As the former counsel to the NAACP Legal Defense Fund and the first African American on the U.S. Supreme Court, Justice Marshall is widely considered a protector of civil rights and civil liberties. While this perception of Justice Marshall is well deserved and substantiated by his record,¹ it may obscure his mastery of ordinary justice as expressed in the law of civil procedure.

The law of procedure was a medium of Justice Marshall’s art in the law, as much as his conversance with free speech and equal rights. Many of his decisions dealt with these internal rules by which the court system performs its functions—“lawyer’s law.” Although issues of procedural law are relatively neutral in ideological and policy implications, they pose fundamental complexities and dilemmas of the system of justice itself. Procedure is the law’s ordinary essence. How the law goes to work every day at the courthouse constitutes as much of the law’s task in the social order as do great cases such as Brown v. Board of Education.² Justice Marshall was in this sense a master of the ordinary.

This commentary develops that point by demonstration and through comment about five cases: Marshall’s resolution of a conflict between issue preclusion and the Seventh Amendment right to a jury trial in Lytle v. Household Manufacturing, Inc.;³ his interpretation of the power of federal courts to remand state law claims to state courts in Carnegie-Mellon Univer-

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The tensions between statutory and common-law forum non conveniens in Piper Aircraft Co. v. Reyno; his maneuvering in Walker v. Armco Steel Corp. to accommodate the recurring Erie choice of law issues in the face of conflicting precedent; and his use of “admonitory” appellate review in Kerr v. United States District Court. Lastly, I provide further reflections on Justice Marshall’s contributions to the field of civil procedure.

I. Lytle v. Household Manufacturing, Inc.

Lytle v. Household Manufacturing, Inc. was decided toward the end of Justice Marshall’s distinguished career on the Supreme Court. At issue was a conflict between the Seventh Amendment right to a jury trial and the doctrine of collateral estoppel. The case involved a suit by a discharged employee, an “Afro-American” as Justice Marshall described him, based on Title VII of the Civil Rights Act of 1964 and § 1 of the Civil Rights Act of 1866, also referred to as § 1981. The essential allegation under both counts was that the plaintiff had been fired because of his race. By settled law plaintiff had a right to a jury trial on the § 1981 count; however, the law was unsettled as to whether a similar right existed under Title VII. The trial judge had dismissed the § 1981 count as a matter of law and then heard the Title VII claim without a jury, making findings of facts adverse to plaintiff. The court of appeals held that the dismissal of the § 1981 count was erroneous, but nevertheless affirmed the trial court’s judgment on collateral estoppel grounds. It held that the trial judge’s previous adverse factual determinations in the Title VII count were issue preclusive against the plaintiff in the § 1981 count. Plaintiff contended that those determinations should not be preclusive, arguing that the right to jury trial on those issues should not be foreclosed where the determination by the judge was predicated on an erroneous dismissal of the jury-triable § 1981 claim.

9. Id. at 547.
13. Id. at 550.
14. Id. at 549 n.1. The Supreme Court assumed for purposes of the opinion that plaintiffs seeking relief under Title VII did not have the right to a jury trial, but declined to rule on this issue. Id.
15. Id. at 549.
16. Id.
17. Id.
18. Id.
An understanding of the problem required consideration of two interrelated counts, two possible outcomes in the fact issues, two modes of finding the facts, and, as it turned out, a dissonance between two lines of precedent. One line of precedent, emanating from *Beacon Theatres, Inc. v. Westover*, 19 established that in cases of uncertainty, a jury trial should be the mode of fact determination, even though doing so would require restructuring the conventional order of the trial. The other line of precedent, emanating from *Parklane Hosiery Co. v. Shore*, 20 established that the findings of a judge sitting without a jury are preclusive through collateral estoppel when the same issues are presented in a later adjudication.

The ease and directness of Justice Marshall’s treatment of the problem is a fair indication of his command of its technical intricacy. From his opinion one gets the distinct sense that the man knows this branch of law. Moreover, the impression is that he knows the law not only as a Supreme Court Justice but as one who has “done” law—indeed, encountered this very kind of problem—from less lofty perspectives. He is intimately familiar with the procedural forms, and recognizes that these different procedural forms will themselves have substantive impact on the disposition of the claims of civil rights plaintiffs.

Justice Marshall put the question to be decided in *Lytle* in the form of the adversarial contentions by the parties. He first summarized the plaintiff’s contention, which his opinion for the Court thereafter sustains. However, before proceeding with the Court’s analysis and conclusion, Justice Marshall stated the defendant’s opposite contention:

[Defendant] argues that this case is governed by *Parklane Hosiery Co.*, rather than by *Beacon Theatres*, because the District Court made its findings when no legal claims [triable by jury] were pending before it. In [defendant’s] view, if an appellate court finds that a trial court’s dismissal of legal claims was erroneous and remands the legal claims to the trial court, that case would in effect constitute a separate action and therefore be subject to collateral estoppel under *Parklane Hosiery Co.* 21

This classic way of framing an issue as the adversaries’ statements gave the defendant’s contention full credit. Moreover, giving full credit to both parties’ contentions also demonstrated concern for the interests of the losing party. Justice Marshall, when he wrote his opinion, well knew that the defendant was to be the loser.

Justice Marshall’s resolution of the conflict rested both upon technical and policy considerations. As a technical matter: “Application of collateral es-

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toppel is unnecessary here to prevent multiple lawsuits because this case involves one suit in which the plaintiff properly joined his legal and equitable claims."

As a matter of policy: "[C]oncern about judicial economy, to the extent that it supports [defendant's] position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial."

Concern both for technical precision and larger policy considerations is typical of Justice Marshall's opinions. Law without technical precision is shapeless and leaves those who would follow the law without guidance as to its limits. Law without policy is vacuous and leaves those who would follow the law without a sense of direction.

II. CARNEGIE-MELLON UNIVERSITY v. COHILL

Carnegie-Mellon University v. Cohill was another employment discrimination case involving multiple claims. This time the multiplicity of claims led to the issue of the federal courts' power to remand cases to state courts. The plaintiffs alleged a single federal claim under the Age Discrimination in Employment Act of 1967 and alternative theories based on state law, all arising from one of the plaintiffs' discharge. The suit had initially been brought in state court, but the defendants removed it to the district court on the basis of the federal claim. The state claims came along under pendent jurisdiction. The plaintiffs then voluntarily dismissed the federal age discrimination claim, leaving only state claims, and sought to remand the case to state court. Defendants resisted, arguing that the district court had only two alternatives: Retain the case notwithstanding the termination of the federal claim, or dismiss the action, leaving the plaintiffs to refile in state court, which could result in foreclosure of the opportunity to litigate if the statute of limitations had expired.

Plaintiffs contended that there was a third option: Remand the case to state court. Aside from being mechanically simple, remanding the case would mean that the statute of limitations period would be calculated from the initial commencement of the action in state court.

Sensible as the plaintiffs' suggestion might appear, there was a serious ob-

22. Id. at 553.
23. Id. at 553-54.
27. Id. at 346.
28. Id.
29. Id. at 351-52.
30. Id. at 346.
stacle. No provision in the Judicial Code\textsuperscript{31} authorized such a remand. As recognized in the lower courts, "[T]wo sections of the [Judicial Code] authorize district courts to remand after removal . . . [However,] § 1447 did not apply because the removal was jurisdictionally proper and . . . § 1441(c) did not apply because the remaining state-law claims . . . were pendent to, rather than separate and independent of, the federal-law claim . . . ."\textsuperscript{32}

Moreover, an additional obstacle had been erected by Justice Marshall himself in \textit{Thermtron Products, Inc. v. Hermansdorfer}\textsuperscript{33}, in which he stated that a case should not be remanded without express authorization in the federal removal statute: "[W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute."\textsuperscript{34}

In the face of such silence in the statutes and such dictum by the Court itself, the defendants were in a strong position to argue, as they did, that the district court did not have the authority to remand a properly removed federal claim case because the predicate federal claim had been dropped.\textsuperscript{35} Concerning this argument, Justice Marshall came as close to a direct concession as one could reasonably expect from a sitting Justice: "As [defendants] point out, this Court's opinion in \textit{Thermtron} . . . contains some language that could be read to support the opposite conclusion [that federal courts have only power to remand as authorized by federal statute]."\textsuperscript{36}

How then to resolve the problem? Justice Marshall had already conceded that the defendants had a rather good argument in technical terms, with part of those terms supplied by the Justice himself. Yet there were very serious practical consequences to treating the silence of the remand statute as preempting authority to remand under circumstances not specified in the statute. The immediate consequence of holding remand to be unauthorized was quite clear: plaintiffs would be time-barred from asserting their state-law claims if the statute of limitations expired while the federal court still had jurisdiction over the case.\textsuperscript{37}

Foreclosure of the possibility of remand could also have third-order consequences in the effect on strategy by plaintiffs' lawyers contemplating assertion of federal claims in state courts:

Moreover, if a plaintiff bringing suit in state court knows that, notwith-

\textsuperscript{32} \textit{Cohill}, 484 U.S. at 346-47.
\textsuperscript{33} 423 U.S. 336 (1976).
\textsuperscript{34} \textit{Id.} at 351.
\textsuperscript{35} \textit{Cohill}, 484 U.S. at 353.
\textsuperscript{36} \textit{Id.} at 355 (citation omitted).
\textsuperscript{37} \textit{Id.} at 351-52.
standing the expiration of a statute of limitations, a federal court to which a
case is removed must dismiss the case upon deciding that exercise of pen-
dent jurisdiction would be inappropriate, the plaintiff may well decline to
allege any federal-law claims . . . . Thus, [such] a rule . . . would . . . chill
other plaintiffs from bringing their federal-law claims.38

Having regard for these consequences, Justice Marshall juxtaposed against
the Thermtron negation a more general premise drawn from the very concept
of pendent jurisdiction set forth in United Mine Workers v. Gibbs:39

Gibbs establishes that the pendent jurisdiction doctrine is designed to
enable courts to handle cases involving state-law claims in the way that will
best accommodate the values of economy, convenience, fairness, and com-
mit, and Gibbs further establishes that the Judicial Branch is to shape and
apply the doctrine in that light.40

Justice Marshall’s formulation of Gibbs is broader than the text of that
decision. To this extent, Justice Marshall makes a bootstrap out of Gibbs. If
Gibbs was as broad as his statement suggests, then a federal district court, if
it had jurisdiction over any claim in a transaction, could also assert pendent
jurisdiction over every claim in the transaction.41 That would be going too
far, or at least much further than the precedents. However, it must also be
noted, as Justice Marshall well knew, that the concept of pendent jurisdiction
is itself a bootstrap, the product of judicial invention with a complex history
long antedating the Gibbs decision.42

The point for present purposes, however, is that Justice Marshall sought
out a precedent that would have three-fold significance. First, it would em-
brace the pragmatic considerations to which he had drawn attention about
the preclusive effect of dismissing, rather than remanding, when there is an
expired statute of limitations. Second, it would neutralize the proposition
unguardedly asserted in Thermtron that the federal courts have only such
jurisdictional powers of remand as are conferred by statute. And, third, it
would call attention to the fact that the problem posed in Cohill—what to do
with state-law claims in a federal question case when the federal question is

38. Id. at 352 n.9.
40. Cohill, 484 U.S. at 351.
41. This, of course, is not the law. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)
(complete diversity of citizenship necessary to obtain federal jurisdiction over state law claims).
Compare Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) (federal court not au-
thorized to hear nonfederal claim based solely on finding that federal and nonfederal claims arose
from common nucleus of operative facts) with 28 U.S.C. § 1332 (1991 Supp.) (district court author-
ized to exercise jurisdiction over civil actions only where amount in controversy exceeds $50,000
and diversity of citizenship present).
42. See Hurn v. Ousler, 289 U.S. 238 (1933) (federal courts have power to decide certain state
no longer involved—was a derivative of pendent jurisdiction, which in turn is a creature of law made by the courts themselves and not by Congress. Of course, that left the *Thermtron* dictum in lonely isolation. But that is where it should have been left.

**III. Piper Aircraft Co. v. Reyno**

*Piper Aircraft Co. v. Reyno* presented another complicated situation created by procedural maneuver and counter-maneuver. The efforts of foreign plaintiffs to obtain a forum in the United States because of its more favorable liability laws suggested a conflict between the doctrine of forum non conveniens and the federal change of venue statute. An American-made light commercial plane manufactured by Piper Aircraft Co. had crashed in Scotland while on a charter flight, killing all aboard. The decedents were Scottish, and their survivors brought an action for damages in the United Kingdom. They also brought parallel wrongful death actions in California state court. The defendants—the manufacturer of the plane (Piper Aircraft Co., located in Pennsylvania) and the manufacturer of its propellers (Hartzell Propellers, Inc., located in Ohio)—removed the case to federal court in California. Upon removal, defendants sought transfer of the case to Pennsylvania under 28 U.S.C. § 1404(a), which provides for transfer from one federal district court to another “for the convenience of parties and witnesses, in the interest of justice.” That motion was granted.

When the case had been lodged in the Middle District of Pennsylvania, defendants moved to dismiss the action on the ground of forum non conveniens—the doctrine that a court which regards itself as a manifestly inappropriate forum may decline to exercise jurisdiction. The district court dismissed after finding that both the private interests of the litigants and the public interests of the forum made exercise of jurisdiction inappropriate. The Third Circuit then reversed the dismissal, analogizing forum non conveniens to a statutory transfer, which would prohibit dismissal if it would lead to a change in the applicable law adverse to the plaintiff.

Justice Marshall's opinion first carefully explained this background, all in

44. Id. at 238-39.
45. Id. at 240.
46. Id. at 239-40. The state court actions followed the appointment by the California probate court of a local administratrix, as it happened, a secretary in the law office of the plaintiff's attorney. Id. at 239.
47. Id. at 240.
48. Id. at 240 & n.4.
49. Id. at 243-44.
50. Id. at 241-44.
51. Id. at 245-46.
greater detail than set forth above. In summarizing the work of the courts below, Justice Marshall recounted that the trial court had relied principally on *Gulf Oil Corp. v. Gilbert*,\(^{52}\) the Supreme Court's leading decision articulating the forum non conveniens doctrine. In contrast, the court of appeals had relied primarily on decisions applying § 1404(a), enacted by Congress shortly after the *Gilbert* decision and commonly known as "statutory forum non conveniens." Decisions under § 1404(a), particularly *Van Dusen v. Barrack*,\(^{53}\) had held that, upon a § 1404(a) transfer, the transferee court should apply the law of the transferor court, thus protecting whatever choice of law advantage the plaintiff had established in the original forum.\(^{54}\)

The plaintiff's argument in *Piper* was that forum non conveniens in multinational litigation should be administered with the same deference to plaintiff's choice of law advantage as under the statutory forum non conveniens provision in § 1404(a).\(^{55}\) As Justice Marshall noted, "[the plaintiff] candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland."\(^{56}\) Since it was certain that the courts of the United Kingdom would not apply American products liability law and damages rules, let alone use American jury procedure, dismissal of the action in this country would relegate the plaintiff to a radically less favorable forum.

One way of stating the question is whether the decisional law formulation of forum non conveniens, epitomized in *Gilbert*, should be displaced by the statutory-interpretive formulation in *Van Dusen*. As Justice Marshall explained, if reference was made primarily to *Gilbert*, then choice of law consequences would not be determinative.\(^{57}\) Although *Gilbert* stated that a plaintiff's choice of forum should not easily be disturbed, it emphasized the district court's discretion to dismiss when the chosen forum is oppressive to the defendant and inconvenient and cumbersome for the court.\(^{58}\) Justice Marshall additionally pointed out that the antecedent of *Gilbert, Canada Malting Co. v. Paterson Steamships, Ltd.*,\(^{59}\) expressly declined to consider adverse choice of law consequences to the plaintiff in a dismissal based on forum non conveniens.\(^{60}\)

Justice Marshall then addressed the impact of the relevant line of cases on

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54. *Id.* at 622.
55. *Piper*, 454 U.S. at 240.
56. *Id.* at 249.
58. 285 U.S. 413 (1932).
the doctrine of forum non conveniens: "Gilbert in no way affects the validity of Canada Malting. Indeed, by holding that the central focus of the forum non conveniens inquiry is convenience, Gilbert implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law."61

As for Van Dusen v. Barrack, Justice Marshall found it inapplicable to forum non conveniens dismissals: "That case . . . focused on 'the construction and application' of § 1404(a). . . . [Van Dusen] concluded that Congress could not have intended a transfer to be accompanied by a change in law . . . . The statute was designed as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system."62

Having thus established the proper formulation of the common-law forum non conveniens doctrine, and distinguished it from the statutory version, Justice Marshall then held that "[t]he forum non conveniens determination is committed to the sound discretion of the trial court."63 Accordingly, the standard of review on appeal is abuse of discretion, one very deferential to the trial court. Under the doctrine of forum non conveniens as stated in Piper, the only factors the trial court must consider are the public and private interests, which look to the convenience of the forum and the litigants.64

While this formulization of the forum non conveniens doctrine resolved the controversy at hand, some aspects of Van Dusen were left unresolved. The Justice said nothing about the factors of fairness that the Court had invoked in Van Dusen to justify its rule that there should be no change in governing law following a statutory change of venue. Such silence could be taken as implicit criticism of Van Dusen. However, if such criticism was intended, it remained unvoiced. Also unvoiced was criticism of the serious legal anomalies that Van Dusen had ignored in arriving at its result.65 However considerations of fairness might be weighed between civil litigants in

61. Id. at 248-49 (footnote omitted).
62. Id. at 253-54 (citations and footnote omitted).
63. Id. at 257.
64. Id.
65. The most serious technical anomaly in Van Dusen concerned the legal status of the plaintiff in that case. Van Dusen, like Piper, involved a suit by the appointed personal representative of a decedent. Under prevailing doctrine, such a legal personality has existence only within the state in which it was created. The personal representative in Van Dusen was constituted in Pennsylvania, and hence, properly speaking, could not have existence in Massachusetts, the location of the district to which the defendants in Van Dusen had sought the § 1404(a) transfer. On that basis, no § 1404(a) transfer would have been legally possible, which of course is one of the considerations the plaintiff in Van Dusen had in mind. The Court in Van Dusen simply chopped through that Gordian knot. But the ultimate price of ignoring this kind of problem was subsequently paid in Ferens v. John Deere Co., 494 U.S. 516 (1990), where the plaintiff brought suit for a Pennsylvania-sited injury in Mississippi to obtain a more favorable Mississippi statute of limitations and then transferred under § 1441(a) to Pennsylvania federal district court because that was where all the parties, witnesses and evidence were located. Some "housekeeping."
different American courts, they weigh differently when the choice of forum would result in radically different choice of law consequences: “The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive.”

One may infer that Justice Marshall, at least in this context, had accepted the sad wisdom that not all of the law’s internal contradictions can be resolved, certainly not in one day’s work.

IV. Walker v. Armco Steel Corporation

An even better example of leaving legal contradictions unresolved is revealed in Walker v. Armco Steel Corp., which presented a recurring variation of the Erie problem. Plaintiff brought a products liability action based on state law in the United States District Court in Oklahoma. The action was filed within the two-year period specified in the applicable Oklahoma statute of limitations. Process was not served, however, until after the two-year period had run. Under the Oklahoma limitations statute “[a]n action shall be deemed commenced . . . as to each defendant, at the date of the summons which is served on him.” On that basis, the action was barred. Federal Rule of Civil Procedure 3, however, provides that an action is “commenced” by filing the complaint. The 1938 Advisory Committee Note concerning this provision’s significance with respect to statutes of limitations was guardedly ambiguous. It is a fair interpretation, however, that Rule 3 was intended to determine the running of a state statute of limitations if doing so could fairly be regarded as a matter of “practice and procedure” within the

66. Piper, 454 U.S. at 251 (footnote omitted). Within this statement is a long footnote explaining why U.S. forums are so attractive to foreign plaintiffs:

First, all but 6 of the 50 American States . . . offer strict liability . . . . Second, the tort plaintiff may choose, at least potentially, from among 50 jurisdictions . . . . Each . . . applies its own malleable choice-of-law rules. Third, jury trials are almost always available in the United States, while they are never provided in civil law jurisdictions. . . . Fourth, . . . American courts allow contingent attorneys’ fees, and do not tax losing parties with their opponents’ attorney’s fees . . . . Fifth, discovery is more extensive in American than in foreign courts.


68. Erie R.R. v. Tompkins, 304 U.S. 64 (1938), established that federal courts exercising diversity jurisdiction are to apply federal law to procedural issues, but must apply state law to substantive state-created rights, “except in matters governed by the federal Constitution or Acts of Congress.”

69. Walker, 446 U.S. at 742.

70. Id.

71. OKLA. STAT. tit. 12, § 97 (1971), quoted in Walker, 446 U.S. at 743 n.4.

72. FED. R. CIV. P. 3.

73. FED. R. CIV. P. 3, Advisory Committee’s Note.
meaning of the Rules Enabling Act,\textsuperscript{74} and if the Enabling Act, as so con-
strued, was a valid exercise of federal authority.\textsuperscript{75} On that analysis the action
was not barred. The question, therefore, was whether the plaintiff's action
should be dismissed on the basis of the state statute or permitted to proceed
on the basis of Rule 3.

As is well known to those familiar with the \textit{Erie} doctrine, essentially the
same question had arisen in \textit{Ragan v. Merchants Transfer & Warehouse Co.},\textsuperscript{76}
years before. The state statute of limitations involved in \textit{Ragan} had the same
terms as that involved in \textit{Walker}, and Rule 3 provided the same text and
legislative history. \textit{Ragan} had been decided under the tutelage of \textit{Guaranty
Trust Co. of New York v. York},\textsuperscript{77} an early and salient rationale for the \textit{Erie}
doctrine. In \textit{York} the Court had pronounced the extravagant premise that:

\begin{quote}
[T]he intent of [the \textit{Erie}] decision was to insure that, in all cases where a
federal court is exercising jurisdiction solely because of the diversity of citi-
zenship of the parties, the outcome of the litigation in the federal court
should be substantially the same, so far as legal rules determine the out-
come of a litigation, as it would be if tried in a State court.\textsuperscript{78}
\end{quote}

Indeed, in \textit{York} the Court went even further and posited that in adjudicat-
ing a state-created right in a diversity case, a federal district court is "in
effect, only another court of the state."\textsuperscript{79} On these premises, the Court in
\textit{Ragan} held that the state provision governed, requiring that service, as well
as filing, be made within the limitation period in order to toll the statute.
Given the premise, the result in \textit{Ragan} was inevitable.

After \textit{Ragan}, however, the Court had been confronted with a case that
presented greater difficulty in giving effect to \textit{York}'s broad premises. \textit{Byrd v.
Blue Ridge Rural Electric Cooperative}\textsuperscript{80} presented another conflict between
state and federal rules. In that case, the applicable state rule would have
required that a critical issue going to the merits be decided
by the judge sitting without a jury. If standard federal procedure was followed, the Sev-

\textsuperscript{75} The Advisory Committee's Note states:

When a Federal or State statute of limitations is pleaded as a defense, a question may arise
\ldots whether the mere filing of the complaint stops the running of the statute \ldots . The
answer to this question may depend on whether it is competent for the Supreme Court,
exercising the power to make rules of procedure without affecting substantive rights, to
vary the operation of statutes of limitation.

\textit{FED. R. CIV. P. 3}, Advisory Committee's Note, \textit{quoted in Walker}, 446 U.S. at 750 n.10. The
Advisory Committee thus was also mindful of the usefulness of postponing the resolution of
uncertainties.

\textsuperscript{76} 337 U.S. 530 (1949).
\textsuperscript{77} 326 U.S. 99 (1945).
\textsuperscript{78} \textit{Id.} at 109.
\textsuperscript{79} \textit{Id.} at 108.
\textsuperscript{80} 356 U.S. 525 (1958).
The Seventh Amendment would require that the issue be submitted to the jury. The Court had previously indicated in its *Erie* jurisprudence that the right to jury trial was an "outcome determinative" rule. On that basis, the state rule should have been followed in the situation presented in *Byrd*. However, this would have put the Court in the interesting position of holding that the Seventh Amendment was inconsistent with the constitutional limitations to which a federal court was subject, under the premise that a federal court in diversity is "only another court of the state." That is, if *Erie* implied that federal courts in a diversity case act as state courts, as stated in *York*, then giving effect to the Seventh Amendment in a diversity case would be unconstitutional.

In *Byrd* the Court recoiled from this absurdity, holding that the federal rule calling for jury trial should govern, even if it might yield a different "outcome." However, in reaching this result the Court, speaking through Justice Brennan, took occasion to express a premise hardly less extravagant than those stated in *York*. Whereas *York* had said that a federal court sitting in diversity is "only another court of the state," the *Byrd* majority stated: "The federal system is an independent system for administering justice . . . ." This premise, if taken at face value, would overrule *Erie*. Indeed, it would cast some doubt on the constitutionality of the Rules of Decision Act itself, which requires that "the laws of the several states shall be the rules of decision" in various situations.

Be that as it may, some years later, in *Hanna v. Plumer*, the Court tried to make sense of these incompatible pronouncements and their divergent results. In that case the Court confronted a slight variation on the *Ragan* problem. A state statute governed the time within which the action had to be brought and specified the crucial event as service "in hand" of process on the defendant. Federal Rule of Civil Procedure 4 provided that service of process could be effected by leaving a copy of the summons and complaint at the defendant's abode. If state procedure governed, the action was too late. If the Federal Rules governed—and if service effected under Rule 4 tolled the statute of limitations—the action was not too late. The Court held that the action was not too late.

Those familiar with the field have recollections of the rationale the Court offered in *Hanna*. However, it is interesting to recall *Hanna* through the description provided by Justice Marshall in his opinion for the Court in the

82. *Byrd*, 356 U.S. at 537.
84. 380 U.S. 460 (1965).
85. Id. at 462.
86. FED. R. CIV. P. 4.
subsequent *Walker* case. *Walker* involved the same issue as *Ragan*, which rested on the premise that a federal court sitting in diversity was "only another court of the state." That premise had been succeeded in *Byrd* by the premise that the federal courts were "an independent system of administering justice," and *Hanna* indicated that the Federal Rules of Civil Procedure displaced state law in matters fairly within the terms of the Rules. Thus, if *Hanna* terms were to be taken literally, *Ragan* had been overruled.

Justice Marshall's account of the Court's decision in *Hanna* is deadpan:

> We stated [in *Hanna*] that the "outcome-determination" test of *Erie* and *York* had to be read with reference to the "twin aims" of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws . . . ." We determined that the choice between the state in-hand service rule and the Federal Rule "would be of scant, if any, relevance to the choice of a forum" . . . .

. . . .

The Court explained that where the Federal Rule was clearly applicable, as in *Hanna*, the test was whether the Rule was within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art. I. 88

This is a fair description of *Hanna*. Anyone who understands *Hanna* at this level of abstraction is to be congratulated. However, at the level of grand procedural theory, *Hanna* had not undertaken to reconcile the premise in *York* that the federal court in diversity was "only another court of the state" with that in *Byrd* that the federal courts were an "independent system of administering justice." Further, at the level of mere procedural technicality, *Hanna* had not explained why the provision for service of process in Federal Rule 4 "trumped" the state rule governing commencement of an action for purposes of the statute of limitations, but the provision for commencing an action in Federal Rule 3 did not.

Justice Marshall refrained from further adventure. He made a gesture toward rationalization at the technical level, but none above that. In holding that the Oklahoma statute of limitations' provisions trumped Federal Rule 3, his *ratio decidendi*, as it used to be called, was indeed quite simple, based in essence on stare decisis:

> The present case is indistinguishable from *Ragan* . . . . [T]he doctrine of *stare decisis* weighs heavily against petitioner . . . . *Stare decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law . . . . A litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence. Petitioner

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here has not met that burden.\textsuperscript{89}

That is, \textit{Ragan} is consistent with \textit{Hanna} because we say it is. And then the Justice adds a perfectly wonderful footnote, putting aside the issue of Rule 3's effect as a tolling provision on statutes of limitations applied to federal law claims: "We do not here address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law."\textsuperscript{90}

This footnote is food for a long mental trip in the law of procedure: if Rule 3 can toll a statute of limitations that otherwise would run according to state law, then Rule 3 must to that extent displace state law in the scheme called for by the Rules of Decision Act. If Rule 3 displaces state law to the extent of tolling a claim based on federal law, it must be that Rule 3 is a valid implementation of the Rules Enabling Act. By the same token, the Rules Enabling Act to that extent must displace the Rules of Decision Act in actions involving federal claims. Furthermore, to that extent Rule 3 must be valid under the Constitution. But if Rule 3 is valid to this extent, why is it not equally valid in the context of a claim based on state law? That is, if Rule 3 is not equally valid in the context of a claim based on state law, does this mean that the Enabling Act has an undisclosed set of internal restrictions, under which some of the rules to be adopted will be applicable in diversity cases but others will not? If Rule 3 does not have equal effect in the context of diversity cases as it has in federal question cases, does this mean that the "judicial power" established in Article III is of lesser scope and stature in diversity cases than it is in federal question cases and admiralty? Does it also imply that Congress has less authority under the Necessary and Proper Clause of Article I when it addresses the administration of justice in diversity jurisdiction than when it addresses federal question jurisdiction?

Justice Marshall's footnote prudently left these questions for another day. Perhaps they have to be left forever.

\textbf{V. \textit{Kerr v. United States District Court}}

\textit{Kerr v. United States District Court}\textsuperscript{91} is not very well known compared with other procedural decisions by Justice Marshall. The opinion is intriguing, however, in that it can be read as legitimating an additional basis of appellate review by augmenting that available in appeals from final judgments, appeals from interlocutory orders, and appellate review by extraordinary writ such as mandamus and prohibition.\textsuperscript{92} The review exercised by the

\textsuperscript{89} \textit{Id.} at 748-49.
\textsuperscript{90} \textit{Id.} at 751 n.11.
\textsuperscript{91} 426 U.S. 394 (1976).
Supreme Court in *Kerr* might be called admonitory appellate review.

*Kerr* involved a prisoner class action concerning the fairness of classification decisions in the administration of California prisons. In pretrial discovery the plaintiffs demanded access to prisoner records in order to compare the treatment accorded various types of prisoners. The defendant prison officials, casting their objections in terms of irrelevance and official privilege, objected that discovery would invade prisoner privacy and chill the development of accurate information about individual prisoners. When the trial court afforded discovery under a limited protective order, the prison officials petitioned for mandamus from the court of appeals. The court of appeals denied the petition on the ground that the claim of privilege was technically imperfect, pretermitting consideration of whether the trial court’s discovery order may have gone too far.

Speaking for the Court, Justice Marshall recited the standard restrictions on obtaining appellate review by means of mandamus, particularly concerning pretrial discovery:

> The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. . . . The writ “has traditionally been used . . . only ‘to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.’” . . . [I]t is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation.

> . . . [T]he party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires . . . [and must] satisfy “the burden of showing that [his] right to issuance of the writ is ‘clear and indisputable.’” . . . [I]ssuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.

As Justice Marshall then observed, “When looked at in the framework of these factors, it would appear that the actions of the Court of Appeals in this case should be affirmed.” That, it would seem, was that.

But Justice Marshall was cognizant of the serious consequences that the prison officials anticipated from the broad discovery order as entered by the district court and affirmed by the refusal of the court of appeals to grant mandamus:


\[93. *Kerr*, 426 U.S. at 397-98.\]
\[94. *Id.* at 398.\]
\[95. *Id.* at 398-99.\]
\[96. *Id.* at 399-400.\]
\[97. *Id.* at 402-03 (citations omitted).\]
\[98. *Id.* at 404.\]
Petitioners’ claims of privilege rest in large part on the notion that turning over the requested documents would result in substantial injury to the State’s prison-parole system by unnecessarily chilling the free and uninhibited exchange of ideas between staff members within the system, by causing the unwarranted disclosure and consequent drying up of confidential sources, and in general by unjustifiably compromising the confidentiality of the system’s records and personnel files. In light of the potential seriousness of these considerations and in light of the fact that the weight to be accorded them will inevitably vary with the nature of the specific documents in question, it would seem that an in camera review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners’ claims of irrelevance and privilege and plaintiffs’ asserted need for the documents is correctly struck.99

Anyone even casually familiar with prison administration would know that these observations are gentle euphemisms. Prisoner personnel files contain records of information supplied by prisoner “snitches.” Disclosure of such sources spreads like wildfire through the prisoner community, and the consequence is often retribution against the snitch, including murder. Justice Marshall, and no doubt other members of the Court, knew all of this from having read certiorari petitions and perhaps other littérature vérité.

With these considerations in mind, Justice Marshall continued his discussion of the denial of mandamus by the court of appeals:

Petitioners ask in essence only that the District Court review the challenged documents in camera before passing on whether each one individually should or should not be disclosed. But the Court of Appeals’ opinion did not foreclose the possible necessity of such in camera review. Its denial of the writ was based largely on the grounds that the governmental privilege had not been asserted personally . . . with the requisite specificity. . . .

We are thus confident that the Court of Appeals did in fact intend to afford the petitioners the opportunity to apply for and, upon proper application, receive in camera review.100

Those who have studied Kerr, and those who have carefully tracked the footnote references to the foregoing quotations from Justice Marshall’s opinion, will recognize that the sequence of rationales above does not correspond to the sequence in the opinion itself. Rather, the sequence in the opinion is: (1) mandamus is to be granted under only extraordinary circumstances, and hence its denial is almost beyond reach of review in this court; (2) the court of appeals opinion did not exclude the relief which its decision refused to grant; (3) failing to grant that relief could have very serious consequences;

99. Id. at 405 (footnotes omitted).
100. Id. at 404, 406.
and then (4) "We are thus confident that the Court of Appeals did in fact intend to afford . . . in camera review."101

Framing the matter as did Justice Marshall makes it go down more gently: The Supreme Court, while affirming the judgment of the court of appeals, was admonishing that court that its decision was wrong. A certain delicacy in decisional method, a subtlety in procedural contrivance is evident here.

VI. FURTHER REFLECTIONS

There are many other decisions by Justice Marshall that could be brought forward for consideration. Some of them made conspicuous contributions to the development of the law, for example, Shaffer v. Heitner,102 which sought to rationalize the law of territorial jurisdiction.103 Others faithfully gave effect to procedural principles in contexts where they might well disfavor political and societal interests to which the Justice was sympathetic. At a time when jury trials were thought to disfavor civil rights plaintiffs because of racial prejudice on juries, Justice Marshall's opinion in Curtis v. Loether104 held that the approach in Beacon Theatres, Inc. v. Westover105 strongly favoring jury trial should be applied to an action under a civil rights statute.106 One could also call to mind some of his dissents. An example is that in Colegrove v. Battin,107 protesting the reduction of federal civil juries from twelve to six. His dissent in the Alyeska Pipeline Service Co. v. Wilderness Society108 protested the Court's narrow interpretation of the powers of an equity court to award attorneys' fees to a prevailing plaintiff. By the count of The Georgetown Law Journal, Justice Marshall was the author of over 100 opinions, most of them for the Court, dealing with questions of civil procedure and federal jurisdiction.109 Practically any one of these would be worthy of comment in itself. Such a comprehensive examination, however, might mistake the trees for the woods.

Much of the law, certainly the law of procedure, is not accurately expressed in broad general propositions, let alone in matters of "principle." On the contrary, the law is a myriad of normative concretions: whatever the

101. Id. at 406.
106. Curtis, 415 U.S. at 196 n.11.
"practical abilities and limitations of juries,"\textsuperscript{110} the fact remains that the jury trial has been made a part of federal civil procedure by the Constitution itself. Although it is often fortuitous that process was served one day rather than the day after,\textsuperscript{111} the fact remains that at the boundary a statute of limitations is always arbitrary. Appellate review, especially by mandamus, is a remedy to be sparingly used, even when the lower court has obviously made a mistake.\textsuperscript{112} A good judge has to know these things, and Justice Marshall demonstrated in his life and work that he knew them well.

Moreover, the law's general propositions are transformed from word to act in concrete cases. The business of the law—the reason for its existence—is the decision of specific legal disputes, most of them relatively inconsequential. The disputes have to be decided with the legal resources at hand in a particular historical moment: specific constitutional tradition; a specific system of courts, in the American situation including more than fifty different subsystems; a finite corps of judges, lawyers and participating litigants; and a limited library of authoritative texts. A good judge has to know this, and Justice Marshall demonstrated in his life and work that he did.\textsuperscript{113}

The text of the law is only language. Surely this is true of the law of procedure, which is the law's own language for defining, deliberating upon, and determining its concrete cases. At some extension the law exhausts the possibilities for refining its definitions. At that stage the judge must move from reason to fiat—to an act and not merely to another word. A good judge has to know that.\textsuperscript{114}

Choice through act manifests itself by pointing or calling to mind prior shared experience. For a Justice of the Supreme Court, the prior shared experience is what has happened in the world, and particularly in this country, since the beginning, as understood in the Justice's lifetime—shared person with person, day by day, case after case. Justice Marshall demonstrated in his life and work that he knew that too.

There is a lawyer. There is a judge.

\textsuperscript{112} See Kerr v. United States District Court, 426 U.S. 394 (1976).
\textsuperscript{113} See, for example, the citation of Canada Malting in support of Gilbert against Van Dusen in the Piper case, supra text accompanying note 62, or the graceful departure from Thermtron in the Cohill case, supra text accompanying notes 39-41.
\textsuperscript{114} The decision in Walker v. Armco Steel Co. is a small masterpiece in that art.