

# University of Miami Law Review

---

Volume 69  
Number 2 *Volume 69 Number 2 (Winter 2015)*  
SYMPOSIUM: Leading from Below

Article 7

---

10-1-2015

## The Most Efficient Finder of Fact: The Federal District Judge

Vaughn R. Walker

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

---

### Recommended Citation

Vaughn R. Walker, *The Most Efficient Finder of Fact: The Federal District Judge*, 69 U. Miami L. Rev. 385 (2015)

Available at: <https://repository.law.miami.edu/umlr/vol69/iss2/7>

This Remarks is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

## The Most Efficient Finder of Fact: The Federal District Judge

VAUGHN R. WALKER\*

First of all, I want to extend my appreciation to the *University of Miami Law Review* for the invitation to be with you and to speak at the 2014 Symposium, *Leading from Below*. This is a beautiful law school on a delightful campus. You are very lucky to be studying here. But, of course, it is the extremely able faculty of this law school and the wonderful and diverse group of students who study here that provide the spark of the learning process. That spark has been evident in all the conversations I have had in the short time I have been here.

Now, the topic that the panelists have been asked to talk about is described as an “examin[ation of] the controversial practice of using social facts and statistics to show harm to communities, . . . and whether district court judges should compile a factual record with an eye toward creating opportunities to change the law on appeal.”<sup>1</sup>

First off, why are we talking about this subject? The reason, or certainly a major reason, why this kind of fact-finding in the judicial process merits reflection goes back a very long way. It goes back at least to 1934 when the Rules Enabling Act<sup>2</sup> was passed. Among other things, that act merged the law and equity jurisdictions of the federal courts.<sup>3</sup> It thus made available to the federal courts all the tools historically associated with courts of equity. These tools were powers traditionally associated with the executive arm of government because courts of equity in our Anglo-American legal tradition were associated with the king or, in this country, the executive.<sup>4</sup>

---

\* United States District Judge for the Northern District of California (retired). Judge Walker originally delivered these remarks during Panel IV, entitled *Judges and the Facts*, at the *University of Miami Law Review's* 2014 Symposium, *Leading from Below*. See *2014 Symposium*, U. MIAMI L. REV., <http://lawreview.law.miami.edu/2014-symposium/> (last visited Nov. 15, 2014). These remarks have been edited for publication.

1. *2014 Symposium—Leading from Below*, U. MIAMI L. REV., <http://lawreview.law.miami.edu/2014-symposium/> (last visited Dec. 14, 2014).

2. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2012)).

3. *Id.* (“The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both.”).

4. See, e.g., W.S. Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 294 (1915) (“Equity therefore came to be exercised by the Chancellor and Council who were in close touch with the king, because through them the king exercised his executive and extraordinary judicial power.”).

The Federal Rules of Civil Procedure, which were the product of the Rules Enabling Act, and became effective in 1938, afforded federal courts the use of the tools of equitable procedure: liberal joinder of claims and parties; hands-on judicial case management; and, significantly, class actions, which were made more powerful by the 1966 amendments to the Federal Rules of Civil Procedure;<sup>5</sup> along with other forms of mass litigation. These essentially equitable techniques were imported into the federal legal process, and similar innovations have followed in almost all the state courts.<sup>6</sup>

When the Judiciary Act of 1789 created the first federal courts apart from the Supreme Court, these newly established federal courts were mandated to pattern their procedure after that of the states in which they functioned.<sup>7</sup> That proved to be essentially unworkable in a national judiciary, especially as new states were admitted to the union. It was not until the latter part of the nineteenth century that uniformity of procedure and the present day organization of the federal courts could be achieved, a transformation completed by the Rules Enabling Act. The results of these innovations of organization—unified procedure and a blending of equity and law—have transformed the ability of federal courts to address issues that confront people and institutions, both public and private, and for which there are essentially no other avenues through which to seek resolution.

Among the most prescient observations about the revolution wrought with the Rules Enabling Act was a law review article written in 1940,<sup>8</sup> just a couple of years after the Federal Rules became effective. The authors were Harry Kalven and Maurice Rosenfield of the University of Chicago. It is a law review article that I put on the reading list every year that I teach, and it rewards me in re-reading every time. Kalven and Rosenfield foresaw that the processes established in the then-new Federal Rules of Civil Procedure were in many of its uses essentially administrative in kind and operation.<sup>9</sup> Like good lawyers,

---

5. See Amendments to the Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1031 (1966) (“[T]he rules of Civil Procedure . . . hereby are, amended by including therein Rules 23.1, 23.2 . . .”).

6. See generally John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355–59 (2003) (discussing and listing states that have replicated the Federal Rules of Civil Procedure, as well as states that have rules of procedure that are very similar to the federal rules).

7. See Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88 (1789) (“And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each State respectively according to the mode of forming juries therein now practiced . . .”).

8. See Harry Kalven, Jr., & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

9. *Id.* at 714–15.

they drew the right analogy. They perceived that these processes augmented and enriched those of the executive and legislative branches and possessed capabilities that the executive and legislative branches lacked.

Just as Kalven and Rosenfield anticipated, the federal courts have been able to carry out tasks that no other institution in our society can perform, and yet, accomplishing these tasks is necessary to provide remedies to individuals and institutions in a whole variety of situations. This is most easily seen in cases that require significant resources—beyond the resources that individuals possess—to bring and prosecute claims when plaintiffs perceive that they have been wronged by large institutions, whether governmental or private.<sup>10</sup> These include so-called low value cases in which the individual injuries are insufficient to make an individual legal remedy practical, but the aggregate harm is great enough to make aggregate redress practical.<sup>11</sup> These also include cases of the kind that Judge Shira Scheindlin discussed, in which a governmental institution singles out persons lacking the political power to obtain redress through the legislative process, as well as cases on behalf of consumers, employees, and injured persons.<sup>12</sup> Class actions are the paradigm: a mechanism that affords a remedy otherwise not available.<sup>13</sup> While class actions are the preeminent remedial innovation of the Federal Rules, they are not the only such mechanism. Federal courts have increasingly learned how aggregate litigation that cannot satisfy the requirements for class certification can nonetheless be crafted to afford a group remedy. Judge Weinstein has aptly labeled mass consolidations required to afford a remedy for mass torts “quasi-class actions.”<sup>14</sup>

It is also discovery, of course, that has enabled the courts to engage the levers of judicial authority in order to effect remedies that extend

---

10. See, e.g., *id.* at 648 (“The employee who is entitled to time and a half for overtime, the stockholder who has been misled by a false statement in a prospectus, the rate-payer who has been charged an excessive rate, the depositor in a closed bank, the taxpayer who resists an illegal assessment, or the small business man who has been the victim of a monopoly in restraint of trade, like the investor in the reorganization, finds himself inadvertently holding a small stake in a large controversy. The type of injury which tends to affect simultaneously the interest of many people is also apt to involve immensely complex facts and intricate law, and redress for it is likely to involve expense totally disproportionate to any of the individual claims.”).

11. See *id.* at 686 (“If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all.”).

12. See Shira A. Scheindlin, *Judicial Fact-Finding and the Trial Court Judge*, 69 U. MIAAMI L. REV. 367 (2015) (discussing *Floyd v. City of New York*, the stop-and-frisk case, and the need to use statistics in order to resolve each of the 4.4 million individual stops at issue there).

13. See Kalven, Jr., & Rosenfield, *supra* note 8, at 686 (“Administrative law removes the obstacles of insufficient funds and insufficient knowledge by shifting the responsibility for protecting the interests of the individuals comprising the group to a public body which has ample funds and adequate powers of investigation.”).

14. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480–81 (1994).

beyond the traditional confines of individual litigation. This brings to mind a vignette in the Proposition Eight case<sup>15</sup> that I will share with you. The lawyers who brought that case are two of the finest lawyers that practice in the United States today—Ted Olson, a superb appellate advocate, and David Boies, a wonderful trial lawyer. They did not anticipate a trial when they brought the case. Nor did the proponents of the initiative expect to have to defend the initiative in a trial.

However, the initial case management statements that were filed by the parties in that case showed factual propositions at war with one another: Sexual orientation, wrote the plaintiffs, is an immutable characteristic.<sup>16</sup> No, sexual orientation is fluid, countered the proponents.<sup>17</sup> The plaintiffs further contended that it is important to establish that gay and lesbian relationships are essentially no different from the relationships of heterosexual couples.<sup>18</sup> However, the proponents argued that there are fundamental differences in the relationships between people of the same gender and people of opposite genders.<sup>19</sup> The role of women is different in today's world than it was in earlier eras, and this has transformed the marital relationship, asserted the plaintiffs.<sup>20</sup> No, the proponents responded, there are still unique capacities in marital relationships for the female and the male.<sup>21</sup> So on and so forth.

These factual propositions passed like ships in the night, never engaging one another. I suggested to the lawyers, somewhat to their surprise, that they ought to resolve these issues via trial—there are people who are experts in these subjects, and there are those who can offer first-hand accounts that inform the parties' respective positions. We can put these witnesses on the stand; they can be examined, they can present their evidence, they can defend their testimony, and they can be cross-examined.

Ted Olson, in particular, was not very enthusiastic about a trial; he wanted to get immediately to the court of appeals and then to the Supreme Court before Justice Stevens retired because, I was told later,

---

15. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

16. Complaint in Intervention for Declaratory, Injunctive or Other Relief ¶ 27, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-cv-2292 VRW) (“The vast majority of people experience little or no choice about their sexual orientation, which cannot be changed readily, if at all.”).

17. Defendant-Intervenors' Trial Memorandum at 5, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-cv-2292 VRW).

18. Complaint in Intervention for Declaratory, Injunctive or Other Relief, *supra* note 16, ¶¶ 33, 39.

19. Defendant-Intervenors' Trial Memorandum, *supra* note 17, at 6.

20. Complaint in Intervention for Declaratory, Injunctive or Other Relief, *supra* note 16, ¶ 37.

21. Defendant-Intervenors' Trial Memorandum, *supra* note 17, at 6.

he thought Justice Stevens could bring Justice Kennedy along to form a five-vote majority for Olson's side of the case. This idea of having a trial would, of course, slow down the process. Thus, when I said at an early case management conference, "Well, counsel, how much time are you going to need for discovery in this case?" Olson stood up and said, "Oh, your honor, we don't need any discovery in this case." At which point, Boies, the trial lawyer, stood up, elbowed Olson out of the way (he almost put his hand over Olson's mouth), and said, "Your honor, we need at least six months for discovery." The trial lawyer knew instinctively the value of discovery in making a record.

In litigation, dealing with the kinds of issues this Symposium focuses upon, and in almost all kinds of litigation, discovery is often *key*. Now, there are debates raising the question of whether discovery in our system has gone too far, is too costly, and its burdens unfairly borne because they fall most heavily upon defendants that have little practical means of recovering those costs. These are fair questions. The scope of discovery, its management, and its costs are debatable subjects, but there is no question that the ability to gather evidence through a judicial proceeding is an exceedingly powerful weapon. It can be done through other means as well, but the judicial process offers certain advantages and poses certain dilemmas. Most of both the advantages and dilemmas arise from the fact that it is directly interested parties and their representatives who initiate the process, and it is guided only by the very loose reins of a judicial officer. Discovery in the federal courts is neither an unalloyed good, nor an unmitigated bad, but a useful, if sometimes abused, tool.

Now, to be sure, judicial fact-finding of the kind that is described in this program<sup>22</sup> is not limited to the kinds of cases that I have mentioned—class actions, aggregate litigation, and so forth. We see it in other kinds of litigation, and I was reminded of that in the program materials that mentioned some of the cases I handled.<sup>23</sup>

The *Apple-Microsoft* case was one that took a while to develop,<sup>24</sup> but one in which the factual issues were eventually teased out. While it

---

22. Program from the *University of Miami Law Review* Symposium, *Leading from Below* (Feb. 14–15, 2014) (on file with the *University of Miami Law Review*) [hereinafter Symposium Program]; see also *supra* note 1 and accompanying text.

23. Symposium Program, *supra* note 22 ("Judge Walker has presided over a number of notable lawsuits. These include *Apple Computer, Inc. v. Microsoft Corporation*, . . . *United States v. Oracle Corporation*, . . . *In re Terrorist Surveillance Cases*, . . . and numerous patent, antitrust, securities and other complex business disputes.").

24. See generally *Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616 (N.D. Cal. 1993), *aff'd in part and remanded in part*, 35 F.3d 1435 (9th Cir. 1994); *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006 (N.D. Cal. 1992); *Apple Computer, Inc. v. Microsoft Corp.*, 779 F. Supp. 133 (N.D. Cal. 1991); *Apple Computer, Inc. v. Microsoft Corp.*, 759 F. Supp. 1444

turned out there was no real controversy about what the facts were, there was great and enormously important controversy about the legal significance of those facts. Summary judgment was entered,<sup>25</sup> and that decision and those that followed in its wake transformed the software industry. In fact, every time you open up your computer, you see all the graphical user features that were at issue in that case and the ownership rights that were ultimately established. It was a case where the interpretation of the law had great repercussions, but the interpretation required establishment of undisputed facts.

Another case that was mentioned is the *Peoplesoft* case.<sup>26</sup> This was a case in which there was a trial, and I was required to make findings of fact with respect to the effects of a merger of the two entities involved in that transaction.<sup>27</sup> The facts were very much in dispute while the law was relatively well settled, just the opposite of the *Apple-Microsoft* case. The outcome of the resolution of those facts had a major impact on the economy in the San Francisco Bay area, because of its impact on the employment opportunities in the region, and on the business applications space generally. And, of course, there are the terrorist surveillance program cases that are still ongoing;<sup>28</sup> these cases are replete with issues of national security, privacy, the scope of governmental authority, and other important questions.

Decisions in disputes of the kind I have mentioned, and in many others as well, can be made by means other than a judicial process. But I think that the judicial process offers some truly great advantages for decisionmaking in matters impacting masses of people, even though traditionally the judicial process has been thought to be suited only for a rather more limited realm of controversies. First, the fundamental principles of due process are more scrupulously observed in a judicial process than in alternative processes.<sup>29</sup> It is no criticism of the political and legislative processes to assert that they are driven primarily by popular

---

(N.D. Cal. 1991); *Apple Computer, Inc. v. Microsoft Corp.*, 717 F. Supp. 1428 (N.D. Cal. 1989); *Apple Computer, Inc. v. Microsoft Corp.*, 709 F. Supp. 925 (N.D. Cal. 1989).

25. *See* *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1438 (9th Cir. 1994).

26. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

27. *See id.* at 1108–09 (stating the court’s findings of fact in regards to the effects of the merger).

28. *See, e.g.,* *ACLU v. Clapper—Challenge to NSA Mass Call-Tracking Program*, ACLU, <https://www.aclu.org/national-security/aclu-v-clapper-challenge-nsa-mass-phone-call-tracking> (last visited Nov. 25, 2014) (“The complaint argues that the dragnet, justified by the Patriot Act’s Section 215, violates the right of privacy protected by the Fourth Amendment as well as the First Amendment rights of free speech and association. The complaint also charges that the program exceeds the authority that Congress provided through the Patriot Act.”).

29. *See* Anthony M. Kennedy, *Judicial Ethics and The Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1073, 1076 (1996) (“Judges must know and remember that we have a language, a logic, a structure, a tradition, a principled discourse, and a link to ancient teachings that transcends the



opinion; indeed, they are intended to be so influenced—that is the nature of those processes.<sup>30</sup> Decisions in the executive branch, whether directly by the executive or by an administrative agency, are also influenced by political considerations, although somewhat less so influenced than the legislative process. Second, a judicial process can afford individually-tailored relief and redress where the political process mediates disputes at a level of generality that makes redress for individuals tentative at best, if not wholly uncertain. Third, and this may be the most important advantage of judicial fact-finding involving social and economic issues, the nature of judicial tenure conduces to impart a long-run view from the bench. In contrast, legislative and political decisionmaking is driven by much shorter-term considerations, and administrative agency decisionmaking is subject to pressures from the entities and institutions regulated by administrative agencies, influences from which judges, at least federal judges, are largely immune.<sup>31</sup> One need not denigrate politicians or speak of regulatory capture to see that judicial decisionmaking is different and removed from influences that tend to focus on the immediate rather than the longer term.

The founders of our Republic were very wise. They understood that not every public servant, whether in the executive, legislative, or judicial branch, was going to be wise and incorruptible.<sup>32</sup> And that is true in the judiciary—not every district judge is a Jack Weinstein; not every court of appeals judge is a Learned Hand; not every Supreme Court Justice is a Benjamin Cardozo. The people who populate the judiciary bring with them the shortcomings and virtues of the rest of humanity. But it is, I think and I hope, not immodest to say that the federal judiciary is an outstanding organization populated by people of tremendous talent and great dedication who serve the country very well. Nevertheless, no branch of our government is perfect, and certainly all who come to the judicial branch do so with whatever their points of views are and whatever their backgrounds are, and these unavoidably affect the outlook of those who become judges.

The key point is this: federal trial judges in conducting trials engage in fact-finding—either directly themselves or through the gui-

---

political process. . . . The ethical principles that shape and inform the judicial mission demand our scrupulous adherence.”).

30. However, “[t]hat is not to say that we [judges] are superior to the political process or to public opinion, for in many respects we must subordinate to their deliberations if a democratic society is to prevail.” *See id.* at 1073.

31. *See id.* (saying that the judicial branch’s “processes and [its] discoveries are different and distinct from other institutions, and are valuable for that reason”).

32. *See id.* at 1070 (“In the Federalist Papers, written to urge ratification of the Constitution, James Madison said, ‘If men were angels, no government would be necessary.’”).



dance of a lay jury—that is informed by testimony, whether it be by expert testimony or by first-hand testimony, given in an orderly and deliberate process, subject to vigorous challenge and an appellate review that looks primarily to ensure that the process conforms to the established modes of evidence and standards of reliability. It is not that federal trial judges are wiser than other decisionmakers in our system. It is that they are part of a process that places a premium on proof and reliability. Their findings are embodied in a carefully and systematically compiled record that is tested at every step of the process in a way unlike any other means of making decisions of this kind. It is this that is referred to by the often uttered, but frequently misunderstood, term: the rule of law.

Federal trial judges are often called upon to deal with issues that are far beyond their experience and even their comprehension of all the nuances of the issues.<sup>33</sup> These judges are not scientists, although they are often called upon to decide questions that impact scientific matters; they are not statisticians, even though they are called upon to decide questions by numbers that can only be understood by statistical inference; they do not practice in the disciplines of medicine, physics, or engineering that are often involved in the cases before them. But federal trial judges are experienced at determining what is important in deciding matters in dispute and in applying the default rules used to resolve contested issues when the facts are in equipoise, as they often are. It is a process that has more cogency and more credibility than the more sweeping generalizations that drive the political branches and the regulatory process.

So, I would submit to you that the most efficient fact finder for many of the kinds of social and economic issues that we confront, and the kinds of cases that we are looking at today, are the federal district judges who day in and day out look witnesses in the eye and listen to their often highly contradictory testimony to decide or help a lay jury of their fellow citizens decide where in fact the truth lies.

Thank you.

---

33. See Weinstein, *supra* note 14, at 542 (discussing ways that Judge Weinstein has dealt with issues that have come before him but were beyond his experience and expertise).