AN AMERICAN'S VIEW OF "THE AMERICANIZATION OF THE ITALIAN CIVIL PROCEEDING": PROCEDURAL CONVERGENCE, STRATEGIC SIGNALING, AND DEMOCRATIC PROCESS

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I. Introduction

In May 2023, the Bocconi University Department of Law hosted a discussion entitled "The Americanization of the Italian Civil Proceeding."[1] The event focused on procedural reforms adopted as part of the Italian National Recovery and Resilience Plan (NRRP), proposed in 2021 as a condition of receiving post-pandemic support from the European Union.[2] The NRRP reforms offer technical solutions to entrenched problems of delay in Italian courts,[3] while also addressing concerns about economic stagnation and social cohesion.[4]

Bocconi's framing of the event—focusing on "Americanization" of the Italian civil proceeding—could easily have generated skepticism or at least surprise that Italy would borrow court practices from the United States. A half century ago, the renowned Italian scholar Mauro Cappelletti described Italian procedure as reflecting a unique "Italian style" of law—a style that by culture and history differed conceptually and practically from that of the United States.[5] Following suit, commentators often have cast Italian courts as resistant to U.S. civil procedure,

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1. *See The Americanization of the Italian Civil Proceeding*, Bocconi Dept. Legal Stud. (May 23, 2023), https://ius.unibocconi.eu/news/americanization-italian-civil-proceedings.

2. *See Italia Domani* [The National Recovery and Resilience Plan], Ministero dell'Economia e delle Finanze (May 26, 2021), https://www.mef.gov.it/en/focus/The-National-Recovery-and-Resilience-Plan-NRRP [hereinafter NRRP]; *Italy's National Recovery and Resilience Plan: Latest State of Play*, Eur. Parliamentary Rsch. Serv. (reporting Italy's expected EU fund allocation for the NRRP) [hereinafter Latest State].

3. *See* Silvia Giacomelli, Sauro Mocetti, Giuliana Palumbo & Giacomo Roma, *Civil Justice in Italy: Recent Trends*, *Questioni di Economia e Finanza*, (Oct. 18, 2017), at 5 (reporting that in 2010 Italy needed "more than twice the number of days … than in the other advanced countries" to resolve its pending docket of 5.8 million civil proceedings).

4. *See* Gianfranco Viesti, *The Implementation of the National Recovery and Resilience Plan*, Friedrich Ebert Stiftung (Dec. 2021), https://library.fes.de/pdf-files/bueros/rom/18657.pdf (stating the goals of "revitalization of the economy" and "social inclusion," among other aims).

5. *See generally* Mauro Cappelletti, John Henry Merryman & Joseph M. Perillo, The Italian Legal System: An Introduction (1st ed. 1967); *see also* Michael A. Livingston, Pier Giuseppe Monateri & Francesco Parisi, The Italian Legal System: An Introduction, vii (2d ed. 2015) (referring to the "'Italian style' of law … [as] background music, as it were, that makes even the same words and concepts take on a different meaning").

or, at the least, incompatible with it,[6] pointing to "barriers" that would make adopting American-style process difficult.[7] Still, even Cappelletti identified "common trends" in Italian procedure with those of non-civil law court systems,[8] and he pointed cautiously to an emergent "New Italian Style" of law that he anticipated would give the Italian judge "an extended role and greater prestige,"[9] akin to that of U.S. practice.

Today, comparative law scholars from both countries generally reject a binary distinction between civil and common law procedure,[10] emphasizing late twentieth-century convergences between the two systems on such matters as case management, pleading, and contractual forms of civil procedure,[11] notwithstanding the persistence of cultural and epistemological differences that trace to different legal origins.[12] Moreover, as the

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6. *See, e.g.*, Paola Lucarelli, Nofit Amir, Dana Rosen, Hadas Cohen & Michal Alberstein, *Fitting the Forum to the Fuss While Seeking the Truth: Lessons from Judicial Reforms in Italy*, 36 Ohio St. J. on Disp. Resol. 213, 217 (2020) (discussing implementation of reforms promoting ADR and judicial settlement prior to 2021 and noting that "the perceived exogenic nature of these reforms bred skepticism regarding the ability to implement them and some resistance").

7. *See, e.g.*, David C. Steelman & Marco Fabri, *Can an Italian Court Use the American Approach to Delay Reduction?*, 29 Just. Sys. J. 1, 11 (2008) (identifying "five barriers to caseflow management improvements" drawn from U.S. courts "that would make their implementation difficult and possibly unlikely to succeed" in Italy without attention "to other considerations").

8. Cappelletti, Merryman & Perillo, *supra* note 5, at 162–63.

9. *Id.* at 276.

10. *See* Oscar G. Chase, Helen Hershkoff, Linda Silberman, John Sorabji, Rolf Stürner, Yasuhei Taniguchi & Vincenzo Varano, Civil Litigation in Comparative Context (2d ed. 2017), at 3–4 (questioning conventional distinctions between civil and common law). Moreover, the traditional categories overlooked the extent to which many systems were "mixed," in the sense of including "individual characteristics of each legal family." Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 Am. J. Compar. L. 1, 21 (1997). *See also* Holger Spamann, *Civil v. Common Law: The Emperor Has No Clothes* (August 26, 2024), Harvard Public Law Working Paper No. 24-11, https://ssrn.com/abstract=4937647 (last visited Jan. 16, 2025) (contending that the distinction between common law and civil law systems is genealogical and does not entail distinguishing cultural traits).

11. *See, e.g.*, Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. Pa. L. Rev. 411 (2010) (discussing convergence regarding more particularized pleading standards).

12. *See* Pierre Legrand, *European Legal Systems Are Not Converging*, 45 Int'l & Compar. L. Q. 1, 61 (1996) (arguing that the suggestion of convergence "is misleading").

Bocconi convening illustrates, U.S. and Italian proceduralists actively engage with each other at conferences and through academic journals,[13] which contributes to transnational learning.

Within this framing, characterizing the NRRP reforms as Americanized arguably carries no surprise at all. Indeed, no one doubts that U.S. law has exerted broad influence outside U.S. borders[14] —some commentators go so far as to call the U.S. judicial model an "engine or inspiration for the reforms in [other] countries' legal systems."[15] More generally, Italian codes now use English-language terms,[16] authorize civil judges to channel disputes to mediation as in the United States,[17] offer a variant of the U.S. class action on an opt-in basis,[18] and use a

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13. *See, e.g.*, Elisabetta Grande, Rodrigo Míguez Núñez & Pier Giuseppe Monateri, *The Italian Theory of Comparative Law Goes Abroad*, 1 It. Rev. Int'l Compar. L. 5, 8 (2021) (discussing, among other engagements, the Cornell Common Core Project); *see also e.g.*, Mauro Cappelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 Buff. L. Rev. 181, 182 (1978) (discussing the Florence "access to justice" project).

14. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L. J. 1, 1 (2004) (stating "the American legal system arguably has become the most influential legal system in the world").

15. Nofit Amir & Michal Alberstein, *Designing Responsive Legal Systems: A Comparative Study*, 22 Pepp. Disp. Resol. L. J. 263, 265 (2022); *see also* Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in Legal Culture and the Legal Profession 137, 148 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996) (pointing out that the reception of American law "is a natural phenomenon," and "not the result of simple convergence brought about by the identity of problems faced by industrialized countries"); *see also* David S. Clark, *Postwar Legal Transplants and Growth of the Academic Discipline: 1945–1990*, in American Comparative Law: A History (2022) (recounting the growing influence of U.S. law).

16. *See* Silvia Ferreri & Larry A. DiMatteo, *Terminology Matters: Dangers of Superficial Transplantation*, 37 B.U. Int'l J. 35 (2019) (discussing incorporation of English legal terms into Italian codes); *but see* Ioana Plesea, *Italian Far-Right Wants to Penalize the Use of English Words*, The Brussels Times (Apr. 4, 2023), https://www.brusselstimes.com/442035/italian-far-right-wants-to-penalise-the-use-of-english-words.

17. *See* Nofit Amir & Michael Alberstein, *From Transplant to Disintegration? A Comparative Study of the Judicial Role*, 17 Ohio State. J. on Disp. Resol. 555, 568 (2022) (describing Italy's "black-letter transplant" of mandatory mediation following the 2010 Mediation Directive).

18. *See* Elisabetta Silvestri, *Rebooting Italian Class Actions*, *in* Class Actions in Europe: Holy Grail or a Wrong Trail? 201 (Alan Uzelac &. Stefaan Voet eds., 2021) (discussing differences between U.S. and Italian collective redress); *see also* Giorgio Afferni, *Class Actions in Italy: A Farewell to America*, 23

modified version of U.S.-style plea bargaining as a part of criminal proceedings.[19] Nor has influence been unidirectional. U.S. practice, once notorious for being "exceptional,"[20] now seems inflected by Continental practices,[21] given the civil jury's vanishing role as a fact finder and the use of judicial practices associated with non-common law countries.[22]

Nevertheless, this story of convergence goes only so far in explaining why commentators would characterize the NRRP court reforms as Americanized. In particular, it sidesteps emergent differences between U.S. and Continental process that seem significant to carrying out the NRRP's ambitious project of judicial improvement: namely, the U.S. legal system's extensive and even excessive reliance on non-judicial actors to decide disputes that elsewhere remain within the domain of public courts.[23] To be sure, some of these non-judicial decision makers are public actors, such as administrative judges who work within the executive branch but lack the independence guaranteed to

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Dig., Nat'l Italian Am. Bar Ass'n. L.J. 33, 36 (2015) (discussing the opt-in class mechanism in the Italian legal system and the opt-out mechanism in the United States).

19. Langer, *supra* note 14, at 6 (discussing Italy's incorporation of American-style plea bargaining into criminal proceedings).

20. *See* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 Am. J. Compar. L. 277 (2002) (discussing unique aspects of U.S. civil procedure as a part of American exceptionalism).

21. This Essay uses the terms Continental, European, civil, and non-common law as a shorthand for those legal systems that trace their origins to the Roman Empire, recognizing that the terminology is "inexact" and "imperfect." *See* Chase, Hershkoff, Silberman, Sorabji, Stürner, Taniguchi, & Varano, *supra* note 10, at 3.

22. *See* Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 Tul. J. Int'l & Compar. L. 125, 130, 133 (1999) (discussing, for example, the use of pre-packaged trial testimony in complex cases and witness summaries in place of live testimony). In 2017, only about 1% of all civil cases filed in U.S. federal court were resolved by trial, with the jury disposition rate about 0.7%. *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 Judicature 26, 28 (2017).

23. *See* Helen Hershkoff & Judith Resnik, *Contractualisation of Civil Litigation in the United States: Procedure, Contract, Public Authority, Autonomy, Aggregate Litigation, and Power*, *in* Contractualisation of Civil Litigation 419 (Anna Nylund & Antonio Cabraal eds., 2023) (documenting pervasive U.S. use of private decision making for dispute resolution).

Article III judges under the U.S. Constitution.[24] Others, however, are private actors, such as mediators and arbitrators, who work behind closed doors and are shielded from public assessment.[25] This trend of adjudicative outsourcing is well known and in some quarters has raised serious concerns. Critics argue that it has tended to subvert constitutional rights,[26] exacerbate economic inequality,[27] undermine democratic norms,[28] and distribute legal benefits disparately by race, class, and gender.[29] Indeed, for these reasons and others, some U.S. scholars view the U.S. judiciary as enabling democratic erosion, calling the U.S. Supreme Court "imperial" in its ambitions[30] and "oligarchic" in its bias toward corporate interests.[31] Admittedly, just

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24. *See* Laura K. Donohue & Jeremy McCabe, *Federal Courts: Article I, II, III, and IV Adjudication*, 71 CATH. U. L. REV. 543, 545 (2022) (distinguishing Article I from Article III judges and explaining the removal protections guaranteed to the latter).

25. *See* E. Gary Spitko, *Arbitration Secrecy*, 108 CORNELL L. REV. 1729 (2023) (discussing the implications of arbitral confidentiality).

26. *See, e.g.*, Richard L. Jolly, Valerie P. Hans & Robert S. Peck, *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79 (2022) (suggesting explanations for the decline of juries as finders of fact and arguing that revitalizing the practice is crucial to democratic governance).

27. *See, e.g.*, Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269, 272 (2020) (explaining that current civil procedure doctrine does not attend to economic inequality and showing that failure's implications inside and outside the courtroom).

28. *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *Standing for Democracy: Is Democracy a Procedural Right in* Vacuo*? A Democratic Perspective on Procedural Violations as a Basis for Article III Standing*, 70 BUFF. L. REV. 523, 595 (2022) (criticizing the blanket use of arbitration and observing that the "Court's overall approach has contributed to democratic backsliding by enabling the displacement of public rules of procedure with private contractual terms, often imposed by the stronger party without any meaningful consent by the weaker party").

29. *See, e.g.*, Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump, and Constitutional Change*, 34 CONST. COMMENT. 43, 87–101 (2019) (discussing the role of pleading and other procedural rules in impeding enforcement of gender and race protections).

30. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2002).

31. Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1 (2023) (explaining how the Court's jurisdictional doctrines relating to removal and arbitrability enable corporations to leverage public power in ways that subvert enforcement of statutory protections for consumers and employees).

as politics in the United States today is hyperpolarized,[32] so, too, are perceptions of the U.S. court system; some commentators insist that the current regime makes courts too accessible, generating costly and inefficient proceedings that burden economic growth.[33] These disagreements, however, highlight that the term Americanized is itself contested—raising further questions about use of this branding in Italy's current effort at judicial reform.

This Article focuses on the characterization of the NRRP's judicial reforms as "Americanized" and interrogates what that might mean for the values and principles that inform Italian public courts. It does not question the stated goals of the NRRP reform, namely to redress litigation delay, and accepts the premise that excessive delay is an unwanted feature of Italian civil proceedings, but it does not examine the causes, distributional effects, or social significance of such delay.[34] Nor does the Article focus on the internal impact of the reforms on the operation of the Italian courts or consider whether the reforms present optimal or even feasible solutions to the problems they purport to solve. Rather, the aim is to probe what invoking the term "Americanization" might portend for the Italian legal system—given disagreements within the United States about

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32. *See* Elizabeth Kolbert, *How Politics Got So Polarized*, The New Yorker (Dec. 27, 2021), https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized ("According to a YouGov survey, sixty per cent of Democrats regard the opposing party as 'a serious threat to the United States.' For Republicans, that figure approaches seventy per cent.").

33. *See, e.g.*, James V. Koch & Richard J. Cebula, *Do Lawyers Inhibit Economic Growth? New Evidence from the 50 U.S. States*, 48 J. Econ. Dev. 157 (2023) (finding that an increase in the number of lawyers and the amount of their compensation are negatively associated with state economic growth rates).

34. For one explanation of the Italian judiciary's backlog and case-disposition delays, see Remo Caponi, *The Performance of the Italian Civil Justice System: An Empirical Assessment*, 2 It. L.J. 15, 27 (2016) (explaining that "[t]he huge workload of the courts plays the leading role in determining the undue delay of ordinary civil proceedings and making it difficult to implement procedural reforms aimed at changing the structure of proceedings by introducing proceedings centred on a main hearing, which would be the best solution from a comparative perspective"). *See also* Helen Hershkoff & Stephen Loffredo, *Legal Culture, Optimal Delay, and Social Commitments: A Tribute to Vincenzo Varano*, *in* Processo E Cultura Giuridica, Procedure And Legal Culture 295, 307 (Vittoria Barsotti & Alessandro Simoni eds., 2020) (treating judicial delay as a normative concept).

procedural optimality[35] and the inevitable tradeoffs that legal systems make among values such as efficiency, fairness, and participation.[36] More generally, the Article emphasizes that branding the NRRP as "Americanized" raises questions about legal transplantation and why a borrowing nation adopts—or purports to adopt—the legal style of another country's system.[37] At the very least, the NRRP reforms present a case study of Pier Giuseppe Monateri's theory of legal transplants—of how even the "*non* deliberate efforts of import/export" of legal patterns can influence the design and implementation of reforms.[38]

The Article proceeds as follows:

Part II provides a brief overview of the NRRP's judicial reforms that on the surface seem "Americanized," illustrated by changes to court management and rule revisions affecting civil proceedings. Part III suggests descriptive and normative content to the term Americanization as applied to civil procedure, focusing on the U.S. court system, U.S. rules of civil procedure, and the values that are said to motivate procedural justice in the United States. This Part considers whether the U.S. judiciary is an apt model for Italian procedural reform and sets out some of the concerns that U.S. critics have raised about the practices the NRRP is said to emulate. Part IV explores the varied and conflicting signals that "Americanization" might send about the NRRP's procedural reforms given different conceptions of legal transplantation—variously theorized as a source of prestige that legitimates reform, as a reinforcement or realignment of political or ideological preferences, and as a

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35. Helen Hershkoff & Arthur R. Miller, *Courts and Civil Justice in the Time of COVID: Emerging Trends and Questions to Ask*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 321, 323 (2021) (describing the absence of consensus among U.S. court reformers on the problems plaguing judicial procedure and the values to guide any changes).

36. *See* Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, 18 NOMOS 126, 149–50 (1977) (discussing a variety of procedural values); *see also* Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L. J. 1473, 1541 (2021) (acknowledging different views of procedural fairness and arguing that the concept "may require subjecting the trade-offs between the different goods associated with access to justice—and, by extension, the trade-offs between the state's different functions—to continuous contestation by decisionmakers who represent all segments of the political community").

37. *See* Grande, *supra* note 13, at 23 (2021) (discussing the problem of the formant approach as "how and why styles are selected and transmitted").

38. Pier Giuseppe Monateri, *The 'Weak Law': Contaminations and Legal Cultures*, 1 GLOB. JURIST ADVANCES 1, 3 (2001).

voluntary exercise in legal translation that can produce hybrid adaptations and cross-jurisdictional benefits.

II. The National Recovery and Resilience Plan and Italian Civil Procedure Reform

The NRRP's judicial reforms are part of a multi-faceted national response to fiscal and governance problems in Italy that deepened during the COVID-19 pandemic and which Italy is seeking to address with funding from the Next Generation EU program.[39] The NRRP builds on the assumption that courts and laws shape market activity and are integral to economic development and social well-being.[40] Moreover, it recognizes that a functioning legal system does not operate in the abstract but rather depends on robust institutions that require budgetary support, sufficient numbers of trained personnel, up-to-date infrastructure, and engaged stakeholders.[41] The Next Generation EU program, which provides funding for the reforms, was itself designed to counter the "entrenched cutback management" mandated by earlier austerity policies that backfired and led to institutional shortfalls in Italy and elsewhere.[42]

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39. The Recovery and Resilience Facility, Eur. Comm'n., https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en.

40. *See* Sara D'Andrea, Silvia D'Andrea, Giovanni Di Bartolomew, Paolo D'Imperio, Giancarlo Infantino & Mara Meacci, *Structural Reforms in the Italian National Recovery and Resilience Plan: A Macroeconomic Assessment of Their Potential Effects* 9 (Ministero dell'Economia e delle Finanze Dipartimento del Tessoro, Working Paper No. 2, March 2023), https://www.dt.mef.gov.it/export/sites/sitodt/modules/documenti_it/analisi_progammazione/working_papers/WP-2-marzo-2023.pdf (stating that "the quality of institutions at the government and judicial level is a precondition for higher productivity, per capita income, quality of life, and citizen satisfaction").

41. *See* Kim Economides, Alfred A. Hang & Joe McIntyre, *Toward Timeliness in Civil Justice*, 41 Monash U. L. Rev. 414, 424–30 (2015) (discussing a range of factors affecting case processing times, including judicial resources, institutional practices, court attitudes and behavior, dispute complexity, and "external environmental factors" such as litigants' health or socioeconomic status).

42. Fabrizio Di Mascio, Alessandro Natalini & Stefania Profeti, *Administrative Reforms in the Italian National Recovery and Resilience Plan: A Selective Approach to Bridge the Capacity Gap*, 14 Contemp. It. Pol. 487, 491 (2022) (discussing "the damage caused by austerity").

The NRRP thus seeks to achieve various interrelated "missions,"[43] aimed "at repairing the economic and social damage caused by the pandemic crisis, contributing to addressing the structural weaknesses of the Italian economy, and leading the country along a path of ecological and environmental transition," and, further, at "reducing territorial, generational and gender gaps"[44] on a range of economic and social issues. Judicial reform plays an integral role in supporting these missions; as the NRRP's public-facing platform states:

> The goal of more effective and efficient justice, in addition to being more just, cannot be achieved only through reforms on the procedure of the trial or trials. It is necessary to move forward at the same time following three inseparable and complementary guidelines: on the organizational level, on the non-procedural dimension and on the legal process dimension.[45]

Given these goals, the NRRP takes a singular focus on reform of Italian civil proceedings—reducing and hopefully eliminating the interminable and protracted delay that critics say plague the Italian civil courts.[46] The NRRP aims to shorten the length of Italian civil proceedings by 40 percent in the five-year period ending 2026,[47] and to ensure that the goal is met on a court-by-court basis so that national data do not obscure regional and other problems.[48] The NRRP is by no means Italy's first contemporary attempt at fixing the problem of Italian

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43. *NRRP: Missions and Components*, Presidenza del Consiglio dei Ministri (Nov. 20, 2022), https://www.governo.it/en/approfondimento/nrrp-missions-and-components/19325.

44. *The National Recovery and Resilience Plan (NRRP)*, Ministero dell'Economia e delle Finanze (May 26, 2021), https://www.mef.gov.it/en/focus/The-National-Recovery-and-Resilience-Plan-NRRP/.

45. *The Reform of the Courts*, Italia Domani, https://www.italiadomani.gov.it/en/Interventi/riforme/riforme-orizzontali/riforma-della-giustizia.html.

46. *See* Livingston, Monateri & Parisi, *supra* note 5, at 90 (stating that "the current perception of the Italian judicial system is quite poor" and that "[i]t is regarded as accurate but habitually slow and inefficient in nature").

47. *The Reform of the Courts*, Italia Domani, https://www.italiadomani.gov.it/en/Interventi/riforme/riforme-orizzontali/riforma-della-giustizia.html.

48. *See* Marco Fabri, *The Italian National Recovery and Resilience Plan to Decrease the Length of Judicial Proceedings*, 184 Revue française d'Administration Publique 1015, 1022 (2023).

court delay.[49] Earlier reforms generally built on making free-standing amendments to the rules of civil procedure, along with a few experimental changes to the judicial office; while credited with modest improvement to the pace of case disposition, commentary nevertheless has called these reforms "a series of failed attempts."[50] Notably, the NRRP goes beyond the earlier reform's approach and comprises instead a coordinated set of "mutually reinforcing" structural changes, infrastructure investments, and capacity-building efforts in addition to technical rule changes.[51]

First, the NRRP seeks to improve the efficiency of the court system by increasing the use of non-judicial personnel to assist the court with case disposition and administration. Beyond adding staff, the Reform mandates the establishment of an *ufficio per il processo* (loosely translated, meaning "Judge's Bureau" or "Office for the Trial") that involves the recruitment and training of more than 20,000 temporary personnel, largely drawn from recent law graduates.[52] Earlier reforms had established

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49. For a detailed account of the Italian courts, see generally Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 Am. J. Compar. L. 657 (1997); Sonja Wolf, *Trial Within a Reasonable Time: The Recent Reforms of the Italian Justice System in Response to the Conflict with Article 6(1) of the ECHR*, 9 Eur. Pub. L. 189 (2003).

50. Elisabetta Silvestri, *The Never-Ending Reforms of Italian Civil Justice* 3 (Aug. 2, 2011), https://ssrn.com/abstract=1903863 (reporting that very little improvement was made in the latest round of reforms in 2009); *see also* Giuseppe Sobbrio, Elena D'Agostino & Emiliano Sironi, *New Disputes and Delay in Italian Courts* (Paolo Baffi Centre Research Paper No. 2010-84, 2010), https://ssrn.com/abstract=1554055 (reporting uptick in rate of disposition in 2000s and confirming that delays in court proceedings disincentivize new lawsuits).

51. Francesco Corti & Jorge Nuñez Ferrer, Ctr. for Eur. Pol'y Stud., *Recovery and Resilience Reflection Papers: Assessing Reforms in the National Recovery and Resilience Plans* 7, No. 3 (June 2021), https://cdn.ceps.eu/wp-content/uploads/2021/06/RRRP-No-3-Assessing-reforms-in-the-national-recovery-and-resilience-plans-Italy.pdf.

52. Prior to the reform, at least as of 2015, "many, if not most, judges, even on the appellate level, … perform[ed] their own clerical tasks" and "[j]udicial clerks [were] essentially nonexistent." Livingston, Montaeri & Parisi *supra* note 5, at 89. Under the NRRP, the ordinary courts can hire 5,410 staff on 36-month contracts; the Court of Cassation can hire 400 staff on 31-month contracts; and the Ministry of Justice can hire for 16,500 positions on 31-month contracts. *See* Dange Figueroa, Library of Congress, *Italy: Additional Measures to Implement the National Recovery and Resilience Plan* (Sept. 2021), https://www.loc.gov/item/global-legal-monitor/2021-09-08/italy-additional-measures-to-implement-the-national-recovery-and-resilience-plan/.

such bureaus in selected courts on a pilot basis.[53] One commentary, anticipating that these personnel will continue on a permanent basis even after the NRRP concludes, sees their role as "hybrid"—"to support judges not only in activities related to adjudication (such as preliminary file study, precedent research, assistance during hearings, preparation of draft judgements, etc.) but also in organizational innovation, workflow monitoring, digitalization, and the creation of a database of case law for tribunals and courts of appeal."[54]

Second, the NRRP connects to the Next Generation EU's broader goal of "digital transformation,"[55] using technological upgrades to expand judicial capacity, ensure public accountability, and promote decisional efficiency. During the pandemic, Italy moved to online proceedings and mandated electronic filings, having initially introduced electronic proceedings in 2012.[56] The NRRP goes further and calls for the structural use of digitization to aid in the disposition of individual cases. It also enlists digitization to enable the creation and collection of data to support reporting, monitoring, and accessibility of public information in courts as part of a broader effort to digitize public services and make them more efficient and business-friendly.

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53. *See* Walter Castelnovo, Alfredo Biffi, Elenora Paganini & Alice Angelini, *Change Management in the Italian Judicial System: The Case of "Ufficio per il Processo"* (Oct. 2023), https://www.researchgate.net/publication/375004314 (finding that the *ufficio per il processo* system was first established in 2012 as part of a broad judicial reform effort).

54. Cristina Dallara, Giancarlo Vecchi, Daniela Cavallini & Marco Di Giulio, *Implementing NRRP Policies and the Interest Groups Perspective in the Justice Sector: the "Ufficio per il processo" Reform*, 16 CONTEM. IT. POL. 39, 41 (2023). The success of the reform is beyond the scope of this Essay. Early reports about implementation have focused on the temporary status of the non-judicial personnel, weak judicial managerial capacity, and the change from the Draghi to the Meloni governments. *See id.* at 49 (asserting that the Draghi and Meloni administrations showed different levels of "interest" in the reforms).

55. Velina Lilyanova, *Next Generation EU, Digital Public Services in the National Recovery and Resilience Plans*, EUR. PARLIAMENTARY RSCH. SERV. (Dec. 2022), https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739271/EPRS_BRI(2022)739271_EN.pdf.

56. Antonio Martini & Ilaria Canepa, *Final Steps for the Digital Transformation of Italian Civil Proceedings—the Development of Remote Justice in the Italian Civil Courts*, INT'L BAR ASS'N (Aug. 4, 2021), https://www.ibanet.org/digital-transformation-italian-civil-proceedings.

Finally, the NRRP calls for changes to the Italian rules of civil procedure, all focused on addressing delay and backlog. These changes involve:

- Requiring alternative dispute resolution (ADR), including through arbitration and mediation, as a condition of entry into the public courts or on order of the judge for any reason (even during the Court of Appeal proceedings), expanding the situations in which the parties may opt for non-court resolution, and providing training to judges in the use of ADR.
- Redesigning the first instance proceeding to enable the judge and the parties to narrow the issues in dispute and, in particular, permit information-exchange prior to the traditional taking of evidence stage.
- Encouraging judicially-supervised settlement, by mandating the parties' personal participation in a conciliation hearing (and not only counsel's participation) and authorizing the judge to propose settlement throughout the proceedings.
- Introducing two new forms of summary adjudications that would terminate the action but not carry res judicata effect.[57]

On the surface, the NRRP's judicial reforms would seem to track many salient features of U.S. civil procedure such as a formative pretrial proceeding, use of ADR, encouragement of settlement, availability of discovery at an early stage in the proceeding, and summary adjudications. The NRRP also extends managerial practices into Italian courts, including use of non-judicial personnel, in forms that are resonant of U.S. practice, as well as integration of electronic technology into the processing and disposition of court matters. As in the United States, the NRRP reforms also use case metrics to monitor delay and backlog.[58] These features, however, are not unique to the United

57. For a more detailed summary of the procedural reforms, see Cesare Cavallini & Stefania Cirillo, *The Americanization of the Italian Civil Proceeding?*, 57 N.Y.U. J. Int'l L. & Pol. 7 (2025).

58. *See* Miguel F.P. Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 Cornell L. Rev. 363 (2020) (finding that the soft six-month deadline for U.S.

States. To be sure, some of the reforms, such as use of the continuous first-instance proceeding, would seem adapted from or at least influenced by U.S. practice.[59] Others, however, such as case management, would seem more allied with Continental approaches to judging than the passivity traditionally associated with the common law judge.[60] And still others, such as the use of judicial assistants, reflect multiple origins and nation-specific arrangements.[61]

III. NRRP, Procedural Reform, and the Americanization Thesis

Arguably, the NRRP's approach to judicial reform reflects a diversity of influences that are both common law and civil law in origin. Given this diversity, characterizing the NRRP reforms as Americanized would seem to require some explanation—both as to the descriptive content of the term and to the normative commitments that it is meant to suggest. Descriptively, civil dispute resolution in the United States is not unitary or centralized; to the contrary, it is a federated, complex, and sprawling system that makes use of an array of courts—federal, state, local, territorial, and tribal—as well as administrative agencies and private decision makers such as arbitrators and mediators that likewise engage in dispute resolution. Moreover, U.S. courts do not use a single set of procedural rules, and attitudes about

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federal judges to decide a case influences them to clear the docket faster at the expense of accuracy on some occasions).

59. *See* Sherman, *supra* note 22, at 126 (observing that "in some continental countries, trials are increasingly becoming continuous single events" as they are in the United States); *see, e.g.*, Anna Nylund, *The Structure of Civil Proceedings—Convergence Through the Main Hearing Model?*, 9 Civ. Proc. Rev. 13 (2018) (studying the similarities and differences in how the German, English, Nordic, and Finnish civil procedures treat main hearings).

60. *See* Helen Hershkoff & Rolf Stürner, *Judicial Case Management as a Democratic Practice: Procedural Convergence and the Constitutional Transplant Model*, in Constitutional Transplantations: The Diffusion and Adoption of Constitutional Ideas (Anat Scolnicov ed., forthcoming 2025) (on file with the authors) (highlighting the similarities in the American and German approaches toward case management).

61. *See, e.g.*, Anne Sanders, *Judicial Assistants in Europe—A Comparative Analysis*, 11 Int'l J. Ct. Admin., no. 3 (2020), at 5 (explaining that the law clerk system in the United States is not the only "origin" of the judicial assistant schemes used by European courts).

the court system lack a clear consensus. This Part deconstructs the U.S. procedural system and focuses on which, if any of the different components might plausibly serve as an apt model for Italian reform given concerns raised in the United States about the costs and benefits of its current procedural regime and the NRRP's stated goals.

A. *Americanization: Specifying the Court*

Descriptively, the term Americanization could refer to the overall system of courts that operates in the United States. But that description begs the question. The U.S. judiciary constitutes a federated system that includes a national set of courts (so-called "Article III" courts), fifty state court systems, and territorial courts, as well as administrative courts, private arbitral panels and mediators, and tribal courts. To be sure, most comparative studies of U.S. procedure (including American scholarship itself[62]) typically focus only on the Article III courts,[63] but these courts are of limited jurisdiction and lack a clear analogue to Italian national courts.[64] State courts, by contrast, have plenary jurisdiction and statewide authority, although within each state system some courts are hyper-specialized and regionally bounded (e.g., a court dealing only with traffic violations or guardianship or with judicial power extending only within a city or village).[65] State courts, however, are the work horses of the American judicial system;[66] in 2019, they handled 99.09

62. *See* Hershkoff & Miller, *supra* note 35, at 422–23 (stating that "the issues facing the state courts differ from those in the federal courts, and concern larger numbers of litigants, although they typically have received less attention").

63. *See, e.g.*, Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts*, 20 IND. INT'L & COMPAR. L. REV. 213, 232–70 (2010).

64. *Id.* at 218 ("Federal courts analogous to United States federal courts do not exist in Italy.").

65. *See, e.g.*, Justin Weinstein-Tull, *Traffic Courts*, 112 CALIF. L. REV. 1183 (2024) (providing a comprehensive account of traffic courts); Justin Weinstein-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031 (2020) (discussing the distinct role of local courts).

66. In 2021, 52.9 million cases were filed in state court. This number is a 4% increase over 2020 but 28% below the number of case filings in 2019. Domestic relations cases showed the largest increase in filings in 2021, showing a 6% jump from 2020, but still down 16% from 2019. In 2021, cases involving

percent of civil and criminal cases filed in the United States.[67] As another data point, four million lawsuits are filed in state courts just to evict tenants from their homes, which is "over ten times the number of all civil cases filed in the federal district courts."[68]

It would not be a surprise if the NRRP reforms looked to the Article III courts as a model to emulate. Commentators tend to idealize federal courts.[69] Federal judges are "special,"[70] and those judges, as Merritt E. McAlister has put it, consider their work as "special, elite, and important—as that is, white-collar judicial work."[71] Two years into the pandemic, federal district courts on the whole did not show a significantly increased backlog, but this is largely because fewer cases were filed overall.[72] However, there was regional variation in backlog. According to the Federal Judicial Center, "about two-fifths of all districts emerged from the second year of the pandemic with more pending criminal defendants or more pending civil cases

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legal determinations of whether a person was mentally ill and needed to be detained for treatment increased, as did products liability cases. *See* Diane Robinson, Morgan Moffett, Miriam Hamilton & Sarah Gibson, *2021 Caseload Highlights* 1–2, 6 (Ct. Stat. Project, 2023), https://www.courtstatistics.org/__data/assets/pdf_file/0029/89084/CSP-Caseload-Highlights-2021.pdf.

67. See Nat'l Ctr. for State Cts., *The Role of State Courts in Our Federal System: An Analysis of How State Courts Are Charged with Implementing Federal Law* 6 (Jan. 2022) (reporting that as of 2019 "state courts handled 99.09% of civil and criminal cases filed in the United States").

68. Nicole Summers, *Eviction Court Displacement Rates*, 117 Nw. U.L. Rev. 287, 287 (2022) (citing Ashley Gromis, Ian Fellows, James R. Hendrickson, Lavar Edmonds, Lillian Leung, Adam Porton & Matthew Desmond, *Estimating Eviction Prevalence Across the United States*, PNAS (May 24, 2022), https://www.pnas.org/doi/full/10.1073/pnas.2116169119 [https://perma.cc/3WJN-8KDB]) (emphasis omitted).

69. *See* Gerald N. Rosenberg, *Romancing the Cour*t, 89 B.U. L. Rev. 563 (2009) (discussing the "endless quest" of legal academics "to romance the Court").

70. Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. Colo. L. Rev. 581, 581 (1985).

71. Merritt E. McAlister, *White-Collar Courts*, 76 Vand. L. Rev. 1155, 1157 (2023).

72. *Federal Judicial Caseload Statistics 2022*, U.S. Cts., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last visited Mar. 12, 2024) (reporting that for the 12-month period ending March 31, 2022, the total number of pending cases in U.S. District Courts increased by 7% over the previous year to 761,028, while the total number of filings decreased by 28% to 380,213).

on their dockets than expected based on pre-pandemic growth trends. In some of these districts, the growth in backlog was substantial."[73]

Yet the very exceptionalism of the federal courts, given the scope of Article III jurisdiction, the size of the federal bench, and the types of cases that these courts hear, raises questions whether these courts provide an appropriate model for Italian reform. Federal dockets are small by design; the Constitution and federal statutes grant them only limited jurisdiction, and their power to hear cases does not include many of the types heard in Italian courts, which are, instead, typically heard by U.S. state courts. Moreover, Italian courts resolve many administrative cases that, in the U.S. federal judicial system, instead are relegated in the first instance to executive branch officials—so-called administrative law judges, who preside over cases ranging from brokerage transactions to food-assistance benefits.[74] These decision makers are subject to varying degrees of appellate judicial oversight, if any.[75] Relocating administrative matters to the federal courts would require an expansion of personnel and resources far beyond the institutional capacity of the current Article III system.[76] In addition, the federal courts

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73. Roy Germano, Timothy Lau & Kristin Garri, Fed. Jud. Ctr, COVID-19 and the U.S. District Courts: An Empirical Investigation 2 (Oct. 2022), https://www.fjc.gov/sites/default/files/materials/11/22-1109_2-COVID19_and_the_US_District_Courts.pdf. The data include information about criminal case dispositions.

74. *See* Peter L. Strauss, Administrative Justice in the United States 274–75 (3d ed. 2016) (explaining that the Administrative Procedure Act allows federal agencies to conduct formal adjudications over a broad range of issues). States likewise make use of administrative law judges appointed under state law. *See, e.g.*, Chris Micheli, *The Role of Administrative Agencies in State Government*, McGeorge Sch. L. Cap. Ctr. L. & Pol'y (July 15, 2019), https://www.capimpactca.com/2019/07/the-role-of-administrative-agencies-in-state-government (writing that California has over 200 state agencies that exist to implement state law).

75. *See* Crowell v. Benson, 285 U.S. 22, 51 (1932) (holding administrative tribunals may decide private claims between private parties as adjuncts to the Article III courts with judicial review over questions of law, constitutional facts, and jurisdictional facts). The Roberts Court has begun to overturn some of the foundational planks in this longstanding administrative regime. *See, e.g.*, John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 Wake Forest L. Rev. 387, 390 (2023) (discussing the "Roberts Court's recasting of administrative law").

76. The Article III federal court system currently consists of 789 district court and appeals court judges, plus the nine Justices of the Supreme Court

depend extensively on private decision makers that are both a part of the court system and external to it. For example, federal statutes currently require federal courts to incorporate forms of alternative dispute resolution into their procedures, and judges use their managerial authority to refer cases to arbitration or mediation staffed by private decision makers as part of court-annexed programs established under federal law.[77] Federal courts also enforce waivers of judicial process in situations that would be unacceptable in Italy and throughout the EU.[78]

These differences between the role and work of U.S. federal courts and those of Italy suggest that a modicum of caution is warranted before characterizing the NRRP reforms as Americanized. Yet arguably state courts likewise are not an appropriate model—in particular, some states suffer from serious institutional problems resulting from budget shortfalls and insufficient infrastructure investment. States in the United States do not do deficit financing, and budget gaps in many states, severe since the 2008 financial crisis, snowballed during

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of the United States. The Social Security Administration, one of more than 400 federal agencies and sub-agencies, employs 1,235 ALJs, who issue more than half a million hearing and appeal dispositions each year. In 2021, each ALJ on average had 30 monthly hearing dispositions and 273 hearings pending. SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT 2022 Table 2.F8, https://www.ssa.gov/policy/docs/statcomps/supplement/2022/supplement22.pdf. *See* Nicholas R. Bednar, *The Public Administration of Justice*, 44 CARDOZO L. REV. 2139, 2139 (2023) (discussing administrative tribunals' case overload and "lack of adjudicative capacity").

77. Currently, two federal statutes—the Civil Justice Reform Act, 28 U.S.C. §§ 471–482 (1990), and the Alternative Dispute Resolution Act, Pub. L. No. 101–552, 104 STAT. 2736 (1998) (codified as amended at 5 U.S.C. §§ 571–584)—provide the scaffolding for court-annexed alternative dispute resolution (ADR) programs in the federal courts and impose requirements on the courts themselves: they direct federal courts to develop an ADR plan, to appoint staff to coordinate ADR programs, and to train non-judicial decision makers, and authorize support for these efforts from the Federal Judicial Center and the Administrative Office of the United States Courts. This institutional frame is complemented by the Federal Rules of Civil Procedure which authorize ADR in the individual courtroom, encouraging judges to use ADR, and setting out rules on pretrial conferences, scheduling, and management. *See* FED. R. CIV. P. 16(c).

78. *See* Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. 357, 358–59 (2002) (explaining that ex ante consumer arbitration terms are valid in the U.S. but invalid in the EU).

the pandemic.[79] Not surprisingly, studies show that many state court systems have serious case backlogs.[80] Critics say that in order to clear dockets, these courts function in some communities as little more than debt collectors for debt servicers who win their lawsuits by default against small stakes consumers who lack funds to retain counsel and might never even have received service of process from the plaintiff.[81] Notwithstanding a reduced number of state court filings during the pandemic, filings outpaced case dispositions.[82] Indeed, in some state courts, cases have been pending for more than two years. The National Center for State Courts reports that "rising backlogs are pervasive and threaten to become a feature of the court landscape for years to come."[83] As a pair of commentators

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79. *See, e.g.*, Geoffrey McGovern & Michael D. Greenberg, *Who Pays for Justice? Perspectives on State Court System Financing and Governance*, RAND INST. FOR CIV. JUST. (Apr. 30, 2014), https://www.rand.org/pubs/research_reports/RR486.html (reporting significant funding variations among state courts).

80. The National Center for State Courts provides states with tools that enable them to collect data and so measure performance along various metrics. These include what the Center calls clearance rates, time to disposition, age of active pending caseload, and trial date certainty. Despite drops in caseload, state courts faced severe challenges during the pandemic leading to case backlogs. *Data-driven performance management*, NAT'L CTR. FOR STATE CT., https://www.ncsc.org/consulting-and-research/areas-of-expertise/court-management-and-performance/caseflow-management/data-and-performance-management. These challenges included closed courthouses, inadequate technology for shifts to virtual proceedings, the need for social distancing which reduced available courtroom space, and staffing constraints. For a discussion of the growing magnitude of state court backlogs, see Amanda Hernández, *Shortage of Prosecutors, Judges, Leads to Widespread Court Backlogs*, STATELINE (Jan. 25, 2024), https://stateline.org/2024/01/25/shortage-of-prosecutors-judges-leads-to-widespread-court-backlogs/; Lyle Moran, *Court Backlogs Have Increased by an Average of One-Third During the Pandemic, New Report Finds*, ABA J. (Aug. 31, 2021) https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds.

81. Erika J. Rickard, *How Debt Collectors Are Transforming the Business of State Courts: Lawsuit Trends Highlight Need to Modernize Civil Legal Systems* (THE PEW CHARITABLE TRUSTS, 2020), https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf (discussing how default judgments can exact heavy tolls on consumers).

82. Diane Robinson & Sarah Gibson, *Pandemic Caseload Highlights, Court filings and dispositions, 2019-2020* (CT. STAT. PROJECT, March 22, 2021), https://www.courtstatistics.org/__data/assets/pdf_file/0022/61519/2020_4Q_pandemic.pdf.

83. Kelly Roberts Freeman & Brian Ostrom, *Moving Court Cases Forward: Simulating the Impact of Policy Changes on Caseloads, in* TRENDS IN STATE COURTS

wrote in 2019, "State civil courts are at the core of the modern American justice system and they are overwhelmed."[84] The institutional exhaustion that marks courts in some states hardly seems an appropriate model for the NRRP's ambitious and energetic judicial reforms.

B. *Americanization: Specifying the Procedural Rules*

Alternatively, use of the term Americanization could refer not to U.S. courts but rather to the procedural rules that are used inside the courts to decide civil disputes. Here, again, there is no single U.S. model to emulate. To be sure, the federal courts, since 1938, have used the Federal Rules of Civil Procedure which, as a formal matter, set out a principle of trans-substantivity[85] and apply to every proceeding and every type of claim (as stated in Federal Rule 2, "[t]here is one form of action—the civil action"). However, each state system has its own rules of procedure, and although many states have adopted or adapted provisions of the Federal Rules, this approach is not universal.[86] Local and specialized courts likewise have their own rules,[87] and administrative tribunals are subject to different procedural rules entirely.[88]

Moreover, even within the federal court system, the rhetoric of uniformity camouflages a great deal of fragmentation and

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92 (Nat'l Ctr. State Ct, 2022), https://www.ncsc.org/__data/assets/pdf_file/0024/80358/Trends-2022.pdf.

84. Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 Daedalus 128 (2019).

85. *See* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. Rev. 1191 (2013) (defending the principle as a response to U.S. institutional imperfections).

86. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev. L.J. 354 (2003) (finding that while the Federal Rules remain influential to states, "the era of federal procedural hegemony has ended"); *see also* John J. Watkins, *A "Different" Top Ten List: Significant Differences Between State and Federal Procedural Rules*, Ark. L., Winter 2010 (identifying differences between Arkansas and Federal Rules of court practice).

87. *See, e.g.*, Christopher D. Randall, *Municipal Courts in Colorado: Practice and Procedure*, Colo. L., Dec. 2009, at 39, 45 (2009) (discussing Colorado's municipal courts' unique practices and procedures).

88. *See, e.g.*, Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 Duke L.J. 1749 (2020) (arguing that the cost of not having a uniform procedure for agency adjudication across federal agencies is high).

local practice—so much so, that one respected scholar has said the entire system of Federal Rules "has collapsed."[89] By design, the Federal Rules accord federal district courts a great deal of discretion in rule application (with many procedural rulings beyond the ambit of appellate review), which in practice has produced complexity and bespoke approaches.[90] Even more, district courts have authority to develop "local rules," and although these rules must be consistent with the Federal Rules, they reflect local needs and preferences.[91] District court are permitted to "carve out" or exempt categories of cases from generally applicable rules,[92] and in some situations, the Federal Rules themselves have been amended to create special rules for certain types of cases (as recently done for Social Security cases).[93] Relatedly, Congress has enacted claim-specific procedures that apply, for example, to cases filed by incarcerated persons[94] and claims under federal securities laws,[95] and courts sometimes devise procedures for cases while they are pending—a practice

89. David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2487 (2021).

90. *See generally* Maurice Rosenberg, Presentation, A Federal Judicial Center Seminar for Federal Appellate Judges (May 13-16, 1975), in APPELLATE REVIEW OF TRIAL COURT DISCRETION (discussing express authorization of judicial discretion in the Federal Rules and federal statutes); *see, e.g.,* FED. R. CIV. P. 24 (providing for discretionary application of the procedural rule permitting intervention). In addition, the Supreme Court has interpreted Federal Rule 8 to authorize federal judges to apply pleading standards in ways that are context-specific and in light of judicial experience. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (finding that the plausibility standard in Rule 8 requires context-specific analysis based on judicial experience and common sense); *see also* Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744, 749 (2016) (highlighting the discretion given to judges in applying the plausibility standard and the resulting fragmentation and inconsistency across federal courts).

91. FED. R. CIV. P. 83; *see also* Katherine A. MacFarlane, *A New Approach to Local Rules*, 11 STAN. J. C.R. & C.L. 121, 131 (2015) (arguing that local rules are often overlooked despite their material impact on litigation).

92. *See* FED. R. CIV. P. 26(A)(1)(B) (providing for exemptions from the mandatory duty to disclose without a party's request).

93. FED. R. CIV. P. SUPPLEMENTAL RULES. SOC. SEC. ACTION UNDER 42 U.S.C. § 405(G).

94. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

95. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u–4.

dubbed "ad hoc procedure" by two noted scholars.[96] Finally, some court proceedings are conducted outside the metes and bounds of formal procedure—with multi-district litigation as the chief current example,[97] again, operating subject to very limited appellate oversight.[98] At the least, specifying which of these procedural systems the NRRP reforms purport to model would be useful.

C. *Americanization: Specifying Values and Acknowledging Problems*

Finally, characterizing the NRRP reforms as Americanized could denote the normative goals and values associated with the U.S. judicial system, and not connote any particular court or procedural mechanism. Yet the term in this sense is likewise complex and contested. Looking just at the federal courts, the formal goal of the civil proceeding is to "secure the just, speedy, and inexpensive determination of every action."[99] However, the Federal Rules of Civil Procedure have gone through waves of revision since their adoption in 1938, and these amendments have affected not only the techniques of adjudication, but also the policies that drive litigation practice.[100] Moreover, some

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96. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767 (2017). Another term is "unbounded procedure." Seth Katsuya Endo, *Ethical Guardrails to Unbounded Procedure*, 93 Fordham L. Rev. 49 (2024).

97. Technically, the multidistrict litigation ("MDL") statute is a venue statute that allows for the transfer and consolidation of related cases that are pending throughout the federal court system to a single judge who has been assigned to the MDL panel for pretrial proceedings. This means that the MDL judge is not authorized to preside as the trial judge and must instead remand the individual actions back to their courts of original filing for final disposition. However, the MDL judge usually does preside over final disposition in the sense of signing off on settlements or pretrial motions. *See* 28 U.S.C. § 1407. For criticisms of the MDL judge's pervasive use of inherent power, see Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Power*, 48 BYU L. Rev. 1869 (2023).

98. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. Rev. 109, 142 (2015) (describing multi-district litigation as a procedural no-man's land).

99. Fed. R. Civ. P. 2.

100. *See* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. Pa. L. Rev. 1839, 1841 (2014) (arguing that the current era of U.S. procedure has largely maintained the formal rules but changed their "core values").

commentators point to a large gap between the principles associated with the Federal Rules of Civil Procedure and their real-world operation.

As is well known, the Federal Rules of Civil Procedure were a New Deal creation marked by an open and democratic ethos.[101] By design, they granted discretion and flexibility to federal judges with the goal of deciding cases on the merits.[102] Later revisions have purported to respond to concerns about expense, congestion, and delay—captured in the terms "litigation explosion"[103] and "adversarial legalism."[104] Formal amendments have curtailed discovery even in cases in which discovery is critical to case disposition and not shown to be burdensome,[105] and they have enlarged the district court's managerial options to favor settlements without requiring supervision of the terms for fairness.[106] Moreover, the Supreme Court of the United States, circumventing the amendment process, has reinterpreted some of the Federal Rules—for example, to heighten pleading requirements—making it more difficult for a plaintiff to survive a motion to dismiss or to resist a summary judgment

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101. *See* Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 Iowa L. Rev. 1269, 1271 (1997) (discussing "puzzling changes" to the Federal Rules that do not reflect their original emphasis on expertise, access, and social reform).

102. *See, e.g.*, Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 Cardozo L. Rev. 1961, 1967 (2007) (stating that "[c]ase-specific discretion has been at the heart of the Federal Rules ever since they were first adopted in 1938").

103. *See* Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983) (considering the empirical basis for the term).

104. Robert A. Kagan, Adversarial Legalism: The American Way of Law (2d ed. 2019).

105. *See* Samuel Issacharoff & Troy A. McKenzie, *Managerialism and its Discontents*, 43 Rev. Litig. 1, 2 (2023) (calling the 1993 changes to federal discovery rules "oddly procrustean," illustrated by the imposition of "arbitrary limits on the maximum number of interrogatories," and arguing that the amendment "ensured only that the number was excessive for a great number of routine cases, yet wildly insufficient in cases of greater consequence").

106. *See, e.g.*, Diego A. Zambrano, *The Unwritten Norms of Civil Procedure*, 118 Nw. U. L. Rev. 853, 886 (2024) (describing the settlement pressure exerted by the judge in a multi-district litigation where "the norm prioritizes finality instead of access to justice, accuracy, or even fairness").

motion and proceed to trial.[107] The Supreme Court also has reinterpreted the Federal Arbitration Act to make mandatory ex ante arbitration provisions imposed on consumers and employees enforceable, notwithstanding a weaker party's loss of their right to the Seventh Amendment right to a civil jury trial or the absence of meaningful consent to the arbitration term.[108]

These reforms have been undertaken in the name of efficiency, which some argue has crowded out concerns over fairness, equality, and democratic participation.[109] Counterintuitively, however, some of the revisions have generated inefficiencies by creating satellite litigation, increasing costs, and producing delay.[110] Arthur R. Miller, a noted U.S. commentator, has called current U.S. federal civil procedure "so elaborate with time-consuming motions, hearings, and discovery that it often seems to have fallen into the hands of some systemic Sorcerer's Apprentice."[111] In a different vein, he and others have questioned the "cost and delay" narrative that fueled

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107. *See* Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 473 (2022) (discussing barriers to relief erected by changes in rules involving pleading, class certification, discovery, and summary judgment).

108. U.S. CONST. AMEND. VII (preserving the right to a jury trial in a civil action where the value in controversy exceeds $20). For opposing views on whether the Court has circumvented the rule-making process or properly exercised discretion in its interpretation of the rules, see Mark Herrmann, James M. Beck & Stephen R. Burbank, *Debate: Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. ONLINE (2009).

109. *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1826–27 (2015) (asserting that in the name of a misconceived notion of efficiency, "civil rule amendments, court decisions, and congressional legislation have coalesced to remake the civil litigation system into a completely different system than the one envisioned in the early twentieth century").

110. For example, studies have raised questions about whether the use of the motion for summary judgment produces efficient outcomes all things considered. In particular, the Federal Judicial Center found that a motion for summary judgment "added 24 percent to plaintiffs' costs and 22 percent to defendants' costs." Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 786 (2010) (citing Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis* 5, 7 (FED. JUD. CTR., Report to the Judicial Conference Advisory Committee on Civil Rules, 2010).

111. Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 8 (2010).

the reforms,[112] which, as they contend, data do not consistently support.[113] Other commentators have argued that the reforms were built on unwarranted assumptions about efficiency,[114] and still others acknowledge problems but emphasize that they were limited to specific types of cases from which broad scale generalization was unwarranted and unfair.[115] In the end, the trend of rule revision has been toward a selectively "restrictive ethos" that blocks particular kinds of claims—by consumers, workers, and the less resourced—from securing federal judicial access,[116] leading to concerns that the federal courts have become the domain of corporate interests and no longer do justice for all Americans. As Rebecca L. Sandefur has put it, judicial access in the United States is "restricted: only some people, and only some kinds of justice problems, receive lawful resolution."[117] She writes that access is "systematically unequal: some groups—wealthy people and white people, for example—are consistently more likely to get access than other groups, like

112. *See* Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 65 (2018) ("The persistence of the cost-and-delay narrative is a bit of a mystery because it seems contradicted by studies dating back to the 1960s claiming otherwise."); Danya Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012) (finding no empirical data for the widespread belief that the civil litigation process is prolonged or costly).

113. *See, e.g.*, Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497, 558 (1996) (presenting results of an empirical study of 2,000 U.S. corporations in federal court litigation showing "that a certain picture of civil litigation—widely promoted by business and increasingly influential in national policy discussion—appears generally wrong").

114. *See* Coleman, *supra* note 109, at 1778 (arguing that reforms have relied on a "faulty conception of efficiency [that] is not producing high-value procedure, but is instead resulting in cut-rate procedural rules and doctrines").

115. *See, e.g.*, Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1803 (2018) ("In a third or more of federal cases, no discovery occurs, and discovery costs in most other cases are not burdensome. In the main, lawyers are satisfied with the process … [and state data provide] evidence that discovery costs constitute only a small fraction of the total recovery from litigation.").

116. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010).

117. Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 51 (2017) (emphasis omitted).

poor people and racial minorities."[118] Whether this is a system to emulate, given the gaps between ideals and operation, is an important question.[119]

Of course, the fact that a particular procedure produces certain reactions or outcomes in the United States in no way predicts whether it will produce similar effects in Italy—but criticisms of the current U.S. procedural regime provide a cautionary note about implementation and unintended effects. The literature on this subject is large and admittedly contested, but certain concerns and questions repeat and appear salient: whether the rules produce unequal distributional effects,[120] whether they stifle legal development,[121] and whether they are resulting in the de facto deregulation of markets.[122] Characterizing the NRRP procedural reforms as Americanized surely puts these concerns front and center as Italian courts attempt the hard work of implementing the NRRP's proposed changes.

1. *Disparate Access to Legal Representation*

The procedures that the NRRP reforms "borrowed" from the American system, like virtually all U.S. civil procedure, build on the adversarial assumption that the parties will be represented by counsel. On the surface, the United States has a glut of lawyers—more than 1.3 million, or just shy of one for

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118. *Id.*; *see also* Hershkoff & Norris, *supra* note 31, at 6 (discussing a "series of doctrinal shifts" that "reveal a larger architecture of the pro-corporate turn in jurisdiction" linked with "democratic decline in the United States").

119. S*ee, e.g.*, Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DePaul L. Rev. 351, 366–67, 376–77 (2002) (questioning "the level of success achieved by the civil justice system within the United States").

120. *See, e.g.,* Hershkoff & Schneider, *supra* note 29, at 80–116 (discussing the compounding legal and political effects of adverse procedural rulings on women's equality).

121. *See, e.g.,* Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 Ind. L.J. 1191, 1225–26 (2014) (discussing the ways in which the Federal Rules screen out "meritless litigation" which, if adjudicated, might "result in development or clarification of the law" or produce "new standards").

122. *See, e.g.,* Hershkoff & Norris, *supra* note 31, at 4 (discussing corporate use of jurisdictional rules that "insidiously promote[] deregulatory efforts to hollow out laws intended to constrain markets").

every 250 residents.[123] Italy stands close—with one lawyer for every 248 residents.[124] But the United States faces a major crisis in the number of claimants who cannot afford representation and appear in court without a lawyer. In the federal courts, more than a quarter of all cases filed between 1999 and 2018 involved at least one party who was not represented by counsel.[125] For example, 20 percent of civil rights employment cases in federal court involve pro se parties,[126] and about 95 percent of cases filed by incarcerated persons in federal court do not have benefit of counsel.[127] In state courts, pro se appearances run the gamut from consumer law to family law cases.[128] Over two-thirds of all cases involve unrepresented litigants, and in landlord-tenant cases, 90 percent of tenants appear without counsel.[129] The phenomenon of "lawyerless courts," specifically cases in which only one party is represented by counsel,[130] has become a recognized feature of the U.S. civil litigation system.[131]

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123. *Growth of the Legal Profession*, ABA PROFILE LEGAL PRO. (last visited Mar. 15, 2024), https://www.abalegalprofile.com/demographics.html (finding that there are nearly four lawyers for every 1,000 residents).

124. *Lawyers Per Capita by Country 2024*, WORLD POPULATION REV. (last visited Mar. 15, 2024), https://worldpopulationreview.com/country-rankings/lawyers-per-capita-by-country (finding that there are 403 lawyers for every 100,000 residents).

125. Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689 (2022).

126. Mark D. Gough & Emily S. Taylor Poppe, *(Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 L. & SOC. INQUIRY 567, 574, 578 (2020); *see also* Roger Michalski & Andrew Hammond, *Mapping the Civil Justice Gap in Federal Court*, 57 WAKE FOREST L. REV. 463, 464 (2022) ("More than a quarter of nonprisoner civil cases in federal district courts were filed pro se").

127. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 167 tbl. 6 (2015).

128. *See* Susannah Camic Tahk, *Distributive Precedent and the Pro Se Crisis*, 108 IOWA L. REV. 745, 745, 747–48, 753 (2023).

129. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 750–51 (2015).

130. *See* Tonya L. Brito & Daniela Campos Ugaz, *Asymmetry of Representation in Poor People's Courts*, 92 FORDHAM L. REV. 1263 (2024) (examining the problematic outcomes of wide asymmetry of representation that has led to low-income, pro se litigants losing out to creditors, landlords, and municipalities).

131. *See* Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1190 (2022) (discussing the dichotomy of lawyered and lawyerless civil proceedings).

Predictably, lack of counsel produces a high likelihood of losing on the merits.[132]

2. *Disparate Access to Electronic Resources*

The NRRP reforms also build on the assumption that technology can expedite court processing and increase access to justice.[133] Of course, this depends on the design of the court system and its adaptation to local needs. In the United States, the pandemic highlighted a major problem with the move to remote hearings. Although federal and state courts were able to pivot because of pre-pandemic investment in technological upgrades,[134] some regions of the country—especially rural areas—lacked broadband access.[135] Moreover, some state judiciaries, fragmented into county courts, lacked centralized electronic case management systems, a gap that increased the difficulties of conducting remote judicial procedures.[136] Turning from institutional deficits to issues of individual access, surveys showed that 44 percent of adults in households with incomes below $30,000 did not have broadband going into the pandemic—meaning they could not access remote proceedings.[137]

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132. Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of* Pro Se *Status*, 42 L. & Soc. Inquiry 1091, 1093 (2017) (reporting meta-analysis showing "that in fields of average complexity in trial courts, *pro se* claimants are on average 6.5 times more likely to lose than counseled claimants").

133. *See, e.g.*, Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy. *Are Litigation Outcome Disparities Inevitable? Courts, Technologies, and the Future of Impartiality*, 71 Ala. L. Rev. 893 (2020) (discussing uses of technology to curb racial and other implicit biases in judicial decision making).

134. See Hershkoff & Miller, *supra* note 35, at 386 (discussing how earlier investments in technology facilitated U.S. courts' response to physical closures necessitated by the pandemic).

135. For a discussion of deficits in rural areas, see Jennifer A. Brobst, *The Lawyer's Duty to Understand the Disparate Impact of Technology in the Legal Profession*, 20 U. St. Thomas L.J. 150 (2024); *Closing the Digital Divide for the Millions of Americans without Broadband*, U.S. Gen. Accountability Off. WatchBlog (Feb. 1, 2023), https://www.gao.gov/blog/closing-digital-divide-millions-americans-without-broadband.

136. *See, e.g.*, Stephanie Smith, *Future of Judicial Branch Taking Shape Through Modernization, Unification, Equalization*, Kan. B. J. July-Aug. 2023, at 16.

137. Joyce Winslow, *America's Digital Divide*, Pew Charitable Trusts (July 26, 2019), https://www.pewtrusts.org/en/trust/archive/summer-2019/

3. *Disparate Access to Judges and Judicial Decision Making*

The NRRP's emphasis on hiring non-judicial personnel fits into a broader trend of what U.S. commentators have called the "bureaucratization of justice" (which tends to look at the practice system-wide)[138] and "managerial judging" (which tends to look at its use in individual cases).[139] The literature on this subject is large and addresses a range of issues: the judges' processes for selecting their short-term clerks;[140] the role of long-term court clerks as de facto decision makers both in trial and appellate courts;[141] a decline in the quality of judicial decision

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americas-digital-divide. Two years later, the digital divide persisted in this cohort. *See* Emily A. Vogels, *Digital Divide Persists Even As Americans with Lower Incomes Make Gains in Tech Adoption*, Pew Charitable Trusts (June 22, 2021), https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/. The Biden Administration aimed to support national infrastructure upgrades to provide "Internet for All"—so far with funding at $65 billion. See U.S. Department of Commerce, FACT SHEET: Biden-Harris Administration's "Internet for All" Initiative: Bringing Affordable, Reliable High-Speed Internet to Everyone in America (May 13, 2022), https://www.commerce.gov/news/fact-sheets/2022/05/fact-sheet-biden-harris-administrations-internet-all-initiative-bringing. *But see* Cong. Res. Serv., IF12637, *The End of the Affordable Connectivity Program: What Next for Consumers?* (Apr. 18, 2024) (reporting that the last full funding for the Internet subsidy program was April 2024 with final, but reduced, payments scheduled for May 2024). As of this writing, Congress has not voted new appropriations for the program.

138. *See* Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442 (1983) (discussing how the organizational capacity of the federal courts grew to meet the needs of a complex modern society through the internal hiring of non-judicial personnel).

139. *See* Judith Resnik, *Managerial Judges*, 98 Harv. L. Rev. 374 (1982) (describing the increasing case management responsibilities of federal judges, which involves oversight of a case from filing to completion, including extensive pretrial contact with litigants).

140. *See, e.g.*, Jeremy D. Fogel, Mary S. Hoopes & Goodwin Liu, *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals,* 137 Harv. L. Rev. 538 (2023) (discussing the lack of transparency in the hiring of judicial clerks and concerns about the demographic distribution of clerks in terms of gender, race, ideology, and other factors).

141. *See, e.g.*, Diane P. Wood & Zachary D. Clopton, *Managerial Judging in the Courts of Appeals*, 43 Rev. Litig. 87, 101 (2023) (describing the Fifth Circuit screening process for determining whether oral argument will be permitted, in which a staff attorney screens "in the first instance, followed by the review of a single judge," and questioning whether the "single-judge review might stack the deck against oral argument in some cases"); *see also* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit*

making[142] (including extensive reliance on unpublished decisions and decisions without explanations[143]); and the perception—and reality—that use of non-judicial staff has led to the creation of two tiers of justice in which judges, at least in the federal courts, "delegate their least sophisticated or valued work to others, and attract higher-profile, more elite civil work for themselves."[144] Problems also are evident at the state level, but, in many state systems, courts lack resources to hire necessary non-judicial personnel—contributing to a "justice gap" that worsened during the pandemic and came on top of budget shortfalls resulting from the 2007 economic meltdown.[145]

"Contractual" ADR has created different but related problems of disparate access to judicial resources in the United States. Under the guise of respecting contractual arrangements, even

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Courts, 61 DUKE L. REV. 315 (2011) (discussing the varying roles of long-term court clerks across the circuit courts in drafting dispositions, scheduling oral arguments, and forming specialized teams to address different types of cases); Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L. Q. 257 (1973) (discussing the roles of law clerks and staff attorneys across the circuit courts in screening cases before trial for frivolous arguments and emphasizing the importance of oral arguments). State appellate courts likewise use non-judicial personnel as long-term clerks; back in the 1980s commentators warned that letting law clerks work "in parallel with the commissioned judiciary" would risk a loss of accountability and an inappropriate "devolution of judicial power upon non-judicial officers." JOHN BILYEU OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS 139 (1980); *see also* Thomas Kallay, *Book Review*, 8 UCLA L. REV. 605 (1981) (REVIEWING JOHN B. OAKLEY & ROBERT S. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS (1980)) (summarizing concerns).

142. *See* Cesare Cavallini & Stefania Cirillo, *The Judge Posner Doctrine as a Method to Reform the Italian Civil Justice System*, 2 COURTS & JUSTICE L.J. 8, 19–20 (2020) (discussing Judge Posner's criticism of federal judges' "misuse of law clerks" as "reflected in the low quality of judges' opinions").

143. *See* Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 535 (2020).

144. Merritt E. McAlister, *Bottom-Rung Appeals*, 91 FORDHAM L. REV. 1355, 1361 (2023) (describing a two-track appellate process, with one track often resulting in unpublished decisions in appeals brought by pro se parties); McAlister, *supra* note 71, at 1193.

145. For a discussion of the "justice gap" and how it affects low-income Americans, see *The Justice Gap*, L. SERV. CORP. (2022), https://justicegap.lsc.gov/the-report/. The adverse effects of resource disparities vary by court and litigant. *See, e.g.*, Brian Pariser, *Reimaging Justice in the Probate and Family Court*, BOS. BAR. J. Fall 2023, at 40 (discussing lack of resources, lack of staff, and hiring freezes in Boston courts dealing with family disputes).

when the terms are adhesive and imposed without negotiation as a condition of employment or purchase of an essential consumer good,[146] the U.S. system now excludes large categories of cases from the public court system, remitting them to private decision makers who conduct their proceedings behind closed doors, frequently impose confidentiality requirements on the parties, shield corporate actors from public liability, and charge participation fees often without any possibility of waiver even if the fee is a barrier to redress.[147] One study found that over 55 percent of U.S. workers are subject to mandatory arbitration, and these terms are most typically imposed upon workers in low-wage jobs and in industries disproportionately composed of women or Black or Brown people.[148] Of employers who impose ADR on their workers, 30 percent also use class action waivers in an effort to bar workers from banding together to bring suit.[149]

4. *Disparate Effects on Legal Development and Regulatory Enforcement*

Differential access to resources, including access to judges, arguably affects judicial outputs by distorting legal development in ways that exacerbate the inequality faced by litigants who are women, poor persons, or people of color. U.S. law relies on the principle of stare decisis, and the content and direction of legal development depend upon the steady flow of written decisions. By apportioning gatekeeping responsibility to non-judicial decision makers, some judges avoid having to write a decision on the merits, and commentary has raised concerns that the

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146. *See* Drahozal & Friel, *supra* note 78.

147. *See* Hershkoff & Resnik, *supra* note 23.

148. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is Now Barred for More Than 60 Million American Workers* 1 (Econ. Pol'y Inst., Apr. 6, 2018), https://files.epi.org/pdf/144131.pdf (finding that the share of workers subject to mandatory arbitration now exceeds 55%). Mandatory arbitration terms in employment documents rose during the early pandemic, with 2020 seeing 17% more arbitration filings year over year: employees were awarded money in just 1.6% of these cases. *See* Abha Bhattarai, *As Closed-Door Arbitration Soared Last Year, Workers Won Cases Against Employers Just 1.6 Percent of the Time*, Wash. Post (Oct. 27, 2021), https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar.

149. Colvin, *supra* note 148, at 2.

decisions they do write tend to bias the path of law in ways that promote the interests of better resourced parties.[150] This concern is particularly pronounced in cases where at least one of the parties is pro se—without counsel, a party is disabled from developing the record and providing arguments. The litigant not only is excluded from meaningful judicial access, but also the exclusion distorts the system's decisional outputs.[151]

High rates of settlement in the United States are another piece of this larger concern about the privatization of dispute resolution. A half century after Owen Fiss wrote his canonical article "Against Settlement,"[152] U.S. commentators continue to quarrel about this feature of U.S. civil proceedings.[153] Some commentators insist that settlements serve the private interest in securing expeditious resolution at a lower cost and also promote the public interest by deterring wrongful behavior and conserving scarce judicial capital.[154] Critics argue that public data do not confirm these theoretical benefits and, to the contrary, settlements may impede legal development.[155] For example, when confidentiality is demanded, settlements withhold important information from the public about settlement amounts, patterns of wrongdoing, and structural defects in

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150. *See* Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109 (2012) (arguing that the evolution of discrimination law is skewed by the fact that judges often write opinions only when the plaintiff loses).

151. *See, e.g.*, Helen Hershkoff, *Introductory Remarks: The Promise and Limits of State Constitutions*, 99 N.Y.U. L. REV. 1895, 1908 (2024) (explaining how pro se litigation and underfunded public defender offices impede the development of state constitutional law).

152. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

153. *See, e.g.*, Kenneth R. Feinberg, *Reexamining the Arguments in Owen M. Fiss, Against Settlement*, 78 FORDHAM L. REV. 1171, 1171 (2009) (calling the arguments against settlement "aspirational").

154. *See, e.g.*, Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1202 (2009) ("[A]ll citizens are better off for the prospect of a secure, if imperfect, system of compensation and deterrence. Trials are . . . a small part of that balance.").

155. *See* Fiss, *supra* note 152 (arguing that settlements do not serve justice and in fact impose a cost on society to accept what is less than the ideal); *see also* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (reaching the same conclusion as Owen Fiss). *But see* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L. REV. 1657, 1680 (2016) (arguing that "in some cases, such as class actions, a settlement can provide a moment of reckoning").

institutions and corporate governance.[156] In particular, without judicial guardrails, settlement may systematically depress the value of claims presented by under-resourced or pro se litigants and have a boomerang effect on litigated results when cases do go to trial. However, other than in the class action context,[157] and a few specialized statutory areas,[158] guardrails are largely absent. An area of increasing concern involves the judge's participation in settlement of multi-district litigation cases[159] and the incentives they create for plaintiffs to settle on less-than-optimal terms.[160] As for judicial settlements in state courts, states generally do not collect or report data on court settlements.[161] However, a few recent empirical studies support concerns that settlement in consumer-credit disputes "can be a one-sided tool of debt collection" that leaves consumers "worse off."[162]

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156. *See infra* notes 162–168.

157. Fed. R. Civ. P. 23(e).

158. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219. *Compare* Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206 (2d Cir. 2015) (holding that the "unique policy considerations underlying the FLSA" required court approval to obviate concerns of "highly restrictive confidentiality provisions," overbroad releases, and excessive attorney fees), *with* Alcantara v. Duran Landscaping, Inc., No. 21-cv-03947, 2022 WL 2703610, at *5 (E.D. Pa. July 12, 2022) (holding that court approval is not needed in a FLSA action if the worker is represented by counsel), *and* Askew v. Inter-Continental Hotels Corporation, 620 F. Supp 3d 635, 643 (W.D. Ky. 2022) (holding that court approval is not required by the FLSA).

159. *See* Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on Approaches to MDL Settlement*, 89 UMKC L. Rev. 971, 980 (2021) ("Though many MDL judges actively strive to settle a case and view remand to the transferor court as a failure, other judges think reaching a settlement is 'not my job.'"). One of these authors is a district court judge (Western District of Missouri, 2014–present).

160. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 Cornell L. Rev. 1835, 1855 (2022) ("Because corporate defendants want to maximize closure, the terms they insert incentivize plaintiffs' attorneys to strongly encourage their clients to take the deal.").

161. *See* Nancy A. Welsh, *But Is It Good: The Need to Measure, Assess, and Report on Court-Connected ADR*, 22 Cardozo J. Conflict Resol. 427, 442 (2021) ("Most states do not even *acknowledge* the disposition of civil cases through settlement in their overall reporting regarding court operations. Indeed, only thirteen states report the sorts of numbers that begin to demonstrate the role of settlement in civil litigation.") (empahsis in original).

162. Nina Lea Oishi, *Judging Debt: How Judges' Practices in Consumer-Credit Court Undermine Procedural Justice*, 133 Yale L.J. Forum 271, 292 (2023) (citing

5. *Lack of Public Data and Accountability*

Some of the NRRP reforms that might seem "borrowed" from U.S. practice are subject to yet another concern in the United States: that their operation is insulated from public scrutiny and their actual effects are not known. This pitfall is most evident with respect to the gatekeeping function of non-judicial personnel, settlement results, and ADR—situations in which a litigant is channeled outside of the courthouse, or dismissed outright by a decision maker whose actions often are not subject to meaningful judicial review.[163] The cloak of confidentiality that surrounds settlement and ADR makes it difficult, if not impossible, for the public to know whether these alternatives to adjudication are providing meaningful relief for meritorious claims or whether they are cost-efficient. A literature survey in 2013 concluded that "[t]he evidence produced to date suggests that the overall impact of ADR programs on trial court dockets has been limited."[164] The public has very little data to assess whether the use of non-judicial personnel, whether as ADR decision makers or for settlement, is addressing delay, reducing backlog, or affording a fair alternative process to court disposition.

In particular, concerns about ADR and settlement garnered headline attention when the "MeToo" movement highlighted the extent to which confidential, mandatory ADR terms blocked information about sexual harassment from the

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Ing-Haw Cheng, Felipe Severino & Richard R. Townsend, *How Do Consumers Fare When Dealing with Debt Collectors? Evidence from Out-of-Court Settlements*, 34 REV. FIN. STUDS. 1617, 1620 (2021)).

163. *See* Peter B. Oh, *Gatekeeping*, 29 J. CORP. L. 735, 736 (2004) ("Gatekeeping is a metaphor ubiquitous across disciplines and fields of law."). As applied to the courts, a gatekeeper is a person or office with authority to exclude a claimant from court, for example, by channeling the claim to ADR, denying in forma pauperis relief, or settling a lawsuit rather than deciding it on the merits. *See, e.g.*, Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 381 (2011) (discussing the "gatekeeping role of judges as the enablers of settlements").

164. Barry Edwards, *Renovating the Multi-Door Courthouse: Designing Trial Court Dispute Resolution Systems to Improve Results and Control Costs*, 18 HARV. NEGOT. L. REV. 281, 287 (2013) (citing Lela P. Love, *Preface to the Justice in Mediation Symposium*, 5 CARDOZO J. CONFLICT RESOL. 59, 59 (2004) and Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 81 (2002)).

public.[165] The movement generated a backlash against private, contractual ADR, leading to federal regulation of these mechanisms in employment disputes but only as they relate to sexual harassment.[166] Moreover, commentators have questioned the fairness of arbitral awards in consumer disputes. Available data show that most consumers lose on the merits—indeed, one study of closed arbitration claims at the nation's two largest forced arbitration providers found that more people climb Mount Everest in a year than win their consumer arbitration cases.[167] Relatedly, the public knows little about state court ADR programs. Georgia and Idaho, for example, report no information about their court-annexed ADR programs and only one-third of states publish information about both court filings and case dispositions.[168] Nancy A. Welsh writes: "Overwhelmingly, we have no data regarding the number of cases that are referred to mediation and other alternative-dispute resolution (ADR) processes, the dispositions that result, or parties' perceptions of the process."[169]

IV. Americanization, Political Signaling, and Democratic Civil Procedure

The problems identified in the previous Part are well researched by scholars and analysts. In that context, it is not surprising that the proponents of the NRRP did not claim to call for the transplantation of U.S. procedures into Italian courts. Rather, its drafters stated they were acting "on the basis

165. *See* Blair Bullock & Joni Hersch, *The Impact of Banning Confidential Settlements on Discrimination Dispute Resolution,* 77 Vand. L. Rev. 51, 88 (2024) (discussing "information void" about sexual harassment generated by nondisclosure agreements).

166. *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 Yale L.J. Forum 1, 1–2 (2022) (arguing the congressional restriction on forced arbitration under the Ending Forced Arbitration Act is constrained in its application because it could only be triggered if the Federal Arbitration Act applies).

167. *Forced Arbitration in a Pandemic: Corporations Double Down*, Amer. Ass'n. for Just. (Oct. 27, 2021), https://www.justice.org/resources/research/forced-arbitration-in-a-pandemic.

168. Welsh, *supra* note 160, at 434–35.

169. Nancy A. Welsh, *Bringing Transparency and Accountability (With a Dash of Competition) to Court-Connected Dispute Resolution*, 88 Fordham L. Rev. 2449, 2449 (2020).

of experience gained in other countries," which of course could include Americanized practices, and building on "best practices as experienced in Italy" drawn from earlier reform efforts.[170] Moreover, the European Union has evaluated the judicial systems of member nations since 2004, and, for more than a decade, published an "EU Justice Scoreboard," publicizing national data on judicial "efficiency, quality, and independence" that enables comparative assessments.[171] Although cross-country comparisons are rife with difficulty,[172] the "Justice Scoreboard" is useful for highlighting national and local practices and generating ideas for cross-jurisdictional reform.

Since the NRRP did not design the court reforms as a transplant of the American system, the question arises why commentators might characterize the reforms as Americanized. Arguably, the NRRP reforms illustrate a general phenomenon of the "circulation" of "legal formants"— terms used by the Italian comparative scholar Rodolfo Sacco[173]—occurring as a result of globalization, the influence of European Union policy, technological innovation, changes in legal education and legal practice, and cultural shifts.[174] This Part turns from considering

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170. Ministero dell'Economia e delle Finanze, Recovery and Resilience Plan #Next Generation Italia 55 (2021), https://www.mef.gov.it/en/focus/documents/PNRR-NEXT-GENERATION-ITALIA_ENG_09022021.pdf, [hereinafter RRP].

171. *See* Ylenia Guerra, *Measuring Justice? The EU Justice Scoreboard in the Light of the Performance-Based Approach*, *in* EU Rule of Law Procedures at the Test Bench: Managing Dissensus in the Europea Constitutional Landscape 157, 158 (Cristina Fasone, Adriano Dirri & Ylenia Geurra eds., 2024) (describing the EU's data driven approach as "a soft tool based on a modality that shapes behavior through dialogue and persuasion").

172. This is not to ignore the difficulties of assessing judicial data across national systems. *See* Elena Alina Ontanu & Marco Velicogna, *The Challenge of Comparing EU Member States Judicial Data*, 11 Oñati Socio-Legal Series 446, 451 (2021) (suggesting caution in comparing judicial data from different national court systems). *See also* Guerra, *supra* note 171, at 164–66 (summarizing criticisms and arguing that "the measurement of justice, which is understood as an essential dimension of the rule of law, needs a clearer teleological orientation of the data").

173. *See generally* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 Am. J. Compar. L. 1 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 Am. J. Comp. L. 343 (1991) [hereinafter Formants II].

174. *See* Cappelletti, Merrymen & Perillo, *supra* note 5, at 162–63 (arguing that common law and civil law systems "have been converging for many decades"). On the role of the E.U. and its limits in securing procedural

what Americanization might mean in terms of a technical comparison of the NRRP reforms with U.S. courts and civil procedure to the term's political meaning within three different conceptions of the legal transplant: first, as a source of prestige that legitimates a legal system; second, as a reinforcement or realignment of ideological preferences; and third, as a voluntary process of adaptation that produces hybridization and cross-jurisdictional benefits.

A. *Americanization as Prestige and Legitimation*

The transplant literature recognizes prestige as a factor in both the "lending" and the "borrowing" of legal procedures, with the donor's prestige seen in the host system's incorporation of an exogenous feature.[175] As Rodolfo Sacco explained, "the desire to appropriate the work of others … arises because this work has a quality one can only describe as 'prestige,'" adding "[t]his explanation in terms of prestige is tautological, and comparative law has no definition of the word 'prestige' to offer."[176] Ugo Mattei has argued that prestige is a "largely empty idea," but sees "a synergy between the efficient model and the 'prestigious' model."[177] Other analysts emphasize that prestige is not a proxy for the superior quality of the law to be borrowed;[178] indeed, in some situations, it is beside the point that the donated procedure is defective. Jonathan M. Miller has emphasized that the borrower may even engage in "intentional

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harmonization in member countries, see Konstantinos D. Kerameus, *Political Integration and Procedural Convergence in the European Union*, 45 Am. J. Compar. L. 919, 926–27 (1997).

175. *See* Vanessa Casado-Pérez & Yael R. Lifshitz, *Natural Transplants*, 97 N.Y.U. L. Rev. 933, 945 (2022) (discussing "the legitimacy-generating transplant").

176. *Formants II*, *supra* note 173, at 398.

177. Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 Int'l Rev. L. & Econ. 3, 4, 8 (1994).

178. *See* Cassandra Steer, *Legal Transplants or Legal Patchworking? The Creation of International Criminal Law as a Pluralistic Body of Law*, in Pluralism in International Criminal Law (Elies van Sliedregt & Sergey Vasilev eds., 2014) at 40, 45 (explaining that Alan Watson "points to the authority of a donor system as a key factor in selection of a law by a receiving system looking to borrow a legal institution, and asserts that the quality of law is less important").

distortions" of the transplant.[179] Within this theory of the transplant, cloaking the NRRP reforms in the mantel of Americanization could provide proponents with what Pier Giuseppe Monateri has conceptualized as a "prestigious mode"—a discursive resource that enables legal elites to demonstrate political will.[180]

The prestige rationale recognizes that the process of transplantation is spatial—from a donor country to a host country—but also temporal,[181] in the sense of being future-oriented, setting expectations about what David Nelken has called an "imagined future."[182] Statutes that incorporate transplantations typically include mandates and requirements—"conditionalities"—that seek to reorient existing systems and so function as motivators for change.

The NRRP's reforms are in line with this conception, announcing milestones and goals, planning for interim assessments through monitoring and reporting, and investing in digitization and personnel to facilitate hoped-for transformations. Indeed, access to EU funding "is restricted to those able to prove that there is a convergence between a member's projection of the future and the fund's own projection of the future."[183] This temporal aspect is manifest in former Justice Minister Marta Cartabia's characterization of the NRRP's reforms as a way to embrace "new approaches" that are forward looking and involve "redesigning the judicial system to focus on repairing divisions, healing conflicts, reconciling relationships at the root."[184] So, too, Giuseppe Conte, President of the Council of Ministers, has emphasized: "For Italy, it is not only about recovering the losses due to the pandemic crisis, we must move on from the past. We cannot afford to return to the *status quo* prior to this crisis."[185]

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179. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMPAR. L. 839 app. at 880, 885 (2003).

180. Monateri, supra note 38, at 7.

181. *See* George Rodrigo Bandeira Galindo, *Legal Transplants between Time and Space*, in 1 ENTANGLEMENTS IN LEGAL HISTORY: CONCEPTUAL APPROACHES 129 (Thomas Duve ed., 2014).

182. *Id.* at 137.

183. *Id.* at 143 (referring to International Monetary Fund's "guidelines on conditionalities").

184. Marta Cartabia, *Introductory Remarks*, 57 N.Y.U. J. INT'L. L. & POL. 3 (2025).

185. RRP, *supra* note 170, at 8.

In both Italy and in the United States, commentators have complained about "intolerable," "interminable," and "unjustifiable" case delays that deny rights and demoralize litigants.[186] In fact, the quest for efficiency gains has been the primary driver of U.S. reforms over the last four decades.[187] Regardless of whether U.S. courts are actually efficient,[188] Americanization arguably offers the NRRP reforms, to borrow again from Monateri, a form of "prestigious propaganda" to encourage cooperation from important stakeholders.[189] It is akin to a rhetorical down payment on the NRRP's promise to end judicial inefficiency and meet the public's demand for an improved system.[190]

Efficiency, however, is not the sole goal of the NRRP's reforms. The reforms also aim to improve social cohesion and overcome economic and social disparities between the north and the south.[191] The reforms thus may be understood as part of what Margaret Y.K Woo has called a "project of national

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186. Oscar G. Chase, *Civil Litigation Delay in Italy and the United States*, 36 Am. J. Compar. L. 41, 42 (1988) (quoting commentary about delay).

187. *See* Bookman & Shanahan, *supra* note 131, at 1201 (stating U.S. "procedure reforms have … long chased 'efficiency'"); Coleman, *supra* note 109, at 1790 (arguing reform has been driven by "the widespread belief that efficiency is achieved when reform makes litigation cheaper—without regard to other kinds of costs").

188. *See* Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 Ind. J. Glob. Legal Stud. 383, 437 (2003) (distinguishing between "efficiency" and "the spectacle of efficiency" when considering the hegemonic role of U.S. law).

189. Monateri, *supra* note 38, at 12.

190. *See, e.g.*, Varano, *supra* note 49, at 657 ("Throughout the years, it has become almost commonplace among Italian as well as foreign commentators, that the Italian system of civil procedure, introduced by the Code of 1940, effective since 1942, amended in 1950, is at best inefficient."). Within Italy, the media have emphasized the "inefficiency" of the domestic courts. *See, e.g.*, Emanuele Bonini, *EU Justice Scoreboard Finds Problems in Italy*, La Stampa (Apr. 27, 2019), https://www.lastampa.it/esteri/la-stampa-in-english/2019/04/27/news/eu-justice-scoreboard-finds-problems-in-italy-1.33698116/#google_vignette. Outside Italy, non-governmental groups such as the International Monetary Fund have likewise singled out the inefficiency of the Italian judiciary, which is said to have "contributed to reduced investments, slow growth, and a difficult business environment." *See* Sergi Lanau, Gianluca Esposito & Sebastian Pompe, *Judicial System Reform in Italy—A Key to Growth* (Int'l Monetary Fund Working Paper, 2014). https://www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf.

191. Dallara, Vecchi, Cavallini & Di Giulio, *supra* note 54, at 40; Stefania Palmentieri, *Post-Pandemic Scenarios. The Role of the Italian Natonal Recovery and Resilience Plan (NRP) in Reducing the Gap Between the Italian Central-Northern Regions and Southern Ones*, 9 Geosciences 555 (2023), DOI: 10.3934/geosci.2023030.

identity and state building," within which "[a] robust civil justice system is a statement of national progress."[192]

Americanization here, too, provides reformers with the support of a prestigious discourse, informed by democratic norms and conceptions of "procedural idealism"—principles of equality, fairness, and inclusion—that justify the work of public courts, even when those norms are not realized in practice.[193] Indeed, even as critics of the U.S. court system acknowledge their "failing faith" in the U.S. system of adjudication,[194] they nevertheless insist on the democratic significance of U.S courts as "a forum and therefore a promise for those who are marginalized."[195] That aspiration likewise supports the goals of the NRRP reforms in their rhetorical alliance with an Americanized system of "justice."

B. *Americanization as Neoliberal Ideology*

Some transplant scholars argue that the prestige rationale is incomplete and even naïve because it ignores the role of power and politics in legal borrowing. Michele Graziadei has argued that prestige is "inscribed in a set of beliefs about the world, about status and achievement," and can be assessed only

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192. Margaret Y.K. Woo, *Manning the Courthouse Gates: Pleadings, Jurisdiction, and the Nation-State*, 15 Nev. L.J. 1261, 1263 (2015).

193. *See* Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 Hastings Const. L.Q. 261, 292 (2021). For those who might argue that judicial discretion—over settlement, over information-exchange, over case management—tends toward a form of authoritarianism associated with fascism, Americanization provides a rhetorical counter. *Cf.* Elisabetta Silvestri, *Notes on Case Management in Italy*, Italian Report to the 2017 Conference of the International Association of Procedural Law, (Apr. 26, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3158105 (discussing concerns that entrusting courts with power "to play an active role in the development of proceedings was seen as the sign of a 'fascist', authoritarian approach to litigation").

194. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494 (1996) (highlighting that the Federal Rules failed to provide guidance on many salient issues arising in litigation, including the prevalence of settlements).

195. Andrew Hammond, *The Master of the Complaint? Pleadings in Our Inegalitarian Age*, in A Guide to Civil Procedure: Integrating Critical Legal Perspectives 265 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022). On the role of democracy in procedural theory, see generally Andrew Hammond, *The Democratic Turn in Procedural Scholarship*, 42 Rev. Litig. 267 (2023).

in the "broader domain of the analysis of ideology."[196] From this perspective, procedural transplantation provides a mechanism through which a legal system may align itself with the political preferences of the donor nation under the protective cloak of dispute-resolution practice.

In the context of the NRRP, critics are likely to compare procedural borrowing from the United States to a Trojan horse that seeks to smuggle U.S. ideology into Italian courts[197]—an ideology that they would sum up in a single word: neoliberal.[198] The end-game of court reform from this perspective is not procedural improvement or the delivery of "justice" but substantive change: the elimination of market regulation, the dilution of democratic guarantees, and the displacement of the state by corporate actors. To borrow from Ugo Mattei and Fernanda Nicola, procedural reform provides a neutral cover for "dismantling the concessions granted to subordinate classes at the advantage of an outright return to a 'far west' of unregulated market behavior."[199]

Numerous scholars have supported the descriptive claim that U.S. civil procedure now reflects a neoliberal model.[200] As evidence, they emphasize the U.S. system's pervasive reliance on private decision makers whose processes are "confidential" and said to shield wrongdoing from disclosure,[201] judicial enforcement of ex ante mandatory arbitration clauses that arguably undermine regulatory protection for workers and consumers,[202] and curtailed discovery, heightened pleading standards, and

196. Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inquiries L. 723, 739 (2009); Casado–Pérez & Lifshitz, *supra* note 175, at 945 n. 54.

197. Ugo Mattei & Alessandra Quarta, *Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law*, 1 Italian L. J. 303, 307–08 (2015) (explaining that neoliberal ideology is a "'Trojan horse' for the final dissolution of the public sector in favor of corporate interests").

198. *See generally* David Singh Grewal & Jedidiah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & Contemp. Probs. 1 (2014).

199. Ugo Mattei & Fernanda Nicola, *A "Social Dimension" in European Private Law?: The Call for Setting a Progressive Agenda*, 41 New Eng. L. Rev. 1, 27 (2006).

200. *See* Norris, supra note 107.

201. *See* Hershkoff & Resnik, *supra* note 23, at 479 (describing how confidentiality in arbitration "can prevent the public from knowing about the allegedly illicit practices and assessing the need for regulation").

202. *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 684 (2018) (writing that forced arbitration in the employment context enables employers to "nullify employee rights").

restrictions on aggregate litigation that subvert the "concept of civil litigation as democratic."[203] Indeed, critics argue that the very process of designing U.S. civil procedure over the last half century has tilted in favor of the "one percent"[204] and enables corporate parties to leverage rules for private advantage to the detriment of the public good.[205] Of course, criticisms that U.S. courts, and especially federal courts, favor business interests is not new,[206] and, as emphasized, U.S. procedure is a contested terrain in which scholars disagree about matters such as pleading rules, discovery, and settlement rates. However, the neoliberal critique comes at a time when racial and class stratification in the United States is at an all-time high,[207] and trust in the state as a provider of public goods, including a functioning court system, is at an all-time low[208]—trends that are associated with neoliberal ideology.

Americanization understood as an instantiation of neoliberal ideology certainly would encourage corporate buy-in for the NRRP reforms.[209] But given the incompatibility of neoliberal

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203. Woo, *supra* note 192, at 1283.

204. *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. 1005, 1014 (2016) (arguing that the Federal Rules are designed to favor the "one percent"); *see also* Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U.L. REV. 407 (2018) (arguing that the racial and gender homogeneity of the Civil Rules Committee makes the body's work democratically problematic).

205. *See* Hershkoff & Norris, *supra* note 31, at 48 (showing how courts' acquiescence in corporate adjudicative efforts helps to consolidate power in favor of business interests).

206. *See* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMPAR. L. 5, 22 (1997) ("A whole line of critical historiography has developed to show that American courts, far from neutral, have been on the side of the rising class of capitalists.").

207. *See Racial and ethnic disparities in the United States: An Interactive Chartbook*, ECON. POL'Y INST. (June 15, 2022), https://www.epi.org/publication/disparities-chartbook/ (providing data that highlight racial and socioeconomic disparities in the United States).

208. *See Public Trust in Government: 1958–2023*, PEW RSCH. CTR. (June 24, 2024) https://www.epi.org/publication/disparities-chartbook/(observing that only about a quarter of Americans trust the federal government to "do the right thing" always or most of the time).

209. On the need for stakeholder "buy in" to the reforms, see, e.g., Crispian Balmer, *Italian Coalition Overcomes Divisions to Back Justice Reform*, REUTERS (July 9, 2021), https://www.reuters.com/world/europe/italian-coalition-overcomes-divisions-back-justice-reform-2021-07-09 (providing an example of the compromise struck between lawmakers to reform Italian criminal courts).

discourse with social welfare rights,[210] invoking Americanization could equally persuade "weaker" parties, such as consumers and workers, to resist cooperation.[211] Just as the technical features of court process are significant in comparative procedural analysis (such as orality or the jury as fact finder), constitutional commitments to social and material well-being likewise influence civil procedure design, purposes, and operation.[212] In particular, the Italian Constitution "recognizes the right of all citizens to work and promotes those conditions which render this right effective";[213] a 1973 reform to Italian court rules established specialized proceedings to hear labor disputes which, at the time of the NRRP reforms, was notable for being "characterized by high outstanding celerity (speed and effectiveness)."[214]

Notably, the Italian and U.S. constitutions take opposing approaches to social and material rights.[215] U.S. neoliberal civil procedure arguably is of a piece with the weak conception of social citizenship that the U.S. Supreme Court has constructed.[216] The text of the U.S. Constitution does not include any of the social and economic guarantees that Continental and post-colonial constitutions adopted in the wake of

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210. *See* Salvador Santino F. Regilme Jr., *Constitutional Order in Oligarchic Democracies: Neoliberal Rights versus Socio-Economic Rights*, 19 L. Culture & Humanities 126, 128 (2023).

211. A study of the NRRP's administrative reforms and implementation efforts emphasized the importance of reinstating consultation with trade unions which otherwise "could threaten to drop their support if the reform measures were not negotiated with them." Di Mascio, Natalini, & Profeti, *supra* note 42, at 498.

212. *See* Hershkoff & Stürner, *supra* note 60.

213. Art. 4 Costituzione [Cost.] (It.).

214. *See* Vittoria De Luca, *Italy: Civil Law Court Proceedings Reform—Employment Provisions* (Am. Bar. Ass'n, Feb. 23, 2023), https://www.americanbar.org/groups/labor_law/publications/ilelc_newsletters/issue-winter-2023/italy-civil-law-court-proceedings-reform/; *see also* Cappelletti & Garth, *supra* note 13, at 276–77 (contrasting the 1973 labor reform with "the difficulties encountered in enacting other reforms in Italy" and emphasizing that the reform "illustrates a dramatic effort to improve the access to justice of individuals in one area of the law").

215. On social rights in the Italian Constitution, see Vittoria Barsotti, Andrea Simoncini, Paolo G. Carozza & Marta Cartabia, Italian Constitutional Justice in Global Context 144–50 (Oxford Univ. Press 2015).

216. *See* Mattei, *supra* note 177, at 391 (referring to the "negative rights" model of the U.S. Constitution "in the absence of thick notions of sovereignty and statehood").

World War II.[217] It sets out no right to public education, no right to public health care, no right to emergency shelter, no right to employment or a fair wage.[218] Likewise, the Due Process Clause has been read to provide only slim and inconsistent protection for judicial access and procedural fairness.[219] The U.S. Constitution includes no right to civil counsel, federal statutes do not establish a right to civil counsel, federal programs do not adequately fund civil counsel for indigent individuals, and the U.S. Supreme Court has not recognized a right to civil counsel as a mandatory feature of due process.[220] Federal judges retain discretion to appoint counsel in civil matters, but appointments are not the norm and even when the litigant faces a loss of property or liberty, refusal to appoint will not automatically violate due process.[221]

U.S. law thus omits the kind of litigant protection contained in Article 24 of the Italian Constitution, which the leading English-language commentary reads as guaranteeing that "[i]n all except minor cases, a party to a civil case … must be represented by an attorney."[222] Similarly, the U.S. Constitution contains no guarantee that a person may "bring cases before a court of law," and federal law does not guarantee the indigent

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217. *See* Mark Tushnet, Weak Courts, *Strong Rights: Judicial Review and Social Welfare Rights*, *in* COMPARATIVE CONSTITUTIONAL LAW 220 (2007) ("Constitutions drafted after World War II almost universally included social welfare provisions.").

218. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 (1999) (explaining that the U.S. Supreme Court "has rejected constitutional claims to housing, to public education, and to medical services, on the view that the government does not owe its citizens any affirmative duty of care"); for an affirmative argument in favor of a constitutional notion of social citizenship, see William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1872, 1881–82 (2001).

219. *See* Helen Hershkoff & Judith Resnik, *Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process*, 76 SMU L. REV. 613 (2023).

220. *See* HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME 791 (2019).

221. *See* Hammond, *supra* note 125 (citing a Supreme Court precedent that did not find a due process violation in the incarceration of a family court defendant who had not been represented by counsel).

222. LIVINGSTON, MONATERI & PARISI, *supra* note 5, at 79 (citing Article 24 of the Italian constitution and the basic law governing legal aid, *Testo unico in material dispese di giustizia D.P.R. testo coordinato* 30.05.2002 n° 115).

the "proper means for action or defence in all courts."[223] Nor does the U.S. Constitution impose duties on federal judges, who hold their positions with life tenure and are subject only to the strong (and rarely invoked) remedy of impeachment. The requirement of Article 111 of the Italian Constitution—that "any judicial ruling in any kind of case must be *motivato*"—that is, accompanied by a written opinion—likewise is absent from the federal Constitution and has not been inferred from the Due Process Clause.[224] The NRRP paid close attention to distinct inequalities, such as the north-side divide, in designing its reforms and seeks to overcome these historic disparities. That goal and its achievement could be undermined if aligned with an Americanized constitutional approach to social rights and a neoliberal ethos that both minimizes government intervention and valorizes existing market relations.

C. *Americanization as Translation, Pragmatic Adaptation, and Hybridization*

This final section considers Americanization from a functional perspective—how its rhetorical support for the NRRP, understood both in its descriptive and normative content, might improve Italian rates of court case-disposition.[225] More broadly, the functional analysis is rooted in a different aspect of transplantation theory: as a voluntary process of incorporation and adaptation, sometimes referred to as "translation" or "transposition" of foreign models, with the resulting "hybrid" system upending the civil-common law divide.[226]

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223. Art. 24 COSTITUZIONE [Cost.] (It.). Admittedly, the formal commitment to counsel has not consistently translated into meaningful representation in civil cases; the Italian system depends on the cooperation of volunteers. Michael Livingston and others report that although in theory the "burden of defending the poor is placed …upon the whole profession," in practice "volunteers assigned are usually the more inexperienced and unsuccessful practitioners in the profession. LIVINGSTON, MONATERI & PARISI, *supra* note 5, at 79.

224. *Id.* at 100.

225. On the functionality of legal transplants, see e.g., Helen Xanthaki, *Legal Transplants in Legislation: Defusing the Trap*, 57 INT'L & COMPAR. L.Q. 659, 661 (2008) (discussing the functionality theory of the legal transplant).

226. *See, e.g.*, John McEldowney, *Hybridization: A Study in Comparative Constitutional Law*, 28 PENN ST. INT'L L. REV. 327 (2010) (using the European Union to demonstrate the concept of the hybridization of different legal systems).

The translation theory arguably descriptively fits the history of U.S. civil procedure developments—unfolding chapters in which the United States on its own initiative adapted a common law system inherited from its days as an English colony, taking into account equitable practices,[227] state procedures,[228] and Continental approaches.[229] Admittedly it may seem odd to dub this process Americanization. At most, U.S. civil procedural reform can be seen as an illustration of the process, but it does not offer a template or a roadmap.

Empirical studies have shown that the most successful transplants are voluntary and adaptive, with modifications "made to take into account domestic legal practice or other initial conditions.[230] Further, they are adopted in response to a "demand for law" and "through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties, [and] legal institutions."[231] The NRRP includes many features of this approach to reform—building on pilot programs, taking experimental steps, looking to best practices, and mandating reporting and monitoring.[232]

To that end, the NRRP has expanded judges' settlement power and made ADR a threshold requirement for

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227. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 928 (1987).

228. *See* JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, HELEN HERSHKOFF, ADAM N. STEINMAN & TROY A. MCKENZIE, CIVIL PROCEDURE: CASES AND MATERIALS 989 (13th ed. 2022) (discussing state origins of Federal Rule 16).

229. *See, e.g.,* Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts*, 1787–1792, 89 FORDHAM L. REV. 1895 (2021) (discussing Roman influences on design of the federal courts); *see also* Louis F. Del Duca & Alain A. Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 AM J. COMPAR. L. 1 (2010) (discussing civil law influences).

230. Daniel Berkowitz, Katharina Pistor & Jean-François Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 179 (2003).

231. *Id.* at 189.

232. Whether development of the plan incorporated sufficient consensual consultation is beyond the scope of this Essay. *See Viesti, supra* note 4 (stating "the government drew up the plan on the basis of very modest … consultation, partly on the strength of the specific political juncture (a national unity government under technical leadership supported by a huge parliamentary majority)"); *see also* Latest State, *supra* note 2 (setting out favorable views of stakeholders including manufacturing and service association, academic experts, universities, and various think tanks).

adjudication—features that arguably are borrowed from the United States. In a formal sense, these procedures have boosted the Italian judge's authority by giving him more managerial tools. Paradoxically, however, the reforms could lead to what scholars have called the "disintegration of the judicial role," a trend some analysts associate with Americanized practice that equates efficiency with dismissal rates as the major unit of measurement.[233]

To the extent Americanization stands for an adaptive process, Italian reformers can be expected to take national culture, professional norms, economic imperatives, and constitutional commitments into account. Indeed, the NRRP itself is no mere rubber stamp of U.S. procedural rule revision but rather takes a holistic approach that integrates institutional support, personnel training, and principles of social cohesion into an innovative plan seeking transformation of the court system with the goal of securing justice for all—in the light of efficiency and expeditiousness, but also fairness and decisional accuracy.

Looking back, Americanization clearly influenced Italy in fields outside law and courts in the second half of the twentieth century, although neither the process nor results suggest rote transplantation. The history of Americanization, Paolo Scriviano has acknowledged, "is usually considered the major factor in Italy's transformation after the second world war." But he hastened to add:

> A multifaceted process characterized by contradictory meanings, Americanization took various forms and developed in highly differentiated ways. Indeed, it is difficult to gauge the extent to which American models were ever simply adopted: closer analysis reveals that such influences were subject to repeated misinterpretation, negotiation and even resistance. … Initially reluctant to follow American examples, Italian society soon demonstrated an unusual capacity for remaking and hybridizing imported transatlantic models.[234]

In the end, many factors—structural and contingent—will affect implementation of the NRRP's procedural reforms and their convergence with practices found in some U.S. courts,

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233. Amir & Alberstein, *supra* note 15, at 558.

234. Paolo Scrivano, *Signs of Americanization in Italian Domestic Life: Italy's Postwar Conversion to Consumerism*, 40 J. Contemp. Hist. 317, 317 (2005).

including incentives for lawyers (e.g., opportunities for multiple appeals), financial pressures (from investors and financial agencies such as the International Monetary Fund), and entrenched regional disparities (affecting the location and staffing of courts). All these, and others, could affect short run adaptation and further inform the branding of the reforms as Americanized.

V. Conclusion

The NRRP reforms mark an important intervention in the modalities of civil dispute resolution in Italy. Their effective operation will require the cooperation of the Bar, judicial oversight, and financial support to ensure that courts and judges have necessary resources. Under this reformed system, invoking Americanization could provide an important rhetorical resource—but NRRP proponents must be careful in choosing the version of Americanization they seek to model. Reform based on U. S. prestige without regard to functionality or fairness is likely to reinforce existing problems, while embrace of the U.S. neoliberal approach could undermine social inclusion and threaten material well-being. Both approaches risk ceding the machinery of justice to private actors at the expense of the public good—and certainly do not support the NRRP's transformative goals of updating "the machinery of justice" while also "repairing divisions, healing conflicts, [and] reconciling relationships."[235]

235. Cartabia, *supra* note 184, at 6.