discretion and that they received almost no wages from the Crown. *See* BAKER, OXFORD HISTORY, *supra* note 88, at 182–83. By the eighteenth century, they were evidently compensated in large part through fees paid by the parties. *See* HEWARD, *supra* note 90, at 26 (listing fees in 1734). French commissioners, in contrast, were (in the Old Regime sense of the term) government bureaucrats—namely, venal officeholders who served in posts that they purchased from the monarchy. *See* M. MARION, DICTIONNAIRE DES INSTITUTIONS DE LA FRANCE AUX XVII[E] ET XVIII[E] SIÈCLES 120 (1993). And, while they—like the English masters—received fees from the parties, these were conceived as privileges inhering in the royal offices that they had purchased, and thus as a kind of official income. *Id.*

229 *See* MARION, *supra* note 228, at 151–52. Between 1300 and 1800, there were rarely more than fifteen judges in Chancery and common law combined. In contrast, by the early eighteenth century, there were more than 5,000 royal judges in France—a difference that remains significant, even when France's larger population is taken into account. *See id.* at 70–72. Furthermore, French judges had numerous full-time assistants to whom they could turn to engage in the difficult and time-consuming work of fact-finding. Thus, for example, the primary royal trial court of general jurisdiction in Old Regime Paris—the *Châtelet*—had at its disposal an entire company of commissioners (*commissaries-enquêteurs-examineurs*) to take witnesses' testimony. By the late seventeenth century, the number of such commissioners available to this one court alone was forty-eight. *See* ALAN WILLIAMS, THE POLICE OF PARIS, 1718–1789, at 23, 119 (1979). In addition, Old Regime French courts could call on groups of sworn experts (*experts jurés*), hailing from the officially established and regulated guild system, to provide expert testimony. *See id.* at 135–36; ENGELMANN, *supra* note 22, at 719; 2 E. GLASSON & ALBERT TISSIER, TRAITÉ THÉORIQUE ET

In sum, in contrast to the continental legal systems, English justice as a whole was marked from the outset by a characteristically English decision not to develop a large, state-controlled and state-funded bureaucracy—a decision that may turn, at a deep historical and cultural level, on the same ideology of self-governance that underlay the development of the rhetoric of the common law as bastion of ancient liberty.[230] But in the equity tradition, committed as it was to a quasi-inquisitorial mode of procedure and therefore to secrecy, the decision not to develop a large judicial bureaucracy never led to party control of the litigation. Thus, while the common-law tradition manifested a strong commitment to a positive, political conception of the value of procedure in the form of substantial party control, equity did not. Instead, equity continued to embrace both quasi-inquisitorial procedure and an institutional structure that was relatively ill-suited to a form of procedure that placed a great deal of power in the hands of the (understaffed) court.[231]

But critically, while equity lacked the common law's positive, political conception of due process, it was equally committed to guaranteeing basic rights of notice and a hearing as a check on arbitrary state action—and (when combined with prepublication secrecy) as a means of promoting truth-seeking.[232] The Federal Rules of Equity and the treatise literature on equity practice reveal that equity ensured notice and a hearing. For example, Rule 29 of the 1822 Rules provided that "[w]hen a matter is referred to a master to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties . . . ."[233] Likewise, contemporary treatises explained that a summons must be issued before proceedings in the master's office commenced.[234] Furthermore, all versions of the Federal Rules of Equity required that notice be given to the parties when-

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PRATIQUE D'ORGANISATION JUDICIAIRE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 855 (3d ed. 1926); *accord* Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 TEX. INT'L L.J. 181, 190 (1996).

230 *See supra* notes 170–80 and accompanying text.

231 The nature and consequences of this tension is a vast and largely unexplored topic, meriting significant further research. But it would seem that it was this tension that, as of the nineteenth century, contributed significantly to the infamous slowness of Chancery procedure, memorably captured in Dickens's portrait of Bleak House. CHARLES DICKENS, BLEAK HOUSE (Nicola Bradbury ed., Penguin Books 1996) (1853).

232 *See supra* notes 163–86 and accompanying text.

233 FED. R. EQ. 29 (1822), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 41. Similar provisions were thereafter incorporated into Rule 75 of the 1842 version of the Federal Equity Rules, *see id.* at 126–27, which were copied verbatim into Rule 60 of the 1912 Rules, *see id.* at 287, and then transferred in largely identical terms into Rule 53(d)(1) of the Federal Rules of Civil Procedure, issued in 1938. *See* FED. R. CIV. P. 53(d)(1).

234 *See, e.g.*, HOFFMAN, *supra* note 132, at 1–3 (describing the "summons" used in New York and the "warrant" used in England to initiate all proceedings in the master's office).

ever a witness was summoned to provide testimony.[235] Thus, even though testimony in equity was taken ex parte, the parties knew it was being taken and, since they drafted the interrogatories themselves, they also had notice of its subject matter. Most importantly, the commissioner or master who took the testimony was required to record it and to transmit the record back to the court.[236] The parties would see the record after the court ordered it to be published and, thus, had notice of the exact nature of the testimony on which the court would rely.

Equity's commitment to secrecy expired when the witness testimony was published and, thus, became a matter of public knowledge. Such publication ensured that the parties could formulate their arguments using all the evidence presented to the court. This served the negative, state-checking function of due process by requiring that the court hear the parties, thereby preventing it from acting arbitrarily. In addition, publication likely contributed to the goal of truth-seeking by enabling the parties to assist the court—though to a much more limited extent than in the common law—in the fact-finding process.

In sum, equity's quasi-inquisitorial procedural system enabled the court, aided by masters, to undertake a great deal of fact-finding responsibility in a manner fully consistent with the litigants' due-process rights to notice and a hearing. In the equity tradition, however, these rights were viewed as a check on arbitrary state action and, deployed within a framework of prepublication secrecy, as an aid in truth-seeking. They were not, as in the common law, a means of promoting a positive, political conception of procedure, in which party control of the adjudication was valued as an end in itself.

But with the nineteenth-century triumph of the common law's adversarial framework, described in Part IV, equity's procedural tradition, along with its distinctive approach to delivering due process, would soon collapse and be forgotten.

IV
EQUITY'S EMBRACE OF THE COMMON LAW'S ORAL, ADVERSARIAL MODE

Beginning in the early to mid-nineteenth century, the procedural and evidentiary framework in which masters traditionally operated be-

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235 According to Rule 28 of the 1822 Rules, "Witnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause by subpoena in the usual form . . . ." FED. R. EQ. 28 (1822), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 40. This provision was copied verbatim in Rule 78 of the 1842 Rules, *see id.* at 59, and then in Rule 52 of the 1912 Rules, *see id.* at 260.

236 *See supra* notes 193–99 and accompanying text.

gan to disintegrate. Congress's mandate (in section 30 of the Judiciary Act of 1789) that equity adopt the common-law approach to presenting testimony orally in open court was not initially implemented, but it was nonetheless ultimately fulfilled through a process of incremental change.[237] Oral testimony began to infiltrate the equitable mode of adjudication when masters began changing how they conducted examinations; over time, their informal experimentation was recognized in case law and ultimately codified in the Federal Rules of Equity. By the early twentieth century, equity had witnessed a near total triumpb of the common-law, adversarial model of adjudication—a triumph akin to that which John Langbein has recently traced in his nuanced and insightful account of the origins of the Anglo-American adversary criminal trial.[238]

As Langbein describes, until the rise of the adversary criminal trial in 1730s England,[239] the criminal trial was a lawyer-free procedure in which the judge, rather than counsel for the parties, presented documentary evidence and examined witnesses.[240] In addition, local magistrates, known as justices of the peace, were primarily responsible for the pretrial process of fact-gathering—not only examining the accused and the accusers, but also seeking on their own initiative additional witnesses who might be examined.[241] In broad outline, though not necessarily for the same reasons, a similar process of transformation to an adversary system occurred in civil procedure.[242] In particular, as described below, as equity courts came to rely on oral testimony, they increasingly embraced an adversarial mode of adjudication.

Equity courts began relying on oral testimony when, very early in American history, masters—who were, in theory, supposed to administer written interrogatories—started to take oral examinations. Writing in 1817, Chancellor Kent observed in *Remsen v. Remsen* that while "the exhibition of interrogatories, duly settled, be the usual mode of examination, appearing in the books, I do not apprehend that it is

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237 *See supra* note 120 and accompanying text.

238 *See generally* LANGBEIN, ORIGINS, *supra* note 35 (describing the genesis of the lawyer-conducted criminal trial).

239 *See id.* at 253.

240 *See id.* at 15.

241 *See id.* at 41. Unfortunately, Langhein's comprehensive historical study focuses exclusively on developments in Anglo-American criminal, rather than civil, procedure, and a full-scale analysis of the latter along the lines of Langbein's study (though greatly needed) is beyond the scope of this Article.

242 Interestingly, Langbein has argued elsewhere that the rise of the adversary criminal trial in eighteenth-century England "may have set the tone for civil practice" in the common-law courts, leading to an increased reliance on oral testimony and adversarial procedure in such civil suits. *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1201–02 (1996).

indispensable."[243] Rather, he concluded, "The practice with us . . . has been more relaxed, and oral examinations have frequently, if not generally, prevailed."[244] As a result of the tremendous influence of New York courts and jurists, and especially Chancellor Kent, numerous state courts cited *Remsen* for the proposition that masters were authorized to direct oral examinations.[245] Likewise, as reflected in Rule 77 of the Federal Equity Rules of 1842, which provided that a master "shall have full authority . . . to examine on oath, *viva voce*, all witnesses produced by the parties before him," federal courts soon adopted the same practice.[246] This is hardly surprising, given that the federal system of equity was expressly modeled on the English Court of Chancery[247] and that New York was arguably the state that had developed a system of equity most like that of England.[248] Furthermore, the manner in which masters in New York's Court of Chancery functioned likely had a particularly significant impact on federal equity practice because, through the first third of the nineteenth century, "the usage of the circuit court within th[e Southern District of New York] seems to have been, to refer subjects appropriate to a master's office to a standing master of the state chancery."[249]

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243 2 Johns. Ch. 495, 499 (N.Y. Ch. 1817).

244 *Id.*

245 *See, e.g.*, Mahone v. Williams, 39 Ala. 202 (1863) (citing *Remsen* for the premise that, while "originally, the examination in the register's office was upon written interrogatories," *viva voce* examinations were later determined to be permissible); Gildart's Heirs v. Starke, 2 Miss. (1 Howard) 450 (1837) (citing a state-court probate rule providing that "parties may be examined on interrogations, or *viva voce*" and holding that "[s]uch examinations must, however conform to the settled rules of proceeding" and that "[m]any of our rules are obviously taken from those laid down by the chancellor in *Remsen v. Remsen*"); State v. Callahan, 229 P. 702, 704 (Nev. 1924) (citing *Remsen* to support the conclusion that masters are permitted to take oral examinations); Hollister v. Barkley, 11 N.H. 501 (1841) (citing *Remsen* for the proposition that "[o]ral examinations were common in New-York," but that "the master is still at liberty to examine on interrogatories," and concluding that "[a]s we have adopted no rule in this respect, either of these modes may be resorted to"); Jackson v. Jackson, 3 N.J. Eq. 96 (1834) (citing *Remsen* for the proposition that "oral examinations have frequently, if not generally, prevailed" in New York, and then observing that "[t]he practice of oral examination is universal in the state of New Jersey").

246 FED. R. EQ. 77 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 127–28.

247 *See supra* notes 128–30 and accompanying text.

248 David Dudley Field, writing about the reform movement of which he was such a key player, explained that New York court practice was modeled after English procedure. *See* MILLAR, *supra* note 80, at 52 ("'Little of the comparative simplicity and directness prevailing in some of the other states was to be found in New York. It thus happened that as the burden there was felt the most, the earlier and stronger became the efforts to throw it off.'" (quoting David Dudley Field, *Law Reform in the United States and Its Influence Abroad*, 25 AM. L. REV. 515, 519 (1891))).

249 Van Hook v. Pendleton, 28 F. Cas. 998, 1000 (C.C.S.D.N.Y. 1848) (No. 16,852). It was only when the United States Circuit Court for the Southern District of New York issued its own local rules on October 27, 1828 that the court established its own set of federal masters. *See id.* at 999.

In theory, this shift to allowing masters to examine witnesses by posing oral, rather than pre-prepared written questions, need not have changed any other aspect of equity adjudication. Indeed, Chancellor Kent explained that the practice of masters undertaking oral examinations was "a question merely of convenience, and does not involve any principle of policy, or of right."[250] In the traditional mode of examination, where the master simply administered written interrogatories drafted in advance by the litigants, the problem arose that in "long and complicated accounts . . . it seems almost impossible to reduce the requisite inquiries to writing, in the first instance, and to know what questions to put, except as they arise in the progress of the inquiry."[251] Although Chancellor Kent did not himself identify the consequences of this failure to pose the "requisite inquiries,"[252] it is likely that further interrogatories would be deemed necessary, thus requiring greater expenditures of time and money. Indeed, as immortalized in Dickens's *Bleak House*, and contributing significantly to the reform movements that culminated in the merger of law and equity, it was commonly recognized in nineteenth-century England and America that equity procedure consumed vast amounts of time and money.[253] Chancellor Kent apparently believed that allowing masters to perform oral examinations—and thus to formulate questions in response to the answers they received—would address these "many inconveniences."[254]

In holding that the shift to oral examination was simply a question of "convenience," rather than of "principle of policy," Chancellor Kent was particularly adamant that this shift would not undermine equity's underlying evidentiary structure—including, most impor-

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250 Remsen v. Remsen, 2 Johns Ch. 495, 499 (N.Y. Ch. 1817).

251 *Id.* at 500.

252 *Id.*

253 Dickens memorably portrayed nineteenth-century chancery practice as follows:

> On such a [raw and foggy] afternoon, some score of members of the High Court of Chancery bar ought to be . . . mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities . . . and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause . . . ought to be . . . ranged in a line . . . with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them. . . . This is the Court of Chancery . . . which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you, rather than come here!'

DICKENS, *supra* note 231, at 14–15. For a scholarly account of the nineteenth-century critique of equity, see BAKER, *supra* note 81, at 111–15.

254 *See Remsen*, 2 Johns. Ch. at 500.

tantly, its commitment to maintaining the secrecy of testimony.[255] Accordingly, he set forth "[t]he general rules . . . which ought to prevail on the subject of examinations before the master," and, in so doing, explained that these were designed so as "to unite convenience and despatch with sound principle and safety."[256] The rules he proposed would permit oral examination, for the sake of convenience, but would maintain equity's fundamental, structural commitment to secrecy—for "whether examinations shall be secret, and to what extent they shall be carried, suggests much more important considerations."[257] In particular, Chancellor Kent reaffirmed the importance of the longstanding rules of equity adjudication "[t]hat no witness in chief, examined before publication, nor the parties, ought to be examined before the master, without an order for that purpose . . .; and [that] a similar order seems to be requisite when a witness, once examined, is sought to be again examined before the master, on the same matter."[258]

As for the mode of examination before the master, it was still permissible for "the requisite proofs . . . to be taken on written interrogatories, prepared by the parties, and approved by the master," as long as, for the sake of convenience, "*viva voce* examination" was also allowed.[259] The choice between the two modes of examination was to be made "as the parties shall deem most expedient, or the master shall think proper to direct, in the given case."[260] If the examination was oral, however, the master would pose the questions. He would prepare himself in advance by "ascertain[ing] from the parties, or their counsel, by suitable acknowledgements, what matters or *items* are agreed to or admitted; and then, as a general rule, and for the sake of precision, [requiring] the disputed *items* claimed by either party . . . to be reduced to writing by the parties, respectively."[261] Having thus required the litigants to set the contours of their dispute, the master would be able to question witnesses about relevant, disputed facts.

Since Chancellor Kent provided that the master, rather than the parties, was to pose the questions, he might have directed masters to conduct oral examinations just like the traditional written ones—namely, in private, outside the presence of the parties and their counsel. He held otherwise, however, stating that "[t]he testimony may be taken in the presence of the parties, or their counsel," unless a unique

255 *See id.* at 499.
256 *Id.* at 500.
257 *Id.* at 499.
258 *Id.* at 501.
259 *Id.* at 502.
260 *Id.*
261 *Id.* at 501.

circumstance required "a special order of the Court [that] it is to be taken secretly."[262]

Why did Chancellor Kent advocate this radical change in procedure, despite his commitment to preserving equity's tradition of secrecy? It is likely that he deemed this change necessary to maintain the role that litigants (or their counsel) traditionally had in framing written interrogatories.[263] Permitting the master to pose his own questions via oral examination would deprive the litigants of their opportunity to frame interrogatories, unless they were permitted to be present during the examination and, presumably, to ask some questions themselves. To guard against the possibility that the parties' presence during oral examination would irreparably subvert the framework of secrecy, Chancellor Kent added the caveat that parties would not be permitted to attend oral examination "when by a special order" the court determined that the testimony "is to be taken secretly."[264] He apparently concluded that this measure, coupled with the prohibition on repeat testimony, would suffice to maintain the secrecy that was so fundamental to the equitable mode of adjudication.

But Chancellor Kent clearly miscalculated. Bringing oral testimony into equitable adjudication undermined the entire structure of secrecy on which such adjudication was traditionally grounded. Consider, for example, how federal courts came to interpret Rule 77 of the Federal Equity Rules of 1842, which codified the new practice of masters performing oral examinations by providing that a master "shall have full authority . . . to examine on oath, *viva voce*, all witnesses produced by the parties before him."[265] This language, echoing that of Chancellor Kent in *Remsen*, clearly anticipated that, while perhaps assisted by the litigants, masters themselves would bear primary responsibility for performing oral examinations. Case law, however demonstrates that, in practice, Rule 77 was quickly interpreted as a license for the parties themselves to undertake the oral examination. For example, in *Foote v. Silsby*,[266] the Circuit Court for the Northern District of New York held—without ever addressing the possibility that the master himself might perform the examination—that "[u]nder the 77th rule prescribed by the supreme court for the observance of the circuit courts in equity cases, the plaintiff had a right, without special order, to call and examine the defendants . . . [and] [i]t was

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262 *Id.* at 502.

263 *See* BENNET, *supra* note 132, at 12 (observing that "where the master decides . . . that witnesses are proper to be examined, the interrogatories for their examination are prepared . . . by counsel" (emphasis removed)).

264 *Remsen*, 2 Johns. Ch. at 502.

265 FED. R. EQ. 77 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 127–28.

266 9 F. Cas. 391 (C.C.N.D.N.Y. 1856)(No. 4,920).

under this rule that some of the defendants were called and examined by the plaintiff."[267]

In retrospect (and despite Chancellor Kent's expectations to the contrary) it is hardly surprising that the license for the master to perform oral examinations mutated into one for the parties themselves to undertake the examination. After all, the master was unlikely to be as informed as the litigants themselves about the relevant issues, however well he might prepare. Accordingly, it is easy to see how litigants came to play an increasingly dominant role in examinations in which they were initially supposed to be little more than an audience. Furthermore, because of the common-law tradition of undertaking oral examination in an adversarial manner, the oral and the adversarial probably appeared to go hand-in-hand, such that permitting the former led to importing the latter. Thus, not surprisingly, the same 1842 Federal Equity Rules that licensed masters to perform oral examinations—a license which, as noted above, was extended to the litigants themselves—also contained a new provision in Rule 67 permitting the parties themselves orally to examine (and cross-examine) witnesses appearing before commissioners.[268]

Rule 67 began by reaffirming the well-established tradition, enshrined in the Federal Equity Rules of 1822, that, once the pleadings were filed, neutral, court-appointed commissioners were to administer party-prepared written interrogatories to the witnesses.[269] The new Rule, however, then created the following very important exception: "If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories."[270] Henceforth, in other words, the parties could agree to undertake the examinations themselves, instead of through commissioners. These examinations would be performed orally, as was becoming the case with testimony before masters, and as was true of the in-court testimony in common-law proceedings. And unlike Rule 77, regarding testimony before masters,[271] Rule 67 did not suggest the possibility that the commissioners themselves might pose the questions orally—presumably because commissioners, unlike masters,

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267 *Id.* at 391.

268 FED. R. EQ. 67 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 119.

269 As the 1842 Rule 67 stated:

> After the cause is at issue, commissions to take testimony may be taken out . . . upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross interrogatories before the issuing of the commission . . . . In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof.

Id.

270 *Id.*

271 *See supra* note 246 and accompanying text.

were responsible only for taking testimony and thus had no occasion to familiarize themselves with the facts, as would be necessary to devise questions.

In sum, as of 1842, the Federal Rules of Equity permitted parties to conduct oral examinations before both masters and commissioners, using the standard common-law, adversarial mode, including cross-examination. It is here, in other words, that we can begin to trace the evolution of the modern deposition. Under the weight of this new influx of the oral and the adversarial, the equitable tradition of secrecy began to collapse.

Equity Rule 67, as first issued in 1842, maintained the method of taking witness testimony by commission as the default and permitted oral examinations only by agreement of the parties. However, the Supreme Court initiated a process in 1861 by which it sought to reverse this arrangement. As amended that year, Equity Rule 67 retained examinations by commission as the default, but established that henceforth only one party had to request oral examinations in order for these to go forward.[272] Thus, if a party gave notice of intent to undertake an oral examination, a commission to take testimony based on written interrogatories would be authorized only upon motion to the court and a showing of some exceptional circumstance.[273] While court-appointed examiners were to be present during the oral examination, the parties themselves were to undertake the questioning in a mode now expressly modeled on that of the common law: "[S]uch examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, . . . which shall be conducted as near as may be in the mode now used in common-law courts."[274] With counsel conducting examination and cross-examination in the presence of the litigants, the traditional equitable structure of secrecy had all but crumbled.

But while the mode of taking witness testimony directed by the 1861 amendment to Equity Rule 67 was "as near as may be" to the oral, adversarial approach that characterized the common law, there nonetheless remained at least one crucial distinction in the way that

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272 Rule 67 stated that:

> Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court.

FED. R. EQ. 67 (1861) (as amended by the Supreme Court in 66 U.S. (1 Black) 6 (1861)).

273 *See id.* at 7 ("Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court . . . , for special reasons, satisfactory to the court . . . .").

274 *Id.* at 6.

testimony was procured in equity. Even after the 1861 amendment, federal judges sitting in equity received witness testimony in the form of written transcripts of examinations performed outside the courtroom.[275] Never having seen these witnesses testify, federal courts could not draw conclusions from witness demeanor in making findings of fact based on the recorded testimony. Furthermore, the court was unlikely to have before it an exact record of the questions asked and answered. This was because Rule 67 specified that "[t]he depositions taken upon such oral examination shall be taken down in writing by the examiner, in the form of narrative, unless he determines the examination shall be by question and answer in special instances . . . ."[276] Fact-finders in suits at law, in contrast, were present during the testimony and were thus able to hear the witness's exact choice of words and to assess the credibility of the witness based on his or her behavior while under examination. Indeed, this ability to assess witness demeanor has long been touted as one of the primary virtues of the common-law method of oral, in-court testimony.[277]

On May 2, 1892, the Supreme Court took an initial step toward bringing more testimony into the courtroom by amending Equity Rule 67 yet again. Henceforth, the new Rule specified, the standard mode of recording testimony would be an exact transcript of questions asked and answered, and the narrative format would be permissible only upon agreement by the parties.[278]

But an even more significant shift toward the common-law mode of oral, in-court testimony occurred one year later. On May 15, 1893, Equity Rule 67 was amended for a final time to grant federal courts sitting in equity the discretion to direct that any or all testimony be presented in open court. In the words of the new Rule, "Upon due notice given . . . , the court may, at its discretion, permit the whole, or

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275 As noted in Rule 67, "When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record . . . ." *Id.* at 7.

276 *Id.* at 6. Of the many reasons traditionally given by advocates of the common law for its superiority to equity, a well-established one was that in the common-law courts the fact-finder heard the witness's exact words, whereas in equity he saw only the narrative recorded by the reporter—a narrative that was not a verbatim transcript, but rather a summary and restatement of the testimony. *See* BARTON, *supra* note 188, at 157 n.1 ("[A]n interested or careless scribe may, in the Courts of Equity, by dressing up the depositions in his own words and language, make a witness speak what he never meant . . . .").

277 *See, e.g.*, Colby v. Klune, 178 F.2d 872, 873 (2d Cir. 1949) ("Trial on oral testimony, with the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system."); *supra* note 188.

278 "The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative." FED. R. EQ. 67 (1892) (as amended by the Supreme Court in 144 U.S. 689, 690 (1891)).

any specific part, of the evidence to be adduced orally in open court, on final hearing."[279] Unless the court decided to direct that testimony be taken in open court, however, the default practice for procuring witness testimony remained that the parties were to perform out-of-court examinations of which they would then file a record.[280]

It was only in 1912, when the Supreme Court adopted an entirely new set of Federal Rules of Equity—the final set before the merger of law and equity in 1938—that "the mode of proof by oral testimony and examination of witnesses in open court . . . [became] the same in all the courts of the United States, as well in the trial of causes in equity . . . as of actions at common law."[281] Fulfilling the promise of Section 30 of the Judiciary Act of 1789, the new Equity Rule 46 directed that "[i]n all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules."[282] While out-of-court testimony was still contemplated by the 1912 Rules, it was now to be the exception, rather than the rule, and it was permitted only if authorized by statute or by the court upon a showing of unique circumstances.[283] And ultimately, the 1938 Federal Rules of Civil Procedure merged law and equity into "one form of action"[284] in which oral, in-court examination and cross-examination is the standard, default method for providing witness testimony to the fact-finder.[285]

What drove this process whereby the federal rules of equity gradually came to embrace the common law's oral and adversarial model of adjudication? Part of the answer is that once masters were permitted, for the sake of convenience, to undertake *viva voce* examination,

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279 FED. R. EQ. 67 (1893) (as amended by the Supreme Court in 149 U.S. 792, 792 (1892)).

280 *See id.*

281 Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88 (1789).

282 FED. R. EQ. 46 (1912), *in* BYRON F. BABBITT, FEDERAL JUDICIAL CODE AND EQUITY RULES 287 (1925).

283 Rule 47 provided:

> The court, upon application of either party, when allowed by statute, or for good and exceptional cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses, to be used before the court or upon a reference to a master, to be taken before an examiner or other named officer . . . .

FED. R. EQ. 47 (1912), *in* BABBITT, *supra* note 282, at 287–88.

284 FED. R. CIV. P. 2.

285 According to Rule 26(a) of the Federal Rules of Civil Procedure issued in 1938, "[T]he testimony of any person . . . may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes." FED. R. CIV. P. 26(a) (1938). Paragraph (d), however, narrowed greatly the circumstances in which deposition testimony could, in fact, be used as evidence at trial—namely, for purposes of impeachment, *see* FED. R. CIV. P. 26(d)(1) (1938), or when the witness was dead, more than one hundred miles from the place of trial, unable to attend the trial because of age, health, or imprisonment, or upon a showing of some "exceptional circumstances." FED. R. CIV. P. 26(d)(3) (1938).

it was necessary—in order to preserve the parties' right to question—to permit the parties to pose questions orally as well.[286] Accordingly, when the movement to merge law and equity arose in the mid-nineteenth century, it made sense for those seeking uniformity to transform equity procedure—which was already beginning to look a great deal like that of the common law—into a full-blown oral, adversarial method. In this sense, the abandonment of equity's traditional approach to procuring witness testimony followed as a necessary counterpart to the true impetus for reform, which was to unify the systems of law and equity. Furthermore, for law and equity to merge, a choice had to be made between the common-law tradition of oral, in-court testimony, and the equitable method of secret, ex parte testimony. Here, the choice was clear. Because the Seventh Amendment to the Constitution enshrined the right to a jury trial in civil cases,[287] the presentation of witnesses in open court before the fact-finder clearly had to continue.

In addition, as some have suggested, efforts to unify law and equity followed from the influence of a codification movement that drew on a populist, Jacksonian commitment to transparency in governance and an emerging positivist conception of the law.[288] To the extent that the codification movement was driven in part by a populist push towards democratic transparency in government, open, in-court testimony likely seemed inherently superior to equity's traditional reliance on secret, ex parte proceedings. Pointing to "Mr. Bentham['s] . . . demonstrat[ion] that publicity is . . . essential,"[289] one nineteenth-century English advocate of reform opined that equity jurisdiction should be reformed through the "general substitution of public VIVA VOCE testimony for the present system of secret WRITTEN evidence."[290]

Notably, the codification movement appears to have been a self-reinforcing process. New York's adoption of the Field Code—which sought to merge law and equity in such a way that it preserved the

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286 *See supra* notes 262–64 and accompanying text.

287 *See* U.S. CONST. amend. VII.

288 *See, e.g.*, Robert W. Gordon, Book Review, 36 VAND. L. REV. 431, 432 (1983) (noting that, according to certain scholars, the nineteenth-century codification movement was a single, coherent movement, which stemmed from anti-elitist, democratic concerns); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 932–33 (1987) (observing that David Dudley Field and other advocates of codification viewed the existence of "separate courts for law and equity . . . [as] unproductive, illogical, and wasteful," and that they came from a Benthamite tradition of legal reform that led them to "attempt[ ] to weed out what to their thinking was needless technicality that prevented the simple and inexpensive application of law").

289 PARKES, *supra* note 145, at 455.

290 *Id.* at 453.

common law's reliance on oral, in-court testimony[291]—reverberated nationwide, and even appears to have contributed to the English reform movement.[292] While federal courts sitting in equity were not bound by the procedure applied in state court,[293] the Field Code, which by the end of the nineteenth century had been adopted by about half the states and applied to the majority of the country's population,[294] profoundly influenced the federal courts. As federal judges, and the lawyers who practiced before them, increasingly hailed from states that had embraced the common-law method of oral, in-court testimony for cases in equity, the traditional equitable approach must have seemed increasingly strange and even improper.[295] Finally, given the long tradition, enshrined in the Federal

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291 In 1846, New York enacted a new state constitution that eliminated the Court of Chancery and establisbed "a supreme court, having general jurisdiction in law and equity." N.Y. CONST. of 1846, art. VI, § 3 (unamended); *see also* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 316 (1988) (discussing the 1846 Constitution). The constitution further specified that "[t]he testimony in cquity cases shall be taken in like manner as in cases at law." N.Y. CONST. of 1846, art. VI, § 10. It then directed "the appointment of three commissioners, whose duty it shall be to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts of record of this state." N.Y. CONST. of 1846, art. VI, § 24 (unamended). One of these commissioners was, of course, the famous David Dudley Field, by whose name the procedural code that New York enacted in 1848 came to be known. The Field Code provided that "[t]he distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished . . . ." Act of April 12, 1848, ch. 379, 1848 N.Y. Laws 510, § 62 (simplifying and abridging the practice, pleadings, and proceedings of the state courts) (current version at N.Y. C.P.L.R. § 103 (2003)). In establishing "but one form of action," *id.*, the Field Code directed that witnesses were to be examined orally in court, with the possible exception of those "who shall reside more than one hundred miles from the place where the trial or hearing is to be had," 1848 N.Y. Laws 560 at § 354. In the case of such witnesses, the court had the option of permitting their examination outside the courtroom, with the recorded deposition then to be used in the trial or hearing, or instead, to direct that the witnesses "attend in open court." 1848 N.Y. Laws 560 at § 355.

292 *See* MILLAR, *supra* note 80, at 62–63.

293 The Conformity Act of 1872 required

> [t]hat the practice, pleadings, and forms and modes of proceeding *in other than equity and admiralty cases* in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held.

The Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872) (emphasis added).

294 *See* Subrin, *supra* note 288, at 939.

295 Thus, for example, it is surely no mere coincidence that the federal court sitting in Nevada, a code state, embraced the common-law method before it was required to do so by the new Federal Rules of Equity issued in 1912. As explained by the United States Circuit Court for the District of Nevada three years prior to the issuance of the new Rulcs:

> While the action is upon the equity side . . . , the evidence, instead of being taken under equity rule 67, was heard and submitted in open court, agreeably to the practice more usually obtaining in this district of pursuing the same general mode of procedure in the trial of suits in equity as in actions at law.

Equity Rules, of tying equity practice to that of English Chancery,[296] the contemporary reform movement in England, which also embraced oral, in-court testimony was, no doubt, influential as well.[297]

At the same time, as Robert Gordon has suggested, the notion that there was any kind of uniform movement for codification, motivated by such high-minded and abstract concerns as "law reform," seems inherently suspicious and is belied by evidence that codification and reform—to the extent such occurred—resulted from the interac-

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Anderson Land & Stock Co. v. McConnell, 171 F. 475, 476 (C.C.D. Nev. 1909) (No. 783). Furthermore, in explaining the modification of the Federal Equity Rules, it is surely significant that, in the early 1860s, Congress began appointing to the Supreme Court justices who hailed from the new code states. *See* GARY L. MCDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 91 (1982) (observing that in the early 1860s three new Supreme Court Justices were appointed, each of whom was from one of the new code states: Noah Swayne of Ohio, Samuel F. Miller of Iowa, and Stephen J. Field of California).

296 As noted above, the Federal Equity Rules of 1822 expressly provided that, to the extent there was no rule on point, federal courts were to "be regulated by the practice of the High Court of Chancery in England." FED. R. EQ. 33 (1822), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 40. When the Supreme Court revised the Federal Equity Rules in 1842, it once again tied equitable procedure in the federal courts to that of the English Chancery Court. *See* FED. R. EQ. 90 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 61. No douht recognizing, however, that English developments over the course of the nineteenth century had rendered the divide between law and equity increasingly tenuous, the new Equity Rule 90 softened the link between American and English procedure. Henceforth, "where the rules . . . d[id] not apply" the federal courts were to "be regulated by the present practice of the High Court of Chancery in England," but only "so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice." FED. R. EQ. 90 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 61.

297 In England, reform of the High Court of Chancery began in 1823, with the appointment of a royal commission assigned the task of reporting on the court's practice and making recommendations for its improvement. *See* NEW FEDERAL EQUITY RULES, *supra* note 123, at 35. In 1852, parliament enacted the Chancery Practice Amendment Act, pursuant to which, at the request of either party, witness testimony would be taken orally by the examiner or by the parties themselves before the examiner. In addition, "[t]he old rule of secrecy was relaxed to the extent of providing that the examination in all cases should be had 'in the presence of the parties, their counsel, solicitors, or agents.'" MILLAR, *supra* note 80, at 270 (quoting the 1852 Act). The Common Law Procedure Act, passed in 1854, enabled the Chancery to apply such fundamental common-law remedies and procedures as awarding money damages and trying issues of fact before a jury. *See* BAKER, *supra* note 81, at 114. In addition, this Act authorized the common-law courts to issue injunctions and compel discovery. *See id.* The process of reform culminated a half-century after it had begun with the enactment of the Judicature Act of 1873, which consolidated Chancery with the common-law courts to create one Supreme Court of Judicature. *See id.*; NEW FEDERAL EQUITY RULES, *supra* note 123, at 36. Thus, as would be the case in the United States, England achieved a fusion of law and equity in which such equitable procedures as court-compelled discovery and a theory (if not always a reality) of flexible pleading were grafted onto a common-law structure of litigation, culminating in a trial based on oral, in-court witness tesiimony.

tion of numerous, often unrelated forces and interests.[298] From this perspective, it seems likely that a key element in this long process of "reform" was the decision, grounded in concerns about efficiency, to permit masters to take oral examinations, and the way that—unrelated to any broader movement for uniformity or codification—this decision created a breach in the traditional equitable structure of secrecy. Because of the longstanding association in common-law procedure between the oral and the adversarial, this seemingly minor shift towards oral examination, which Chancellor Kent presumed to be a mere matter of "convenience," appears to have unleashed the underlying ideology of adversarial justice and its virtues.[299] The political implications of this adversarial ideology resonated in Anglo-American legal culture since the English Revolution first established the link between common-law adjudication and parliamentary constitutionalism, on the one hand, and equity adjudication and royal/popish tyranny, on the other. Thus, for example, in 1856, when the Supreme Court was just at the beginning of the decades-long process by which it regularly amended the Federal Rules of Equity (until finally directing that testimony must be presented orally in open court), Justice Grier penned an opinion vociferously attacking the traditional equitable mode of gathering witness testimony as "the secret method of inquisition borrowed from 'holy church.'"[300]

Ultimately, regardless of its cause, it is clear that a shift towards the oral and adversarial occurred and that it had profound implications for the role of the master in civil litigation. To the extent that it became common, and ultimately required, for the court itself to hear

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298 *See generally* Robert W. Gordon, Book Review, 36 VAND. L. REV. 431 (1983) (reviewing CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981)).

299 *See* Remsen v Remsen, 2 Johns. Ch. 495, 499 (N.Y. Ch. 1817).

300 Sickles v. Gloucester Co., 22 F. Cas. 92, 94 (C.C.E.D. Pa. 1856) (No. 12,840). In *Sickles*, the defendant sought to take the testimony of witnesses by commission—the standard, default mode for taking witness testimony in equity suits established under Rule 67 of the then-operative Federal Equity Rules of 1842. *See id.* at 92–93. The plaintiff, however, objected, and the trial court issued an order providing that the plaintiff might "cross-examine the witnesses ore tenus" before the commissioner. *Id.* at 92. In denying the defendant's appeal, Justice Grier opined that the traditional equitable mode of gathering witness testimony was inextricably linked to the Catholic Church's history of secret inquisitions, and stood in opposition to the longstanding, valiant struggle of the English parliament to gain supremacy over its popish and monarchical foes. *See id.* at 93. Indeed, he noted, there was an extended confrontation between the English chancellor and parliament precisely because the "'proceedings [of the equity courts] were according to the civil law and the law of holy church, in subversion of the common law.'" *Id.* According to Justice Grier, equity procedure had since improved, but "it still retain[ed] some of the features which originally caused the enmity of the common lawyers and the parliament," including the taking of testimony "by secret inquisition." *Id.* From this perspective, there was no question but that the defendant's (fundamentally un-English and nn-American effort) to take testimony in an ex parte proceeding had to be denied.

testimony, masters seemed to lose much of their purpose, and, therefore, their legitimacy. This left contemporary jurists with essentially two viable options—either reconfigure the role of masters to take into account the changed procedural and adjudicatory framework in which they now operated, or abandon masters entirely. As described in Part V, both of these options were considered, but neither was fully realized.

V
FAILED ATTEMPTS TO RECONFIGURE THE MASTER'S ROLE

Around the late nineteenth to early twentieth century, some attention was given to the possibility of reconfiguring masters as "trial masters," so that they would serve much like the court itself—holding trials in which testimony was presented in the established oral, adversarial manner with the parties themselves bearing sole responsibility for bringing forward witnesses.[301] As described below, recent scholars exploring the master's pre- and post-trial roles in complex litigation have mistakenly assumed that the master's original, and thus legitimate, role was as such a trial master. But what these scholars fail to grasp is that the trial master was, in fact, a relatively *new* creation—and one that never resulted in the necessary (and hard) rethinking of how to merge the master's inquisitorial origins with his new role in the oral, adversarial system of adjudication.

The figure of the trial master appears particularly clearly in a treatise published in 1904 by John G. Henderson, a professor of equity pleading and practice at the Illinois College of Law: *Chancery Practice with Especial Reference to the Office and Duties of Masters in Chancery, Registers, Auditors, Commissioners in Chancery, Court Commissioners, Master Commissioners, Referees, Etc.*[302] As suggested by its title, Henderson's treatise focuses on the role of the master in equity proceedings—a necessary undertaking, he explained, because the few works devoted to the subject, while "valuable as additions to legal literature at the time of their publication," were now outdated.[303] According to Henderson, "Upon a reference to a master where witnesses are to be examined the hearing now assumes the form of a trial in court, and the witnesses are examined orally."[304] The trial-like nature of the proceedings, he argued, entailed a wholesale importation of common-law rules of evidence, governing, *inter alia*, the order in which witnesses

301 *See infra* notes 302–35 and accompanying text.

302 HENDERSON, *supra* note 68, at 2.

303 *Id.* at 1 (citing HOFFMAN, *supra* note 132, and BENNET, *supra* note 132).

304 *Id.* at 301.

were to be called, the admissibility of evidence, and the mode of objecting to it.[305]

In addition, and of fundamental importance here, Henderson claimed that because the proceeding before the master was now a kind of mini-trial, equity's traditional rules of secrecy—rules prohibiting the repeated calling of witnesses and repeated questioning about the same facts—had for the most part been abandoned. Thus, for example, in a section entitled, "Recalling a witness after he has been once examined," Henderson acknowledged equity's traditional practice of prohibiting such recalling because of "the danger of perjury."[306] Nonetheless, he noted that while the rule prohibiting such recalling is "definitely stated and rigidly enforced whenever insisted upon, . . . it is generally ignored in actual practice and a far looser one is followed . . . ."[307] In particular, "in modern practice, the evidence being given *viva voce*, the hearing before the master is conducted in the same manner as a hearing before the chancellor where it rests solely within the discretion of the latter whether a witness, once examined in a cause, may be recalled."[308] Rather than relying on traditional rules of secrecy to ensure the veracity of witness testimony, masters were now to draw on the common-law method of assessing

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305 *See id.* at 296 ("It follows . . . that the rules governing the admissibility or rejection of evidence before a master . . . are precisely the same as in a trial before the court.").

Traditionally, equity's approach to evidence was much more like that of the Roman-canon tradition. Although equity courts do not appear to have embraced the Roman-canon law's quantitative metric of proof in its entirety, they did adopt at least one off-shoot. As of the late seventeenth century, English equity courts regularly observed that because the defendant was required to submit his answer under oath, if the plaintiff came forward with but one witness supporting an allegation denied by the defendant's answer, the court would be faced with "oath against oath." MACNAIR, *supra* note 30, at 252. In such circumstances, the plaintiff, as the party typically bearing the burden of proof, would lose. Thus, equity courts, like their civilian counterparts, frequently held that, to sustain his case, a plaintiff needed a minimum of two witnesses—or one witness and corroborating circumstances sufficient to complete the proof. *See id.* at 249–50. This modified version of the two-witness rule appears to have been alive and well in the federal equity courts, before the change to the common-law mode of presenting witness testimony orally and in court served to undermine the entire evidentiary framework on which equity was traditionally based. *See, e.g.*, Fowler v. Merrill, 52 U.S. 375, 389 (1850) (disregarding for unspecified reasons defendants' argument—which cited a long line of equity cases and treatises—that their answers were "conclusive evidence in their favor, unless overturned by two witnesses, or one positive witness, with strong corroborating circumstances"). See also *Slessinger v. Buckingham*, where the court asserted:

> The answer, so far as responsive to the bill, directly denying the matters alleged, not only makes an issue, but it is testimony in the case called for by complainant, proving the issue for defendants; and it must be overthrown by the testimony of two witnesses, or the testimony of one witness, and circumstances equivalent to another, or, at least, sufficient to make a preponderance of testimony in favor of complainant.

17 F. 454, 455 (C.C.D. Cal. 1883).

306 HENDERSON, *supra* note 68, at 316–17 (citation omitted).

307 *Id.* at 317.

308 *Id.*

credibility through such informal measures as witness demeanor while testifying—particularly while under cross-examination.[309] Thus, Henderson emphasized that among the various "tests of truth" to be applied in analyzing testimony, "chief . . . [among these] is that of a cross-examination in the presence of the court, master or jury."[310] From this he concluded that "in determining the weight to be given to the testimony of a witness, close attention should be given to his manner while testifying, because his manner and demeanor frequently afford valuable aids in determining the degree of credibility to be given to what he says."[311]

But to the extent proceedings before masters were now so trial-like, masters had, in his view, become a form of jury. Like the jury, masters were responsible for making findings of fact based on the testimony of witnesses brought forward by the parties, and they were to assess the veracity of such testimony by observing witness demeanor during cross-examination. Thus, as Henderson approvingly noted:

> [Q]uite a number of the [state and federal] courts of this country have taken the stand that a master's findings of fact, where the evidence is conflicting and he had the advantage of seeing the witnesses upon the stand and of hearing them testify, is as binding upon the chancellor as the verdict of a jury is upon the trial judge in a common-law court.[312]

Notably, the vast majority of the cases cited by Henderson for the proposition that the master's findings based on oral testimony must be given the weight of a jury verdict date from the late nineteenth century[313]—from the time, in other words, that the traditional, quasi-inquisitorial mode of equity adjudication had been almost entirely swept away by the new commitment to the oral and adversarial. Indeed, a comparison of Henderson's treatise with those he claimed as predecessors from the early nineteenth century—namely, the works of Hoffman and Bennett—is particularly telling in this regard. In contrast to Henderson, who devotes a significant number of pages to setting forth the applicable standard for the equity court's review of the

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309 Interestingly, as George Fisher has argued, the role of the common-law jury in assessing the credibility of witness testimony in criminal trials appears to have arisen relatively recently—namely, during the late eighteenth through mid-nineteenth centuries. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 579–80, 624–50 (1997). As this is about the same period during which the equity tradition came to embrace the common law's oral, adversarial mode, there arises the very interesting—and as yet unanswered—question of whether and how procedural transformations in equity and law were intertwined.

310 HENDERSON, *supra* note 68, at 502.

311 *Id.* at 503.

312 *Id.* at 719.

313 *See id.* at 714–20.

master's findings,[314] neither Hoffman nor Bennet address the question as such. Instead, they both describe a much more informal practice whereby the master completed a draft report setting forth his findings of fact and invited the parties to comment.[315] Thereafter, if the parties raised objections, the master would address these and then submit a final report to the court.[316] If the master refused to change the report as a party had requested, that party could raise the same concern with the court, this time termed an "exception."[317] As for the standard of review that the court was to apply in ruling on such exceptions, both Hoffman and Bennet were silent.[318]

Likewise, federal case law from the early part of the nineteenth century is equally silent about the standard by which a court sitting in equity must review a master's findings of fact in response to a party's filing of exceptions. The reason for such silence is almost certainly that, at that time, most of the evidence on which the master relied in making his findings consisted of written documentation and recorded narratives of witness testimony, all of which could be submitted to the court.[319] To the extent that the court had before it the same written evidence on which the master had relied, it was in no worse position than the master had been in making findings of fact. Accordingly, the court was free to modify the master's findings as it saw fit[320]—or at least much freer than it had become by the end of the nineteenth century, when the master had been transformed into a kind of surrogate jury.

This new concern regarding the appropriate standard of review of a master's findings of fact is evident not only in the treatise literature and case law, but also in the Federal Rules of Equity. Thus, the 1842 edition of the Rules provided in Rule 83 that "[t]he parties shall have one month from the time of filing the report to file exceptions thereto" and that "[i]f exceptions are filed, they shall stand for hear-

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314 *See, e.g., id.* at 640–76.

315 *See* HOFFMAN, *supra* note 132, at 65–75; BENNET, *supra* note 132, at 20–23.

316 *See* BENNET, *supra* note 132, at 21–22.

317 *See id.*

318 *See id.*

319 The one notable exception, of course, was that, as discussed above, some testimony before masters began to be taken *viva voce* in the early nineteenth century. *See supra* notes 243–67 and accompanying text.

320 To the extent that courts in the first half of the nineteenth century declined to modify the master's findings, this was by choice—in order to avoid the burden—and not because the evidence on which the master relied was unavailable to them. Thus, one of the very few cases that Henderson cites from this period in which a court did discuss the standard for reviewing a master's findings is one in which it declined to engage in de novo review on the grounds that, should it do so, "the office of master would prove but little aid in the administration of justice—the court being compelled to go over all the facts again, and thus their labors be greatly and unnecessarily increased." Mason v. Crosby, 16 F. Cas. 1029, 1032 (C.C. D. Me. 1847) (No. 9,236).

ing before the court," but said nothing about the weight that the reviewing court was to give such findings.[321] Renumbered as Rule 66, these provisions were copied largely verbatim by the 1912 version of the Equity Rules.[322] However, on May 31, 1932, just a few years before the merger of law and equity, the Supreme Court issued a new Equity Rule $61^{1/2}$, setting forth "presumptions as to how . . . [the master's report must be] reviewed."[323] In particular, Rule $61^{1/2}$ provided that

> the report of the master shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed.[324]

By the time the Federal Rules of Civil Procedure were issued in 1938, the effort to equate master and jury was nearly complete. Thus, Rule 53 established that in nonjury actions the master's findings were not simply to be treated as "presumptively correct," but that "the court shall accept the master's findings of fact unless clearly erroneous"[325]—in essence, the same standard that federal courts were to apply in deciding whether to set aside a jury verdict as requested in a Rule 50(b) motion for a judgment notwithstanding the verdict.[326]

While the creation of the trial master made the master compatible with equity's new common-law-like oral and adversarial method, it did so only by reconfiguring the master's role entirely, and disassociating it from its inquisitorial roots. To the extent that masters had been transformed into surrogate juries (and thus implied all the formalities of the common-law trial), it was far from clear that they could continue to save the court much time or money.[327] Furthermore, these trial masters could no longer gather evidence on their own initiative, as the quasi-inquisitorial tradition of equity had once permitted. Thus, at the same time that some courts and commentators increas-

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321 FED. R. EQ. 83 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 132.

322 Among other minor changes, the new Rule 66 shortened the time period for filing exceptions to "twenty days from the time of [the filing of] the report." FED. R. EQ. 66 (1912), *in* BABBITT, *supra* note 282, at 298.

323 FED. R. EQ. $61^{1/2}$ (1932).

324 *Id.*

325 FED. R. CIV. P. 53 (1938).

326 *See, e.g.*, Galloway v. United States, 319 U.S. 372, 389 (1943) (holding that, as provided in Rule 50, "federal courts . . . [have the] power to direct a verdict for insufficiency of evidence").

327 Indeed, to the extent that the master was simply a surrogate for the jury, his role was at best superfluous and—to the extent he intruded on the jury's constitutionally established function—arguably illegitimate. Notably, as explained in the Advisory Committee notes to the December 2003 amendments to Rule 53—and reflecting much prior controversy and concern—the new Rule changes prior practice by "permit[ting] appointment of a trial master in an action to be tried to a jury only if the parties consent." FED. R. CIV. P. 53 advisory committee's note (2003).

ingly treated the master as a kind of jury, some seem to have concluded that the master would and ought simply to disappear.[328] Accordingly, the second possible solution to the problem of the disjunction between the master's traditional inquisitorial role and the rise of oral, adversarial adjudication was to decide that the traditional role was no longer necessary and, for this reason, to eliminate the master entirely.

As noted above, the Federal Rules of Equity issued in 1912 fully embraced oral, in-court testimony, providing in Rule 46 that "[i]n all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules."[329] In addition, the 1912 version of Rule 59 directed, for the first time, that references to masters would cease to be the norm and would instead be permitted only under exceptional circumstances.[330] Rule 59, which governed references to masters, repeated the language of its predecessor, Rule 74, in the 1842 Rules,[331] but added this key sentence: "Save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it."[332]

Chief Justice Taft acknowledged the existence of a direct link between the rise of oral, adversarial testimony and the new provision that courts should employ masters only in "exceptional circumstances." In *Los Angeles Brush Manufacturing Corp. v. James*,[333] Taft explained that the Supreme Court issued Rules 46 and 59 together as part of a comprehensive scheme to ensure that federal courts sitting in equity fully embraced the common law's oral, adversarial approach:

> Rule 46 requires that in any trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or the rules, and that the Court shall pass upon the admissibility of all evidence offered as in actions at law. Equity Rule 59 provides that save in matters of account, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some exceptional condition requires it. These rules were adopted by this Court after a thorough revision. Committees of the Bar from the nine different circuits were invited to assist the Court in the matter. The Court, after much consideration, concluded that the then method of taking evidence in patent, and other causes in equity, had been productive of unnecessary expense and burden to the litigants and caused much delay in their disposi-

328 *See infra* notes 333–39 and accompanying text.

329 FED. R. EQ. 46 (1912), *in* BABBITT, *supra* note 282, at 287.

330 FED. R. EQ. 59 (1912), *in* BABBITT, *supra* note 282, at 295.

331 *See* FED. R. EQ. 74 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 126.

332 FED. R. EQ. 59 (1912), *in* BABBITT, *supra* note 282, at 295.

333 272 U.S. 701, 706 (1927).

> tion, and that the effective way to avoid the making of extended records, unnecessary to a consideration of the real issues of the causes, was to require, so far as it might be possible and practicable, that the evidence taken in patent and other cases should be taken in open court, and that in only exceptional cases should the cause be referred after issue to a special master.[334]

Given the gradual progression towards oral testimony, it is hardly surprising that the Court concluded that such testimony was superior for any number of reasons (including, as Taft noted, reasons of cost and efficiency) to equity's tradition of taking testimony in secret, outside the courtroom.[335]

Scholars[336] and later courts,[337] however, have failed to grasp that the decision to permit references to masters only under "exceptional

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334 *Id.* at 706–07.

335 For a case-law discussion of the purposes of Rule 46 and the advantages of in-court testimony, *see, e.g.*, North v. Herrick, 203 F. 591, 592 (N.D.N.Y. 1913) ("When witnesses are present in court, objections can be made and rulings had by the court, and much better justice administered, than when the evidence is taken out of court before an examiner, without power to rule on the questions presented."); *see also* Anchor Brewing Co. v. United States, 5 F.2d 883, 884 (3d Cir. 1925) ("The purpose of this rule was to expedite the work of courts, by requiring the testimony to be taken in open court, where the testimony could be abridged by the rulings of a judge and the delays incident to the uncontrolled range of testimony when taken elsewhere [avoided].").

336 *See, e.g.*, MARGARET G. FARRELL, SPECIAL MASTERS, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 596–97 (1994) (acknowledging that the decision in *La Buy v. Howes Leather Co.*, 352 U.S. 244 (1957), "did not hold that a reference to the master under the circumstances of that case violated Article III of the Constitution, only that it was not warranted under the provision of Rule 53," but arguing that "the boundaries within which Rule 53 authority must be contained are established by Article III and the due process clause of the Constitution"); Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 453 (1958) (citing *La Buy, inter alia*, for the proposition that "[t]he chief factor militating against unrestricted references in the federal courts is the possibility that it may result in an abdication of the judicial function, exclusively reserved by the Constitution to the federal judiciary"). *But see* Linda J. Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297, 1329 (1975) (arguing that "neither the 'abdication' language of *La Buy* nor the restrictions of rule 53 should be taken to imply that references to masters are constitutionally prohibited" under Article III).

337 *See. e.g.*, United States v. Microsoft Corp., 147 F.3d 935, 954 (D.C. Cir. 1998) (vacating the reference to a master and observing that "it may be that the boundaries of Rule 53(b) and Article III are close, so that the *La Buy* Court, in addressing the Rule 53 'exceptional condition[s]' criterion, was actually finding unconstitutional conduct"); Prudential Ins. Co. of America v. U.S. Gypsum Co., 991 F.2d 1080, 1086 (3d Cir. 1993) (vacating the reference to a master and citing *La Buy* for the proposition—clearly based on Article III, though not so identified—that "[a] district court has no discretion to delegate its adjudicatory responsibility in favor of a decision maker who has not been appointed by the President and confirmed by the Senate"); *In re* Pearson, 990 F.2d 653, 659 (1st Cir. 1993) (denying a writ of mandamus to vacate the reference to a master based on the conclusion that the facts did not come within the *La Buy* principle that a reference is impermissible if it "constitutes an 'abdication of the judicial function' to a non-Article III adjudicator"); Stauble v. Warrob, Inc., 977 F.2d 690, 691, 694 (1st Cir. 1992) (vacating the reference to a master based on an "assess[ment of] the constraints that Article III of the Constitution imposes on Fed. R. Civ. P. 53" and concluding that "[t]he wisdom of *La Buy* is . . . [that] crowded dockets and complex business disputes . . . are dismayingly commonplace[,] . . .

circumstances" was simply one element of implementing the shift towards an oral, adversarial mode of adjudication. Instead, they have mistakenly assumed that this decision was intended as a means of codifying Article III limits on the exercise of the judicial function by prohibiting judges from delegating too much of their authority to masters.[338] The real motivation for the "exceptional circumstances" requirement, however, was simply a recognition that if the court itself

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[so] predicating access to auxiliary adjudicators on the incidence of such circumstances would likely trivialize Article III"); *In re* Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165, 1168 (D.C. Cir. 1991) (vacating the reference to a master and citing both Article III and *La Buy* for the proposition that "Rule 53 of the Federal Rules of Civil Procedure authorizes the appointment of special masters to *assist*, not to replace, the adjudicator, whether judge or jury, constitutionally indicated for federal court litigation"). Very few opinions have rejected the proposition that *La Buy* seeks to implement Article III limits. *See, e.g.*, Collins v. Foreman, 729 F.2d 108, 118 (2d Cir. 1984) (holding that the *La Buy* "Court did not suggest that more delegation would be unconstitutional, but merely that it was not authorized by Congress and would be undesirable on policy grounds"); Cruz v. Hauck, 515 F.2d 322, 330 (5th Cir. 1975) ("The ineluctable conclusion is that the 'exceptional condition' limitation results from the deficiencies of the master system rather than from constitutional limitations upon non-Article III judges.").

338 As issued in 1938, Federal Rule of Civil Procedure 53 copied the exceptional circumstances requirement directly from Rule 59 of the Federal Equity Rules of 1912. The Supreme Court's only significant ruling regarding Rule 53 in the last half-century concerned the meaning of this requirement. In *La Buy*, the Court reviewed the district court's decision—made on grounds of an "extremely congested calendar"—to refer two consolidated antitrust litigations to a master with instructions to make findings of fact and law. 352 U.S. 249, 253 (1957). The Supreme Court held that this reference "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation"; the mere fact that a litigation was complex and dockets were overwhelmed did not constitute the sorts of "exceptional circumstances" justifying a non-accounting reference under Rule 53. *Id.* at 256.

While the Court formally based its ruling on the language of Rule 53, its reference to the "judicial function" has often been interpreted as implicating Article III concerns. *See supra* notes 336–37. Accordingly, much scholarly literature, *see supra* note 336, and many judicial opinions on masters, *see supra* note 337, have focused on the question of the limits of delegating the judicial function and have viewed the exceptional circumstances language as a tool for implementing constitutional restraints regarding the "judicial Power of the United States" imposed by Article III. U.S. CONST. art. III, § 1.

This turn towards Article III is unfortunate. As a doctrinal matter, the values underlying Article III are not implicated in any meaningful way by courts' use of masters. As Richard H. Fallon, Jr. has argued, Article III's primary purpose in granting life tenure to federal judges is to implement "the values implicit in the constitutional separation of powers" by ensuring that federal judges will not be "subject . . . to political influence by Congress or the national executive." Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 937 (1988). Accordingly, the Supreme Court's recent opinions assessing the constitutionality of various judicial mechanisms created by Congress pursuant to Article I have focused, *inter alia*, on whether these run afoul of the separation-of-powers framework that the Framers intended Article III to implement. *See e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854–57 (1986) (discussing Article III constraints on matters that may be heard before a non-Article III tribunal); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 582–83 (1985) (same); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 (1982) (same). While subject to some regulation under Rule 53, masters are not judicial mechanisms created by any act of Congress, but are instead appointed directly by courts.

heard testimony, there would be very little left, besides accountings, for masters to do. Presumably, "matters of account" were carved out from the new requirement that references to masters must be "exceptional" because this was an area of inquiry in which the necessary findings would be based largely on written documentation, such as account books, rather than on witness testimony.[339]

This, of course, raises the question of why the master was retained at all. Given the conclusion that litigants were entitled to in-court, oral presentation of testimony, which undermined the master's traditional role, why not eliminate masters entirely? Here, we can only speculate, but two answers seem likely. First, there is the inherent conservatism of legal thought and practice, which no doubt cautioned against eliminating a function that had existed in equity for centuries—especially to the extent that it seemed possible to remake the master as a kind of jury.[340] Second, the main reason for the emergence of masters many centuries before—namely, the inability of a lone judge to manage the entire equity docket—continued to pertain, particularly in the decades before the passage of the Federal Magistrates Act.[341]

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339 That Rule 53 of the Federal Rules of Civil Procedure of 1938 copied the exceptional circumstances provision from the Federal Equity Rules is hardly surprising, since the Civil Procedure Rules of 1938 accomplished the merger of law and equity largely by adopting the framework provided by the Federal Equity Rules. *See* Subrin, *supra* note 288, at 922–25. In this respect, Rule 53 was in no way unique. It was simply a composite of the old equity rules regarding masters, often borrowing the language of these earlier rules verbatim. In the words of Charles E. Clark—then Dean of the Yale Law School, and Reporter for the Advisory Committee responsible for framing the Federal Rules of Civil Procedure—the new provisions on masters were "'almost all a copy of the equity rules.'" Levine, *supra* note 63, at 769 & n.65. Prior to the December 2003 amendments, Rule 53 provided that "[a] reference to a master shall be the exception and not the rule" and that "in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." FED. R. CIV. P. 53(b) (1983). The new Rule 53 provides that "a court may appoint a master only to . . . bold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by some exceptional condition." FED. R. CIV. P. 53(a)(1)(B)(i). As concerns the appointment of pre- and post-trial masters, the new Rule provides that such uses of masters are permissible "only to . . . address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge." FED. R. CIV. P. 53(a)(1)(C). Interestingly, however, the Advisory Committee notes specify that "[t]he core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule." FED. R. CIV. P. 53 advisory committee's note (2003).

340 Indeed, even though a complete abolition of the master was not attempted, the more limited changes implemented by the Equity Rules of 1912—in particular, limiting the use of masters to exceptional circumstances—were received with much resistance in the legal community. Recognizing this resistance, Chief Justice Taft observed: "Though there has been some criticism and complaint of the inconveniences that arise from this change of the rules, the Court is strongly convinced that the change has justified itself; and it has no purpose to amend the provisions of Rule 46 and Rule 59." Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701, 707 (1926).

341 Pub. L. No. 90-578, 82 Stat. 1108 (1968).

The Federal Equity Rules of 1912 failed, however, directly to address how the transformation to oral, in-court testimony implicated the master's role. Instead, these Rules copied largely verbatim the provisions governing masters from the 1842 Federal Equity Rules, the first set of rules to provide a detailed account of the master's role. The 1912 Rules acknowledged the triumph of oral, adversarial testimony only by eliminating an earlier provision that the master might "order the examination of other witnesses to be taken, under a commission."[342] But, as provided in Equity Rule 62—and ultimately copied with minor variations into Federal Rule of Civil Procedure 53—this left the master with his longstanding power, rooted in equity's quasi-inquisitorial tradition, "generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties."[343] Thus, the master's inquisitorial role, imported from the Federal Rules of Equity, remained embedded in the language of Rule 53.

After lying dormant for decades, the master's latent, inquisitorial role reemerged over the last half-century, as federal courts dealing with the challenge of increasingly complex litigation have confronted the limits of adversarial procedure. Thus, for example, in *Cobell v. Norton*, discussed in the Introduction, the court justified its decision to authorize a master to undertake ex parte communications on the grounds that "[a]lmost a century ago, former Equity Rule 62 empowered the master . . . 'generally to do all other acts, and direct all other inquiries and proceedings in the matter before him.'"[344] Because the language in Rule 53 (especially before the recent December 2003 amendments) was so similar to that contained in Equity Rule 62, the court concluded that "Rule 53 grants special masters the same autonomy and discretionary authority they enjoyed in equity."[345] But the *Cobell* court, and others like it, draw upon the master's longstanding inquisitorial power in the context of a system that now identifies itself as adversarial. Thus, the disjunction between the master's inquisitorial role and the oral, adversarial framework of adjudication remains unresolved.

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342 *Compare* FED. R. EQ. 77 (1842), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 127–28 (containing provision allowing master to order examination of witnesses) *with* FED. R. EQ. 62 (1912), *in* BABBITT, *supra* note 282, at 296 (eliminating provision); *see also* NEW FEDERAL EQUITY RULES, *supra* note 123, at 289 (noting that Federal Rule of Equity 62, as issued in 1912, is former Federal Rule of Equity 77).

343 FED. R. EQ. 62 (1912), *in* BABBITT, *supra* note 282, at 296.

344 Cobell v. Norton, 310 F. Supp. 2d 102, 110 (D.C. Cir. 2004) (quoting FED. R. EQ. 62 (1912)).

345 *Id.* at 111.

Rather than considering how to make the inquisitorial role of the master fit within the oral, adversarial framework of adjudication, scholars have focused, instead, on the seeming novelty of the inquisitorial role itself.[346] As they have forgotten that the master originated in equity's quasi-inquisitorial tradition—and, indeed, that inquisitorial procedures were ever part of our tradition—they have mistakenly assumed that the master's original, and thus legitimate, role is as a trial master presiding over oral, adversarial court proceedings. Accordingly, they have seen the master as more troublesome and anomalous than is, in fact, the case, and have struggled to explain the master's place in our procedural system.

Consider, for example, the writings of Wayne D. Brazil, author of some of the most extensive and nuanced analyses of masters in recent years. Brazil devotes an entire piece to the question of a federal court's authority to refer discovery to special masters—a question that arises, he concludes, because "Rule 53 was designed to authorize (and to limit) only the kinds of *trial-stage* references that were well-established features of equity practice before 1938."[347] According to Brazil:

> Rule 53 was intended to preserve practices developed under the Federal Equity Rules; it was not designed to radically alter the adversary system. . . . There is absolutely no reason to believe that the[ ] drafters [of the Federal Rules of Civil Procedure] foresaw masters wielding the quasi-inquisitorial powers listed in paragraph (c) [of former Rule 53] during pretrial discovery proceedings. The discovery system as contemplated in the Federal Rules . . . was to be largely self-executing, and the primary locus of responsibility for it was to rest with counsel. Thus it would have been completely inconsistent with common expectations about the proper role of the judiciary during pretrial to provide for special masters who could move into

346 *See, e.g.*, Samuel Jan Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RES. J. 543, 558 (1979) (arguing that the "transformation in the character of litigation [and, in particular, the rise of public law litigation, as epitomized by the structural injunction] . . . produces a matching transformation in the functions of, and the rationales for using, masters who 'assist' judges in bringing the litigation to a final resolution"); Edward H. Cooper, *Civil Rule 53: An Enabling Act Challenge*, 76 TEX. L. REV. 1607, 1609 (1998) (expressing concern that "[t]here is ample anecdotal information suggesting that masters are used much more often for pretrial and post-trial purposes than for the trial functions contemplated by Rule 53"); Levine, *supra* note 63, at 77 & n.6 (noting that "[a]s courts have turned to remedial special masters [in institutional reform litigation], commentators have remarked upon the apparent novelty of the use and the transformation of the master into an almost wholly new role"); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2141–42 (1989) (noting the "recent and expanding phenomenon of delegations of authority to special masters" and, in particular, "two broader interventionist roles for special masters that have emerged relatively recently: one is a case evaluation and case management function[,] . . . the second is a post-relief role in helping the court implement and effectuate equitable decrees involving complicated institutional relationships"); *see also infra* notes 362–63 and accompanying text.

347 Brazil, *supra* note 62, at 305–06.

> the *discovery* arena with the power to specify which documents were to be produced and to call and examine witnesses. A master so endowed would have displaced the parties. No one expected that.[348]

Brazil thus assumes that, because "Rule 53 was intended to preserve practices developed under the Federal Equity Rules[,] it was not designed to radically alter the adversary system."[349] But insofar as this assumption presupposes that the Federal Equity Rules were structured to promote a purely adversarial system, it is, historically speaking, a non sequitur. It fails to take into account that Rule 53 incorporated, essentially verbatim, the provisions regarding masters contained in early versions of the Federal Rules of Equity, even while the Equity Rules as a whole shifted from promoting a quasi-inquisitorial mode of adjudication to promoting a fundamentally adversarial one.[350] Indeed, as described above, it was only the final version of the Federal Equity Rules issued in 1912 that fully embraced a common-law style adversary system.[351] Earlier versions of the Equity Rules, in which the role of the master was first set forth, embraced a mode of adjudication that relied on a written, quasi-inquisitorial approach that derived from the Roman-canon tradition.[352]

In this earlier, more inquisitorial mode of adjudication, the distinction between the trial-stage and the pre- and post-trial roles of the master—the very distinction on which Brazil and others have focused—was far less significant.[353] Because equity adjudication was not aimed at presenting facts to a lay jury and thus was not concerned with condensing all fact-presentation into a single "trial," it was a more fluid undertaking than common-law based, adversarial adjudication.[354] Equity litigation did typically begin with a period during which the parties devoted themselves to discovery, but contrary to Brazil's suggestion, such discovery was not "largely self-executing" and did not sustain an "adversary system"—at least not until equity came to adopt the common law's oral, adversarial method.[355] To the contrary, equity courts were intimately involved in discovery, requiring witnesses to answer questions as presented by a court-appointed officer outside the presence of both parties.[356] Furthermore, when this initial period of discovery was completed, the court frequently referred the case to a

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348 *Id.* at 335 (citations omitted).

349 *Id.*

350 *See supra* Part IV.

351 *See id.*

352 *See supra* text accompanying note 98.

353 *See supra* Part II.

354 *See id.*

355 *See supra* Part IV.

356 *See supra* text accompanying notes 132–34, 189–99.

master, who—despite Brazil's assertion otherwise[357]—had full authority "to specify which documents were to be produced and to call and examine witnesses."[358] This master-directed discovery was conducted in the same quasi-inquisitorial manner as that previously initiated by the parties, such that the master did, indeed, displace the parties to some extent—and for a long time this is precisely what everyone "expected."[359]

Given that both party-initiated and master-ordered discovery was undertaken in the same quasi-inquisitorial fashion, that the same set of rules regarding maintaining the secrecy of the evidence governed the parties and the master, and that all evidence thus gathered ultimately went before the master (and thus the court), there simply was no clear line between the pretrial/discovery stage of the litigation and the trial-stage. Accordingly, history teaches that to focus attention on whether Rule 53 enables masters to deviate from their supposedly traditional role as trial masters is to pose the wrong question. Yet, just as (and, indeed, because) commentators have focused on this question,[360] so too have the drafters of the new Rule 53. As explained in the Advisory Committee notes to the 2003 amendments:

> Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments.[361]

Thus, ironically, while seeking to provide courts with greater inquisitorial authority to appoint pretrial managerial and post-trial investigatory masters, the new Rule 53 is premised on a complete erasure of equity's (and thus its own) quasi-inquisitorial past. And, as explained in Part VI, this erasure of the equity tradition has come at a price.

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357 *See* Brazil, *supra* note 62, at 335 ("[I]t would have been completely inconsistent with common expectations about the proper role of the judiciary during pretrial to provide for special masters who could move into the *discovery* arena . . . .").

358 *Id.*

359 *See* text accompanying note 348.

360 *See, e.g.*, Cooper, *supra* note 346, at 1608 (noting that the Civil Rules Advisory Committee of the Judicial Conference had decided to consider revising Rule 53 because advisory groups suggested that "district courts have come to rely on special masters in many circumstances not clearly covered by Rule 53"—in particular, in the pre- and post-trial context).

361 FED. R. CIV. P. 53 advisory committee's note (2003) (internal citation omitted).

VI
THE FAILURE TO RECALL EQUITY'S QUASI-INQUISITORIAL TRADITION AND OUR CURRENT PROCEDURAL AILMENTS

Why should we care about the fact that, as represented by the new Rule 53, we no longer recall the quasi-inquisitorial nature of our equity tradition? The history presented in this Article suggests the following response: Our forgotten equity tradition—in particular, the way we made the shift from our divided law/equity past to today's adversarial framework—may account both for (1) many of the widely bemoaned ailments of our current procedural system, and (2) our apparent difficulty remedying these ailments. This is, of course, a very broad claim. What follows below is offered not as a complete account, but as an initial sketch of overarching developments.

One of the most criticized features of our current procedural system is that justice often appears to be for sale to the highest bidder—to the litigant who is sufficiently wealthy to deploy costly procedure as a means of overwhelming the adversary. As a result, procedure fails to serve the fundamental goal of truth-seeking—of ensuring that victory goes to the litigant with the valid claims—and, at the same time, generates systemic, wealth-based inequities that impair our ability to ensure equal access to justice.[362] Key to the development of this unfortunate state of affairs was the importation of inquisitorial devices inherited from equity into the common law's adversarial framework. Due to this ill-conceived importation, control of the classic tools of equity was transferred from the court—which had little, if any, incentive to use them other than for truth-seeking—to the parties, who, in the adversarial framework, have every incentive to deploy them as a means of obstructing the truth and generating costs.

This history sheds important light on our current dilemmas. In the context of modern, complex litigation, adversarial procedure can lead to great inefficiencies and unfairness.[363] But the complex nature of much of today's litigation is not exclusively an artifact of the increasing complexity of social and economic life. The set of procedural changes brought about by the merger of law and equity in 1938, as embodied in the Federal Rules of Civil Procedure, made large-scale, factually sophisticated disputes susceptible to adjudication. For the many disputes that, prior to merger, fell into the category of those at law, rather than equity, complexity was obviated by strict pleading de-

362 *See, e.g.*, Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 640–41 (1985) (discussing procedural alternatives that could address the "market failures" of civil litigation).

363 *See id.* ("The objective should be to minimize not only adversarial imbalances but also the societal waste that accompanies protracted belligerence among equals.").

vices that sought to frame a single, relatively simple question of fact, suitable for resolution by a jury.[364] Merger facilitated the adjudication of complex disputes by formally importing into the new, merged system such equity devices as unrestricted pleading, broad joinder, and written interrogatories (which then formed the core of what became modern discovery).[365] At the time of merger, however, as this Article has traced, equity had already embraced the common law's oral, adversarial framework.[366] Folding equity fully into the adversarial system of law allowed the parties themselves to wield against their adversaries equity devices far more powerful than those that had ever existed at law.

Party use of these devices has transformed the traditions of the common law in deep ways that have undermined fairness. Litigation in the common-law tradition was relatively simple. Indeed, one of the primary purposes of procedure in this tradition was to ensure simplicity and, thus, facilitate adjudication by a lay jury.[367] As the common law lacked extensive rules of joinder, litigation typically consisted of two parties.[368] Similarly, strict pleading devices served to frame a single, relatively easy factual question, thereby obviating much need for fact-finding.[369] Indeed, discovery did not exist in the common-law tradition.[370] Litigants at law thus had great freedom to control the evidence presented and the sequence and nature of the proceedings, but could only exercise this freedom within a very circumscribed sphere. This, in turn, meant that litigants had relatively limited opportunities and incentives to use the adversarial framework to undermine truth-seeking. For example, it was impossible to deploy discovery devices to overwhelm one's adversary because discovery simply did not exist.

While the common-law tradition constrained the parties' ability to use adversarial procedure to hinder truth-seeking, its rigid procedures (including formal rules of pleading and lack of discovery) served themselves to subvert the truth, especially as the increasingly

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364 *See* Subrin, *supra* note 288, at 916–17 (noting that the system was "rigid and rarefied," and that "a party could easily lose on technical grounds").

365 *See id.* at 922–25.

366 *See supra* Part IV.

367 *See* Subrin, *supra* note 288, at 917.

368 *See* Susan M. Glenn, Note, *Federal Supplemental Enforcement Jurisdiction*, 42 S.C. L. REV. 469, 475 (1991) (noting that "the objective of common-law procedure was the reduction of the controversy to a single legal or factual issue between only two parties").

369 *See* Subrin, *supra* note 288, at 916.

370 Not only was discovery of third parties unavailable, but the parties themselves were prohibited from testifying on the grounds that their self-interest undermined the likely veracity of their testimony. *See id.* at 919. As a result, litigants in common-law cases sometimes also filed bills in equity for the sole "purpose of obtaining a discovery in aid of an action at law between the same parties." MITFORD & TYLER, *supra* note 125, at 440. However, by 1876 such bills were largely unnecessary, because most courts of law "enforce[d] the required discovery in the law case without aid of equity." *Id.* at 441.

complex nature of society made it ever more difficult to fit disputes within the narrow procedural boxes provided by common-law pleading.[371] Hence, the decision was made to borrow from equity. But importing various equity devices into a common-law, adversarial framework created a system in which it is nearly impossible to ensure that adversarial procedure will be compatible with truth-seeking. Modern equity-based devices, such as discovery and joinder, generate complex questions that were once avoided by a procedural sleight of hand—namely, pleading. Moreover, as imported into our current adversarial framework, these devices are now in control of the parties, rather than the court. The result is our current predicament, in which litigants, deploying equity devices as part of the adversarial struggle, have enormous opportunities and incentives to pervert the truth-seeking function of litigation.

In addition, the importation of equity devices into an adversarial framework likely bears part of the blame for our system's distressing inability to provide equal access to justice. In 1938, we embraced such equity-based devices as discovery and joinder precisely because they, unlike common-law procedure, permit factual complexity, rather than seeking to erase it.[372] This factual complexity, while in theory encouraging truth-seeking, comes at a price. The question of how to allocate this cost is, as described above, one that equity, long before its merger with law, was never clearly able to resolve. Continental legal systems, such as that of the French, committed early to developing a large judicial bureaucracy.[373] In contrast, equity—while adopting a quasi-inquisitorial procedural framework—never embraced the staffing requirements that such a framework implied, and made do, instead, with masters and other relatively ad hoc appointees.[374] Notably, one of the main factors that led to the critique of equity in mid-nineteenth century England, and thus to its ultimate merger with law, was the high cost of its procedure—a cost that exacerbated the longstanding

371 *See* Subrin, *supra* note 288, at 917.

372 *See, e.g.*, Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 389–406 (2003) (discussing the transformation of trial practice under the Federal Rules of Civil Procedure).

373 As Antoine Garapon and Ioannis Papadopoulos argue, accusatory systems tend to operate "to the detriment of equality, which the inquisitorial system better protects." GARAPON & PAPADOPOULOS, *supra* note 41, at 116. However, as they also suggest, there is reason to doubt that the bureaucratized justice afforded in inquisitorial systems is as good as the justice provided in accusatorial systems to those who are sufficiently wealthy to pay for a good lawyer. *See id* at 116–18.

374 Michael Lobban, *Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I*, 22 L. & HIST. REV. 389, 393–94 (2004).

English reluctance to appoint the full panoply of salaried personnel needed to deploy such procedure in a timely manner.[375]

Importing equity devices into the common-law adversarial framework reinforced the longstanding reluctance to embrace judicial personnel as a public good since, in the adversarial context, the parties control most procedural devices. However, equity-based devices like discovery and joinder are expensive to implement—much more expensive than the simple pleading that once occurred in the common-law tradition. In the new merged, adversarial system, there was no question where this cost was to fall; as the parties control procedure, they also pay for it. And significantly, given the incentives in the adversarial framework to deploy such costly procedural devices to overwhelm the adversary, these (already high) costs skyrocketed. As a result, the goal of affording equal access to justice suffered a serious blow, and the goal of truth-seeking was subverted by the very procedures which were once intended to achieve it.

In this context, the problem of masters can be seen as merely one instance, albeit an instructive one, of a more pervasive problem. Like other equity devices that we imported into the common law's adversarial framework, masters are both powerful and costly. For this reason, as deployed within the adversarial context, they generate opportunities and incentives to pervert the truth-seeking function of litigation and, in so doing, threaten to generate systemic inequities. In the equity tradition, masters were inquisitorial tools designed to be controlled by the court and thus to augment its fact-finding power in ways that would promote truth-seeking. Admittedly, as a result of the longstanding tension in equity between the quasi-inquisitorial nature of its procedure and the failure to develop a large, professional staff, the master was always something of a private judicial officer, and thus somewhat in the hands of the parties—certainly more so than the judicial assistants in continental legal systems, who, at least in theory, were recognized and funded as agents of the state.[376] But the triumph of the adversarial framework has made the master even more susceptible to capture by the litigants—or at least to the troubling appearance of such capture.

Unlike such equity-based devices as discovery and joinder, masters have retained more of their truly inquisitorial function, as they continue to be significantly within the judge's control. The judge nonetheless seeks the parties' opinions in deciding which master to appoint—and, most importantly, directs one or both of the parties to

375 *See id.* at 391–97, 425 (suggesting that the delay and high cost associated with nineteenth-century English Chancery was due, *inter alia*, to the limited power of masters, and the strategic efforts of the parties to increase delay and cost).

376 *See supra* notes 225–29 and accompanying text.

pay the master, in the amount and proportion the judge deems appropriate.[377] In this fundamental sense, the master remains a private judicial officer. And in the current adversarial framework, where the parties have enormous opportunities and incentives to use their wealth to deploy procedural devices to their tactical advantage, masters' semi-private status increases the risk that litigants responsible for paying and nominating them might seek to control them in ways that unfairly further their cause or, at a minimum, increase time and costs. Moreover, the mere appearance that parties can control the master is corrosive to a legal system committed to values of rule of law and equal justice.[378]

It is precisely such concerns about our uses of the inquisitorial master in an adversarial context that contributed significantly to the decision to amend Rule 53 in December 2003. One of the primary criticisms of former Rule 53 was that, under the existing procedural regime, masters were appointed and compensated in ways that made them susceptible to party control, thus undermining their public accountability. For example, the notes to a 1994 Reporter's draft of a revised Rule 53 express concern that "[p]ublic judicial officers . . . enjoy presumptions of ability, experience, and neutrality that cannot attach to masters."[379] Likewise, these notes identify as a general problem that, while "[p]arties are not required to defray the costs of providing public judicial officers," this is not the case with "private judicial officers."[380] They then state specifically that "there is some risk that a master may appear beholden to a party who pays most or all of the fees."[381] Similarly, the 2000 Federal Judicial Center Study of masters found that one of the two main suggestions for revising Rule 53 made by the judges, masters, and attorneys who had been interviewed was to "clarify[ ] the rules regarding some problem areas, especially relating to . . . methods of selecting masters."[382]

As ultimately issued in December 2003, however, the new Rule 53 does essentially nothing to address the issue of the master's lack of

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377 According to the new Rule 53, "[t]he court must give the parties notice and an opportunity to be heard before appointing a master." FED. R. CIV. P. 53(b)(1). The only limit on the court's discretion in determining the master's compensation is that it "must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense." FED. R. CIV. P. 53(a)(3).

378 *See* Offutt v. United States, 348 U.S. 11, 13 (1954) ("[J]ustice must satisfy the appearance of justice.").

379 Committee Note to Reporter's Draft of Rule 53 (Sept. 25, 1994), *in* Cooper, *supra* note 346, at 1619.

380 *Id.* at 1623.

381 *Id.*

382 WILLGING ET AL., *supra* note 64, at 12.

public accountability.[383] The master's appointment and compensation remain significantly in the hands of the adversarial litigants, and the threat to the values of truth-seeking and equal access to justice thus persists.

The amended Rule's failure to address a key concern that led to its revision is representative of our difficulty addressing current procedural woes. In particular, to the extent that party control of equity devices perverts the goal of truth-seeking and generates systemic inequities, one possible solution would appear to be establishing greater court control over such devices. But such an embrace of the inquisitorial as a means of addressing our procedural ailments is itself hampered by the triumph of the common law's adversarial framework, which has resulted in a concomitant triumph of the positive, political conception of due process. As we tend to view active party participation and control over the litigation as a fundamental due-process norm,[384] we have difficulty ceding power to a court, even if doing so is compatible with the negative, state-checking conception of due process.

Thus, as noted in Part I, despite the widely recognized problems with party control of discovery, the attempts we have made to provide greater court control have been fairly limited—authorizing judges to hold scheduling conferences and to appoint pretrial discovery masters, but leaving primary responsibility with the parties. Likewise, despite the freedom judges have to appoint their own experts under Federal Rule of Evidence 706, the parties themselves continue to supply most expert testimony.[385] No doubt, one reason for this failure to embrace the possibility of significant procedural change is that the status quo (as well as the various interest groups that benefit from it) always weighs heavily against change. In addition, however, the supremacy of the adversarial model and its positive, political conception of due process have greatly constrained our imaginative capacity.

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383 The new Rule made only two changes regarding the appointment of masters. First, when masters are appointed directly by the court, rather than on the basis of party consent, "[t]he court must give the parties notice and an opportunity to be heard before appointing a master." FED. R. CIV. P. 53(b)(1)–(2) (2005). Second, as per longstanding case-law, unless the "the parties consent with the court's approval" to waive their objection, "[a] master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455." FED. R. CIV. P. 53(a)(2).

384 *See supra* Part III.

385 *See* Karen Butler Reisinger, Note, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 IND. L. REV. 225, 225 (1998) (discussing JOEL S. CECIL & THOMAS E. WILLGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 7–8 (1993), which found that of 431 federal judges polled, only 20% had appointed an expert under Rule 706, and only 10% had done so more than once); Note, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941, 947 (1997) (same).

Consider once again the recent December 2003 amendments to Rule 53, which were expressly intended to legitimate and encourage inquisitorial uses of masters—though the term "inquisitorial" (itself anathema in our adversarial legal culture) was not employed. In explaining its decision to amend Rule 53, the Advisory Committee cited the aforementioned Federal Judicial Center study and its conclusion that masters are now being used to serve pretrial managerial and post-trial investigatory roles that fall outside traditional adversarial norms.[386] One purpose in revising Rule 53 was to legitimate this practice by making clear that masters may be appointed to "address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district."[387] Such matters that cannot be "effectively" addressed by a judge or magistrate, and thus require the appointment of a master, "include . . . duties that might not be suitable for a judge," such as "[s]ome forms of settlement negotiations, investigations, or administration of an organization"[388]—all duties, in other words, that fall outside the role of the judicial officer as neutral umpire in an adversarial framework.

But remarkably, while seeking to encourage such inquisitorial uses of the master, the new Rule 53 at the same time discourages them. Several decades of experience using post-trial investigatory masters—particularly in institutional reform suits—have taught that the best (and sometimes only) way for the court accurately and efficiently to learn whether and how its judgment is being implemented is by sending the master, as its agent, out into the field to investigate. But because the incentives are great in such cases for a reluctant defendant to paint a rosy picture of its compliance, many courts have (either expressly or *sub rosa*) instructed the post-trial investigatory master to make surprise, ex parte visits. The new Rule 53 seeks to legitimate this practice by providing that ex parte communications are permissible—as long as the court order appointing the master "state[s] . . . the circumstances—if any—in which the master may communicate ex parte with . . . a party."[389] But while the Rule's effort to encourage and legitimate the master's investigatory role would thus seem to lend itself to a willingness to encourage and legitimate ex parte communications, the Advisory Committee notes suggest the opposite. These notes describe the issue of ex parte communications as presenting "troubling" and "difficult questions," and state that "[i]n

386 *See* FED. R. CIV. P. 53 advisory committee's note (2003) (citing WILLGING ET AL., *supra* note 64, at 2–5, which notes that consent and acquiescence permit the extension of the use of masters past the limits of the pre-2003 version of the rule).

387 FED. R. CIV. P. 53(a)(1)(C).

388 FED. R. CIV. P. 53 advisory committee's note (2003).

389 FED. R. CIV. P. 53(b)(2)(B).

most settings . . . ex parte communications with the parties should be discouraged or prohibited."[390] Indeed, the notes identify only two situations—not including investigations—in which such communications are likely to be permissible: "in seeking to advance settlement" and when "in camera review of documents [is necessary to] resolve privilege questions."[391]

Although the Advisory Committee notes do not explain why ex parte communications should generally be "discouraged or prohibited," this statement surely follows from onr reflexive commitment to an adversarial norm of due process—the positive, political conception of due process pursuant to which the parties must actively control the litigation and ex parte communications are therefore by definition impermissible.[392] But if we relinquish the positive, political conception of due process as our sole measure of procedural fairness, then it is no longer so clear that ex parte communications should always be impermissible. As the equity tradition demonstrates, it is possible to preserve the negative, state-checking function of due process in a system in which masters are granted substantial inquisitorial authority—including the authority to undertake secret interviews—as long as rules are in place to ensure basic rights of notice and a hearing, such that whatever testimony the master hears is ultimately made available to the parties to address in their arguments to the court.

This is by no means to suggest that a master's ex parte communications in our current adversarial framework present no cause for concern. As Antoine Garapon and Ioannis Papadopoulos have rightly argued—pointing, in particular, to the role of the Special Prosecutor in the Lewinsky-Clinton scandal—"the introduction of an inquisitorial figure in an accusatory culture can wreak havoc."[393] Nor is it to suggest that we ought to return to equity's tradition of taking all testimony in secret. Such secrecy does, indeed, run counter to norms of publicity in government that we have, for many good reasons, come to

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390 FED. R. CIV. P. 53 advisory committee's note (2003).

391 *Id.*

392 Dating to the Federal Equity Rules of 1822, federal rules governing masters have contained a provision authorizing masters to proceed ex parte if, after notice, a party fails to appear. *See, e.g.*, FED. R. EQ. 29 (1822), *in* NEW FEDERAL EQUITY RULES, *supra* note 123, at 41 (providing, *inter alia*, that a master shall assign a place and day to examine a witness and "give reasonable notice thereof to the parties, . . . and if either party shall fail to attend . . . the master may adjourn the examination of the matter to some future day, and give notice thereof to the parties . . . that if the party fail again to appear, the master will proceed *ex parte*."). As issued in 1938, Federal Rule of Civil Procedure 53 contained the nearly identical provision that "[i]f a party fails to appear at the time and place appointed, the master may proceed *ex parte* . . . ." FED. R. CIV. P. 53 (1938). This authority of masters to proceed ex parte has never been controversial, as the ex parte contact is preceded by notice and an opportunity to participate, and is therefore akin to the court's power to enter a default judgment.

393 GARAPON & PAPADOPOULOS, *supra* note 41, at 293.

embrace. But, as our recent experience with the post-trial investigatory master in institutional reform suits suggests, there are situations when momentary secrecy may be the best way to find the truth.

Yet, because we are now committed to an adversarial conception of due process, our approach to the master's ex parte investigations, enshrined in the new Rule 53, is confused and vacillating—permitting such investigations without limit because of our recognition that adversarial procedure alone does not suffice, yet at the same time, forbidding them as contrary to our basic procedural instincts. Surely, an approach that encouraged such investigations when necessary, but also required that masters make a record of all ex parte testimony would be far more rational.[394] Such an approach, however, requires that we recognize, as did the equity tradition, that due process, as a check on arbitrary state action, is a value separate and apart from the common law's positive, political devotion to party-controlled procedure.

Our use of masters, in sum, is representative of a broader set of problems and tensions that follow from our importation of equity's inquisitorial devices into the common law's adversarial framework. When deployed by litigants in the adversarial context, the great power that inheres in equity devices often seems to contribute to a perversion of the truth, rather than to its pursuit—and, in the process, generates systemic inequities in access to justice. Although this formulation of the problem suggests that its solution might entail greater court involvement in deploying such procedural devices, this has, ironically, proven quite difficult because of the very historical developments that gave rise to the problem in the first place—namely, the triumph of the common law's adversarial framework. The triumph of this framework has resulted in a concomitant triumph of the common law's longstanding positive, political conception of due process—an essentially adversarial conception of due process—and this, in turn, has greatly constrained our capacity to envision inquisitorial reforms to our procedural system, despite our evident need for them. Thus, to the extent that we have turned towards inquisitorial procedure, we have done so without acknowledging that this is what we are doing, and our use of inquisitorial procedure has been both insufficient and confused.

Developments in French civil procedure, explored in Part VII, suggest that were we to overcome our mistaken view that the positive, political conception of due process is the only one, it might become

394 The new Rule 53 has no such requirement. The Rule provides solely that the order appointing the master "must state . . . the nature of the materials to be preserved and filed as the record of the master's activities." FED. R. CIV. P. 53(b)(2)(C).

possible self-consciously (and thus systematically) to embrace inquisitorial procedure as a remedy to the excesses of the adversarial.

VII
A Brief Excursus on French Civil Procedure and Some Lessons for Our Own Procedural Reform

This Article seeks to recover our forgotten equity tradition and thereby to demonstrate that—contrary to our deeply ingrained assumption—inquisitorial forms of procedure are not so foreign to American practice after all, and can be consistent with (a negative conception of) due process. In so doing, it has traced the problems of modern procedure to an inadvertent melding of processes designed for a judge-controlled system with those used in the party-controlled system of the common law. To rectify the problems we have created, we must therefore incorporate more inquisitorial court control into our procedural system. How, precisely, we might do so is a vast question, lying beyond the scope of this Article. Developments in continental European civil procedure, however, suggest some valuable, broad lessons about the possibility of using inquisitorial procedure to facilitate truth-seeking, while also ensuring the negative, state-checking function of due process. At the same time, examining European procedure highlights the extent to which global procedural convergence characterizes the current legal landscape.

Accordingly, the Article concludes by briefly surveying civil procedure in France—one of the world's leading, most influential civil-law systems, and thus a particularly valuable case study.[395] The point in doing so is not to suggest that French civil procedure has found the perfect solution to merging adversarial and inquisitorial procedures, or to advocate importing French procedure wholesale into the American context. As Mirjan Damaska has wisely cautioned, reformers attempting to combine civil- and common-law fact-finding approaches should be aware of the possible costs of importing rules directly from one system into the other, because "institutional differences between the two Western legal families [are] capable of affecting the factfinding style."[396] The point, instead, is that we need to develop our own path to reform, but that this path can be informed by successful experimentation undertaken in other countries.

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395 This is not to suggest that the French legal system is the only possible case study. There are undoubtedly other civil-law systems, besides the French, from which useful lessons might be derived. *See, e.g.*, Langbein, *supra* note 38, at 824 (arguing that "the Germans avoid the most troublesome aspects of our [civil procedure] practice").

396 Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 Am. J. Comp. L. 839, 839 (1997).

Contrary to the assumption of many in the Anglo-American legal world, French civil procedure, like that of most civil-law countries, is not really inquisitorial—but neither is it purely adversarial. As explained by two contemporary French jurists, the goal of modern French civil procedure is "to reconcile the accusatory principle with a certain orientation towards an inquisitorial procedure."[397] Notably, over the last half-century or so, French civil procedure has evolved to increase the court's inquisitorial authority, and thereby facilitate truth-seeking, while strengthening the parties' rights to notice and a hearing. In the French tradition, these rights—designated by the term, *principe du contradictoire*, or principle of the contradictory—serve the negative, state-checking function of due process.

Like adversarial, common-law procedure, French civil procedure requires the parties to initiate the proceeding, to identify their claims and the relevant facts, and to take primary responsibility for bringing forth the evidence to sustain their factual allegations.[398] At the same time, as in the ideal type of the inquisitorial model—and quite unlike the current American adversarial method—the parties have no powers of discovery whereby, without first seeking the court's permission, they can question witnesses[399] or require the other side to produce evidence.[400] Instead, they must request specific court orders authorizing document production and any other "investigatory measures" they seek.[401] Furthermore, all investigatory measures—other than an or-

397 JEAN VINCENT & SERGE GUINCHARD, PROCÉDURE CIVILE 471 (26th ed. 2001).

398 Thus, the New Code of Civil Procedure specifies that, as a general rule, "[t]he parties alone institute proceedings," N.C.P.C. art. 1, *in* I NEW CODE OF CIVIL PROCEDURE IN FRANCE 1 (Francoise Grivart de Kerstrat & William E. Crawford trans., 1978) [hereinafter NEW CODE], and are responsible for "conduct[ing] the proceedings under the burdens incumbent upon them," N.C.P.C. art. 2, *in* NEW CODE, *supra*, at 1, while the role of "[t]he judge [is to] insure[ ] that the proceedings are properly conducted," N.C.P.C. art. 3, *in* NEW CODE, *supra*, at 1. Furthermore, "the parties have the burden of alleging the facts proper to founding their claims," N.C.P.C. art. 6, *in* NEW CODE, *supra*, at 2, and "[t]he judge may not base his decision on facts which do not appear from the hearing," N.C.P.C. art. 7, *in* NEW CODE, *supra*, at 2.

399 *See* FED R. CIV. P. 45(a)(3) (2003) (stating, *inter alia*, that "[a]n attorney as officer of the court may also issue and sign a subpoena").

400 The one exception is that each party must spontaneously furnish the adversary with whatever documents on which it relies in the proceedings. *See* N.C.P.C. art. 132, *in* NEW CODE, *supra* note 398, at 29; JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 94 (1998). As suggested, however, by the limitation of such mandatory production to documents on which the party relies, the primary purpose of this rule is to allow the adversary an opportunity to respond to the evidence used, and not to furnish a means of gathering evidence. *See* BELL ET AL., *supra*, at 94; James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459, 475 (1986).

401 *See* C. N. Ngwasiri, *The Role of the Judge in French Civil Proceedings*, 9 CIV. JUST. Q. 167, 169 (1990).

der that the adversary or a third party produce documents[402]—may be directed by the judge *sua sponte*.[403]

Although French civil procedure, because of its Roman-canon roots, was never adversarial to the extent of the common-law tradition, the complexity of modern litigation is such that French courts, like our own, have experienced a growing need for greater judicial control and management of the adjudicatory process. Consider, for example, how the following three elements of French civil procedure—the *mise en état*, or preparatory stage; the *enquête*, or investigation; and the *expertise*, or expert assistance—have been reshaped in recent years to augment the court's inquisitorial authority.

The *mise en état* is the initial stage of the litigation, in which the parties enter their pleadings and in which the issues to be adjudicated are framed.[404] As part of a broader effort to increase the court's inquisitorial authority, a series of statutes were enacted beginning in 1958, which sought clearly to delineate the *mise en état* as a distinctive phase of the litigation to be managed by its own, particular judge—called the *juge de la mise en état*.[405] The parties must request authorization for an "investigatory measure" from this judge, who also has the authority to order such measures *sua sponte*.[406] Sometimes the *juge de la mise en état* decides the case himself, but generally, after the *instruction* or investigation is closed, he refers it to a three-judge panel for decision.[407] Thus, unlike the American pretrial—where judges, re-

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402 *See* N.C.P.C. art. 11, in NEW CODE, *supra* note 398, at 3.

403 This policy is enshrined in Article 10 of the New Code, which provides that "[t]he judge has the power sua sponte to render all orders of investigation legally permissible." N.C.P.C. art. 10, *in* NEW CODE, *supra* note 398, at 2–3. In addition, the Code provides that "[t]he facts upon which the resolution of the suit depends, may, at the request of the parties or sua sponte, be the subject of any order of investigation legally permissible," N.C.P.C. art. 143, *in* NEW CODE, *supra* note 398, at 31, and these orders "may be rendered at any stage of the proceedings[,] whenever the judge lacks sufficient basis to make a ruling." N.C.P.C. art. 144, *in* NEW CODE, *supra* note 398, at 31. In addition, French procedure permits an individual who is a victim of a crime to intervene in a criminal prosecution as a "civil party" seeking tort relief. *See* ANDREW WEST ET AL., THE FRENCH LEGAL SYSTEM: AN INTRODUCTION 229 (1992). Many civil litigants choose to avail themselves of this option, as it enables them to benefit from the highly inquisitorial fact-finding undertaken directly by the court in criminal cases. *See id.* at 229–31; CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 199–209 (2d ed. 1996) (describing how in French criminal procedure a *juge d'instruction*, or investigating judge, is responsible for establishing the scope and terms of the investigation and for conducting it); WEST ET AL., *supra*, at 232–33. That civil litigants are permitted to rely on criminal procedure in this manner may help account for the lack of discovery mechanisms in French civil procedure, and suggests that the procedure employed to resolve certain civil claims may actually be even more inquisitorial than a reading of the New Code of Civil Procedure itself would suggest.

404 *See* ENGELMANN, *supra* note 22, at 756–57.

405 *See* DADOMO & FARRAN, *supra* note 403, at 173–74.

406 *See supra* note 403 and accompanying text.

407 When a suit is filed in the basic trial court of general civil jurisdiction, known as the *tribunal de grande instance*, the president of the court holds a preliminary conference in

cently granted greater management authority, must seek to exercise this in the interstices of their more pressing (and likely more interesting) trial-related duties—the French *mise en état* is deemed an end in itself, requiring its own personnel.[408]

The *enquête* is the primary procedure through which witness testimony is obtained, and it derives from the same Roman-canon mode of procuring witness testimony that shaped the development of the equity tradition. Indeed, when the *enquête* procedure was codified in Louis XIV's Ordinance of Civil Procedure of April 1667,[409] it bore a striking resemblance to the equity practice that had by then emerged of taking witness testimony before examiners or commissioners. As in equity, the witness in the *enquête* procedure was summoned to provide testimony in a special proceeding conducted by a judge or by a court-appointed officer known as a commissioner-examiner (*commissaire-enquêteur*), who would then transmit a written record of this testimony to the court.[410] Parallel to traditional equity practice, the judge or commissioner who conducted the examination posed questions initially drafted by the parties themselves[411] and recorded the witness's testimony in the form of a narrative, rather than as a verbatim transcript of questions and answers.[412] Likewise, as in equity, the *enquête* was performed secretly, outside the presence of the parties and of other witnesses.[413] Significantly, however, in the French tradition—and unlike

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which he or she decides whether the court has sufficient information to reach a decision or whether "another exchange of pleadings or further documentation" is necessary. HERBERT J. LIEBESNY, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS 311 (4th ed. 1981). If further fact-finding is necessary, the president then refers the case to a *juge de la mise en état* to oversee the "instruction" or investigation. *See id.* When the instruction phase is closed, the president may order the *juge de la mise en état* to decide the case. *See id.* at 311–12. Otherwise, or if the parties so request, the case is referred to a panel of three judges to decide. *See id.* at 312; N.C.P.C. arts. 801–04, *in* NOUVEAU CODE DE PROCÉDURE CIVILE (DALLOZ) 402 (93rd ed. 2001) [hereinafter NOUVEAU CODE]; WEST ET AL., *supra* note 403, at 87.

408 This important difference likely follows, in part, from the fact that, as in the equity tradition—and quite unlike that of the common law—French adjudication consists of a series of different hearings that continue until the matter is ripe for decision. In other words, this seriatim approach to adjudication treats each input of adjudication as a distinct and important end in itself, unlike the common law, which focuses instead on facilitating a single and complete trial.

409 The *enquête*, thus codified, actually dated back several centuries. *See* ENGELMANN, *supra* note 22, at 680–83, 717–18, 722–23.

410 *See id.* at 723; MARION, *supra* note 228, at 120; WILLIAMS, *supra* note 229, at 119.

411 *See* ENGELMANN, *supra* note 22, at 723.

412 *Id.* at 719, 723; Ordonnance civile touchant la réformation de la justice, Tit. 22, arts. 16–19 (St. Gérmain en Laye, Apr. 1667) [hereinafter Ordonnance], *in* 1 CODE LOUIS 36 (1996) (detailing the process whereby the judge or commissioner must record a single "deposition," which is then read back to the witness for his approval).

413 *See* Ordonnance, Tit. 22, arts. 16–19, *in* 1 CODE LOUIS, *supra* note 412, at 36. According to the Ordinance of 1667, "The witnesses may not be deposed in the presence of the parties, nor in the presence of the other witnesses . . . ; but will be heard separately, without there being other people besides the judge, his commissioner to undertake the

that of equity[414]—those who served as commissioners were not appointed on an ad hoc, case-specific basis, but were instead full-time, official appointees. As was characteristic of the French Old Regime, such full-time, official status took the form of a venal office-holding bureaucracy, such that commissioners purchased their posts from the monarchy, along with its concomitant duties and privileges.[415]

While equity abandoned this Roman-canon based tradition for procuring witness testimony in favor of the common law's oral, adversarial mode, French civil procedure remains deeply committed to written evidence, obtained pursuant to a significant amount of court control. Thus, to this day, French civil procedure has no mechanism for providing oral, in-court testimony and continues to rely on the *enquête*, or on the newer mechanism of the *attestation*—a witness's signed declaration.[416] This continued reliance on the *enquête* requires personnel to examine witnesses. In lieu of the venal office-holding commissioners of the Old Regime, judges themselves—typically the *juge de la mise en état*—are now responsible for performing the *enquête*, which usually takes place in chambers, rather than in open court.[417] In addition, during the French Revolution, the veil of secrecy was torn from the *enquête* procedure, such that the parties' presence was thereafter required.[418]

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enquête, and the recorder of the deposition." Ordonnance, Tit. 22, art. 15, *in* 1 CODE LOUIS, *supra* note 412, at 36.

414 The examiners who took testimony in London were the exception in that they worked full-time, rather than being appointed on an ad hoc basis. *See* BAKER, OXFORD HISTORY, *supra* note 88, at 195; BENNET, *supra* note 132, at 13; MITFORD & TYLER, *supra* note 125, at 429–30.

415 *See supra* notes 228–29 and accompanying text.

416 *See* N.C.P.C. arts. 200–03, *in* NEW CODE, *supra* note 398, at 42–43; Beardsley, *supra* note 400, at 476. Indeed, as several commentators have noted, the longstanding French distrust of oral testimony is so deep-rooted that even when witness testimony is recorded in writing outside the courtroom—and, from the traditional inquisitorial perspective, the opportunities for perjury are thereby limited—it has traditionally been, and in fact remains, suspect. *See, e.g.*, Beardsley, *supra* note 400, at 476. Accordingly, the statement of the sixteenth-century French jurist Loysel that "'a witness who is well wined and dined will testify well'" continues to ring true to modern ears. *Id.* at 478 n.85 (quoting ANTOINE LOYSEL, INSTITUTES COUTUMIÈRES § 770 (Par M. Dupin & M. Edouard Laboulaye eds., 1846)); BELL ET AL., *supra* note 400, at 84 (quoting same, but translating as: "A well-plied witness will come up to proof"). In his commentaries on Loysel, the eighteenth-century French jurist, Gabriel Davot, stated that this "proverb says that it is madness to rely on the *enquête*, that is to make one's case depend on testimonial proof, because he who best wines his witnesses obtains the best proof . . . . It is for this very reason that our ordinances have limited the use of testimonial proof." LOYSEL, *supra*, § 770 (containing Davot's commentary).

417 *See* BELL ET AL., *supra* note 400, at 99; *Introduction* to NEW CODE, *supra* note 398, at xxvii.

418 The reform measures enacted by the revolutionaries sought to empower the citizen-litigants and restrain the might of the professional judiciary, whose arbitrary exercise of power was deemed to epitomize the evils of the Old Regime. *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 375–76 (1968); WOLOCH, *supra* note 118, at 301. Thus, at the height of the Revolution's most radical phase, the National Convention issued the Law of 3 Bru-

But while the *enquête* must now be conducted before the parties by a salaried bureaucrat, it is otherwise remarkably unchanged, and in recent years, it has been redesigned to strengthen the court's inquisitorial authority as a means of facilitating truth-seeking. Thus, the New Code of Civil Procedure, enacted in 1975, breaks new ground by authorizing the judge undertaking the *enquête* to go beyond the issues framed by the parties.[419] In addition, if in the process of undertaking the *enquête* it appears that the testimony of other witnesses may be required, the New Code permits the judge to examine these new individuals *sua sponte*.[420]

Like the *enquête*, the French *expertise* is a longstanding technique that derives from Roman-canon procedure and that has a clear parallel in the equity tradition—namely, the master's report. The Ordinance of 1667 provided French courts with the authority to order that "places and works will be seen, visited, evaluated or estimated by ex-

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maire, Year II (Oct. 24, 1793), abrogating the Ordinance of 1667 and seeking to eliminate the role of the legal professional, both as judge and advocate. *See* ENGELMANN, *supra* note 22, at 750. Eschewing formal procedural rules of any kind, the revolutionaries created instead a series of informal dispute resolution mechanisms. *See* WOLOCH, *supra* note 118, at 307. As part of this broader process of democratization, the Law of 3 Brumaire mandated that, to the extent the *enquête* procedure continued to be used, it must be undertaken publicly, in open court and in the presence of the litigants. *See* 2 GLASSON & TISSIER, *supra* note 229, at 781. Several years later, with the widespread reaction against perceived revolutionary extremes, French jurists abandoned their effort to turn dispute resolution into an entirely private, citizen-directed process. Thus, as ultimately enacted in April 1806, Napoleon's Code of Civil Procedure adopted the basic structure and indeed many of the same provisions of the Ordinance of 1667—including, most fundamentally, a reliance on traditional, professional institutions of the judiciary and of trained legal advocates. *See* ENGELMANN, *supra* note 22, at 750. But while the Code abandoned much of the revolution's judicial ideology, the principle that the parties must be permitted to attend the *enquête* was retained, *see id.* at 760; C.P.C. arts. 36, 261–62, *in* CODE DE PROCÉDURE CIVIL 14, 68–69 (1806), and remains in force to this day. Notably, however, the Code abandoned the revolutionary-era requirement that the *enquête* be held in open court. *See* 2 GLASSON & TISSIER, *supra* note 229, at 781. Accordingly, the New Code of Civil Procedure provides, in addition to the generally applicable mandate of Article 16, that in the *enquête*, "[t]he witnesses are heard in the presence of those parties attending, all parties having been notified." N.C.P.C. art. 208, *in* NEW CODE, *supra* note 398, at 44. Furthermore, once the judge or commissioner finishes questioning the witness, he or she may then agree to "put[ ] to the witness questions submitted . . . by the parties." N.C.P.C. art. 214, *in* NEW CODE, *supra* note 398, at 45.

419 According to the New Code, "[t]he judge may hear or question witnesses on all facts of which evidence is legally admissible, even if these facts are not mentioned in the decision ordering the examination [*enquête*]." N.C.P.C. art. 213, *in* NEW CODE, *supra* note 398, at 45. However, the extent to which French judges avail themselves of the provisions in the New Code that authorize them to pursue investigatory measures *sua sponte* is a subject of some debate. According to some commentators, many French judges have been hesitant to embrace these new inquisitorial powers. *See, e.g.*, Beardsley, *supra* note 400, at 467–68; Claude Reymond, *Civil Law and Common Law Procedures: Which Is the More Inquisitorial? A Civil Lawyer's Response*, 5 ARB. INT'L 357, 362 (1989).

420 "The judge who proceeds with the examination [*enquête*] may, sua sponte or at the request of the parties, summon for hearing, or hear, any person should he consider this useful to establish the truth." N.C.P.C. art. 218, *in* NEW CODE, *supra* note 398, at 46.

perts."[421] Pursuant to the Ordinance, judgments directing such recourse to experts were to "expressly state the facts regarding which the [expert] reports must be written."[422] Thus, like masters in traditional equity practice, French experts were called on to report on a specific set of factual issues, often entailing complex, mathematical calculations, and were thus intended to ease the court's fact-finding burden. But quite unlike masters, they were commonly selected from groups of "sworn experts," who, like the commissioners and many other bureaucrats in the Old Regime, were venal officeholders.[423]

As is true of the *enquête*, the *expertise* survived into the present remarkably intact—changed primarily in that, post-Revolution, the staff responsible for it have ceased to be venal office-holders[424] and in that, in recent years, the court's inquisitorial authority in deploying it has been substantially augmented. Whereas in the case of the *enquête*, commissioners were transformed into full-time employees, in the case of the *expertise*, experts were at first privatized, such that the parties themselves became responsible for selecting experts on a case-specific basis.[425] As is true of the *enquête*, however, and of all "investigatory measures," the last half-century or so has witnessed an effort to place greater control in the hands of the court. Thus, a statute enacted on July 15, 1944 provided that henceforth "[t]he choice of experts . . . will belong to the court," rather than to the parties.[426]

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421 Ordonnance, Tit. 21, art. 8, *in* 1 CODE LOUIS, *supra* note 412, at 33; *see also* ENGELMANN, *supra* note 22, at 719.

422 Ordonnance, Tit. 21, art. 8, *in* 1 CODE LOUIS, *supra* note 412, at 33.

423 *See* ENGELMANN, *supra* note 22, at 719; 2 GLASSON & TISSIER, *supra* note 229, at 855; Taylor, *supra* note 229, at 190. According to the Ordinance of 1667, it was the parties, rather than the judge who bore primary responsibility for selecting the experts. The Ordinance provided that each party was to select his own expert. The court, however, was to name an expert "in case of a refusal by one or the other parties to nominate one," Ordonnance, Tit. 21, art. 9, *in* 1 CODE LOUIS, *supra* note 412, or "[i]f the [two] experts disagree in their report, the Judge will nominate a third on his own motion." Ordonnance, Tit. 21, art. 13, *in* 1 CODE LOUIS, *supra* note 412.

424 *See* ENGELMANN, *supra* note 22, at 762; Taylor, *supra* note 229, at 190.

425 Except for medical experts—who, as of 1803, were required to hold medical degrees—experts were appointed by agreement of the parties, subject to ultimate judicial approval. *See* ENGELMANN, *supra* note 22, at 762; Taylor, *supra* note 229, at 190 & n.80.

426 Loi sur les rapports d'experts July 15, 1944, J.O., July 27, 1944, p. 1903; Duv. & Boc. 1944, 256, 257, § 306 [hereinafter Loi sur les rapports] (abrogating, *inter alia*, Articles 302–09 of the Code of 1806, and creating a new Article 306 as quoted above). Currently, the judge is granted complete discretion in deciding whom to appoint, and the parties may object only on the narrow grounds that would justify recusal of a judge, such as conflict of interest. *See* N.C.P.C. art. 232–34, *in* NEW CODE *supra* note 398, at 49–50; BELL ET AL., *supra* note 400, at 101. In this way, the system seeks to ensure that the expert is an arm of the court, rather than a hired gun of the litigants. In keeping with this effort to treat experts as officers of the court, and thus part of established court procedure, their fees are deemed but one component of a longer list of court-related expenses—including the cost of taking witness testimony—for which the losing party is responsible. *See* BELL ET AL., *supra* note 400, at 108; Taylor, *supra* note 229, at 209–10.

But while the sole limit imposed by the New Code on the judge's selection of an expert is that this individual be "empowered . . . by reason of his qualifications,"[427] the court's discretion is, in fact, far more limited. Such discretion is typically exercised in accordance with a set of practices that have emerged to guarantee the qualifications—and thus public accountability—of those selected. First, when French courts seek general assistance in the fact-finding process, but require no special expertise, they usually appoint a *huissier* (roughly speaking, a bailiff) to undertake a *constatation*—a report on facts as to which further information is required.[428] The individual selected to serve this general fact-finding role is termed a *technicien*, a word frequently translated as "expert"—and which often means expert, when used in a nonlegal context—but much more akin to the master in the Anglo-American legal world than to our court-appointed expert.[429] Second, when French courts require technical expertise, they usually select an expert—now termed *expert*—from regional and national lists of pre-approved *experts*.[430] The *expert* undertakes either an *expertise* (an extensive investigation, resulting in a written report, and reserved for highly complex matters) or a *consultation* (a more rapid, informal, and typically oral mechanism for supplying the court with expertise regarding "a purely technical question [that] does not require complex investigations").[431]

In line with the New Code's general commitment to augmenting the court's inquisitorial authority, it grants *techniciens* and *experts* extensive powers to obtain relevant information. In particular, the New Code provides that the *technicien* or *expert* "may receive oral or written information from any person"[432] and that he "may request the parties and third parties to transmit all documents to him."[433] As suggested

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427 N.C.P.C. art. 233, *in* NEW CODE *supra* note 398, at 49–50.

428 *See* N.C.P.C. art. 249, *in* NEW CODE, *supra* note 398, at 52; LIEBESNY, *supra* note 407, at 317; Beardsley, *supra* note 400, at 480; Taylor, *supra* note 229, at 197–98.

429 Of course, some masters are appointed in large measure for their expertise and are to this extent interchangeable with official experts appointed by the court under Federal Rule of Evidence 706. *See* FED. R. EVID. 706 (2004); *supra* note 64 and accompanying text.

430 *See* BELL ET AL., *supra* note 400, at 101; LIEBESNY, *supra* note 407, at 317; Taylor, *supra* note 229, at 195. These lists were first established by a law of June 29, 1971, which directed, *inter alia*, that "[t]here will be established each year, for the information of judges, a national list prepared by the *Cour de Cassation* [the French Supreme Court for matters of private litigation], and a list prepared by each court of appeals, of experts in civil matters." Law No. 71-498 of June 29, 1971, J.O., June 30, 1971, p. 6300; B.L.D. 1971, 256, 256, at art. 2. While these experts, unlike their Old Regime counterparts, do not own their offices, inclusion on such lists carries much prestige, and courts typically select from among these pre-approved experts. *See* BELL ET AL., *supra* note 400, at 100–01; LIEBESNY, *supra* note 407, at 317; Taylor, *supra* note 229, at 195.

431 N.C.P.C. art. 256, *in* NEW CODE, *supra* note 398, at 54; *see also* LIEBESNY, *supra* note 407, at 317; Taylor, *supra* note 229, at 198–201.

432 N.C.P.C. art. 242, *in* NEW CODE *supra* note 398, at 51.

433 N.C.P.C. art. 243, *in* NEW CODE, *supra* note 398, at 51.

by this somewhat vague reference to "receiv[ing] oral information," the *technicien* or *expert* is not limited to the formalities of the *enquête* in seeking witness testimony, and is, instead, free to proceed more informally.[434]

While recent modifications of the *mise en état*, *enquête*, and *expertise* reveal a sustained effort to increase the court's inquisitorial authority (in service of the value of truth-seeking), this effort has coincided with a concomitant attempt to strengthen the application of the *principe du contradictoire*, pursuant to which no court action may be taken without prior notice and a hearing. Though it has much older roots, this concern with notice and a hearing first emerged as a driving force for change in the writings of Enlightenment critics of the Old Regime judicial system (and, in particular, of its criminal proceedings).[435] With the onset of the Revolution, such critiques were finally acted upon and reform was extended to both the civil and criminal system for administering justice. Indeed, the revolutionary roots of the *principe du contradictoire* are evident in the way contemporary French jurists tend to identify it as a necessary component and corollary of a democratic-republican social and political order: "The principle . . . is dependent on a society that recognizes a certain equality between citizens. To debate and to contradict are not conceived as possible in an authoritarian society."[436] As this emphasis on the link between the *principe du contradictoire* and a free, nonauthoritarian society suggests, the French procedural commitment to notice and a hearing is designed to serve as a guarantee against arbitrary state action. It is the functional equivalent, in other words, of a negative, state-checking conception of due process.

The New Code of Civil Procedure does not contain a succinct statement of the *principe du contradictoire*, but it is generally thought to be embodied in Articles 14 through 17.[437] These articles, constituting a section entitled, "*La contradiction*," or the "contradictory process," are subsumed within Chapter I—"[t]he guiding principles of the pro-

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434 This more informal practice of taking oral testimony, which has emerged under the regime of the New Code, should be contrasted with the regime established under the Law of July 15, 1944. Pursuant to the earlier law,

> [i]f it seems necessary either to the expert or to the parties to have witnesses heard, the judge charged with directing the procedure [i.e., the predecessor to the *juge de mise en état*] will rule on the request and, if need be, will hear the witnesses according to the rules prescribed in the present code in the title concerning enquêtes.

Loi sur les rapports, *supra* note 426, § 303.

435 *See* Taylor, *supra* note 229, at 186–88.

436 VINCENT & GUINCHARD, *supra* note 397, at 503.

437 These articles were first enacted by a law of September 9, 1971, "instituting new rules of procedure destined to constitute part of a new code of civil procedure." Law No. 71-740 of September 9, 1971, J.O., September 11, 1971, p. 9072; N.C.P.C. art. 14–17, *in* NEW CODE, *supra note* 398, at 4.

ceedings"[438]—and are thus applicable to the Code as a whole. Article 14, in particular, provides that "[n]o party may be judged without having been heard or summoned,"[439] and Article 16 requires the judge to, "in all circumstances, insure that the principle of the contradictory process is observed."[440]

In addition to identifying the *principe du contradictoire* as a generally applicable requirement, the New Code contains several provisions specific to investigatory measures, which are designed to provide an additional guarantee that such measures will be preceded by notice and a hearing.[441] In particular, the Code directs that whenever the court orders an investigatory measure, such as an *enquête* or *expertise*, the clerk of the court or the expert designated to implement the measure must first provide notice by summoning "the parties and the third parties."[442] Likewise, the Code provides that "one who represents or assists a party before the court which has rendered the order [of an investigatory measure] may attend to its execution wherever it takes place, make comments and present any requests relative to this execution, even in the absence of the party."[443]

Beyond these requirements set forth in the New Code, the French *Cour de Cassation*—the supreme court for matters of private adjudication—has issued a series of rulings over the last several decades emphasizing that proceedings before experts must be conducted in a manner consistent with the *principe du contradictoire*.[444] Thus, once experts are appointed, they cannot proceed without summoning the parties to a preliminary hearing where the nature of the investigation to be undertaken is discussed.[445] Furthermore, before undertaking any particular investigatory measure, experts must first inform the parties of the time and place of their intended actions so that the parties can attend if they so choose.[446]

Exceptions to these requirements have emerged when, for example, there is reason to believe that an ex parte proceeding is necessary

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438 NEW CODE, *supra* note 398, at 1.

439 N.C.P.C. art. 14, *in* NEW CODE, *supra* note 398, at 4.

440 N.C.P.C. art. 16, *in* NEW CODE, *supra* note 398, at 4.

441 N.C.P.C. art. 155–74, *in* NEW CODE, *supra* note 398, at 33–37.

442 N.C.P.C. art. 160, *in* NEW CODE, *supra* note 398, at 34–35.

443 N.C.P.C. art. 162, *in* NEW CODE, *supra* note 398, at 35.

444 As noted by one commentator in December 1978, "Whoever peruses the bulletin on the decrees of the *Cour de Cassation* cannot but be struck by the recent growth in the number of decisions concerning the requirement that expert proceedings be undertaken in adversarial fashion." J.-P. Rousse, *Le Respect Du Principe Du Contradictoire Dans Le Deroulement Des Opérations D'Expertise*, 98 GAZ. PAL. 627, 627 (1978); *see also* Jean Debaurain, *Les caractères de l'expertise civile*, D. 143, 144–45 (1979) (explaining how the *principe du contradictoire* shapes the nature of expert testimony).

445 *See* Rousse, *supra* note 444, at 627–28.

446 *See id.* at 628–29.

to detect or prevent fraud.[447] And in practice, particularly in highly complex litigation, parties do not avail themselves of their right to be present at all expert investigations.[448] Yet, as one commentator noted, the existence of a general right to be notified of the proposed investigation and to attend—even when the parties choose not to exercise it—results in a "double and fundamental obligation that weighs on the expert to inform the[ ] [parties] both of the progress and of the result of his investigations."[449]

What are the lessons that we can learn from these developments in French civil procedure? While there are no doubt many, three stand out as particularly important. First, even though French civil procedure remained closer to its Roman-canon, quasi-inquisitorial roots than has the Anglo-American equity tradition, developments over the last half-century—in particular, the rise of modern, complex litigation—have nonetheless required an increase in French courts' inquisitorial authority. Given the greater adversarial nature of current American procedure, our need to embrace more inquisitorial, court-controlled procedure is at least as pressing.

Second, the exercise of inquisitorial authority by French courts requires the availability of specialized personnel to undertake various inquisitorial tasks—including, the *juge de la mise en état* to oversee the preparatory stage of the litigation and to undertake the *enquête*, and the various types of *techniciens/experts* to conduct the *constatation, consultation,* and *expertise.*[450] While the French legal system has a long tradition of relying on state-created and -funded personnel, the same is not the case in the Anglo-American world. Indeed, despite the remarkable parallels between traditional equity procedure and the procedure employed in continental European courts, equity differed in at least one key respect—it never developed a large, official judicial staff.[451]

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447 *See id.* at 628; Cass. Civ., 7 juin 1972, Bull. Cass., #73, p. 142 (affirming the appellate court's holding that the expert investigation was conducted properly, despite the failure to notify the parties in advance, because the expert—who was charged with calculating damages to the plaintiff's land caused by a jet of water emanating from the defendant factory's turbine—had reason "to fear fraud on the part of the factory" and, in particular, that it would "voluntarily decrease the force of the jet"); Cass. Civ., 14 mars 1978, Bull. Cas. #117, p. 91 (affirming the appellate court's holding that the expert investigation was conducted properly, despite the failure to notify the parties in advance, because the expert—who was charged with examining the noise levels emitted by the defendant factory—needed to observe actual noise levels, and "it was necessary . . . that the managers of the factory not be informed of the expert's arrival, in order to avoid the possibility that they might intentionally decrease the noise levels").

448 *See* Rousse, *supra* note 444, at 629.

449 *Id.* at 629.

450 *See supra* notes 428–31 and accompanying text.

451 *See supra* notes 225–31.

Notably, however, modern French civil procedure's approach to the staffing problem has not taken the exclusive form of relying on salaried bureaucrats to provide the needed inquisitorial assistance. Today, *experts* are private individuals selected on a case-specific basis.[452] They are selected, however, subject to regulations that help ensure their public accountability. Given the longstanding American distaste for developing a large judicial bureaucracy, as well as the problems that experience has shown can be attendant on such bureaucratization,[453] it is perhaps to such methods of ensuring the public accountability of private judicial officers that we should turn for inspiration—at least in the initial stages of procedural reform.

Thus, for example, we might continue to appoint masters on a case-by-case basis, but in doing so, apply a set of uniform standards regarding their qualifications. This might mean adopting a list of pre-approved masters, as have the French.[454] Or it might mean designing a procedural requirement whereby judges must justify their selection of masters (perhaps by reference to an established list of criteria, such as relevant education, work experience, and the like), along with mechanisms for appellate review. And learning from the French view that the generalist *technicien* and the specialized *expert* both provide the court with fact-finding assistance,[455] we might decide that courts should be responsible for appointing not only masters, but also experts (on the basis of uniform standards).

As concerns the compensation of masters and experts, one possibility for ensuring their public accountability, without turning them into salaried bureaucrats, is to increase their nonfinancial, reputational incentives to serve. In France, inclusion on the lists of pre-approved *experts* carries much prestige, which, in turn, can be used for financial benefit in other contexts, thus providing an additional incentive to serve.[456] Similarly, in our own legal culture, a judicial clerkship is desirable because of its high status and not its salary, suggesting that payment via reputational capital is, indeed, a possibility here.

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452 *See* BELL ET AL., supra note 400, at 100–01.

453 *See generally* GARAPON & PAPADOPOULOS, *supra* note 41 (suggesting that there are drawbacks to the French legal system's treatment of judges as civil servants, including a tendency to discourage creative and independent thinking).

454 *See supra* note 430 and accompanying text.

455 As described above, the term *technicien* is usually used to distinguish the general, fact-finding role typically served by the *huissier* (who performs a *constatation*) from the more specialized *consultation* and *expertise* performed by the *expert*. *See supra* notes 428–31 and accompanying text. Technically, however, as established in the New Code of Civil Procedure, *experts* are but a subcategory of a broader category of individuals, termed *techniciens*, upon whom the court might call for assistance. See the Chapter of the New Code entitled, "Investigatory Measures Executed by a *Technicien*," which describes not only the *constatation*, but also the *consultation* and *expertise*. N.C.P.C. art. 232–84, in NOUVEAU CODE, *supra* note 407, at 156.

456 *See supra* note 430 and accompanying text.

Of course, many possibilities for reforming our means of appointing and compensating judicial assistants such as masters and experts are imaginable, each containing its own benefits and drawbacks and posing complex questions that require us to balance values like fairness, flexibility, and efficiency. The point is not to decide these questions here, but instead to suggest that there is a range of possibilities, and that it is time to begin considering them seriously.

Third, French civil procedure suggests that the fundamental due-process values of notice and a hearing can be separated from adversarial procedure. French civil procedure as a whole is marked by the simultaneous effort—especially over the last half-century or so—to increase the court's inquisitorial authority while strengthening its commitment to the *principe du contradictoire.* The French *enquête,* for example, remains largely inquisitorial in that the judge bears primary responsibility for conducting the questioning.[457] Indeed, the judge's inquisitorial authority—for example to pose his own questions and to identify witnesses to call—has increased in recent years.[458] But critically, following the dictates of the *principe du contradictoire,* the parties are now entitled to attend and even to suggest questions to the judge, thus helping to prevent the court from adjudicating their rights in an entirely unaccountable and arbitrary fashion.[459] Similarly, the New Code of Civil Procedure grants the *technicien* and *expert* inquisitorial authority to obtain information on an oral and informal basis, thereby eschewing the formalities of the written *enquête.*[460] But at the same time, an extensive case law has developed providing that prior to every investigatory measure, the *expert* must give notice to the parties so that they can attend if they so choose.[461]

The French have been able thus to ensure that inquisitorial procedure coexists with a guarantee of a negative, state-checking conception of due process, because their conception of procedural fairness has not been shaped by an adversarial, common-law tradition.[462] They, in other words, have no concept of due process that subsumes the *principe du contradictoire* within a broader political ideology, thereby failing to identify it as a distinctive value.[463] As J.A. Jolowicz has argued:

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457 *See supra* note 417 and accompanying text.

458 *See supra* notes 419–20 and accompanying text.

459 *See supra* note 418 and accompanying text.

460 *See* N.C.P.C. art. 199, *in* NEW CODE, *supra* note 398, at 42.

461 *See supra* notes 444–49 and accompanying text. Of course, formally speaking, France has no case law, in the sense of an official system of precedent. Yet, as is well known, judicial decisions of the *Cour de Cassation* are generally given precedential effect. *See* DAWSON, *supra* note 418, at 374–431.

462 *See* J.A. JOLOWICZ, ON CIVIL PROCEDURE 177 (2000).

463 *See id.*

> It is true that in a system of procedure that is wholly adversarial, as the English system is popularly supposed to be, the demands of the *principe du contradictoire* are automatically met, and that, perhaps, explains why English law does not recognize it as an independent principle. Be that as it may, however, the principle can and does live as happily in a system recognised as inquisitorial [namely, that of France] as in one claimed to be adversarial.[464]

Of course, to the extent that the positive, political conception of due process seeks to do more than protect the individual litigant's rights vis-à-vis state action—to the extent that it embraces a deep-rooted civic ideology of political self-governance—something is lost in this relatively narrow French conception of the value of procedure. But in the modern world, the robust, political conception of due process may cost too much. In particular, party control of equity-based inquisitorial devices perverts the goal of truth-seeking by favoring the wealthy claimant, rather than the legitimate one, and in so doing generates systemic inequities.[465] Given the possibility of a narrower, state-checking conception of due process—one that we ourselves embraced in our own equity tradition—we ought at least to be considering if the price of our essentially untempered, exclusive reliance on adversarial procedure is worth paying. And in asking this question, we must rid ourselves of any misconception that the more minimalist, but clearly essential, function of notice and a hearing can be ensured only through adversarial procedure.

CONCLUSION

In their recent and brilliant book, *Juger en Amérique et en France*, Antoine Garapon and Ioannis Papadopoulos argue that American and French juridical cultures each tend toward certain potentially destructive excesses.[466] In the United States, they suggest, these excesses partially arise from the adversarial tradition, which—as also suggested in this Article—is far more than a "legal technique" and is, instead, an entire "political imaginary."[467]

In pointing to the power and dangers of this political imaginary, Garapon and Papadopoulos, like most scholars who have examined this issue, focus primarily on developments in the common law—especially the key seventeenth-century ones—that gave rise to the association between adversarial procedure and civic liberty.[468] While these

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464 *Id.*

465 *See supra* Part VI.

466 GARAPON & PAPADOPOULOS, *supra* note 41, at 309–10.

467 *Id.* at 121 (discussing Robert A. Kagan, *Adversarial Legalism and American Government*, *in* THE NEW POLITICS OF PUBLIC POLICY 88, 88–118 (Mark K. Landy & Martin A. Levin eds., 1995)).

468 *See id.* at 41–47, 203–05.

developments were indisputably important, the unilateral focus on the common-law tradition ignores the fact that the path to our current commitment to the adversarial was far more circuitous and complex. This path proceeded by way of a quasi-inquisitorial equity tradition that remained firmly in place until the early nineteenth century and that only fully disappeared by century's end. Erasing this equity tradition (not only from practice, but also from memory) was a key and final step in the rise of the political imaginary of the adversarial. But while equity's history was erased, its procedures were integrated into our rules of civil procedure in ways that subvert justice.

In pointing to the excesses to which both the American and French juridical cultures tend, Garapon and Papadopoulos suggest that these can be overcome through a process of "mutual correction," by which "each culture seek[s] in the other correctives to its own excesses."[469] Thus, the French tradition of centralized, judicial control should temper the United States's tradition of decentralized, party control, and vice versa. Indeed, they argue, this process of mutual correction may already be under way because of the demands of an increasingly global economy and the common nature of many of the problems that we in the West now face.[470] In the United States, they note, federal judges have recently been granted substantial case-management powers, and an entire bureaucracy of administrative law judges—who are often career civil servants operating within specialized areas of the law—has been created over the last century.[471] Likewise, in France, it is now recognized that there are "important, moral, economic, and political stakes" at issue in the decisions reached by the *Cour de Cassation*, and there is a growing rejection of the positivist "myth of the judge as simply the 'mouthpiece of the law.'"[472]

As suggested in this Article, there are indeed indications that American procedure has been reaching towards the inquisitorial in order to correct the excesses associated with our current adversarial framework. But we have failed to be self-conscious about the fact that we are adopting inquisitorial procedure, and as a result, our use of such procedure has been minimal, conflicted, and, at times, troubling. As long as we remain trapped within the political imaginary of the adversarial—an imaginary in which due process requires party control of the litigation—meaningful procedural reform will continue to elude us.

But history can liberate. Rediscovering equity's procedural framework shows that inquisitorial procedure is not alien to our legal

469 *Id.* at 298.
470 *See id.* at 297–300.
471 *See id.* at 299.
472 *Id.*

culture and reminds us that we have a well-established tradition of deploying it consistent with a legitimate, if as yet too little explored, concept of inquisitorial due process.