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COUNTING IS HARD!
A THEORY OF DOCTRINAL EXPANSION

by
*Kip M. Hustace**

*We conventionally see pleading as liberalized, with leeway for inconsistent claims and expansive choice among theories of relief, or counts. Yet procedure scholars have shown how heightened pleading post-*Twiqbal *constricts liberality, turning us back toward 19th century fact-intensive code pleading. This Article theorizes a further constriction: proliferating and ossifying counts. While affording pleading latitude, doctrinal expansion forces hard strategy decisions and represents an inversion of the maxim that procedure shapes substance. Expansion increases system complexity, making localized strategy and discretion more impactful and amplifying opportunities for juridical manipulation. The result: doctrines complexifying toward a tipping point, beyond which we make frantic reforms to deal with inequities and other system failures.*

Through this macroscale theory of doctrinal development, the Article makes several contributions. First, it parses the claim—the operative facts warranting judicial involvement in a dispute—from the count—the articulation of how a claim can be adjudicated. Second, the Article explains how over time substantive splits in doctrine become procedural hurdles requiring particularized allegations above and beyond a heightened factual showing and thus resembling traditional common law "forms of action." Third, the Article situates doctrinal expansion within a multi-generational undulation between complexity and simplicity; infers as eventualities both doctrinal contraction and

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system failure; and proposes more routine system maintenance with respect to doctrinal splits in lieu of infrequent but intensive renovation. To work out these ideas, the Article engages critical civil procedure, law and social movements, law of democracy, complexity theory, and professional responsibility literatures, among others.

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INTRODUCTION

The conventional take on doctrinal development is a paean to laissez-faire: let the common law take its course, and all will be well. Of course, case-by-case lawmaking is "quintessentially democratic," enabling citizens to shape legal relations

directly,[1] and is "practically designed to promote evolution."[2] Case-by-case lawmaking helps to "deriv[e] content" from broad constitutional or statutory text,[3] and it suits courts' institutional competence in dispute resolution.[4]

But the ideal even-handedness and creativity of *unmanaged* doctrinal development are mirages. Because neutrality is not neutral,[5] a laissez-faire approach's supposed even-handedness hides who actually shapes law and how. Because law's sustainability could require studied deconstruction just as much as generation, laissez-faire's presumed creativity obscures the stultifying effects of overdevelopment.[6] Periodic redrafting of procedural rules, as in 19th and 20th century efforts to fuse traditional common law and equity,[7] represents intensive legal system renovation that both implies that doctrines can become too complex and casts doubt on whether case-by-case lawmaking can correct this on its own.

We readily see this complexity at pleading, where theories of relief, or counts (as at the backs of complaints), take shape. Conventional procedure accounts cast the gradual fusion of equity and common law as liberalizing, such that pleading aids "resolution of disputes *on their merits*, not by tricks or traps or obfuscation."[8] Where

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[1] Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690, 692–93 (1983); *accord* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 917 (1987).

[2] J.B. Ruhl, *Managing Systemic Risk in Legal Systems*, 89 IND. L.J. 559, 574 (2014).

[3] Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 991 (2014); *accord* Kip M. Hustace, *Education, Antidomination, and the Republican Guarantee*, 30 WM. & MARY BILL RTS. J. 91, 147–49 (2021).

[4] Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1447–48 (2008).

[5] *See* CÉCILE LABORDE, CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY 63 (2008) (observing that even a "neutral" state governs "against [a] backdrop of specific, non-neutral, cultural contexts"); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 9 (1989) (observing that "ongoing dilemma of neutral principles is challenged by outsiders' reality"); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 49 (1990) (observing that "[d]ifference can be recreated in color or gender blindness and in affirmative action[,] in governmental neutrality and in governmental preferences" (internal citation omitted)).

[6] *See* Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 498 (1950) ("Unfortunately by a kind of Gresham's Law, the bad, or harsh, procedural decisions drive out the good, so that in time a rule becomes entirely obscured by its interpretative barnacles.").

[7] *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045–98, 1106 (1982); Kellen Funk, *Equity's Federalism*, 97 NOTRE DAME L. REV. 2057, 2077–78 (2022); Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 3 (2001); Subrin, *supra* note 1, at 922–26, 931–75.

[8] Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 288 (2013) (emphasis

we once expected pleading to lay out facts and issues "in considerable detail," we now ask less and less of it.[9] In one "general and generous sentence,"[10] Federal Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief," a liberality bolstered by modern joinder, discovery, and case management.[11] Procedural liberality has multiplied claimants' paths to relief. One theory to fix racial vote dilution has trifurcated into a totality of the circumstances count, a formulaic statutory count, and a gerrymandering count now in vogue.[12] Where Title VII once guarded against workplace discrimination on the basis of sex, workers can now invoke its protection with sex-, gender-, gender identity-, and sexual orientation-based counts.[13]

At the same time, overlapping theories of relief have proliferated in many fields as intricate sets of counts subject to strategy and manipulation, even turned against claimants. Lawyers shore up Indian tribes' governance by arguing either inherent tribal sovereignty or federal preemption;[14] and while current courts have credited preemption, the theory recently failed to block encroachment of state criminal jurisdiction into Indian country.[15] Despite the age of legal malpractice counts like

added); *see* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) (noting that pleading, a means to an end, "should not limit [but aid] the operation of the general law"); Simona Grossi, *The Claim*, 55 HOUS. L. REV. 1, 6 (2017) (noting that centering the claim centers courts' ultimate dispute resolution mission).

[9] Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824 (2010); *accord* Clark, *supra* note 8, at 542; Sherman J. Clark, *To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine*, 49 HASTINGS L.J. 565, 576 (1998).

[10] Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 471–73 (2003).

[11] FED. R. CIV. P. 8(a)(2); *see, e.g.*, FED. R. CIV. P. 8(d) (permitting pleading inconsistently or in alternative); FED. R. CIV. P. 15 (permitting ready amendment and supplemental pleading); FED. R. CIV. P. 18(a) (permitting joinder of "as many claims as [a party] has against an opposing party").

[12] *See infra* notes 179–211 and accompanying text.

[13] *See infra* notes 228–53 and accompanying text.

[14] *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980) (noting multiple bases that states lack authority to regulate in Indian country); RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 13 (AM. L. INST. 2021) ("Tribal sovereignty predates the formation of the United States. Tribal authority is inherent, not granted by the federal government to Indian tribes."); *id.* § 29 (explaining that states may not regulate in Indian country where in conflict with express federal law, impliedly preempted by federal law, or infringing on tribal self-governance).

[15] *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2504–05 (2022); Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1910 (2022).

breach of contract, breach of fiduciary duty, and professional negligence, courts disagree on their parameters.[16] Similar confusion bedevils the Lanham Act's many false advertisement claims.[17] Tortious death too is a web of theories: wrongful death, loss of consortium, emotional distress, survival, etc.[18] As are First Amendment counts at war with each other: freedom of speech, free exercise of religion, freedom from establishment.[19]

None of this discounts creative claimants devising new ways to perceive injuries and leading courts to recognize rights long denied.[20] But sometimes, especially after that moment of recognition, more counts just means more complexity.[21] The concern is not that there is "too much law;"[22] it is through law that we secure freedom and wellbeing.[23] Nor is the concern merely that more counts make litigation more

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[16] Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 235 (1994); *see* Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 693 (2006) (describing breach of fiduciary duty and professional negligence as distinct but overlapping legal malpractice counts).

[17] *See* 44 AM. JUR. PROOF OF FACTS 3d § 6 (1997) (describing Lanham Act § 43(a) counts for unregistered trademark infringement, false advertising, false designation of origin, and false endorsement).

[18] *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS §§ 28.1, 29.10, 29.11 (2d ed. 2000) (describing wrongful death, loss of consortium, and emotional distress as distinct but overlapping tortious death counts); Anne E. Simerman, Note, *The Right of a Cohabitant to Recover in Tort: Wrongful Death, Negligent Infliction of Emotional Distress and Loss of Consortium*, 32 U. LOUISVILLE J. FAM. L. 531, 532–34, 536–38 (1993).

[19] *See infra* notes 84–103, 321–23, 349 and accompanying text. Of course, "cumulative constitutional rights" cases abound. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1310 (2017).

[20] *See, e.g.*, Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. L. REV. 529, 575–94 (2019) (taxonomizing movement lawyering strategies); Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877 (2019) (documenting creative lawyering in resisting and undermining the Fugitive Slave Law of 1850); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 70–74 (1987) (explaining need to remake understanding of "difference" in order to avoid reinforcing hierarchies); William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 11 (2007) (arguing that lawyering for justice requires creativity, flexibility, and patience).

[21] *See* Gillian K. Hadfield, *More Markets, More Justice,* DÆDALUS, Winter 2019, at 37, 38 (describing how interpretations of text become fixed over time as sources of law that must be reconciled); Ruhl, *supra* note 2, at 603 (noting that "building organization into the legal system" is sensible and necessary but "leads inevitably to complexity and, consequently, fragility").

[22] *See generally* Mila Sohoni, *The Idea of "Too Much Law,"* 80 FORDHAM L. REV. 1585 (2012) (taxonomizing and critiquing arguments that there are too many laws).

[23] GEOFFREY HINCHLIFFE, LIBERTY AND EDUCATION: A CIVIC REPUBLICAN APPROACH 12 (2015) (discussing JAMES HARRINGTON, *The Commonwealth of Oceana*, *in* THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 1, 20 (J.G.A. Pocock ed., trans., Cambridge Univ. Press 1992) (1656)); Hustace, *supra* note 3, at 117–20.

difficult, though that risk exists.[24] It is rather that despite the value in having more ways to secure rights, failure to manage complexity threatens the very liberality that created it, increasing system fragility and its associated system burdens.[25]

In this Article, I challenge the standard account of progression toward liberality by theorizing and appraising doctrinal expansion. I argue that the proliferation of counts through which to resolve claims, gradually expanding doctrines through lateral and lineal moves, represents a notable increase in system complexity that in turn reformalizes and constricts pleading. Thus, I agree with critiques that "the very liberality of the original Federal Rules" has been a source of "constriction."[26] My account, however, focuses less on how procedures or institutions bring "an ignominious fate" upon discretion and flexibility than on how substantive complexity in case law does too.[27] And my account supports more routine system maintenance in lieu of a laissez-fairism periodically necessitating frantic renovation.

Making these points, I answer a summons to devise procedure theory.[28] Imagining how doctrines expand and contract across many generations and identifying system abrasions that this undulation incurs, I take stock of what grand narratives of progress overlook. The idea that the legal system is complex is not new, nor is the general idea that complexity is increasing.[29] Still others have theorized individual legal tests' development as "ceaseless oscillation, from rules to balancing and back,"[30]

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[24] *See* J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 201 (2015) (explaining that learning rules imposes effort burdens and compiling evidence to comply with rules imposes information burdens).

[25] *See id.* at 201–02 (explaining that system burdens reflect difficulty navigating interconnected rules and institutions).

[26] Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1858–59 (2014).

[27] Main, *supra* note 10, at 479–83.

[28] *See, e.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 319 (2008) (insisting that "[e]ffective rulemaking depends at least as much on having a coherent normative theory . . . as it does on having an accurate empirical account"); Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 157 (2021) (insisting that we can "prevent civil procedural rules and doctrine from being deployed to maintain or further subjugate marginalized people"); Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 HASTINGS CONST. L.Q. 261, 292 (2021) (urging studying procedural failures, because for too many of us, "the status quo is nothing short of dehumanizing").

[29] *See, e.g.*, Ruhl, *supra* note 2, at 568; Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 6–8 (1992) (arguing that legal complexity is increasing and that this is a problem for our legal system).

[30] *E.g.*, Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 CORNELL L. REV. 341, 346 (1991).

"from crystal to mud and back."[31] Here, I theorize specifically how splits in doctrines add complexity and how entire doctrines—small universes of counts asserted to resolve the same claims—expand (and can be made to contract) in the *longue durée*. Added complexity arises not merely from the volume of counts asserted—my critique is not about "floodgates"[32]—but from substantive divergences in doctrine that yield overlapping theories of relief.[33] Added complexity further limits the liberality that we take for granted, straining procedural fairness and the rule of law.

In Part I of this Article, I explain the relationship between claims and the counts asserted to resolve them, and I situate counts proliferating in a "complex adaptive system."[34] Whereas claims are sets of operative facts warranting judicial resolution, counts are articulations of how parties and courts can prove those facts and demand remedies. These are two layers of pleading that claimants must consider. Claimants must do so, moreover, from within both the legal system's complexity and that of our pleading regime. Drawing on complexity theory,[35] I explain how doctrines can become not merely complicated—teeming with independent counts—but complex—teeming *and* interconnected. And I identify some competing incentives on pleading strategy, as strategize pleaders must.

In Part II, I theorize how doctrines expand, describing two constituent processes. The first is the hydraulic shift, a lateral process in which claimants unsuccessful with one count eventually devise a new, successful count. I distinguish theory hydraulics, which feature in doctrinal expansion, from forum hydraulics, in which claimants unsuccessful in one forum find another, though both kinds of shifts feature in legal change. The second process is count ossification, a lineal process in which theories of relief harden in doctrine, becoming the very "ill-fitting conceptual schemes" that they were meant to disrupt.[36] This process reflects longstanding tendencies to parse and categorize, as well as post-*Twiqbal* pressure to rely on well-established theories of relief.

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[31] Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 582 (1988); *see* Main, *supra* note 10, at 479 ("Centuries of legal history confirm that flexible and discretionary rules and standards of any form tend to rigidify over the course of time.").

[32] Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1009–10 (2013) (taxonomizing and critiquing "floodgates" concerns, which argue against outcomes on grounds that they will increase volume of claims or litigation).

[33] For analyses of related issue of legal redundancy, see generally, for example, Abrams & Garrett, *supra* note 19; Michael Coenen, *Four Responses to Constitutional Overlap*, 28 WM. & MARY BILL RTS. J. 347 (2019); John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629 (2016); F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635 (2016); Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791 (2017).

[34] J.B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. U. L. REV. 885, 902 (2008).

[35] Complexity theory "studies how agents interact and the aggregate product of their interactions." *Id.* at 889.

[36] Minow, *supra* note 20, at 87.

In Part III, I address implications of doctrinal expansion. First, I argue that expansion, while affording more channels to relief, constricts pleading. The pleading standard's elevation from possibility to plausibility "harkened back" to requiring "factual allegations addressed to a particular substantive issue."[37] But plausibility is half of the story. The other half is the distinct, ossified counts into which claimants must fit their allegations, ensuring that facts "go to" each element in each count that they assert. The result is procedure bending back toward common law forms of action and the brittle pleading system that they embodied. Then, I describe two indicia of this emergent system fragility—procedural fairness failures and rule of law failures—that we can observe to evaluate when and how to confront doctrinal complexity. Finally, I propose that we conduct routine system maintenance, an undertheorized process and professional obligation, to manage system fragility.[38] The solution to complexifying doctrine, I stress, is not outright reducing the number of counts available to claimants, and I offer preliminary maintenance suggestions.

This Article is, in a broad sense, about how legal substance shapes legal procedure, an inversion of the maxim that procedure shapes substance.[39] Doctrinal changes, not just a heightened pleading standard, alter over time and in aggregate how we experience procedural rules.[40] Complexity theory casts this as "emergence," the macroscopic result of many microscopic interactions.[41] Indeed, many features of doctrinal expansion are emergent, from count ossification to constricted pleading

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[37] Grossi, *supra* note 8, at 18 (discussing Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

[38] *See* Ruhl & Katz, *supra* note 24, at 240 (favoring "*management* rather than *reduction*," as we cannot assume "that all legal complexity is structurally or normatively bad").

[39] *E.g.*, Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1583–1612 (2014); Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 464–525 (2014).

[40] *Cf.* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) (observing that "procedure is embedded in substantive law"). That the present legal system as inevitably altered by past acts in the system recalls philosophy's river metaphors. *See, e.g.*, LUDWIG WITTGENSTEIN, ON CERTAINTY 15e (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., 1969) (describing a river as epitomizing flux more than its riverbed, which *is* changed by the river, but gradually enough for the riverbed to serve as a "hardened" empirical proposition against which to measure the river as the more "fluid" empirical proposition); David G. Stern, *Heraclitus' and Wittgenstein's River Images: Stepping Twice into the Same River*, 74 MONIST 579, 593–97 (1991) (reconciling Herakleitos's and Wittgenstein's river metaphors for understanding constancy, indeterminacy, and what things *are* constant or indeterminate); *cf.* Kaiponanea T. Matsumura, *The Integrity of Marriage*, 61 WM. & MARY L. REV. 453, 479 (2019) ("Every change to marriage's positive law—through addition, deletion, or revision—affects the ability of the body of law to achieve its intended purposes.").

[41] *See* Ruhl, *supra* note 2, at 567–68.

to increased system fragility. "[B]ecause the first-beginnings of things cannot be distinguished by the eye," we use metaphor and analogical reasoning to detect the contours of such macroscale legal behavior.[42]

I. LIBERAL PLEADING AND COMPLEXITY

Civil claim selection is a morass of pleading incentives and strategies.[43] Preclusion rules encourage pleading multiple claims at once to prevent their forfeiture,[44] while courts discourage *shotgun* or *kitchen sink* pleading to make cases more manageable.[45] Selecting among theories of relief is even more fraught, especially where the options afford the same or similar remedies but entail different arguments and evidentiary showings.

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[42] LUCRETIUS, DE RERUM NATURA 21 (W. H. D. Rouse trans., Harvard Univ. Press 3d ed. rev. 1937) (1924); *see* Stern, *supra* note 40, at 589 ("Language, [according to Wittgenstein], gains its significance by being connected up with the stream of consciousness . . . . While we can't say how, we can show this in metaphors and imagery which indicate where language runs out.").

[43] *See, e.g.*, Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1443–71 (2000) (taxonomizing approaches to enlist, pressure, or disempower legal decisionmakers); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73–82 (2005) (elucidating rationales and tradeoffs of statutes of limitations); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 124–25 (2011) (noting prevalent assumptions that case merit correlates with factual detail in pleadings).

[44] *E.g.*, Brown v. Felsen, 442 U.S. 127, 131–32 (1979); Núñez Colón v. Toledo-Dávila, 648 F.3d 15, 19 (1st Cir. 2011); Budik v. Ashley, 36 F.3d 132, 142 (D.D.C. 2014); Rivera v. P.R. Elec. Power Auth., 4 F.Supp.3d 342, 350 (D.P.R. 2014); Edward H. Cooper, *Ch. 18: Res Judicata*, *in* 18 FEDERAL PRACTICE AND PROCEDURE: JURISDICTION & RELATED MATTERS § 4403 (Charles Alan Wright, Arthur R. Miller eds., 3d ed. 2020); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 312 (1993) (noting the difficulty of forecasting "probability of future suits" and assessing "risk of preclusion"); Lindsey D. Simon, *Claim Preclusion and the Problem of Fictional Consent*, 41 CARDOZO L. REV. 2561, 2572 (2020) (noting that claim preclusion bars claims that were raised *and* that could have been raised); Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47, 68 (2001) (noting incentives for parties to introduce in one case all facts and law "relevant to resolution of the controversy").

[45] *E.g.*, OFI Asset Mgmt. v. Cooper Tire & Rubber, 834 F.3d 481, 492–93 (3d Cir. 2016); Lee v. Ohio Educ. Ass'n, 951 F.3d 386, 393 (6th Cir. 2020); Cincinnati Life Ins. Co. v. Beyrer, 722 F.3d 939, 946–47 (7th Cir. 2013) (citing Stanard v. Nygren, 658 F.3d 792, 798 (7th Cir. 2011)); Destfino v. Reiswig, 630 F.3d 952, 958–59 (9th Cir. 2011); Glenn v. First Nat'l Bank, 868 F.2d 368, 371–72 (10th Cir. 1989); Weiland v. Palm Beach Cnty. Sheriff's Off., 792 F.3d 1313, 1320–23 (11th Cir. 2015). *But cf.* United States *ex rel.* Estate of Cunningham v. Millennium Lab'ys of Cal., Inc., 713 F.3d 662, 664 n.2 (1st Cir. 2013) (noting that pleading's "'shotgun' nature" cannot on its own support dismissal, given that even one claim can afford subject matter jurisdiction).

In this Part, I describe two key aspects of pleading, a kind of plane on which doctrines expand. First, I distinguish between claims and counts, the theories of relief through which claims are resolved, providing a conceptual foundation and illustration of how multiple counts can channel an underlying claim. Then, I situate pleading as part of a complex adaptive system, drawing on complexity theory to elucidate how proliferating, overlapping counts can increase legal complexity. I also inventory system features that make pleading strategy essential.

A. Resolving Claims Through Counts

Given courts' historically contingent roles in dispute resolution, it is no wonder that how we get cases heard has varied. The most significant contrast in early American law was between pre-fusion common law and equity pleading rules.[46] Common law pleading centered on a fixed array of "forms of action," which presented triable issues through "highly stylized and often fictitious language."[47] Equity pleading, in contrast, centered on the "bill in equity," a "straightforward, factual account[] of the controversy" and request for discovery.[48] These practices evinced the common law and equity courts' relationship: one could not rely on equity where there was "an adequate remedy at law," and so the bill in equity was "the procedural vehicle for the exceptional case."[49]

Our current focus on claims as the cores of disputes arose from these practices' gradual fusion. But claims were always there, and the form of action and the bill in equity were only ever devices by which claims were brought to court. The simple yet rigid common law approach "gave court and parties notice of litigation" but obscured a claim's "precise nature."[50] And flexible yet indeterminate equity unearthed facts but provided less guidance to future system users on what claims were at stake.[51] In this Section, I explain and illustrate what a claim is and how it relates to a count, the modern doctrinal device for bringing claims to court.

As Charles Clark explained, the claim (or cause of action) is "the group of operative facts giving cause or ground for judicial interference," in other words "the

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[46] *See* Main, *supra* note 10, at 444 ("The law's dilemma long has been to develop a jurisprudence that recognizes when unique circumstances justify a departure from rigid rules.").

[47] Kellen Funk, *Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76*, 36 J. LEGAL HIST. 152, 156 (2015).

[48] *Id.*; Main, *supra* note 10, at 457–58.

[49] Subrin, *supra* note 1, at 918, 920.

[50] Funk, *supra* note 47, at 170; *accord* Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 259 (1926).

[51] Main, *supra* note 10, at 465; Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2120 (1989); Subrin, *supra* note 1, at 920.

facts themselves, not the statement of them."[52] We see this understanding reflected in Rule 8's requirement that a pleading "*state*[] a claim for relief."[53] As Simona Grossi has elaborated, the claim is neither the complaint nor its narrative; the claim is "suggestive of a legal theory," comprising "the operative facts and the attendant rights that exist apart from any pleading."[54] Although influenced by Wesley Hohfeld, "claim" in this sense is broader than his "claim-right," a specific legal incident under which a person has a right that another person fulfill a duty owed to them.[55]

What about that list of first, second, etc. "claims for relief," provided at the back of a complaint? Those "counts" articulate varied bases for liability, often incorporating by reference facts recounted prior, and yet they are not "claims." They are not themselves the facts, "[j]ust as a painting of a pipe is not a pipe."[56] Rather, they are blueprints for the proceedings ahead.[57] Grossi has noted that the term "claim" can be used in this more colloquial manner but, to avoid confusion, has advised referring to these articulations as "counts."[58] I follow her lead in this Article, distinguishing counts from the claims that they serve.

The distinction between claim and count is important for epistemic and pragmatic reasons. As evidence of the multiple layers of legal convention, the distinction reminds us that law is not mere text but "the underlying system of social rules."[59] Whereas the claim *is* part of that underlying law, the count is a reminder that "[t]he

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[52] Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 828 (1924); *see id.* at 832 (noting that joinder is not about joining claims—the underlying facts—so much as recitals of the claims). Operative facts are those that "suffice to change legal relations," creating them or extinguishing them. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 25 (1913).

[53] FED. R. CIV. P. 8(a) (emphasis added).

[54] Grossi, *supra* note 8, at 7, 17.

[55] *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717–18 (1917).

[56] Grossi, *supra* note 8, at 17 (citing Rene Magritte, *La Trahison des images* (illustration) (1929)).

[57] *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 524 (1988) (arguing that although language rules are "contingent," language use can determine subsequent decision and action through "short-term, or even intermediate-term, noncontingency of meaning").

[58] Grossi, *supra* note 8, at 28.

[59] FRANK LOVETT, A REPUBLIC OF LAW 88 (2016) ("[W]hile [texts] can certainly *affect* what the law is—for instance, by creating or changing expectations regarding the incidence of public coercion—in an important sense those texts are not *themselves* the law."); *accord* EVE DARIAN-SMITH, LAWS AND SOCIETIES IN GLOBAL CONTEXTS: CONTEMPORARY APPROACHES 2–4 (2013) (noting the difference between law "presented in law books" and law "constituted and practiced in real life"); Rachel A. Cichowski, *Courts, Democracy, and Governance*, 39 COMPAR. POL. STUD. 3, 10 (2006); Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI., Dec. 12, 2006, at 17, 17.

best laws in the world are meaningless unless they can be meaningfully enforced."[60] The claim comprises an injury—whether from interference,[61] domination,[62] breach of duty,[63] or failure to provide[64]—warranting a remedy. Put differently, whereas rights are "considerations that others are expected to take into account, at least in certain circumstances, in dealing with that person," claims are entitlements to such treatment arising in those certain circumstances.[65] The count, in contrast, is the articulation of how a claim will be proven and adjudicated. That the count is not itself law but can alter legal meaning when asserted is consequential; meaningful change "is not possible without a comprehensive understanding of how rhetoric shapes reality."[66]

Then there is the distinction between count and claim in praxis. The claim "controls the scope of discovery, provides the focal point for summary judgment, and determines the relevance of the evidence to be presented," setting the ambit of

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[60] Subrin & Main, *supra* note 26, at 1877 (quoting Jean R. Sternlight, *Dispute Resolution and the Quest for Justice*, 19 EXPERIENCE 14, 15 (2009)).

[61] *See, e.g.*, ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 12 (1958) (suggesting that "every plea for civil liberties and individual rights" springs from humanity's controversial "individualistic" interest in noninterference).

[62] *See, e.g.*, M. Victoria Costa, *Freedom as Non-Domination and Widespread Prejudice*, 50 METAPHILOSOPHY 441, 453–54 (2019) (construing rights as legal devices to secure nondomination); Eoin Daly, *Freedom as Non-Domination in the Jurisprudence of Constitutional Rights*, 28 CANADIAN J.L. & JURIS. 289, 300–07 (2015) (reconciling rights-based dispute resolution with the republican imperative to eliminate domination). People experience domination, and thus are unfree, where others have "unconstrained abilities to frustrate their choices." Sean Ingham & Frank Lovett, *Republican Freedom, Popular Control, and Collective Action*, 63 AM. J. POL. SCI. 774, 774 (2019); *accord* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 27–28, 56–59, 296 (2012); Christopher McCammon, *Domination: A Rethinking*, 125 ETHICS 1028, 1030, 1047–52 (2015); Melvin L. Rogers, *Race, Domination, and Republicanism*, *in* DIFFERENCE WITHOUT DOMINATION 59, 78–83 (Danielle Allen & Rohini Somanathan eds., 2020).

[63] *See, e.g.*, Leif Wenar, *The Nature of Rights*, 33 PHIL. & PUB. AFFS. 223, 224–37 (2005) (setting out "a modified Hohfeldian framework" of legal incidents, including those pertaining to performance and nonperformance of duties).

[64] *See, e.g.*, MINOW, *supra* note 5, at 72 n.91, 72–73 (critiquing feigned neutrality of adjudicating rights without accounting for differences in wealth and other material opportunities and constraints); Amartya Sen, *Human Rights and Capabilities*, 6 J. HUM. DEV. 151, 152–55 (2005) (linking rights to capabilities or "opportunit[ies] to achieve valuable combinations of human functionings").

[65] Philip Pettit, *The Consequentialist Can Recognise Rights*, 38 PHIL. Q. 42, 45 (1988); *see* Grossi, *supra* note 8, at 9 (explaining how claims incorporate rights as implicated by operative facts).

[66] Main, *supra* note 40, at 804.

what is or could become relevant to the dispute.[67] This reflects "a pragmatic understanding of the basic litigation unit."[68] But it is the count that communicates to others in the dispute where this ambit is. The count lays out a legal test, that is how a claimant will demonstrate and a tribunal will remedy their claim. Like a sonar blip indicating where a sunken wreck was moments ago relative to a dive team, the count points the parties where to go (and not to go) to investigate and record facts and to form arguments. In this way, the count is a tool to assert narrative control over litigation.[69]

Parsing count from claim evinces how more than one count can serve one underlying claim.[70] How claims differ from one another is a Hohfeldian concern;[71] and whether multiple counts serve the same or different claims of course depends on characterizing claims in the first instance.[72] But it seems reasonable to imagine that we can perceive claims, especially in aggregate and over time, as substantially similar enough that we can acknowledge when counts present different legal tests to fix the same problem.[73] In illustrations throughout this Article, we can see how claimants have described what they set out to do as well as their advocacy's effects, a good starting point for parsing claims functionally, not just formally.[74]

We have, in fact, had a lot of practice figuring out what claim grounds a complaint (and its counts), even if our methods are still crude. To perceive a claim more clearly, or to confirm whether there is any "there" at all,[75] courts often look to the

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[67] *See* Grossi, *supra* note 8, at 11–12.

[68] *Id.* at 7; *cf.* Alan M. Trammell, *Transactionalism Costs*, 100 VA. L. REV. 1211, 1218 (2014) (noting that transactionalism, grouping claims that arise from the same "transaction or occurrence," reflects "a flexible and pragmatic vision of how to organize lawsuits").

[69] *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("The [well-pleaded complaint] rule makes the plaintiff the master of the claim . . . ."); Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) (reasoning that "the party who brings a suit [and not the defendant] is master to decide what law [to] rely upon" in seeking to trigger federal court jurisdiction).

[70] The Federal Rules accommodate the use of multiple counts of course. *E.g.*, FED. R. CIV. P. 8(d) (permitting pleading inconsistently or in alternative).

[71] *See, e.g.*, Pierre Schlag, *How to Do Things with Hohfeld*, LAW & CONTEMP. PROBS., 2015, at 185, 204–12; Wenar, *supra* note 63, at 224–37.

[72] *See* Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. 743, 749 (2018) (observing that input characterization is an inevitable problem in legal analysis).

[73] *Cf.* B.E. WITKIN, CALIFORNIA PROCEDURE ch. 5, § 39, (6th ed. 2023), Westlaw 4 Witkin (explaining that complaint states same or different claims when alleging violations of same or different rights). I write "substantially similar" to acknowledge the possibility, given the universe's infiniteness, that no two rights (or no two anythings, for that matter) *are* the same. By analyzing and categorizing, we inevitably hold some phenomena constant or consistent in our minds so that we can study others. *See supra* note 40.

[74] *See infra* Section I.A.2.

[75] GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (1937).

"gravamen of the complaint."[76] The gravamen is the "crux" of a claim, a core of facts that should be relatively impervious to "attempts at artful pleading."[77] Examining the gravamen means "consider[ing] substance, not surface" and resisting the allure of "magic words" that might get, and keep, a case in court.[78] Thus, courts invoke the "gravamen of the complaint" in the course of dismissal, summary judgment, or even venue transfer.[79] The doctrine responds to an enduring dilemma: how a pleading can convince a court and other parties that a case is sound while being able to adapt to inevitable factual revelation.[80]

A further point: while claims might themselves become more complex, perhaps as life on Earth does, it is counts' proliferation that contributes to doctrinal expansion and complexity. Counts are ultimately frameworks for channeling stories toward judicial resolution, stories that themselves have many tellings.[81] Effective channeling depends on stories fitting the confines of available counts,[82] if only because lawyers "must appear to be constructively engaged in a process that 'narrows the issues.'"[83] Where a count insufficiently channels an underlying claim—perhaps conceptually, perhaps in practice—lawyers and clients find new ones that will.

First Amendment doctrine illustrates this well. Freedom of speech and free exercise counts to redress compelled expression arose in two World War II-era cases concerning school flag salute ceremonies. In *Minersville School District v. Gobitis*, the Supreme Court held that a school could expel Jehovah's Witness students for

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[76] *See, e.g.*, Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 752 (2017); OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 33–34 (2015); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 108 (1998); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 660–61 (1978); Imbler v. Pachtman, 424 U.S. 409, 416 (1976); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 266 n.30 (1963); B.E. WITKIN, CALIFORNIA PROCEDURE ch. 4, §§ 145, 945 (6th ed. 2023), Westlaw 3 Witkin.

[77] *Fry*, 137 S. Ct. at 755.

[78] *Id.*

[79] *E.g.*, *OBB Personenverkehr AG*, 577 U.S. at 35, 38 (upholding dismissal of Californian's tort suit against Austria's state-owned railway because it "turn[ed] on the same tragic episode in Austria" and thus was barred by Foreign Sovereign Immunities Act, despite stateside ticket sales); *Imbler*, 424 U.S. at 416, 430–31 (upholding dismissal of a § 1983 suit against a prosecutor who used perjured testimony to achieve conviction, because the conduct, "initiating a prosecution and . . . presenting the State's case," were among traditional functions for which a prosecutor has immunity).

[80] *See* Clark, *supra* note 50, at 285.

[81] *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2416 (1989) (observing that we often "will not be able to ascertain the single best description or interpretation of what we have seen").

[82] *See* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 66 (2017) (observing that litigation both "requires that individuals fit their stories into the categories mandated by law" and disseminates "stories that might not otherwise be heard").

[83] LoPucki & Weyrauch, *supra* note 43, at 1441; *see* Farbman, *supra* note 20, at 1927 (observing that lawyers cannot "rupture their relationship to the legitimacy of the process").

refusing to salute the flag.[84] Rejecting a free exercise challenge, the Court would not question the soundness of the school's policy.[85] Following *Gobitis*, vigilantes persecuted Witnesses, compulsory flag salutes proliferated, and expulsions of Witness students shot up.[86] Despite these harmful ramifications, the Court had broached an enduring dilemma. Schools tend to "awaken in the child's mind" ideas "contrary to those implanted by the parent."[87] Yet schools, as public agencies, may neither serve mere private ends nor relinquish their obligations to students whose parents deny them knowledge or liberation.[88]

The Court revisited this dilemma three years later in *West Virginia State Board of Education v. Barnette*, an about-face about a salute adopted in *Gobitis*'s wake.[89] As before, Witness students had refused to salute and been expelled; but the Court reframed religious exemption as universal speech protection.[90] The issue became whether instruction that "'tend[s] to inspire patriotism'" could be "short-cut by substituting a compulsory salute and slogan."[91] It could not be, the Court held, without letting the state compel one to say what is *not* on one's mind.[92] As Robert Jackson famously penned, "no official . . . can prescribe what shall be orthodox . . . or force

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[84] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591–93, 600 (1940); Vincent Blasi & Seana Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409, 410–16 (Michael C. Dorf ed., 2d ed. 2009).

[85] *See Gobitis*, 310 U.S. at 592–93, 598, 600.

[86] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 63 (2018); *see* Blasi & Shiffrin, *supra* note 84, at 419–22.

[87] *See Gobitis*, 310 U.S. at 599.

[88] *See* Rob Reich, *Equality, Adequacy, and K–12 Education*, *in* EDUCATION, JUSTICE, AND DEMOCRACY 43, 57 (Danielle Allen & Rob Reich eds., 2013) (cautioning against "deploy[ing] public institutions to deliver private advantages"); OLÚFẸ́MI O. TÁÍWÒ, ELITE CAPTURE: HOW THE POWERFUL TOOK OVER IDENTITY POLITICS (AND EVERYTHING ELSE) 22 (2022) (noting that "elite capture happens when the advantaged few steer resources and institutions that could serve the many toward their own" objectives); Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1521–22 (2018) (observing that education is "a sphere of shared responsibilities rather than a contest between parents and the state for control over children's upbringing," and each group must "ensure that children are exposed to new ideas and ways of life when they are at school").

[89] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626–27, 642 (1943); Blasi & Shiffrin, *supra* note 84, at 422–23. The decision further charged courts with monitoring schools. *See* DRIVER, *supra* note 86, at 66–67.

[90] *See Barnette*, 319 U.S. at 633–34.

[91] *Id.* at 630–31 (quoting *Gobitis*, 310 U.S. at 604 (Stone, J., dissenting)).

[92] *See id.* at 634.

citizens to confess by word or act their faith therein."[93] Sincere or not, the salute influenced students covertly, "circumvent[ing] critical reflection."[94]

From a freedom of conscience nexus,[95] *Barnette* bifurcated compelled expression claims as remediable through speech and religious exercise counts.[96] Ever since, claimants have based such challenges on either freedom of speech, free exercise, or both.[97] For some, freedom of conscience has been a religious matter;[98] for others, a matter of speech.[99] This has afforded multiple, overlapping doctrines, as "[t]he First Amendment protects speech and religion by quite different mechanisms."[100] Speech doctrines categorize speech and scrutinize its restriction in varying degrees.[101] Religious exercise doctrines interrogate whether laws target religions or whether practices warrant exemption from neutral laws of general applicability.[102] The divergence bespeaks that we are often trying "to persuade the government to adopt an

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[93] *Id.* at 642.

[94] Blasi & Shiffrin, *supra* note 84, at 437.

[95] *See id.* at 433–34; ARCHIBALD COX, THE COURT AND THE CONSTITUTION 198–99 (1987); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 568 (1983).

[96] *See* DRIVER, *supra* note 86, at 65–67; Genevieve Lakier, *Not Such a Fixed Star After All:* West Virginia State Board of Education v. Barnette*, and the Changing Meaning of the First Amendment Right Not To Speak*, 13 FIU L. REV. 741, 742 (2019); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1346 (2000); COX, *supra* note 95, at 192–98. *Compare Gobitis*, 310 U.S. at 592–93 (considering free exercise violation), *with Barnette*, 319 U.S. at 635–37 (considering "matters of opinion and political attitude" beyond the claim for religious exemption).

[97] *E.g.*, Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 190 (2007) (observing that speech doctrine has successfully channeled religious exercise claims); Leslie Kendrick & Micah Schwartzman, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 163 (2018) (same); Marshall, *supra* note 95, at 561; *cf.* Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 347–48 (2011) (schematizing freedom of conscience violations as "compelled speech, compelled support for private speech, and compelled support for government speech").

[98] *E.g.*, McDaniel v. Paty, 435 U.S. 618, 626–27 (1978); Torcaso v. Watkins, 367 U.S. 488, 495–96 (1961) (striking down a Maryland requirement that government officials attest belief in god, under which claimant was denied a notary public job).

[99] *E.g.*, Wooley v. Maynard, 430 U.S. 705, 713–15 (1977) (striking down a New Hampshire requirement that individuals who found the state motto morally, religiously, and politically abhorrent must nonetheless display it on their car license plates).

[100] Lee v. Weisman, 505 U.S. 577, 591 (1992).

[101] *E.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418–19, 423 (2006); Texas v. Johnson, 491 U.S. 397, 406–07, 412 (1989); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); Buckley v. Valeo, 424 U.S. 1, 14–15, 17 (1976); Miller v. California, 413 U.S. 15, 24 (1973); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[102] *E.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); Emp.

idea as its own" while not "subject[ing] [citizens] to state-sponsored religious exercises."[103]

In cultivating both speech and religious exercise theories, claimants and their lawyers have demonstrated how to use multiple, overlapping counts to resolve compelled expression claims. That such counts are not exclusive and may be asserted together is crucial to doctrinal expansion as an increase in legal complexity, the concept to which I turn next.

B. Pleading Within Complexity

Claimants plead and devise counts in a "complex adaptive system," where "large networks of components with no central control and simple rules of operation give rise to complex collective behavior, sophisticated information processing, and adaptation via learning or evolution."[104] It is almost prosaic to say that our legal system is complex. Yet seen through complexity science, the implications of the system as "organized complexity," developing and implementing "fail-safe strategies growing ever more diverse and targeted," are weighty.[105] Complexity science deals with, among other things, questions of system robustness, system fragility, the relationship between the two, and how a system "can be both robust *and* fragile."[106] Scholars do not yet agree on metrics "for determining what it takes to move an adaptive system to a complex adaptive system and for measuring the degree of complexity," but the field is new.[107]

One of complexity theory's foundational insights is that complexity is not complicatedness.[108] Under complicatedness, system elements "maintain a degree of independence from one another" such that removing one element "does not fundamentally alter the system's behavior."[109] Under complexity, in contrast, elements can be interdependent such that removing one element "destroys system behavior

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Div. v. Smith, 494 U.S. 872, 881–82 (1990). Cases from recent decades manifest the incentive to bring separate counts together. *See, e.g.*, Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 570 (2004) (documenting that number of speech counts coinciding with religious exercise counts more than doubled in years after *Employment Division v. Smith*).

[103] *Lee*, 505 U.S. at 591–92.

[104] MELANIE MITCHELL, COMPLEXITY: A GUIDED TOUR 13 (2009).

[105] Ruhl, *supra* note 2, at 585.

[106] *See id.* at 561–62; *see also* David L. Alderson & John C. Doyle, *Contrasting Views of Complexity and Their Implications for Network-Centric Infrastructures*, 40 IEEE TRANSACTIONS ON SYS., MAN, & CYBERNETICS PART A: SYS. & HUMS. 839, 840 (2010); Ruhl & Katz, *supra* note 24, at 206–07.

[107] Ruhl, *supra* note 34, at 891.

[108] Ruhl, *supra* note 2, at 565; Ruhl, *supra* note 34, at 890.

[109] JOHN H. MILLER & SCOTT E. PAGE, COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE 9 (2007).

to an extent that goes well beyond" the ambit of that element's operation.[110] *Twiqbal* exemplifies complexity as distinct from mere complicatedness. Imposing a plausibility standard in pleading, "the [Supreme] Court not only fixed on a *novel* and *unpredictable* test that applies to every case, but . . . also followed a *disruptive* legal process in so altering a defining feature of the litigation system."[111] *Twiqbal* was not an isolated rule change but a profoundly integral one.

Like the legal system as a whole and civil procedure writ large, pleading operates as a complex system.[112] Complexity theory holds that society's subsystems, in which communications "take on differentiated meanings" are themselves complex systems.[113] Moreover, pleading features tradeoffs, its rules susceptible to strategy and manipulation, its decisionmakers to informational limits and institutional incentives. In the next few Sections, I discuss these constraints, which pleaders navigate while providing notice and narrowing the issues.[114] Some are architectural, such as formal system rules and the information environment in which claimants plead; others are agential, like lawyers' and judges' roles and habits.

1. Rule and Resource Limits

Claimants strategize "under conditions of uncertainty."[115] We do not know early in litigation what facts discovery will uncover or what theories will persuade courts.[116] When pleading, cognitive fallacies limit perception of counts' existence, costs to assert, or likely success. Favoring anecdotes over probabilities, we can misconstrue how viable counts are, and we tend to prioritize information to which we

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[110] *Id.*

[111] Clermont & Yeazell, *supra* note 9, at 832; *see* Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1108 (2015) (noting difficulty of rulemaking while *Twiqbal* pleading standard elevation was still taking effect and thus norms were very much in flux).

[112] *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1966 (2007) (describing procedure as "tightly integrated system").

[113] Julian Webb, *Law, Ethics, and Complexity: Complexity Theory & the Normative Reconstruction of Law*, 52 CLEV. ST. L. REV. 227, 231 (2005).

[114] *See, e.g.*, Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 941 (1990) (noting such pleading functions as providing notice, stating facts, narrowing issues, and disposing of frivolous claims or defenses); David Marcus, *Two Models of the Civil Litigant*, 64 DEPAUL L. REV. 537, 537–38 (2015) (noting tensions in pleading for different kinds of relief); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 18–19 (2009) (identifying values of pleading: notice, efficiency, and justice); Trammell, *supra* note 68, at 1213–14 (noting "tension between transactionalism's goals": maximizing flexibility to shape lawsuit on front end of litigation and maximizing predictability on back end through preclusion).

[115] Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 126 (1980).

[116] Abrams & Garrett, *supra* note 19, at 1324 (arguing that "there is nothing wrong with pleading a case using multiple theories").

have ready access, even when higher quality information exists elsewhere.[117] Informational constraints affect marginalized litigants especially,[118] and some procedures that would cure lack of information can in fact burden them disproportionately.[119]

Preclusion, waiver, and exhaustion rules comprise just a few procedural constraints on pleader decision-making. Preclusion rules bar relitigating claims or issues that were or could have been resolved conclusively in prior litigation.[120] Claim preclusion thus impels litigants to assert and pursue as many counts as they can,[121] consolidation abetted by other procedures.[122] Furthermore, waiver rules prevent claimants from arguing and appealing issues or theories that they failed to raise in their pleadings.[123] But these rules can stimulate "overlitigation" too.[124] Claimants feel pressure to include all distinct counts and to argue each one as intensely as the next, regardless of the prudence of doing so, in order not to forfeit them.[125] In addition,

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[117] *See* Saks & Kidd, *supra* note 115, at 137 (discussing misperceptions of representativeness in data as well as estimations influenced "not only by [events'] actual frequencies . . . but by their availability in memory"); Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1300–05 (2003) (discussing availability heuristic and probability neglect).

[118] *See, e.g.*, Emily R.D. Murphy, *Brains Without Money: Poverty as Disabling*, 54 CONN. L. REV. 699, 726–40 (2022) (discussing adverse effects on decision-making that are fairly attributable to poverty or negative income shocks, such as augmented "attentional neglect").

[119] *See, e.g.*, Alex Reinert, *Pleading as Information-Forcing*, 75 LAW & CONTEMP. PROBS. 1, 3 (2012) (noting risk in "information-forcing" pleading replacing notice pleading, given difficulty in obtaining certain evidence prior to discovery); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 586–87 (2001) (noting that limiting discovery impels "shotgun" pleading in order to maximize opportunities to obtain evidence).

[120] *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 19, 27 (AM. L. INST. 1982); COOPER, *supra* note 44, §§ 4401, 4403; Allan D. Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29, 31–34 (1964) (specifying interests in repose provided by preclusion as efficient courts, respected judgments, and unharried litigants).

[121] *See supra* note 44 and accompanying text.

[122] *E.g.*, FED. R. CIV. P. 15(c) (permitting amending pleadings to include matters relating back to matters already pled); FED. R. CIV. P. 18 (permitting parties to join as many claims as they have against each other).

[123] *E.g.*, Hayes v. SkyWest Airlines, Inc., 12 F.4th 1186, 1201 (10th Cir. 2021); Méndez-Núñez v. Fin. Oversight & Mgmt. Bd. for P.R., 916 F.3d 98, 114 n.12 (1st Cir. 2019); Anschutz Corp. v. Merrill Lynch & Co., 690 F.3d 98, 111 n.16 (2d Cir. 2012); *see* Abrams & Garrett, *supra* note 19, at 1324 (noting that claimants assert multiple counts in order to preserve arguments on appeal).

[124] Yuval Sinai, *The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel in Civil Actions*, 56 MCGILL L.J. 673, 677 (2011).

[125] *See id.* at 685, 698; *see also* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 814 (1989).

preclusion that is unevenly applied or not trans-substantive can distort otherwise clear incentives for claimants.[126]

Exhaustion rules, meanwhile, require that claimants avail themselves of designated processes in order to trigger courts' jurisdiction.[127] Unless and until exhaustion requirements are precise and publicized, claimants risk false starts in seeking relief. Consider *Fry v. Napoleon Community Schools*, in which the Supreme Court held that a (dis)abled child's parents need not exhaust procedures under the Individuals with Disabilities Education Act (IDEA) in order to sue for educational remedies under the Americans with Disabilities Act.[128] The IDEA affords certain educational remedies and requires exhausting administrative procedures when claiming those remedies.[129] Looking to the gravamen of the parents' complaint, however, the Court determined that they sought distinct remedies not actually triggering the IDEA's exhaustion requirement.[130]

2. Professional Constraints and Incentives

Proliferating counts are salient to varying degrees due to the lawyer's professional norms. A lawyer must provide representation that is competent in light of complexity,[131] as well as diligent, taking "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[132] A lawyer need not press every advantage but is restrained primarily by their own composite identities,[133] their duties to nonclients,[134] and their duties as officers of the court.[135] At the same time, the lawyer is fallible, and representation "will almost never be based on anything

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[126] *See, e.g.*, Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 302 (2016) (describing asymmetric preclusion, as when public civil rights enforcement can both cut off private enforcement actions and preclude future ones).

[127] *E.g.*, Ross v. Blake, 136 S. Ct. 1850, 1857–58 (2016); Sauceda v. Garland, 23 F.4th 824, 835 (9th Cir. 2022). *But see* Hardaway v. Hartford Pub. Works Dep't, 879 F.3d 486, 491 (2d Cir. 2018) (holding that burden to plead exhaustion in a Title VII lawsuit lies with defendants).

[128] Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 748 (2017).

[129] *Id.* at 748–49 (citing 20 U.S.C. §§ 1414(e), 1415(b), (d)–(i)).

[130] *Id.* at 758.

[131] *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. (AM. BAR ASS'N 1983).

[132] *Id.* at r. 1.3 cmt.

[133] *See* Margaret Chon, *Multidimensional Lawyering and Professional Responsibility*, 43 SYRACUSE L. REV. 1137, 1138–40, 1156–57 (1992).

[134] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 3.4 (barring treating opposing parties unfairly); *id.* at r. 4.1 (barring knowingly making false statements of fact or law); *id.* at r. 4.4(a) (barring needlessly embarrassing or burdening third parties and violating their rights).

[135] *See* Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 40–42, 76–82 (1989) (discussing antagonism between lawyers' roles as zealous advocates and as officers of the court); John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 215 (2008) (same).

approaching complete knowledge."[136] Failure to leverage multiple theories of relief, or the "right" one, will not likely trigger sanction.[137]

The lawyer is bound also by duties of truthfulness and candor, which impose various obligations on handling law. Codified duties are narrow—do not knowingly lie, fail to disclose adverse authority, or offer false evidence[138]—representing an ethical "floor."[139] But the lawyer who treats truth cavalierly engages in bullshit.[140] Bullshit, in Harry Frankfurt's formulation, is speech "grounded neither in a belief that it is true nor, as a lie must be, in a belief that it is not true."[141] A bullshitter tries "to manipulate the opinions and the attitudes of those to whom they speak" and is "more or less indifferent to whether what they say is true or whether it is false."[142] Rhetoric and strategy indifferent to "things as they are" corrode professional values and, if egregious, even the rule of law.[143]

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[136] Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1384 (2008).

[137] *See* Norman W. Spaulding, *The Practice of Law as a Useful Art: Toward an Alternative Theory of Professionalism*, 40 FORDHAM URB. L.J. 433, 452–54 (2012) (acknowledging limited client remedies for many breaches of professional duty).

[138] *E.g.*, MODEL RULES OF PRO. CONDUCT r. 3.3; CAL. R. PRO. CONDUCT r. 3.3 (STATE BAR OF CAL. 2023); TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 3.03 (STATE BAR OF TEX. 2022).

[139] Ann B. Ching, *Taking a Positive Approach to Government Ethics*, 35 NOTRE DAME J.L., ETHICS & PUB. POL'Y 753, 753 (2021).

[140] *See* W. Bradley Wendel, *Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy*, 28 YALE J.L. & HUMANS. 105, 111 (2016) (arguing that lawyers "are constrained by what is the case" and that granting otherwise "ultimately leads to a cynical, bullshitty (in Harry Frankfurt's sense) style of advocacy that undermines its own . . . legitimacy" (footnote omitted)); *see also* Matthew L.M. Fletcher, *Bullshit and the Tribal Client*, 2015 MICH. ST. L. REV. 1435, 1437 (2015) ("Lawyers are bullshitters, too."); Zahr K. Said & Jessica Silbey, *Narrative Topoi in the Digital Age*, 68 J. LEGAL EDUC. 103, 113 (2018) ("Good lawyers are excellent bullshit-callers . . . .").

[141] HARRY G. FRANKFURT, ON BULLSHIT 33 (2005); *see id.* at 47 ("[T]he essence of bullshit is not that it is *false* but that it is *phony*.").

[142] HARRY G. FRANKFURT, ON TRUTH 3–4 (2006).

[143] WALLACE STEVENS, *The Man with the Blue Guitar*, *in* THE COLLECTED POEMS OF WALLACE STEVENS 165, 165–84 (1954); *see* Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 176 (2018) ("Bullshit is insufficiently concerned with truth, so it risks reducing our knowledge of how the world really is.").

3. Judicial Biases and Incentives

Like the lawyer, the judge (or other legal decisionmaker) is a "strategic player."[144] The judge must be truthful *and* open, "provid[ing] guidance and instruction" to future system users.[145] Candor undergirds restraints on their power; "limitations imposed by constitutions, statutes, and precedents count for little if judges feel free to believe one thing about them and to say another."[146] Yet the judge has interests in "conscious dissembling," whether to preserve continuity with precedents, to maintain collegiality, or to build voting majorities.[147] As for the lawyer, doing so risks trading in "judicial bullshit."[148] A judge ought to square with claimants that some cases are hard and that discretion is inevitable and imperfect, but incentives to play fast and loose with theories abide.[149]

Furthermore, against pressures applied by preclusion rules, which serve efficiency across cases, judges pursue efficiency within cases.[150] Asserting many counts, even against multiple parties, can seem a "rational strategy," improving the odds

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[144] Bone, *supra* note 112, at 1996.

[145] *See* Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 131 (2021); *see also* MODEL CODE OF JUD. CONDUCT r. 1.2, 2.2 cmt. (AM. BAR ASS'N 1990).

[146] David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987); *see, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 48 (2014) (observing that textualism that excludes interpretive tools like legislative history "is just as likely to expand a judge's discretion as reduce it").

[147] Shapiro, *supra* note 146, at 739–50; *accord* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 988–89 (2008); *see, e.g.*, KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 42 (Oxford Univ. Press 2008) (1960) (observing how we train lawyers to see continuities by looking beyond the "*ratio decidendi*, the rule *the court tells you* is the rule of the case"); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Functions*, 96 GEO. L.J. 1283, 1317–42 (2008) (describing institutional goals in sustaining precedent and shoring up legitimacy).

[148] Kolber, *supra* note 143, at 144 (describing *judicial bullshit* as a tool "to keep precedents malleable, avoid line drawing, . . . sound important . . . [or] poetic, . . . and seem principled rather than strategic").

[149] *See* LOVETT, *supra* note 59, at 171 (noting that republican judging acknowledges legal officials' "discretionary interpretation when faced with hard cases"); Rose Elizabeth Bird, *Protecting Individuals' Rights: The Courts' Responsibility in a Changing Society*, 14 LOY. L.A. L. REV. 765, 769 (1981) (cautioning against trivializing hard questions of public concern by packaging them in catchy slogans); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (urging seeing through law's "vivid fictions and metaphors," lest we forget "the social forces which mold the law and the social ideals by which the law is to be judged").

[150] *See, e.g.*, Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 405 (2013) ("Judges only have so much time to decide so many cases, meaning . . . that judicial attention is a scarce resource.").

that at least one advances past pleading.[151] But *shotgun* and *kitchen sink* pleading can "desensitize courts to legitimate claims" by overwhelming them with dubious ones.[152] Courts themselves discourage the practice in order to make litigation more manageable, narrowing issues sooner rather than later.[153]

Finally, judges' biases and inexperience can also constrain pleaders' strategy to assert multiple counts. On one hand, judges can exhibit social biases, leading them to discount particular arguments or, worse, particular claimants.[154] For example, courts generally disfavor plaintiffs bringing intersecting claims of discrimination.[155] On the other hand, as fewer counts advance to trial, judges have less and less expertise with what counts will be like when fully developed and must rely on common sense, subject to the same cognitive biases that affect pleaders.[156]

II. DOCTRINAL EXPANSION

In this Part, I theorize doctrinal expansion, describing the ideational and temporal proliferation of counts. Doctrines expand from varied origins: a structure or relationship between multiple constitutional guarantees,[157] the convergence of two

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[151] Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 208 n.182 (1998).

[152] *Id.*

[153] *See* cases cited *supra* note 45; *see also* Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 550 (2008) (describing a judicial diatribe against wasteful "shotgun" pleading in *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 979 (11th Cir. 2008)); Debbie A. Wilson, Note, *The Intended Application of Federal Rule of Civil Procedure 11: An End to the "Empty Head, Pure Heart" Defense and a Reinforcement of Ethical Standards*, 41 VAND. L. REV. 343, 364 (1988) (discussing how Rule 11 curbs "shotgun" pleading).

[154] *E.g.*, Levy, *supra* note 150, at 419 (noting that pro se, immigration, Social Security, and various criminal appeals "receive less judicial attention than other categories of cases"); Victor D. Quintanilla, *Doing Unrepresented Status: The Social Construction and Production of Pro Se Persons*, 69 DEPAUL L. REV. 543, 550–51 (2020) (discussing legal professionals' tendencies to treat self-represented parties less favorably than counseled ones); Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of* Pro Se *Status*, 42 LAW & SOC. INQUIRY 1091, 1114 (2017) (same).

[155] *E.g.*, Rachel Kahn Best, Lauren B. Edelman, Linda Hamilton Krieger & Scott R. Eliason, *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC'Y REV. 991, 992 (2011); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1456–59 (2009); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 714 (2015).

[156] *See* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767 (2014).

[157] *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (identifying the right to vote as fundamental "because [it is] preservative of all rights"); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 8–13 (1969) (illustrating how individual rights cases can be decided structurally and relationally rather than "textually").

clauses,[158] or a single statutory phrase.[159] Whereas overlapping sources of law might obviously engender new counts, singular words or phrases are no less generative, "capacious enough to respond to changes" in our needs and desires as readers of law.[160]

The first stage of doctrinal expansion is proliferation of theories for redressing harms. In a sense, this is a lateral (or horizontal) process, making more and more counts available to litigants at one moment in time. The second stage is those theories' ossification, fixing them in court reporters and legal databases, but fixing them also in legal understanding as the appropriate ways to conceptualize underlying claims. This process is lineal (or vertical), making counts available to subsequent generations. Describing these moves, I anticipate several problems arising from this increasing complexity, to which I turn in Part III.

A. Hydraulic Shifts

The first part of doctrinal expansion is the hydraulic shift: the creation of a new count to channel a claim to resolution where existing counts have failed. Scholars have called many phenomena "hydraulic" for their resemblance to the compression and resulting movement of fluid in confined space.[161] Mindful of the limits of metaphor,[162] I draw inspiration from Samuel Issacharoff's and Pamela Karlan's "hydraulic" account of campaign spending that, even under well-meaning regulations, "never really disappears" and, "like water, has to go somewhere."[163] If we cannot

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[158] *See* U.S. CONST. amend. I.

[159] *See* 42 U.S.C. § 2000e-2(a).

[160] Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2355 (2021).

[161] Hydraulics is the applied science of fluid mechanics, which explain the effects of force applied to fluids in motion and at rest. *See* BLAISE PASCAL, THE PHYSICAL TREATISES OF PASCAL: THE EQUILIBRIUM OF LIQUIDS AND THE WEIGHT OF THE MASS OF THE AIR 5–11 (Austin P. Evans ed., I.H.B. Spiers & A.G.H. Spiers trans., Columbia Univ. Press 1937) (1663).

[162] In using metaphor to analyze law, we should be candid about its power and perils. Carrie Sperling & Kimberly Holst, *Do Muddy Waters Shift Burdens?*, 76 MD. L. REV. 629, 632 (2017) ("While metaphors can be used to help us understand abstract or complex concepts, they can also be used to manipulate our reaction to words and concepts.").

[163] Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999); *see also* McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 224 (2014) (noting how aggregate limits on campaign finance might "encourage the movement of money away from entities subject to disclosure"); Fed. Election Comm'n v. Wisc. Right to Life, Inc., 551 U.S. 449, 515 (2007) (Souter, J., dissenting) (citing Issacharoff & Karlan, *supra*); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 224 (2003) ("Money, like water, will always find an outlet."); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 489 (7th Cir. 2012) (citing Issacharoff & Karlan, *supra*); Emily's List v. Fed. Election Comm'n, 581 F.3d 1, 19 (D.C. Cir. 2009) (citing Issacharoff & Karlan, *supra*); Jocelyn Benson, *Saving Democracy: A Blueprint for Reform in the Post*–Citizens United *Era*, 40 FORDHAM URB. L.J. 723, 724 n.1 (2012)

turn off the tap, then it might be better to diffuse money in politics by affording "*multiple* channels of political influence."[164] It is the creation of multiple doctrinal channels that my theory tries to render.

We can imagine three moments in a hydraulic shift: an obstruction, a pressure buildup, and a kind of equitable pressure release, resulting in recognition of a new theory or institutional opportunity.[165] I describe two kinds of shifts, which I term "theory hydraulics" and "forum hydraulics" respectively, the former being more central to doctrinal expansion (but the latter being just as vital to legal change more broadly). Claimants cause both kinds of shifts after facing obdurate, even hostile, decisionmakers.[166] When one theory fails to deliver, "the demand that the legal claim embodies might be made more pressing and the deprivation more acute."[167] In addition to, or as part of, the theory and forum shifts that I discuss, loss triggers a range of claimant responses, from movement restructuring to deeper engagement in grassroots politics and legal reform.[168] Theory and forum shifts are meaningful, moreover, as increases to complexity, not just complicatedness. Concurrently available due to initial disputes, they force appraisal and prioritization for subsequent disputes.

1. Theory Hydraulics

The process that I synthesize as "theory hydraulics" can occur, scholars have observed, through doctrinal displacement.[169] Kenji Yoshino described the Supreme Court's solicitude for substantive due process over equal protection as "the end of equality doctrine *as we have known it*," though not "the end of protection for subordinated groups."[170] "Squeezing law is often like squeezing a balloon," he wrote; "[t]he contents do not escape, but erupt in another area . . . ."[171] The Court,

(citing Issacharoff & Karlan, *supra*); Seth Katsuya Endo, *Discovery Hydraulics*, 52 U.C. DAVIS L. REV. 1317, 1319 n.3 (2019); Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to* Our Undemocratic Constitution, 55 DRAKE L. REV. 925, 927, 937 (2007); Sarah C. Haan, *The CEO and the Hydraulics of Campaign Finance Deregulation*, 109 NW. U. L. REV. 269, 270–71 (2015); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 149 (2005); Athanasios Psygkas, *The Hydraulics of Constitutional Claims: Multiplicity of Actors in Constitutional Interpretation*, 69 U. TORONTO L.J. 211, 213 (2019).

[164] Issacharoff & Karlan, *supra* note 163, at 1731 (quoting Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 133 (1995)); *see also id.* at 1734.

[165] *Cf.* Main, *supra* note 10, at 478 (noting the "awesome power of equity to create entirely new rights").

[166] *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011).

[167] *Id.* at 984.

[168] *See id.* at 969 (describing effects of litigation loss on social movements).

[169] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

[170] *Id.* (emphasis added).

[171] *Id.*

Yoshino wrote, limited equal protection out of anxiety over ever available antidiscrimination protections and opted for "liberty-based dignity."[172] Earlier, Louis Henkin had argued that the laissez-faire-infused substantive due process of *Lochner v. New York* crept back into doctrine after years of being "unmentionable."[173] "[E]ven as substantive due process disappeared as a limitation on regulation of 'liberty' in economic activities," Henkin wrote, a "presumptive immunity to governmental regulation" arose "to frustrate governmental assertions of public good."[174] Each account described the enduring transformation of an entire jurisprudence around protecting a legal interest.

Displacement is one kind of theory hydraulics. But a new theory often forms without supplanting an old one, or obscures it only temporarily, leaving multiple counts on the books.[175] In school finance litigation, for example, educational equality arguments widely used during the 1970s and 1980s gave way, at least at first, to educational adequacy arguments over multiple waves of federal and state cases.[176] But equality (or equity) theories soon resurfaced; current cases leverage them alongside adequacy theories to target discrete resource and administrative failures.[177] Marriage equality likewise reflects the proliferation of theories concurrently used, most prominently equal protection and substantive due process.[178] Voting rights doctrine, specifically antidilution doctrine, embodies this steady hydraulic development too, as I illustrate here.

Racial vote dilution cases "represent the fruits" of prior struggles against vote denial and to broaden the electorate, litigators and scholars theorizing and resolving

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[172] *Id.* at 776–87; *see also id.* at 750 ("[T]he Court has shut doors in its equality jurisprudence in the name of pluralism anxiety and opened doors in its liberty jurisprudence to compensate.").

[173] Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1417 (1974).

[174] *Id.* at 1411, 1417.

[175] *See, e.g.*, *infra* notes 197–200 and accompanying text. Often these are "partial redundancies" or incomplete, rather than total, coverage between legal devices. *See* Golden, *supra* note 33, at 640–41.

[176] *See* David G. Hinojosa, *"Race-Conscious" School Finance Litigation: Is a Fourth Wave Emerging?*, 50 U. RICH. L. REV. 869, 871–73 (2016); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 556–62 (2006).

[177] *See, e.g.*, Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 740–41 (2018); William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1915–16 (2017).

[178] *See, e.g.*, Abrams & Garrett, *supra* note 19, at 1331–38; Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1528–41 (2016); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1412–13 (2010); *cf.* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) (arguing that the relationship between the equal protection and due process clauses is "bi-directional").

dilution in tandem.[179] The right to vote means the right to an effective vote, which can turn on aggregating one's vote with others'.[180] While many laws can reduce electoral power, reapportionment plans do so through "cracking" or "packing."[181] Cracking splits groups across districts or an at-large system, precluding effective majorities or pluralities; packing aggregates them "beyond the level needed for . . . effective political control" in one district (or too few districts), wasting votes.[182] Facing obdurate courts, lawyers expanded doctrine to fix these problems, crafting an "intensely local" constitutional test;[183] a count under the Voting Rights Act (VRA), which initially abolished literacy tests and poll taxes but became an antidilution tool;[184] and a racial gerrymandering count that was once part of a "disorderly retreat" from antidilution.[185]

The first count appraised whether laws "operate to minimize or cancel out [minority] voting strength."[186] In a key early victory, Black and Latino voters in Texas used circumstantial evidence to prove "invidious discrimination," and the Court upheld an "intensely local appraisal" of the totality of that evidence.[187] The Court tried to elevate this standard in 1980's *City of Mobile v. Bolden*, purporting both to require perpetrator intent, not just disparate effect, and to hold that sociological facts that evince invidiousness in actuality somehow cannot prove intent.[188] This

[179] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 302 (2000); *see* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1424–27 (1991) (observing that dilution and its remedies became better understood when litigated).

[180] Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1676–79 (2001). Thus, redressing dilution entails assessing "relative treatment of *groups* in determining whether an *individual* has been harmed." *Id.* at 1666.

[181] Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1732 (1993).

[182] Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 19 (1993).

[183] Rogers v. Lodge, 458 U.S. 613, 621–27 (1982).

[184] *See* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1254–56 (1989).

[185] *See* KEYSSAR, *supra* note 179, at 297–98.

[186] Whitcomb v. Chavis, 403 U.S. 124, 143 (1971) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Burns v. Richardson, 384 U.S. 73, 88 (1966)); *see* Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 179–80 (2012).

[187] *See* White v. Regester, 412 U.S. 755, 765–70 (1973).

[188] *See* City of Mobile v. Bolden, 446 U.S. 55, 72–74 (1980) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976)).

deviated from prevailing court practice of looking to "a panoply of factors," any number of which could show dilution.[189]

The deviation was short-lived, as the Court reestablished its totality of the circumstances test two years later in *Rogers v. Lodge*.[190] Affirming that "racially neutral" elections in Georgia had been "*maintained* for invidious purposes," the Court solidified one of the dilution counts available today.[191] Voters can show unconstitutional dilution through any relevant facts, including disparate effect.[192] Crucially, they can use sociological evidence, like lower voter registration rates, historical discrimination, and elected officials' unresponsiveness; several factors, or other factors entirely, suffice, representing "'a blend of history and an intensely local appraisal of [a law's] design and impact.'"[193]

Also reacting to *City of Mobile*, Congress created a second antidilution count by amending Section 2 of the VRA to provide a "results" test that prioritizes proof of dilutive effects.[194] Under *Thornburg v. Gingles*, which set a Section 2 framework, minority voters show that: (1) they are numerous and geographically compact; (2) they vote as a bloc; and (3) they usually lose to White bloc voting.[195] Then they

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[189] Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973).

[190] Rogers v. Lodge, 458 U.S. 613, 620–22 (1982).

[191] *Id.* at 616 (citation and internal quotation marks omitted); *see* Navajo Nation v. San Juan Cnty. (*Navajo Nation I*), 162 F. Supp. 3d 1162, 1173 (D. Utah 2016) (observing that *Rogers* claims "remain cognizable"); *see also*, *e.g.*, Harding v. Cnty. of Dallas, 948 F.3d 302, 312–15 (5th Cir. 2020); Patino v. City of Pasadena, 230 F. Supp. 3d 667, 673–74, 676–77 (S.D. Tex. 2017); First Am. Compl. at ¶¶ 160–73, S.C. State Conf. of NAACP v. McMaster, 584 F. Supp. 3d 152 (D.S.C. Dec. 23, 2021) (No. 21-cv-03302), ECF No. 84.

[192] *See Rogers*, 458 U.S. at 618.

[193] *Id.* at 622 (quoting White v. Regester, 412 U.S. 755, 769–70 (1973)); *see also id.* at 621–27 (noting appropriate consideration of *Zimmer* factors); *Zimmer*, 485 F.2d at 1305; Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1127 (1989) (noting that *Rogers* sanctioned finding intent in "an aggregate of factors" that indirectly bear on motivation).

[194] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified at 52 U.S.C. § 10301); Thornburg v. Gingles, 478 U.S. 30, 35 (1986); *accord* Allen v. Milligan, 143 S. Ct. 1487, 1507 (2023); *see* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 443 (2015). Section 2 permits "intent" counts too, though they simply rearticulate *Rogers*. *See* U.S. DEP'T OF JUST., GUIDANCE UNDER SECTION 2 OF THE VOTING RIGHTS ACT, 52 U.S.C. 10301, FOR REDISTRICTING AND METHODS OF ELECTING GOVERNMENT BODIES 9–10 (2021), https://www.justice.gov/opa/press-release/file/1429486/download.

[195] *Gingles*, 478 U.S. at 50–51. The Court derived this framework from an article written by lawyers who represented the challengers in *City of Mobile*. Pamela S. Karlan, *Answering Questions, Questioning Answers, and the Roles of Empiricism in the Law of Democracy*, 65 STAN. L. REV. 1269, 1275 (2013) (citing James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 50–51 (1982)).

show that, all things considered, they "have less opportunity than other[s] . . . to participate in the political process and to elect representatives of their choice."[196]

Voters began to bring statutory rather than constitutional counts, the conventional reason being that it is easier to prove effects than intent.[197] *Rogers* and *Gingles* afford largely overlapping antidilution remedies,[198] but their standards make different demands on litigants. Whereas in *Gingles* the three "preconditions" have tended to be dispositive, with totality evidence either confirming or undermining that finding,[199] *Rogers* is a totality inquiry from start to finish. Yet it has become difficult to square the conventional view that *Gingles* counts are always preferable to *Rogers* counts with the fact that the Court has steadily made the *Gingles* test more onerous (and in turn made *Rogers* more relevant).[200]

The third main vote dilution count arose, ironically, from 1993's *Shaw v. Reno*, where the Supreme Court greenlit a theory "'analytically distinct' from a vote dilution claim."[201] White voters had contested North Carolina making two of twelve congressional districts majority-Black to comply with the VRA, objecting (on paper) to their "dramatically irregular shape[s]."[202] They did not allege dilution and could not prove it.[203] Yet the Court held that voters could challenge a map that "can be viewed only as an effort to segregate the races for purposes of voting."[204]

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[196] *Gingles*, 478 U.S. at 43 (quoting 52 U.S.C. § 10301(b)). Plaintiffs show this through renamed *Zimmer* factors. *See id.* at 44–45.

[197] Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 282 (2020); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 201–02 (2007). *But cf.* Ross, *supra* note 186, at 179 (arguing that *Rogers* tests more for "operative effects" undermining political equality than for bias).

[198] The primary exception: that intent counts "open the door to preclearance under Section 3 of the VRA." Danielle Lang & J. Gerald Hebert, *A Post-*Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J.F. 779, 782 (2018); *e.g.*, Patino v. City of Pasadena, 230 F. Supp. 3d 667, 729–30 (S.D. Tex. 2017) (describing and imposing remedies under § 3(c) VRA, 52 U.S.C. § 10302(c)).

[199] *See* Joshua S. Sellers, *The Irony of Intent: Statutory Interpretation and the Constitutionality of Section 2 of the Voting Rights Act*, 76 LA. L. REV. 43, 52 (2015).

[200] *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2338–43 (2021) (purporting to offer counter-considerations to totality factors for Section 2 counts); Bartlett v. Strickland, 556 U.S. 1, 18 (2009) (heightening first *Gingles* precondition by narrowing relevant demographic baseline); Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1437 n.68, 70 (2011) (book review) (discussing *Bartlett* and other decisions that narrowed baseline further).

[201] Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 652 (1993)).

[202] *Shaw*, 509 U.S. at 633–34.

[203] *Id.* at 641; *see* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after* Shaw v. Reno, 92 MICH. L. REV. 483, 494 (1993).

[204] *Shaw*, 509 U.S. at 642.

Over time, *Shaw* has become another antidilution theory. It was based superficially on a 1960 challenge to a law redrawing Tuskegee, Alabama as an "uncouth twenty-eight-sided figure" that excluded almost all of the city's Black voters.[205] And whereas other counts redressed the material harm of diminished political power, *Shaw* targeted the "expressive" harm in formal segregation,[206] reflecting ideological drift toward "colorblindness."[207] The injury was *how* districts were drawn, not the *effects*.[208] *Shaw* counts show that mappers "subordinated other factors . . . to racial considerations"; if race predominated, then districts must withstand strict scrutiny.[209] Although *Shaw* purported to be a race-neutral theory, Black and Latino voters have repurposed its focus on segregative acts to fix dilutive effects.[210] They have successfully challenged setting "racial targets" for districts, an "expressive" act, which tends to result in cracking or packing.[211]

At each moment when voting rights advocates encountered resistance, they devised a new theory of relief or repurposed an existing one. But the power behind

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[205] Gomillion v. Lightfoot, 364 U.S. 339, 340–41 (1960).

[206] Pildes & Nieme, *supra* note 203, at 493; *accord* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2285–86 (1998).

[207] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[208] *See* Miller v. Johnson, 515 U.S. 900, 911–12 (1995) (observing that racial gerrymandering makes "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates'" (quoting *Shaw*, 509 U.S. at 647)).

[209] Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017) (citation and internal quotation marks omitted).

[210] *See, e.g.*, Abbott v. Perez, 138 S. Ct. 2305, 2334–35 (2018) (upholding Texas Latino voters' *Shaw* count in Texas); *Cooper*, 137 S. Ct. at 1466, 1468, 1472 (upholding Black voters' *Shaw* counts in North Carolina); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 794–95 (2017) (vacating failure of Black voters' *Shaw* counts in Virginia); Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 258 (2015) (vacating failure of Black voters' *Shaw* counts in Alabama).

[211] *See, e.g.*, *Cooper*, 137 S. Ct. at 1464, 1468 (emphasizing that racial targets dispersed Black voters into districts where they could not form effective voting blocs); *Bethune-Hill*, 137 S. Ct. at 802 (emphasizing that a target could ensconce "functional working majority"); *Ala. Legis. Black Caucus*, 575 U.S. at 273–74 (emphasizing that targets directly influenced district boundaries); Navajo Nation v. San Juan Cnty., 266 F. Supp. 3d 1341, 1356–57, 2359 (D. Utah 2017) (interrogating dilutive potential in proposed map's targets). Targets evince incumbent government's interest in containing racial minorities' electoral power. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 438–41 (2006); Rogers v. Lodge, 458 U.S. 613, 616 (1982); *cf.* IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 48–49 (2014) (describing "dog whistle politics" as "dog whistle racism," the "manipulation of racial ideas in pursuit of political power and . . . material wealth").

each new channel did not materialize in those moments. Litigation loss or judicial obduracy do not themselves generate power; they renew motivation, inspire outrage, or strengthen resolve.[212] Resistance to domination is always there too. Marginalized claimants, who know "that stories are an essential tool to their own survival and liberation," direct and redirect stories for "psychic self-preservation" and to "lessen[] their own subordination."[213] Although all kinds of claimants engage theory hydraulics, when marginalized claimants have done so, they have both expanded doctrine and wrought civil rights wins.

2. Forum Hydraulics

Scholars have described another phenomenon that plays a role in legal change: the appeal to one lawmaking institution when another becomes closed off.[214] Athanasios Psygkas has theorized this forum hydraulics in the context of movements making constitutional claims.[215] Analyzing marriage equality in four nations, Psygkas has observed how movements "shut out of one forum . . . channel[ed] their constitutional claims through other institutional avenues."[216] Irish courts, for example, had refused to recognize marriages between individuals regardless of gender, so reformers concerned that courts might overrule a legislative enactment turned to the constitutional referendum process.[217] Such "hydraulic shifts" occur, Psygkas explained, because "claims do not disappear" but are instead "'compressed' out of one *institutional* channel [and] diverted," thus "engaging new institutional actors."[218]

Whereas theory hydraulics describe the creation of new ways to assert harm, forum hydraulics describe the appeal to new institutions judging those assertions. In a sense, forum hydraulics is a movements-focused account of older observations that citizens unsatisfied by legal processes often resort to lawmaking by other means, from self-help to vigilantism.[219] Although shifts between forums do not comprise

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[212] NeJaime, *supra* note 166, at 984–85.

[213] Delgado, *supra* note 81, at 2436.

[214] *See, e.g.*, Burbank & Farhang, *supra* note 39, at 1544 (noting how competition among lawmaking institutions has transformed federal civil practice); NeJaime, *supra* note 166, at 988–1002; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (contending that federal courts are institutionally preferable to state courts for raising federal constitutional claims); William B. Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599 (1999) (contending that federal courts are not necessarily institutionally preferable to state courts, in light of experiences of LGBTQ+ rights claimants).

[215] Psygkas, *supra* note 163, at 211–14.

[216] *Id.* at 242.

[217] *Id.* at 235–38.

[218] *Id.* at 214 (emphasis added).

[219] *See, e.g.*, NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 39 (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 1997) (1531) (recalling Livy's account of Coriolanus to extol democratic accountability in civil suits, for "when such legal means are not available, [the people] will resort to illegal ones, and without any doubt the latter produce much

doctrinal expansion per se, they do enable new actors to deliberate on and apply pressure to doctrinal development, liberalizing opportunities for legal change and democratic contestation. Lawmaking institutions' relative accessibility might well factor into lawyers' decisions to remain invested in devising new theories of relief or to give up on theory hydraulics altogether.[220]

B. Count Ossification

Doctrinal expansion's second stage is the hardening of theories of relief that proliferated in the first place. Many legal system features contribute to ossification, from stare decisis to simple recordkeeping.[221] In this Section, I discuss two important features at work. The first is enduring: the same need to categorize that undergirded common law forms of action, often in the name of simplicity, motivates reliance on counts to conceptualize underlying claims. This is an intractable, ubiquitous problem, but it is necessary to see clearly. The second feature is newer: pleading's increased role post-*Twiqbal* impels litigants to state claims in tried and trusted theories, thus entrenching them.

1. The Persistence of Memorialization

Our tendency in legal reasoning toward greater specificity contributes to ossification, especially when that tendency becomes obsession with formal devices rather than their functional aims. Notwithstanding the limits of language and interpretation,[222] we

worse effects than the former"); Alexander A. Reinert, *Screening out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1225 (2014) ("[I]t goes without saying that providing access to a judicial system for all litigants ensures social stability by providing an alternative to violent self-help."); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMPAR. L. 871, 874 (1997) (noting that dissatisfaction with legal system can lead to "increasing public support for citizens who take the law into their own hands").

[220] *See* Burbank & Farhang, *supra* note 39, at 1613; NeJaime, *supra* note 166, at 988.

[221] *See, e.g.*, Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307, 308–17 (2007) (describing sustained reliance on legal categorization throughout growth of computer-assisted legal research); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176–84 (2006) (articulating a "pragmatic case for stare decisis," in particular that it stabilizes and informs expectations).

[222] *See* GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 153 (2000) (describing interpretation as "convention-bound activity" that entails "putting a text to use in some institutional context in a way that will be accepted by other participants as legitimate"); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1628 (1986) (cautioning against "forgetting the limits . . . of legal interpretation"); *cf.* EAVAN BOLAND, *That the Science of Cartography Is Limited*, *in* NEW COLLECTED POEMS 204, 204–05 (2008) (describing failures of contemporary Irish maps to indicate still-extant famine roads built as part of 1847 jobs programs at peak of Great Famine).

tend to "particularize the law to better distinguish various classes of conduct."[223] We then keep intricate records, deploying citation practices, court reporters, restatements, and legal databases. In doing so, we preserve distinctions for later use. While much of this is inevitable, even good, we risk relying on our professional facility arguing conventions and formal tests to define and even to perceive the problems that we are tasked with solving.

Devising a new theory of relief to accommodate a claim where a prior theory failed is one thing. Understanding the actual claim only in terms of the new count—letting count dictate claim—is another thing entirely.[224] This is the fundamental concern with ossified counts. Relying on articulations of legal tests to understand actual legal relations formed by occurrences on the ground is like relying on oil paintings and advertisements to tell us what we should value.[225]

If multiple counts are useful, then it is because they can channel the same underlying claim, helping us to fix the same underlying problem.[226] But when counts fracture a claim's meaning or significance, and when that fracture becomes settled, we become fixated on the stereotypical scenario that each count supposes, and we lose sight of how that scenario was only ever a variation on a theme. That we think of certain legal problems first with reference to the counts that could cure them—that our first thought is the category, not the right—is evidence of ossification taking place.

The rigidity of Title VII counts for employment discrimination on the basis of sex illustrates this well.[227] As a "super-statute," Title VII should be "construed liberally and purposively" to protect rights "to own and use [our] own labor, free of discrimination."[228] Its enforcement, however, has been marred by lines dividing physiological sex from other expressions of sexuality.[229] We know that sex, gender,

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[223] Ruhl & Katz, *supra* note 24, at 224.

[224] *See, e.g.*, Hessick, *supra* note 33, at 662 (observing that existence of two legal tests might pressure courts "to conclude that the two tests are, or at least should be, different").

[225] *See* JOHN BERGER, WAYS OF SEEING 134 (1972) ("[T]he publicity image steals [the spectator-buyer's] love of herself as she is, and offers it back to her for the price of the product.").

[226] And counts are on one level inevitably in a dialectic with claims, reshaping how we *do*, and *do want to*, relate to each other. *Cf. id.* at 20 (noting argument that "all reproductions more or less distort"); Delgado, *supra* note 81, at 2416 ("We participate in creating what we see in the very act of describing it.").

[227] 42 U.S.C. § 2000e-2(a).

[228] Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.J. 1165, 1175, 1183 (2014); *cf.* Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 171–72 (2004) (arguing that Title VII means to unmake sex hierarchy just the same as race hierarchy).

[229] *See* Zachary A. Kramer, *Some Preliminary Thoughts on Title VII's Intersexions*, 7 GEO. J. GENDER & L. 31, 37 (2006). *See generally* William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017);

gender identity, and sexual orientation, while analyzable, are interdependent expressions of personhood or, to parse personhood slightly, a person's sexuality.[230] These expressions are to a great degree socially constructed or conferred.[231] Yet courts and other actors have long manipulated them, categorizing and conflating us as masculine males and feminine females[232] or isolating sexual orientation as deviation from the "classic gender script."[233] In doing so, they have policed cis-hetero-patriarchy

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Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

[230] *See generally, e.g.*, GLORIA ANZALDÚA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA (4th ed. 2012); JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (2011); Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193 (2019); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT (2d ed. 2000); Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J.L. & FEMINISM 1 (2019); Anne Fausto-Sterling, *Gender/Sex, Sexual Orientation, and Identity Are in the Body: How Did They Get There?*, 56 J. SEX RSCH. 529 (2019); Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J. L. REFORM 713 (2010); ROBERT MCRUER, CRIP THEORY: CULTURAL SIGNS OF QUEERNESS AND DISABILITY (2006); Anne Waters, *Language Matters: Nondiscrete Nonbinary Dualism*, *in* AMERICAN INDIAN THOUGHT: PHILOSOPHICAL ESSAYS 97 (Anne Waters ed., 2004); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

[231] *E.g.*, ÁSTA, CATEGORIES WE LIVE BY: THE CONSTRUCTION OF SEX, GENDER, RACE, AND OTHER SOCIAL CATEGORIES 70–92 (2018) (advancing a conferralist account of social categories); ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 235 (2000) (insisting that studying gender embodiment presumes: indivisible nature/nurture, humans as active processes, and interdisciplinarity as necessary to understand human sexuality); Kaiponanea T. Matsumura, *Transcending Time and Place: Judge A. Wallace Tashima and the Liberation of LGBT Identity*, 66 UCLA L. REV. 1910, 1913 (2019) (critiquing sexual orientation "immutability" for ignoring how "identities may be culturally and even personally contingent").

[232] Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 265 (1995) (arguing that conflating sex and gender splits us into "two sexes and their corresponding, fixed social and sexual gender roles"); *see* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 8–9 (1995) (arguing that we have agency beyond "rigid determinism of biology" and "bleak overdeterminism of strong constructionism").

[233] Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 210; *see* Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 491–92 (2004) (noting courts' improper discussion of sexual orientation as unrelated to gender); Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L.

and "repress[ed] individuated expressions of sex/gender variety and diversity in general."[234]

Given this obduracy, backed up by deep social conservatism, claimants leaned into categories to broaden Title VII coverage, ossifying them in the process. At first, Title VII quashed only formal sex exclusion[235] but cracks formed in that approach.[236] The pipe burst in *Price Waterhouse v. Hopkins*, which formalized gender stereotyping theories.[237] Whereas sex-based counts "concerned employers who *ascribed* actual characteristics to . . . employees," gender-based counts targeted "*prescriptive* stereotyping," that is comparing them to biased norms.[238] Ann Hopkins had sued when denied partnership at an accounting firm, arguing that it was because she did not fit feminine stereotypes.[239] Siding with Hopkins, the Court pronounced that bosses may not evaluate workers "by *assuming* or *insisting* that they matched [a] stereotype."[240]

67, 83 (2000) (arguing that discrimination against queer persons is sex discrimination because it is "based on a desire to preserve gender polarities and to subordinate women").

[234] Valdes, *supra* note 232, at 10; *see also id.* at 115, 249 (noting equation of nature, normality, and morality within Euro-American regulation of sexuality). For arguments that everyone's sexual personhood is unique, see, for example, OKLAHOMA! (Samuel Goldwyn 1955) (depicting, in the number *Many a New Day*—especially through Agnes de Mille's choreography—varied sexuality among settler women in late 19th century Oklahoma territory); PARIS IS BURNING (Miramax 1990) (documenting Black and Latino queer ballroom scene's mimesis, critique, and resistance of mainstream economic, cultural, racial, and sexual norms); THOMAS SAVAGE, THE POWER OF THE DOG 33–34, 74, 82, 103, 133 (1967) (depicting varied masculinities in early 20th century Montana cattle ranching community).

[235] Eskridge, Jr., *supra* note 229, at 347; *see, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 714, 718 (7th Cir. 1969) (holding that the employer violated Title VII by foreclosing women from seeking certain manufacturing roles); Weeks v. S. Bell Tel. & Tel. Co., 408 F.2d 228, 236 (5th Cir. 1969) (holding that the employer violated Title VII by refusing to hire women for the role of switchman).

[236] *See, e.g.*, City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 704–05, 711 (1978) (holding that the agency could not make women contribute more to a pension fund than men, despite determining that on average they would live longer); Phillips v. Martin Marietta Corp., 400 U.S. 542, 543–44 (1971) (per curiam) (holding that the company could not refuse to hire mothers while hiring fathers).

[237] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see* ZACHARY KRAMER, OUTSIDERS: WHY DIFFERENCE IS THE FUTURE OF CIVIL RIGHTS 27–28 (2019).

[238] Zachary R. Herz, Note, Price*'s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 406 (2014) (first emphasis added); *accord* Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 763 n.19 (2013).

[239] *Price Waterhouse*, 490 U.S. at 231–32; *see* KRAMER, *supra* note 237, at 11–13, 27–30. Colleagues had, among other things, called her "macho" and told her to walk, talk, and dress "more femininely." *Price Waterhouse*, 490 U.S. at 235 (citations and internal quotation marks omitted).

[240] *Price Waterhouse*, 490 U.S. at 251 (emphasis added).

Analytically distinct, sex- and gender-based counts became two ways to prove sexuality bias. Yet when queer claimants asserted gender counts, many judges assumed artful pleading, failing to see that gender and sexual orientation biases coincide.[241] Insisting that queer plaintiffs raise yet unrecognized sexual orientation counts, judges feared that gender counts would be "used to 'bootstrap protection for sexual orientation into Title VII.'"[242] The trend kept gender available only to certain kinds of plaintiffs, leaving queer plaintiffs for the most part out in the cold.[243] The exception proving the rule: gender counts could succeed when based on more visible transgressions of gender norms; "employees who manifest[ed] traits coded as gay in *observable* ways at work" won far more than those whose sexual orientations were merely known or supposed.[244]

When the pipe burst again in *Bostock v. Clayton County*, recognizing sexual orientation- and gender-identity-based counts too, sex- and gender-based counts were doctrinal fixtures.[245] Each worker in the consolidated *Bostock* decision had asserted multiple counts of discrimination,[246] courts again crying "bootstrapping."[247] Thus, *Bostock* was momentous.[248] But the path to it, parsing and freezing Title VII's

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[241] *See* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 717–18 (2014) (noting the conventional view that gender counts and sexual orientation counts remedied "categorically different" discrimination claims).

[242] Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)); *see* Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 594 (2016); KRAMER, *supra* note 237, at 65.

[243] Some courts and observers recognized transgender plaintiffs' gender identity-based discrimination cases as gender stereotyping cases. *E.g.*, Smith v. City of Salem, 378 F.3d 566, 571–72 (6th Cir. 2004); Glenn v. Brumby, 663 F.3d 1312, 1317–18 (11th Cir. 2011); *see* Ilona M. Turner, Comment, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562–63 (2007) (arguing that discrimination against someone for being trans is bias against gender non-conformity); Michael J. Vargas, *Title VII and the Trans-Inclusive Paradigm*, 32 LAW & INEQ. 169, 188–93 (2014) (describing a shift from courts' refusal to courts' embrace of gender counts to vindicate trans plaintiffs).

[244] Soucek, *supra* note 241, at 718 (emphasis added).

[245] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (holding that firing a worker for being gay or transgender violates Title VII).

[246] Three cases were consolidated in *Bostock*: Bostock v. Clayton Cnty., No. 16-CV-1460, 2017 WL 4456898, at *1–2 (N.D. Ga. July 20, 2017); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566–67 (6th Cir. 2018); Zarda v. Altitude Express, Inc., 883 F.3d 100, 108–09 (2d Cir. 2018).

[247] *See, e.g.*, *Zarda*, 883 F.3d at 111; *Bostock*, 2017 WL 4456898, at *2.

[248] *E.g.*, Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 382–83 (2021); Andrew Koppelman, Bostock*, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1 (2020); Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. ONLINE 1, 16–20 (2020); Amy

protection in multiple counts, was to outmaneuver earlier textual maneuvers.[249] The good result nonetheless epitomizes legal culture concerned with whether discrimination is "'based' on sex, or on gender, or on sexual orientation in isolation."[250] Meanwhile, newly sanctioned counts obviate a need for Congress to amend Title VII, and courts have duly "extended" Title VII to queer plaintiffs,[251] noting that sex and gender counts remain available.[252]

Parsing claims with counts to ensure that we are getting all that we can out of them as possible, as if slicing open fruit to see its internal structure, is inevitable in refining doctrines. We often respond to system failures (as I would construe failures of doctrine to cover entire swaths of people or their legal problems) by building "more organized network structure into the system," though doing so ironically risks further fragility.[253] Legal rules proliferate where we need more certainty for otherwise capacious inquiries, like negligence.[254] But legal rules ossify where claimants cannot "present information beyond that given privileged status by the existing legal rule."[255] The boundaries of counts thus become fixed, and claims can either fit inside or not,

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Post, Ashley Stephens & Valarie Blake, *Sex Discrimination in Healthcare: Section 1557 and LGBTQ Rights After* Bostock, 11 CALIF. L. REV. ONLINE 545, 546–47 (2021).

[249] *See, e.g.*, Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 108, 120–25 (2021); William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503 (2021); Cary Franklin, *Living Textualism*, 2020 S. CT. REV. 119 (2020); Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 266–67, 283–85 (2020); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365 (2023).

[250] Valdes, *supra* note 232, at 121.

[251] *E.g.*, Tudor v. Se. Okla. State Univ., 13 F.4th 1019, 1028 (10th Cir. 2021); Doe v. City of Detroit, 3 F.4th 294, 300 n.1 (6th Cir. 2021); Olivarez v. T-Mobile USA, Inc., 997 F.3d 595, 601 (5th Cir. 2021); Horton v. Midwest Geriatric Mgmt., LLC, 963 F.3d 844, 847 (8th Cir. 2020); Fry v. Ascension Health Ministry Servs., No. 18-CV-1573, 2021 WL 1733397, at *5 (E.D. Wis. May 3, 2021); Scutt v. Dorris, No. 20-00333, 2020 WL 7344595, at *4, *4 n.6 (D. Haw. Dec. 14, 2020); Guirkin v. CMH Physician Servs., LLC, No. 20-CV-59, 2020 WL 6829769, at *4 (E.D. Va. Nov. 20, 2020).

[252] *E.g.*, Thomas v. Farmers Ins. Exch., 856 F. App'x 176, 188 (10th Cir. 2021) (noting gender and sexual orientation counts' viability); Howell v. STRM LLC - Garden of Eden, No. 20-CV-00123, 2020 WL 5816582, at *3 (N.D. Cal. Sept. 30, 2020) (resolving gender and sexual orientation counts); Doe v. DeJoy, No. 19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020) (noting gender counts' viability).

[253] Ruhl & Katz, *supra* note 24, at 239; *see* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 111–13 (2017) (describing how added legal frameworks saddle even decisionmakers with complexity).

[254] *See* Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 610–11 (1992).

[255] *Id.* at 611; *see* Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 619 (2018) (observing that "without new stories or new narratives, new legal pathways cannot develop").

contravening the principle that "lived experience . . . should determine the doctrine and not the other way around."[256]

*2. The Importance of Being Right Post-*Twiqbal

The re-elevation of pleading standards in recent decades, epitomized by the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, is another important contributor to ossification.[257] Where the significance of pleading counts that will survive dismissal and summary judgment has grown, so has the need to rely on effective theories of relief. Yet efficacy in this context depends on perception.[258]

Among the greatest constraints on litigation strategy is resource availability, not least availability of information.[259] Federal litigation costs have increased over the past few decades, driven in part by in-depth pleading,[260] in part by e-discovery, though how problematic discovery costs are on their own remains under debate.[261] But the needs for in-depth pleading (and for earlier discovery) have themselves risen with the stakes of dismissal and summary judgment, especially in civil rights, prisoner, forma pauperis, and pro se litigation.[262] Partly this is due to *Twiqbal*'s replacement of notice pleading with plausibility pleading.[263] Partly it is due to defendants'

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[256] Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 896 (2014); *see* Justin Weinstein-Tull, *The Experience of Structure*, 55 ARIZ. ST. L.J. (forthcoming 2024) (manuscript at 7) (on file with author) (arguing that liberty and other constitutional values are real ideas that can affect people's everyday lives but that courts treat as empty words, crafting "a structural jurisprudence blind to the immense variability of lived experience").

[257] *See* Ashcroft v. Iqbal, 556 U.S. 662, 677–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–56 (2007).

[258] *See* LAHAV, *supra* note 82, at 14–15 (noting the importance of litigant perceptions of risks and rewards in deciding whether and how to litigate through trial).

[259] *See* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 73 (2010); Endo, *supra* note 163, at 1319.

[260] SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS? 121 (2013) (noting cost increases due to "more prolix complaints, more . . . presuit investigation, increased numbers of defense-side motions, and more amended complaints").

[261] *E.g.*, Dodson, *supra* note 259, at 64; Endo, *supra* note 163, at 1337–38 (noting concerns of rising discovery costs and efforts to rein them in).

[262] *See* Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 502–03 (2012); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122–23 (2015).

[263] Ashcroft v. Iqbal, 556 U.S. 662, 677–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–56 (2007); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 210–11 (2013) (documenting higher dismissal rates for Black plaintiffs' claims post-*Twiqbal*, despite comparable rates among Black and White plaintiffs pre-*Twiqbal*); Suja A. Thomas, *The New Summary Judgment Motion: The Motion To Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 17 (2010) (noting that

increased reliance on motions to dismiss out of a perception that their odds of success are greater post-*Twiqbal*.[264] Procedural hurdles can even be more substantive than meets the eye and can easily "end a case, or dramatically reshape it."[265]

In cases' high-stakes early stages, these constraints accentuate other ideational aspects of strategy. As limited opportunity structure literature holds, movements must articulate theories of change that "correspond with 'categories previously established by an amalgam of constitutional, statutory, administrative, common, and case law.'"[266] Where there are no established counts, analogical reasoning helps to bridge an unfamiliar claim to familiar law. Where there is such a count, a lawyer can rely on it but in doing so entrench it. Where there are overlapping counts, moreover, it becomes key to heed how courts have received them, in addition to the distinct proof standards and evidentiary needs that they outline. In relying on tried and trusted counts for resolving claims, litigants fix those theories deeper in future litigants' awareness of which counts survive dismissal.

Assessing claim sufficiency at pleading, as Grossi has argued, "harken[s] back to the sensibilities of strict code pleading by requiring factual allegations addressed to a particular substantive issue."[267] Even more than a deep well of facts, pleaders must access specific wells to support allegations "going to" each element of the counts that they assert. Code pleading might have "explicitly abolished" common law forms of action, and the Federal Rules might have departed from code pleading toward "operative facts" claims.[268] But the strategic need to calibrate allegations with legal tests tilts us back toward an older, more constricted approach, as I explore next.[269]

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dismissal standard has evolved such that "the motion to dismiss [is] the new summary judgment motion").

[264] Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 132, 134 (2012).

[265] Elizabeth M. Schneider & Nancy Gertner, *"Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y. L. SCH. L. REV. 767, 768 (2012).

[266] Psygkas, *supra* note 163, at 242–43 (quoting ELLEN ANN ANDERSEN, OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 12 (2005)).

[267] Grossi, *supra* note 8, at 18.

[268] Funk, *supra* note 47, at 170.

[269] Grossi, *supra* note 8, at 23 (arguing that, post-*Twiqbal*, "[t]he claim has regressed into a primary rights cause of action, the very thing it was designed to supplant").

III. SYSTEM FRAGILITY AND SUSTAINABILITY

Doctrinal expansion represents a broadening universe of arguments and precedents upon which future claimants and decisionmakers can draw.[270] In this respect, expansion is valuable and should not go underappreciated. Expansion is to some degree inevitable too, given our need, or tendency, to create formal legal tests for resolving disputes.[271] There is great utility, moreover, in partially redundant theories of relief that "prevent undesired gaps in legal coverage"[272] or that "implement a highly important value [when decisionmakers] are uncertain about the best way to do it."[273]

Consider *Navajo Nation v. San Juan County*, a successful vote dilution challenge.[274] Working to halt "a history of intentional discrimination"—from forced relocation and removal of Navajo (Diné) children to off-reservation schools to vote suppression and economic exploitation[275]—Indigenous voters challenged a Utah county's decision to "pack" them into one of three county commissioner districts, minimizing their electoral power.[276] The case began on all dilution counts discussed

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[270] *See* Coleman, *supra* note 262, at 526 (arguing that vanishing plaintiffs' claims "create or reinforce path-breaking laws" and "provide a primary, if not sole, mode of enforcement").

[271] *See* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1478 (1987) (book review) (observing that "in a formless system, [litigation] abuse may be in the eye of the beholder."); Massaro, *supra* note 51, at 2112 (observing that formal tests can help those "least understood by the decisionmakers" by constraining judicial discretion and channeling claims).

[272] Golden, *supra* note 33, at 665.

[273] Hessick, *supra* note 33, at 670.

[274] *Navajo Nation I*, 162 F. Supp. 3d 1162 (D. Utah 2016), *aff'd*, 929 F.3d 1270 (10th Cir. 2019).

[275] Yanito v. Barber, 348 F. Supp. 587, 591 (D. Utah 1972); *see* Allen v. Merrell, 305 P.2d 490, 495 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957); NED BLACKHAWK, VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST 192, 222–24 (2006); DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 90–110 (2007); LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 19–20 (2010) (chronicling states' disenfranchisement of Indigenous citizens); Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1108–09 (2015) (analyzing Arizona's disenfranchisement of Diné and other Indigenous citizens).

[276] Second Amended Complaint ¶¶ 14–32, Navajo Nation v. San Juan Cnty., 150 F. Supp. 3d 1253 (D. Utah 2012) (No. 12-CV-00039), ECF No. 75; *see* JAMES THOMAS TUCKER, JACQUELINE DE LEÓN & DAN MCCOOL, NATIVE AM. RTS. FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 117 (2020); Hilary C. Tompkins, *Domestic Nations in the Age of "Tribalism,"* 52 ARIZ. ST. L.J. 580, 591 (2020); Emily Rong Zhang, *Native American Representation: What the Future Holds*, 56 IDAHO L. REV. 323, 335 (2020).

above and ended on racial gerrymandering alone, an unexpected turn given the districts' shapeliness.[277] But the overlapping theories enabled the district court early on to prioritize gerrymandering theory, now in vogue, and the voters to reframe their evidence as "going to" gerrymandering.[278] *Navajo Nation* epitomizes a trend of racial vote dilution cases resolved on race-neutral gerrymandering theory,[279] and dilution theories' overlap has deepened claimants' strategy toolkit.

Notwithstanding the gifts of doctrinal expansion, or perhaps given their widespread appreciation, I focus in this Part on other structural implications. First, I theorize how expansion contributes to constricted pleading, as seen through a long view of civil procedure, and how this emerges as legal system fragility.[280] Then, I describe two indicia of legal system fragility. Finally, I propose routine system maintenance for managing such fragility and bolstering sustainability.

A. Constricted Pleading in the Longue Durée

Theorizing doctrinal expansion raises questions about the inevitability of doctrinal contraction, the need or possibility for intervention, and where we are in these processes. In this Section, I situate expansion as one kind of flux in the *longue durée* of civil procedure. Given the pleading latitude that expansion affords and likely existence of a tipping point in doctrinal complexity, expansion might continue until complexity produces system failures causing doctrinal contraction. Or we might incite contraction upon determining that pleading has become too constricted and the resulting system fragility too great.

As explained above, pleading merely opens dispute resolution, notifying others that one believes there to be a dispute.[281] Pleading is an "inferior method to find out

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[277] *Navajo Nation I*, 126 F. Supp. 3d at 1176–77; Navajo Nation v. San Juan Cnty. (*Navajo Nation II*), 929 F.3d 1270, 1280–82 (10th Cir. 2019); *see* MCCOOL ET AL., *supra* note 275, at 79 (noting that classic racial gerrymandering of "elongated" districts in American South is uncommon in Indian country, where Indigenous nations and reservations are relatively compact); Karlan, *supra* note 200, at 1444, 1440 n.80 (discussing how settler governments have often packed and cracked Indigenous nations in spite of—perhaps because of—their relative compactness).

[278] *See, e.g.*, Transcript of Hearing on Motions for Summary Judgment at 4–5, 17–18, 35, 48, 52, Navajo Nation v. San Juan Cnty., 150 F. Supp. 3d 1253 (D. Utah 2015) (12-CV-00039), ECF No. 273 (describing constitutionality as "threshold question" with no need to reach statutory count); Resp. to Def. Mot. for Summ. J. at 3–4, 6, 9 n.16, 16–23, Navajo Nation v. San Juan Cnty., 150 F. Supp. 3d 1253 (D. Utah 2015) (12-CV-00039), ECF No. 250 (arguing that County was on notice of packed district's dilutive effects); *see also Navajo Nation II*, 929 F.3d at 1280–82 (holding that county officials' belief that standing consent decree required packing Indigenous voters was not compelling interest); *Navajo Nation I*, 126 F. Supp. 3d at 1173, 1175–77.

[279] *See supra* notes 210–11 and accompanying text.

[280] Ruhl, *supra* note 2, at 588 (noting that system fragility is "an emergent property").

[281] *See supra* note 8 and accompanying text.

what actually happened."[282] Thus, in trying to liberalize pleading, the drafters of the 1938 Federal Rules embraced legal realism, rejecting traditional common law's "obsessive quest to reach a single issue regardless of the facts" and code pleading's "insistence on pleading all facts necessary to constitute a cause of action."[283] Yet we have not committed fully to equity either,[284] despite its increased prominence in the Rules.[285] The liberality that we associate with civil procedure's "third era" emerged from the confluence of rules that each provide more procedural choices.[286] Rules on pleading, inconsistencies, objections, joinder, amendment, and others interacted in "macroscopic behavior that could not be predicted by examining [them] at microscopic scales."[287] Liberality has, in this sense, been an emergent property of procedure.

All the same, proliferating and ossifying theories of relief represent emergent pleading constriction, related to but distinct from constriction caused by elevating the pleading standard. We can think of this constriction as an eclipse of equity by the need to formally articulate claims. Although 19th century reformers "criticized the common law forms of action as a hodgepodge of rights, remedies, and procedures,"[288] fusing law and equity might only have suspended them in tension. Fusion denied equity "structural autonomy," limiting "relief from the procedures of the merged system itself" when they prove inadequate.[289] Moreover, the use of "counts" at traditional common law to state a cause of action in different ways, and thus "to evade the harsh effects of the rule," continues today.[290] Whether a gradual revival or "preservation-through-transformation,"[291] overlapping counts requiring careful recitation and precise allegations resemble, even echo, traditional common law's forms of action.

For procedural and institutional reasons, it would be wrong to say that counts today *are* the forms of action anew. At traditional common law, each form of action "incorporated a distinct method of procedure adapted to [it]" and could entail its

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[282] Burbank & Farhang, *supra* note 39, at 1584.

[283] *Id.*; *accord* Clark, *supra* note 8, at 543.

[284] *See* Burbank & Farhang, *supra* note 39, at 1584; Funk, *supra* note 7, at 2060.

[285] *See* Subrin, *supra* note 1, at 922–26.

[286] Subrin & Main, *supra* note 26, at 1841. I am grateful to Professors Maggie Chon and Hilary Allen for helping me to refine my thinking on these points.

[287] Ruhl & Katz, *supra* note 24, at 204; *see* Main, *supra* note 10, at 471–73 (discussing Federal Rules that together liberalized procedure).

[288] Bone, *supra* note 28, at 321.

[289] Main, *supra* note 10, at 432.

[290] *See* Clark, *supra* note 50, at 279.

[291] Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996).

own set of discovery rules.[292] Moreover, forms of action limited the possible grounds on which law courts might resolve disputes.[293] In contrast, there is no formal limit to the number of counts that may be asserted today,[294] and, for the most part, procedure remains trans-substantive. But theories of relief like *Gingles*, which courts have construed to require a proposed remedial map to prove liability,[295] show how counts can assume their own procedures over time.[296] This squares with how common law procedure has reemerged within the fused system,[297] and broadly with how substantive law itself assumes procedures to enforce it.[298]

In a long view of procedure, counts' resemblance to forms of action instantiates the perennial problems in devising harm redress mechanisms and evaluating complexity. When sacrificing common law stability and not defining concepts like remedy or entitlement, fusion relied on lawyers' and judges' preexisting "situation sense . . . to apply 'appropriate' remedies to cognizable harms."[299] Need for "situation sense" has not waned. And in contexts cited throughout this Article, doctrinal divergence has sometimes echoed divergence in social understandings. Despite this, and despite no consensus on measuring complexity, we can discern counts' proliferation amplifying the "robust yet fragile" dilemma of complex systems.[300] Even as proliferation affords additional "fail-safe strategies" to resolve claims, it increases interconnectedness, complexity, and ultimately "the number of points of failure."[301]

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[292] Main, *supra* note 10, at 455.

[293] Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354, 355 (1934).

[294] *E.g.*, McGrath v. Town of Sandwich, 169 F. Supp. 3d 251, 256 (D. Mass. 2015).

[295] *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 91 (1997) (calling *Gingles* preconditions "threshold findings"); Growe v. Emison, 507 U.S. 25, 40–42 (1993) (holding that *Gingles* preconditions are required for vote dilution liability). *But cf.* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.–C.L. L. REV. 173, 202 (1989) (arguing that courts misread *Gingles* when they elevate creation of a majority-minority district to a threshold requirement for vote dilution liability).

[296] To be sure, count-specific procedure is not as extreme as "case-specific" procedure, in which courts set rules in each dispute to determine how to resolve it. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 927–30 (1999).

[297] *See, e.g.*, Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 29–30 (1989) (explaining how multiplicity-of-suits doctrine, which converted separate common law actions into one equity action, "disappeared [after fusion] as a jurisdictional problem only to reappear as a joinder problem").

[298] Main, *supra* note 40, at 834–35, 841.

[299] Funk, *supra* note 7, at 2069–70.

[300] Ruhl, *supra* note 2, at 562. A robust system "remains relatively intact endogenously, notwithstanding disruptions from exogenous forces and endogenous failures." *Id.* at 570.

[301] *Id.* at 587.

To understand fragility due to doctrinal expansion, it is useful to envision such failure, to which I turn now.

B. System Abrasions

In this Section, I elucidate two indicia of system fragility attributable in part to complexifying doctrines: procedural fairness failures and rule of law failures. Scholars have taxonomized redundancy costs, which overlapping counts (as partial redundancies) could well incur.[302] Here, I focus on two broader abrasions to the legal system that are linked but implicate distinct concerns. Whereas procedural equity failures inhibit people from fully and equally availing themselves of the legal system, rule of law failures expose people to domination even beyond that system. As indicia of fragility, they are further emergent properties.

1. Procedural Inequity

In expanding doctrine, strategy guides the decision to assert one count, another, or even an entire set of them. Where strategy is presumed, so are lawyers and resources.[303] We expect wealthy, well-represented parties and repeat legal players to deploy *multiple* counts most ably, which is not to say that that is just.[304] But despite the increased options that *overlapping* counts afford, their effective use requires knowing not merely *that* they are related but more importantly *how*. It can be vital, for example, to understand what evidence each overlapping test requires and even how a judge favors the mode of legal analysis used in each test. Thus, substantive peculiarities across counts demand strategy by experts, not just practitioners.

Claimants not knowing which counts to plead might choose to plead everything but the kitchen sink. But this is risky: courts could wonder if any count is meritorious and dismiss or reconfigure the case on their own.[305] Neither uncounseled claimants, nor even nonexpert litigators, can rely on courts' help determining the appropriate way to resolve a claim.[306] Field expertise is crucial. In voting rights,

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[302] *See, e.g.*, Golden, *supra* note 33, at 633 (identifying inefficiency and confusion among redundancies' costs); Hessick, *supra* note 33, at 661–68 (identifying the creation of unwarranted law and the underdevelopment of law among redundancies' costs).

[303] *See* LoPucki & Weyrauch, *supra* note 43, at 1482 (observing lawyers as strategists where stakes are high).

[304] *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (describing factors contributing generally to long-term success in court, such as frequency of participation in legal system, access to legal services, overloaded institutions, and alignment with status quo rules).

[305] *See supra* notes 45, 154–56 and accompanying text.

[306] *E.g.*, Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 516 (2022) (finding that with lawyers absent in many state courts, judges exercised control and "maintained legal and procedural complexity in their courtrooms by offering" scant litigant education and limiting pleading and evidence presentation).

for example, some lawyers have thought racial gerrymandering (*Shaw*) easier to prove than intentional dilution (*Rogers*), and others have thought the opposite.[307] The latter group likely has the better argument. Whereas *Shaw* requires showing that race was "the predominant factor" in drawing district lines, *Rogers* requires showing merely that race was "*a* motivating factor" in executing a dilutive law.[308] Perception is key too, and it could well be that, degree of discriminatory intent aside, litigators prefer *Shaw*'s burden-shifting test over *Rogers*'s totality inquiry. Litigators might also perceive courts to favor *Shaw* over *Rogers*, if only because lately there have been more *Shaw* cases than *Rogers* cases.[309]

Yet differential access to field expertise means that proliferating counts can primarily benefit wealthy, counseled, and otherwise repeat players.[310] Access to counsel itself is an inequitably distributed good,[311] to say nothing of access to courts and legal information.[312] Reasons to represent oneself range from limited resources to not seeing problems as *legal* problems.[313] But access to counsel is important, for

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[307] *Compare* Dale E. Ho, *Something Old, Something New, or Something* Really *Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. 1887, 1918 (2018) (arguing that "the level of proof [required by *Rogers*] may exceed what is typically necessary in [*Shaw*] cases"), *with* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1215 (1996) (noting that *Rogers* is "more plaintiff-friendly" than *Shaw*).

[308] Miller v. Johnson, 515 U.S. 900, 916 (1995) (citing Shaw v. Reno, 509 U.S. 630, 646 (1993)); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977); Lang & Hebert, *supra* note 198, at 785.

[309] *See, e.g.*, *Navajo Nation I*, 162 F. Supp. 3d 1162, 1173 (D. Utah 2016) (noting that *Rogers* claims "have become rare" given advent of Section 2 claims).

[310] *See* Hadfield, *supra* note 21, at 38 (noting the advantage of claimants who "can retain expensive lawyers for help in navigating and sculpting complex legal terrain . . . over those who must muddle through alone"); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 71–74 (2010) (finding that lawyers contribute significantly to clients' cases by managing procedural complexity).

[311] *See, e.g.*, Carpenter et al., *supra* note 306, at 511–13 (noting extensive scholarship on civil justice problems facing poorer claimants, many of which never make it to a lawyer or a courtroom); Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2691–92 (2022) (noting pro se litigants' heterogeneity: prisoners, frivolous filers, and *in forma pauperis* filers); Cheryl R. Kaiser & Victor D. Quintanilla, *Access to Counsel: Psychological Science Can Improve the Promise of Civil Rights Enforcement*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 95, 96 (2014) (documenting disproportionately more racial minority and employment discrimination claimants litigating pro se, holding their claims' strength constant).

[312] Rachel A. Cichowski, *Courts, Rights, and Democratic Participation*, 39 COMPAR. POL. STUD. 50, 55–56 (2006); *see* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 561 (arguing that *Twiqbal* is troublesome for its disparate effect on those with inferior access to information or pre-suit investigation).

[313] *E.g.*, Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1, 7–9 (1989); Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 49, 51 (2019); Rebecca L. Sandefur,

"information alone is not enough to close access-to-justice gaps."[314] Although self-represented claimants can capably argue and present evidence, representation by counsel leads other legal actors to take claimants seriously.[315] There is something irreplaceable, furthermore, in the opinion of a professional charged with pursuing our interests.[316] In *Bostock*, for example, counsel included a gender stereotyping count in complaint amendments where an original complaint, filed pro se, had asserted only sexual orientation-based discrimination.[317]

As tools for repeat legal players and litigators with field expertise, proliferating overlapping counts enable gamesmanship, giving elites more devices with which to win and shape litigation norms.[318] Benefits accrue even to the elite-adjacent, like clients of specialized bars or even law school clinics.[319] In contrast, marginalized claimants must persuade judges who cannot relate to them well, however they cast their claims.[320] For example, mainstream religious groups routinely leverage multiple First

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What We Know and Need to Know About the Legal Needs of the Public, 67 S.C. L. REV. 443, 448–50 (2016).

[314] Kathryn M. Kroeper, Victor D. Quintanilla, Michael Frisby, Nedim Yel, Amy G. Applegate, Steven J. Sherman & Mary C. Murphy, *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*, 26 PSYCH. PUB. POL'Y & L. 198, 198 (2020).

[315] *See, e.g.*, *id.* at 203–04 (finding that judges experience bias against self-represented parties, leading them to undervalue cases brought pro se); Quintanilla et al., *supra* note 154, at 1116 (finding similar bias among lawyers).

[316] *See supra* notes 131–32 and accompanying text.

[317] Bostock v. Clayton Cnty., No. 16-CV-1460, 2017 WL 4456898, at *2 (N.D. Ga. July 21, 2017), *rev'd*, 819 Fed. App'x. 891 (11th Cir. 2020).

[318] *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1012 (2016) (explaining that elites can "dictate the rules of the game," even "refuse to play that game at all, instead substituting a different one"); David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1092–98 (2021) (describing lessened asymmetries in legal technology and information as "democratization"); Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 477–79 (2022) (explaining how neoliberal decisions obscure power differentials, depoliticize economic arrangements, and recast government as company and citizen as consumer); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 478 (2004) (noting that wealth and information inequities "skew outcomes" in settlement and adjudication alike).

[319] *E.g.*, Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 162, 167–75 (2013) (documenting advantages for claimants represented by Supreme Court specialists and detailing how law school clinics provide expertise).

[320] *See* Coleman, *supra* note 262, at 521–26 (describing outsiders' difficulty persuading decisionmakers ensconced in status quo); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1867–68 (2002) (taxonomizing equality in civil litigation); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 369–71 (2010) (explaining how outsiders must confront "ordered dominance," procedure's overarching facilitation of elite interests); *cf.* Matsuda, *supra* note 5, at 9.

Amendment counts to contest economic regulations for elites' benefit,[321] as well as nondiscrimination laws to marginalized groups' detriment.[322] Meanwhile, Indigenous religious practitioners, whose practices do not coincide with common Euro-American assumptions about religion, have struggled to convince courts finding their claims "too broad or too idiosyncratic."[323] Expanded doctrines are no surefire fix for, and can simply accentuate, inequitable access to expertise and the "capacity to structure the transaction, play the odds, and influence rule-development and enforcement policy."[324]

2. Unrule of Law

The rule of law is rule *by* law, "the successful restriction or limitation of the use of coercive force by all . . . to the method of convention."[325] In a nation becoming a republic, the rule of law must contribute to minimizing, if not eliminating, the

[321] *See, e.g.*, Kendrick & Schwartzman, *supra* note 97, at 163 (describing "free speech opportunism" as the practice of cloaking religious complaints as compelled speech claims, which could "immunize large swaths of the economy from regulation"); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1507–12 (2015) (noting deregulation risk in growing solicitude for businesses' free exercise claims, as in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014)); Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 1003–18 (2020) (discussing freedom of speech and free exercise Lochnerism).

[322] *E.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 562–63, 566 (1995); 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168–71 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023); Nat'l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823, 828–29 (9th Cir. 2016), *rev'd sub nom.* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018); *see* Kendrick & Schwartzman, *supra* note 97, at 136 (noting, in their discussion of *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018), that "at least in terms of litigation strategy," prioritizing speech made sense, given then-frequent rejections of religious exercise exemptions).

[323] Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 391 (2012); *see* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 525 n.4 (2010) (noting judicial practice construing Indigenous religion claims as burdensome); Lyng v. Nw. Indian Cemetery Ass'n, 485 U.S. 439, 441–42, 451, 453 (1988) (rejecting challenge to road construction through forest sacred to Yurok, Karok, and Tolowa Indians on grounds that site was large, unlike churches, despite "devastating effects" on Indigenous practices); Nā Īwi o nā Kūpuna o Mōkapu v. Dalton, 894 F. Supp. 1397, 1406–08 (D. Haw. 1995) (holding that neither graves protection statute nor common law afforded standing to human remains to litigate their safekeeping, notwithstanding that for kānaka ʻ ōiwi (Native Hawaiians), remains have interest in their preservation); MARY KAWENA PUKUI, E.W. HAERTIG & CATHERINE A. LEE, 1 NĀNĀ I KE KUMU (LOOK TO THE SOURCE) 106–11 (1972) (describing kānaka ʻ ōiwi practices in preserving, disposing, concealing, and guarding iwi (bones)).

[324] Galanter, *supra* note 304, at 118.

[325] LOVETT, *supra* note 59, at 106.

domination to which each person could be subject.[326] A would-be republic's hallmark is open governance, and yet its Achilles' heel is that same governance's susceptibility to private ambition.[327] Its legal system must therefore realize certain principles: "regularity," or reliable and consistent constraints on power; "publicity," or open access for all individuals to leverage legal rules; and "generality," or application of rules to all persons without irrelevant distinctions.[328]

Doctrinal expansion, when unmanaged, can strain these principles. First, multiplying avenues for relief can strain regularity by inviting uneven dispute resolution. Regularity entails reliable constraints on public officials' power, "authorized by good faith and reasonable interpretations of preexisting, reasonably specific rules."[329] In civil litigation, this means rough "outcome equality," under which "like cases reach [reasonably] like results."[330] Courts must reconcile precedent with present needs, either shifting expectations gradually enough to seem faithful to prevailing norms or breaking with the past candidly.[331] Expectation shocks (as through rapid overruling of precedent and sophistic reasoning) risk alienating claimants and hindering the legal system's regulatory role.[332]

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[326] *See id.* at 114–19.

[327] *See* Dawood, *supra* note 4, at 1440 (noting "powerful incentives for political elites to manipulate the rules of the game" to further private ambition at public expense); *cf.* David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISCOURSE 246, 266 (2020) (arguing that the legal system's declining capacity to serve ordinary people is "a democracy problem, not just a legal or technocratic problem").

[328] PAUL GOWDER, THE RULE OF LAW IN THE UNITED STATES: AN UNFINISHED PROJECT OF BLACK LIBERATION 6 (2021); *see* PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD 7 (2016) [hereinafter GOWDER, RULE OF LAW IN THE REAL WORLD]; *cf.* R v. Sussex Justices [1924] K.B. 256 at 259 (UK) (observing that it is fundamental "that justice should not only be done, but should [also] be seen to be done"); LOVETT, *supra* note 59, at 133–35; Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 935 (1988) (noting rule of law "regulative ideals" like "neutrality, consistency, [and] fairness"). *See generally* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004) (describing rule of law accounts requiring regularity, publicity, and generality).

[329] GOWDER, RULE OF LAW IN THE REAL WORLD, *supra* note 328, at 12.

[330] Rubenstein, *supra* note 320, at 1868; *accord* LAHAV, *supra* note 82, at 139–40.

[331] *See* DODSON, *supra* note 260, at 78 (noting that courts, in contrast to legislatures, can only modify procedural rules in the context of one case); LoPucki & Weyrauch, *supra* note 43, at 1442 (noting the public's conventional understanding of legal change as limited by stare decisis); *cf.* EMILY DICKINSON, *As Imperceptibly as Grief* (No. 1540), *in* THE COMPLETE POEMS OF EMILY DICKINSON 642 (Thomas H. Johnson ed., 1960) (1882) ("As imperceptibly as Grief / The Summer lapsed away – / Too imperceptible at last / To *seem* like Perfidy – . . . ." (emphasis added)).

[332] *See, e.g.*, David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1919 (2014) (noting a shift "away from administrative regulation and enforcement and toward the use of private lawsuits to regulate social and economic behavior"); LAHAV, *supra* note 82, at 33 (linking erosion of legal enforcement via private litigation

Second, overlapping counts' availability elevates what duties of candor require, and failing to illuminate bona fide legal rationales strains publicity. As a "reason-giving requirement," publicity entails laws universally accessible to learn, public explanation of how laws apply, and citizens' participation in applications affecting them.[333] But using unexpected legal tests to resolve disputes can communicate that rules do not matter as much as raw power.[334] This can undermine transparency and impede the public's opportunity "to understand how a law will be interpreted by judges and applied in fact situations that are likely to repeat themselves."[335]

Third, complexifying doctrines can strain generality by privileging repeat players over infrequent, marginalized claimants. Generality requires legal systems to treat all persons as equals, subject only to material distinctions.[336] Generality is the most contested rule of law principle. Whereas minimal accounts deny that it entails anti-discrimination,[337] more robust accounts tether equal status to meaningful access to and participation in legal and democratic processes.[338] Doctrinal manipulability risks claimant alienation and legal estrangement even under minimal accounts.[339] Courts and lawyers fail often enough to align legal system operation with public needs and expectations, especially those of marginalized publics.[340] Title VII "boot-

to abrasion of rule of law); Sepper, *supra* note 321, at 1518; Valdes, *supra* note 232, at 193–94, 277.

[333] GOWDER, RULE OF LAW IN THE REAL WORLD, *supra* note 328, at 15–16.

[334] *Cf.* Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 30–34 (2011) (noting that, while lawyers and judges value thematic consistencies, lay persons value operational clarity, in which doctrine explains why results differ across cases).

[335] LAHAV, *supra* note 82, at 58; *see* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1281 (2009) (observing that reason-giving requirements force officials to "invoke relatively general principles" that the public can expect to apply consistently and that enable the public to contest decisions).

[336] GOWDER, RULE OF LAW IN THE REAL WORLD, *supra* note 328, at 6.

[337] *Id.*

[338] *E.g.*, Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 331 (1999) (democratic equality); Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHIL. 565, 611–14 (2013) (anticaste commitments and reciprocal cost-bearing); LOVETT, *supra* note 59, at 114–15 (nondomination).

[339] *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2086 (2017) (theorizing "legal estrangement" as cultural and systemic "anomie related to the law and legal authorities" that interacts with material conditions like poverty, racism, and sexism "to maintain segregation and dispossession").

[340] *See, e.g.*, Grossi, *supra* note 8, at 30 (explaining how procedural manipulation can limit litigants' substantive rights); Elizabeth Holzer, *What Happens to Law in a Refugee Camp?*, 47 LAW & SOC'Y REV. 837, 839 (2013) (describing refugees as "deeply enmeshed in international human rights, but alienated from local law"); Brie McLemore, *Procedural Justice, Legal Estrangement, and the Black People's Grand Jury*, 105 VA. L. REV. 371, 380–81 (2019) (observing that court failures to hold police accountable for disproportionately killing and injuring Black citizens sustains

strapping" panic was a case in point, with courts dawdling for years before recognizing and hearing queer workers' inexorable claims.[341] Such arbitrariness, especially cumulative, can disintegrate faith in, and expectations for, the rule of law.[342]

Whereas gamesmanship among litigants implicates procedural fairness, judicial gamesmanship is a concern for all rule of law principles. Distinct from fallibility and inevitable experience-informed discretion,[343] judicial gamesmanship entails "sculpt[ing] legal precedent with manipulative techniques," from backroom maneuvers that parties cannot contest to distortions of fact and law in opinions.[344] In *Kennedy v. Bremerton High School District*, for example, a high school football coach argued that he was entitled to lead students in prayer after each game, and the Supreme Court parroted his false gloss of these facts.[345] The Court purported to resolve overlapping speech and religious exercise counts too but gave short shrift to speech, depicting the coach as "pray[ing] quietly by himself" and thus not speaking to others.[346] To deal with speech, the Court would have had to concede that he communicated with students and to square that with less favorable precedent on government employee speech.[347] Aside from the substantive harm flowing from any one decision, an important problem with such judicial gamesmanship is its ripple effects on the professional conduct of other judges.[348]

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anomie and communicates falsely that Black citizens do not deserve the same protection as White citizens).

[341] *See supra* notes 241–44, 247 and accompanying text.

[342] *Cf.* Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 482 (2010) (observing that "people's concerns about procedural values exist independently of whether they win or lose" and that people evaluate procedural fairness according to many, diverse criteria).

[343] *See, e.g.*, Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 732 (2009) (observing that legal realism entails awareness of "flaws, limitations, and openness of law" and of inevitable influences on judges).

[344] Justin C. Van Orsdol, *Cooking the Books: The Art of Judicial Gamesmanship*, 74 RUTGERS U. L. REV. 1099, 1102 (2022); *see* Hessick, *supra* note 33, at 668 (arguing that doctrinal divergence grants courts cover to achieve desired outcomes).

[345] *Compare* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–19 (2022), *with id.* at 2434–40 (Sotomayor, J., dissenting); *see also* Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 911–26 (9th Cir. 2021) (Smith, J., concurring in denial of rehearing en banc) (correcting "deceitful narrative of [the] case spun by [coach's lawyers]" and believed by some judges); *id.* at 927–30 (Christen, J., concurring in denial of rehearing en banc) (clarifying facts actually in dispute and actually in record).

[346] *Kennedy*, 142 S. Ct. at 2430.

[347] *See id.* at 2423–24 (citing Garcetti v. Ceballos, 547 U.S. 410 (2006); Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

[348] *See* Van Orsdol, *supra* note 344, at 1102 n.6 ("'[S]tudies show that people are more likely to accept others' unethical behavior when ethical degradation occurs slowly rather than in one abrupt shift." (quoting Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed:*

Finally, although doctrinal expansion has sometimes resulted from civil rights wins and other liberation struggles, we should not conflate more tools to achieve justice with justice itself. To close the circle with an example, opportunists' use of freedom of speech and free exercise doctrines has met judicial willingness to abandon anti-establishment.[349] From an expressivist standpoint, anti-establishment guarantees that government "express equal respect and concern toward citizens."[350] From a republican standpoint, that "cultivation of public identity should not be divested to or captured by the most dominant religious bodies."[351] Failures to protect outsiders from a false neutrality imposed by a dominant few are rule of law failures, undermining the entire system's capacity for justice.

C. Routine System Maintenance

Given increased system complexity, and system fragilities in constricted pleading and in risks of procedural inequity and the unrule of law, we could be tempted to reimpose simplicity, to "undevelop" doctrine across the board. To do so, however, could cause the very stultification that this Article critiques. We should not reflexively eliminate theories of relief, which could seem the obvious solution to doctrinal expansion problems. We should instead conduct routine system maintenance to sustain, or to renew, bona fide liberality in pleading, which will manifest differently in different eras for social and technological reasons.

Complexity theory counsels that to aim above all at "simplifying laws" would miss the mark and that it is more important to aim at features that threaten system sustainability.[352] The legal system is inevitably—and ought to be—a site of politics

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The Acceptability of Gradual Erosion in Others' Unethical Behavior, 45 J. EXPERIMENTAL SOC. PSYCH. 708, 708 (2009) (alteration in original))).

[349] *E.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); Carson *ex rel.* O.C. v. Makin, 142 S. Ct. 1987, 1998 (2022); Shurtleff v. City of Boston, 142 S. Ct. 1583, 1593 (2022); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

[350] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000); *see* Anderson, *supra* note 338, at 331 (observing that "all citizens are entitled to the social conditions of their freedom and standing as equals in civil society").

[351] EOIN DALY & TOM HICKEY, THE POLITICAL THEORY OF THE IRISH CONSTITUTION: REPUBLICANISM AND THE BASIC LAW 198–99 (2015); *see also* Daly, *supra* note 62, at 291 ("[F]ar from abrogating freedom, public interference—exercised under democratic control—in fact *constitutes* freedom as distinct from *causing* it, because it secures citizens against private domination.").

[352] J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849, 860 (1996).

and mobilization for change; but it is most usefully also a system adjacent to the democratic process for steady, reliable dispute resolution.[353] Its value is as a ready outlet for solving problems without resort to vigilantism and for making social problems salient so that all branches of government, not courts alone, may address them.[354] The goal of routine maintenance thus is sustainability, given inevitable fragility. With respect to reshaping legal rules, maintenance means purposively exercising a wide variety of professional functions to better align theories of relief with underlying claims, or at least de-ossifying them, by means other than common law adjudication.

We need purposive maintenance not least because the progression of common law doctrine is not sensible, in the sense that it is directed less by deliberation than by chance and mischance. Common law's development is a "distributed process," wherein no individual can unilaterally impose their vision of its direction.[355] Although it purports to be "a process of prestige and persuasion,"[356] its path "depends on the random circumstances [that] generate cases."[357] Indeed, it appears as a "path" only in retrospect and under heavy interpretation, glosses concealing "a series of nonlinear, chaotic jumps from point to point."[358] Under "activity selection bias," Gillian Hadfield has observed, courts "will not usually see a random sample" of disputes and thus not learn enough to develop a rule aimed at handling all disputes.[359] Unless managed purposively, doctrines will arrive at good, effective rules "only by chance."[360]

Consider percolation, the expected—or just hoped-for—emergence of answers to legal questions by awaiting multiple courts to weigh in,[361] as if akin to "laboratories

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[353] *See* Zemans, *supra* note 1, at 692–94 (describing legal mobilization *as* political participation).

[354] *See supra* text accompanying note 219.

[355] Ruhl & Katz, *supra* note 24, at 226. Whether prestige is even a legitimate basis, in a democratic republic, for achieving legal consensus is debatable.

[356] *Id.*

[357] Johnston, *supra* note 30, at 362.

[358] *Id.*; *see* Webb, *supra* note 113, at 239 (observing that "law delivers justice as much by accident as by design").

[359] Hadfield, *supra* note 254, at 585.

[360] *See id.* at 591–94.

[361] Some construe percolation as "the practice of awaiting multiple lower courts' answers to a legal question that the [Supreme] Court is bound to decide." *E.g.*, Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 371 (2021). I construe it as the result observed while waiting, analogizing to the physical process of percolation—the filtering of fluids through porous materials—though practice and result are linked. *Cf.* WILLIAM BUTLER YEATS, *Among School Children* (No. 222), *in* THE COLLECTED POEMS OF W.B. YEATS 215, 217 (Richard J. Finneran ed., rev. 2d ed. 1989) ("How can we know the dancer from the dance?").

of democracy."[362] Although percolation might enhance a court system's institutional legitimacy,[363] it is not a "purposeful" process, its value is "contingent and context-specific," and any nonuniformity bubbling up can threaten the rule of law.[364] In complexity terms, we might describe it as more "the aggregate byproduct of bottom-up decisions offered by various agents and agent sets" than a "function of top-down choices made by a system designer."[365]

In routine system maintenance, there are roles for those close to courts and common law adjudication, like litigators and restatement committees, as well as roles for those further away, like legislators and professional associations. And routine system maintenance can comprise, among other things: (1) active, dialectic legislation that consolidates or distinguishes ossified counts; (2) those counts' replacement by or supplement with more open-textured legal tests, affording more opportunity for claimant narrative and equitable response; (3) rules requiring courts and claimants to disclose which theories of relief are in play; and (4) careful use of artificial intelligence, and machine learning in particular, to reorganize doctrine.

Active legislatures are central to the maintenance project, though it is important to remember that they work in dialectics with courts. Their work can entail consolidating or distinguishing theories of relief,[366] for example amending Title VII to expressly cover prescriptive stereotyping in the workplace just the same as ascriptive stereotyping, notwithstanding the *Bostock* decision's provisional coverage.[367] In contrast to "unwritten" common law, codification has often prioritized democratic accountability, reinforcing legislatures' primacy and elevation of the people's concerns.[368] In contrast to courts' generally reactive stance, legislatures "have the advantage of an activist stance with respect to identifying problems, researching them,

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[362] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *But cf.* Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, 117 AM. POL. SCI. REV. 967 (2022) (finding national antidemocracy politics driving reduced state-level democracy performance).

[363] *See* Coenen & Davis, *supra* note 361, at 409.

[364] *Id.* at 369, 387–89; *see* Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1226–27 (2017) (describing percolation as "bottom-up" process).

[365] Ruhl & Katz, *supra* note 24, at 216.

[366] *Cf.* Coenen, *supra* note 33, at 373–81 (evaluating judicial responses to doctrinal overlap, including consolidation and displacement).

[367] *See supra* notes 240–52 and accompanying text; *see also, e.g.*, Meredith Rolfs Severtson, Note, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-*Bostock, 74 VAND. L. REV. 1507, 1535–38 (2021) (urging amending Title VII along these lines); William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 513–14 (2011) (same); Vargas, *supra* note 243, at 201–04 (same).

[368] *See* Burbank, *supra* note 7, at 1106, 1113–14; Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 137–38 (2018).

and developing rules."[369] Thus, to submit that legislatures can contribute to system maintenance is in large part to argue that they could more frequently reinforce valuable court-won additions to doctrine, or to override pernicious additions.

The challenge in any legislative fix is knowing when theories of relief have run their course, as some can be effective even after a rights-protection breakthrough, or as part of ongoing rights-protective breakthroughs, as with recent use of racial gerrymandering doctrine to combat vote dilution.[370] And some complexity theorists posit that "decentralized forms of governance" handle complexity better than "top-down, centralized regulation."[371] But clarity within complexity comes from a robust lawmaking dialectic between legislatures and courts. Because legislatures have affirmative obligations to unearth and unmake the people's problems, legislative silence is legislative approval of what courts are up to.

In lieu of consolidating or further distinguishing theories of relief, lawmakers could supplant overlapping legal tests with a more open-textured inquiry, or even supplement one more formulaic test with one more open-textured inquiry. In doing so, lawmakers would draw on traditional equity practice to afford a "safety valve" from a more rigid count.[372] Open-textured counts are not perfect. They depend on decisionmakers' abilities "to acquire and evaluate accurate information" and to "assign weights and compare values."[373] They imbue decisionmakers with discretion and thus power.[374] However, open-textured counts can provide fuller coverage for underlying claims, negating a need to shoehorn central facts into misaligned or incompatible elements to survive dismissal, while accommodating subtle variations claim to claim. They can benefit marginalized claimants by inducing decisionmakers "to suspend judgment, listen for the story's point, and test it against [their] own

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[369] Hadfield, *supra* note 254, at 615.

[370] *See* Section II.A.1.

[371] Ruhl & Katz, *supra* note 24, at 209.

[372] *See* Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1537 (2008) (describing totality inquiry in current *Gingles* vote dilution test as "safety valve" to *Gingles* preconditions); *supra* notes 195–97 and accompanying text.

[373] Bone, supra note 112, at 2016.

[374] *See* Burbank, *supra* note 271, at 1470; Massaro, *supra* note 51, at 2112, 2116–20; Dailey & Rosenbury, *supra* note 88, at 1452, 1469–70 (observing that "the traditional 'best interests of the child' standard . . . has largely operated as a cover for the exercise of unprincipled judicial discretion"); Janet L. Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD.'S LEGAL RTS. J. 2, 2–3, 6 (1996) (observing that the "best interest" standard has disguised judges' focus on parents' interest and provided "the illusion of consistency for [family] law").

version of reality."[375] And they can alleviate system fragility associated with "constructing a rigid, highly integrated network" of putatively ultra-quality components.[376]

Another important technique lies in illuminating when overlapping counts are or could be in use. We could require that legal decisionmakers routinely identify in their opinions all grounds for decision implicated by parties' claims, enabling the public and legal practitioners alike to discern alternate routes.[377] We tend not to charge courts with proactively making case law more consistent, which reflects blending civil law and common law perspectives, but candor in this respect would be a first step.[378] We could likewise require that advocates not only disclose directly adverse legal authority, a common duty,[379] but also disclose alternative theories of relief that are available, even if not pursued. Disclosure of full sets of counts could tamp down on the gamesmanship in asserting one count in a set but not the rest.[380] Where advocates do not know about available counts or purposefully leave them out, we could insist that decisionmakers help out, consistent with their duties to educate parties and the public.[381]

Given legal technology's transformation of legal practice, we should consider how artificial intelligence (AI), in particular machine learning, can support system sustainability. From hornbooks and treatises to legal indexing tools, like the West Key Number System, users rely on technology to "confront the sheer volume of

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[375] *See* Delgado, *supra* note 81, at 2440; Ralph, *supra* note 255, at 608 (arguing that "when narrative-erasing procedure takes hold, future litigants' abilities to tell their own stories are sorely limited").

[376] Ruhl, *supra* note 2, at 594.

[377] *See generally* Varsava, *supra* note 145 (suggesting that instead of writing opinions with a focus on the facts that make a compelling narrative, judges should reveal alternate grounds for decision in their opinions).

[378] *See* JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 27–33 (4th ed. 2018) (describing ideology of repeal and renewal underlying civil law codification); John Henry Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 357, 380 (1981) (describing emphasis on distilling rules in civil law systems relative to common law systems).

[379] *E.g.*, MODEL RULES OF PRO. CONDUCT r. 3.3(b) (AM. BAR ASS'N 1983) (barring knowingly failing to disclose controlling, adverse authority known to lawyer and not previously disclosed); CAL. R. PRO. CONDUCT r. 3.3(a)(2) (STATE BAR OF CAL. 2018); TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 3.03 (STATE BAR OF TEX. 2022).

[380] More rigorous enforcement of claim joinder rules could be a starting point for this. *See* Freer, *supra* note 125, at 822.

[381] *E.g.*, MODEL CODE OF JUD. CONDUCT r. 1.2 cmt. (AM. BAR ASS'N 1990) (admonishing judges to conduct community outreach to promote confidence in courts); *see also id.* at r. 2.6(A) & cmt. (requiring judges to ensure a right to be heard for each claimant).

information and overall attendant complexity of legal systems."[382] We could expressly link overlapping counts in legal databases, treatises, and other resources so that claimants can readily learn and appraise their options. Courts would benefit too. We must elucidate counts' connections to each other because machine learning ultimately replicates human ideas and limitations. Search algorithms play crucial roles in "selecting what legal information we see" and more broadly "mediating our information environment."[383] Uncritical reliance on AI risks replicating biases, entrenching categories, dehumanizing legal problems, and obscuring normative dimensions behind all of this.[384]

These nascent proposals are just a few techniques for managing doctrinal complexity. One commonality is a principle that the burden to address problems remains for the most part on those with power to do so.[385] It should not fall on claimants themselves, much less underrepresented claimants, to alter their own understandings of their lived experiences or legal problems to use a system for which they are not custodians. This sense of what can and ought to be expected from each system participant is consistent with ethical values supporting maintenance of those systems, like altruism, pluralism, and interdependence.[386]

CONCLUSION

In this Article, I have above all tried to see doctrinal development in a new way, attending to layers of law embodied by claims and the theories of relief that proliferate above them, and to the unexpected constriction of pleading through this complexity. The goal is to "situate ourselves" in a macroscale history of doctrinal change so as to avoid being "mystified" by overly rosy accounts of how the common law *as it is* suffices for democracy and liberation.[387] I have taken this hard look—identifying system abrasions that could emerge as indicia of a more brittle legal system—not to be deconstructive but to be reconstructive.[388] I have taken this hard look,

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[382] Ruhl & Katz, *supra* note 24, at 223; *accord* Delgado & Stefancic, *supra* note 221, at 308–09; Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]search*, 109 LAW LIBR. J. 387, 388 (2017).

[383] Nevelow Mart, *supra* note 382, at 391.

[384] *See* Ryan Calo, *Modeling Through*, 71 DUKE L.J. 1391, 1413–22 (2022).

[385] *Cf.* South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) (upholding federal preclearance of state election laws as a constitutional response to broad disenfranchisement, shifting "advantage of time and inertia from the perpetrators of the evil to its victims").

[386] *E.g.*, Webb, *supra* note 113, at 239–40.

[387] *See* Berger, *supra* note 225, at 11.

[388] JACK TURNER, AWAKENING TO RACE: INDIVIDUALISM AND SOCIAL CONSCIOUSNESS IN AMERICA 85 (2012) (describing patient attention as a democratic act); Ruhl & Katz, *supra* note 24, at 206–07 (arguing that analyzing the legal system as a complex adaptive system "changes perspective and leads to new questions").

offering theory and systemic analysis, to support social action that could sustain and improve our legal systems.[389]

The theory of doctrinal expansion offered here advances our knowledge of legal change in several ways. Parsing claims from counts, which takes a hyperrealist outlook, underscores that even form has function and can cause tangible effects.[390] Ossified counts constrain litigation where courts are predisposed to fixate on text, and they risk distorting how we understand claims themselves, the underlying injuries and legal relations.[391] In addition, analyzing lateral and lineal aspects of doctrinal expansion reveals how count ossification is more problematic than count creation. Although both processes increase system complexity, inducing system fragilities like constricted pleading, procedural inequities, and erosions in rule of law, creation reflects real need for new theories, whereas ossification reflects a failure to synthesize new theories with existing law. And it is ossification that we can most readily manage as a profession.

In parsing counts from claims and illustrating hydraulic and ossifying processes in this theory of expansion, I have relied on examples of doctrinal development in civil rights law. I have done so not to suggest that devising new theories of relief could somehow be wrong but to "denaturalize the status quo" of how we manage, or fail to manage, precedent and recordkeeping for theories once they are devised.[392] In theorizing doctrinal expansion, I underscore the importance of claimants forging new modes for redress but also some problems with a laissez-faire approach to preserving their successes: failing to convert court decisions into legislation, failing to recommend rather than merely to restate legal approaches, and failing to code theories of relief effectively for future research and legal change. This theory of doctrinal expansion reminds us also not to assume the existence of a "logical terminus" in liberality or complexity, which emerge not from clichéd say-so but as the results of our work together.[393]

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[389] *See* Webb, *supra* note 113, at 238–39 (describing requirements of sociolegal theory "as a framework for social action").

[390] *Cf.* Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT'S MAG. 403, 408 (1896) (arguing that "*form ever follows function*").

[391] *See supra* Section II.B.

[392] Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 861 (2021).

[393] *See* Burbank, *supra* note 271, at 1486 (noting conventional view that law progressed to equity and progresses now to "dispute resolution simpliciter"); *cf.* Pedro, *supra* note 28, at 162 (cautioning against accepting uncritically accounts that cast civil procedure as ably evening the odds between powerful and marginalized claimants, lest we perpetuate that clear untruth).