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Revisiting the 1938 Rules Experiment

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THE LEWIS F. POWELL JR.
DISTINGUISHED LECTURE

Revisiting the 1938 Rules Experiment

The Honorable Paul V. Niemeyer*

It is a genuine pleasure to be here at this graceful Law School. I can say that there is some intangible aspect that makes this place special, and I have always enjoyed coming here.

I wish to thank the Lewis F. Powell Jr. Lecture Series Board, in particular Po Lutken, John Cleveland, and Zach Agee for their kind invitation and Po, John, as well as Ryan Starks and Devin Catlin, for their generous hospitality.

* * *

It is a particular honor to be delivering a lecture named in honor of Justice Lewis Powell. The Justice was a most distinguished alumnus of this University and its Law School, and it is fitting that the Law School provides the home for his papers. I was particularly pleased to have met with John Jacob, the especially knowledgeable Archivist of Justice Powell's papers.

After Justice Powell retired from the Supreme Court, he chose to sit periodically with the Fourth Circuit for a number of years and would have dinner with the judges during the week of our court sittings. I recall him describing in remarkable detail his initial hesitancy in accepting appointment to the Supreme Court and how Mrs. Powell (whom he fondly referred to as Jo for Josephine) advised him that he could not turn the President down. I also remember a discussion during one of these dinners in which one of the judges asked Justice Powell what opinion of the Court he most regretted. Without hesitancy, he responded: *Bates v. State Bar of Arizona*,¹ which I took to be an expression of his love for the legal profession and his regard for it as a noble profession. You may recall that in *Bates*, the Court held, among

* The Lewis F. Powell Jr. Distinguished Lecture presented March 27, 2014, at the Washington and Lee School of Law. The Honorable Paul V. Niemeyer, Judge, United States Court of Appeals for the Fourth Circuit.

1. 433 U.S. 350 (1977).

other things, that the law profession's blanket regulation of advertising by attorneys could not be justified under the First Amendment's Free Speech Clause.² Justice Powell dissented from this holding, noting, "It is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession."³

Justice Powell was himself the epitome of graciousness. For example, whenever he sat with us, we always offered to let him preside, but he never chose to do so. He elected instead to sit in what I call the catbird seat—the seat to the right of the presiding judge. I have proudly retained Justice Powell's several notes to me expressing his pleasure in sitting together.

I also learned much from him. Most fundamentally, I noticed that when he came to court, he did so with a healthy disposition in favor of the process given the parties by the lower court, imposing squarely on the appellant the burden to demonstrate why we should not affirm. While that sounds obvious, when appellate judges so often spend time considering the intricacies of individual issues—the trees in the forest, if you will—the forest itself can be forgotten.

Just as we were all proud to have known Justice Powell, I am proud to join Washington and Lee in honoring him here.

* * *

This afternoon, I propose to revisit the 1938 Federal Rules of Civil Procedure. Those new rules employed a range of procedural devices and an underlying procedural philosophy that had never before been employed.⁴ It was no less than a bold experiment in procedure.

Let me explain with some background. The 1938 Civil Rules did not simply appear as the singular and immediate creation of the Advisory Committee appointed by the Chief Justice in June of

2. See *id.* at 383 (holding that attorney advertising is not subject to blanket suppression).

3. *Id.* at 389 (Powell, J., concurring in part and dissenting in part).

4. See Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673, 675 (2013) [hereinafter Niemeyer, *Simplified Rules*] (discussing the changes made by, and the impact of, the 1938 Rules).

1935 to draft such rules.⁵ To the contrary, the Advisory Committee's work was the end of a long process that had begun in earnest almost a hundred years earlier.⁶

Pleading in the federal courts had traditionally followed two disconnected tracks—one for courts of equity and one for courts at law.⁷ There was a third track for courts in admiralty,⁸ but that is a story for another day.

With enactment of the Act of August 23, 1842,⁹ the Supreme Court was authorized to regulate the process and procedures in cases in equity, in admiralty, and at law.¹⁰ Acting on that authority, the Court adopted admiralty rules and updated an earlier set of equity rules.¹¹ But it did nothing for rules in courts at law.¹² Instead, it left the procedure for those cases to be controlled by the Conformity Act of 1828,¹³ which required the procedure at law to be that applied in the courts of the State

5. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 710 (1998) [hereinafter Subrin, *Fishing Expeditions*] (describing the process of establishing the 1935 Advisory Committee).

6. See *id.* at 692–701 (discussing the developments that led to the Federal Rules of Civil Procedure).

7. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 918–20 (1987) [hereinafter Subrin, *Equity*] (discussing the traditional divisions between courts of equity and courts at law).

8. See *id.* at 929 (noting that admiralty jurisdiction was independent from courts at equity and courts at law).

9. Act of August 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (1842).

10. See *id.*

[T]he Supreme Court shall have full power and authority . . . to prescribe, and regulate, and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States . . . and other proceedings and pleadings, in suits at common law, or in admiralty and in equity pending in the said courts . . .

11. See HENRY M. HART JR. & HERBERT WESCHLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 579–80 (1953) (noting that the Supreme Court promulgated ninety-two rules of equity and forty-seven admiralty rules in response to the Act of August 23, 1842).

12. See *id.* at 584 (discussing the impact of the Act of August 23, 1842 on actions at law, and noting that although the Court's rule-making power was affirmed by the Act, "courts were reluctant to use that power").

13. Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278 (1828).

where the federal court sat and also by the more flexible Conformity Act of 1872,¹⁴ which permitted federal courts to follow current state practice.¹⁵ Of course, that state of affairs resulted in the use of inconsistent rules of procedure in the federal courts to the extent that state court procedures differed from State to State. As might be expected, the resulting uncertainty and confusion soon prompted calls for reform.

Efforts began in the 1880s to create uniformity by conforming the rules for courts at law with the rules used in equity, except, of course, as necessary to preserve the right to jury trials at law.¹⁶ Those efforts, however, fizzled. Again in 1911, the American Bar Association called for a uniform process in all federal courts¹⁷—a call also made a year earlier by President Taft¹⁸—but that initiative also fizzled. And the complaints about federal procedure continued, as did the discussions and the circulation of ideas through speeches, articles, and books.¹⁹

Without delving into the details of the ensuing history, it suffices to say that Congress eventually enacted the Rules Enabling Act of 1934,²⁰ authorizing the Supreme Court to promulgate rules for courts at law and, importantly, providing that the Court “may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so

14. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196 (1872).

15. See Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278–81 (1828) (“[T]he forms of . . . process . . . in the courts of the United States, held in those states admitted into the Union . . . shall be the same in each of the said states . . .”); Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (1872) (permitting practice and pleadings, except for admiralty and equity, to conform to state court procedure).

16. See Subrin, *Equity*, *supra* note 7, at 932 (describing the rationale behind seeking conformity for rules for courts at law and equity rules).

17. See *id.* at 944 n.202 (citing to ABA Report 50, which called for action to create a uniform process to avoid delays and costs).

18. See William Howard Taft, *Second Annual Message, December 6, 1910*, in 16 MESSAGES AND PAPERS OF THE PRESIDENTS 7492, 7522–23 (1906–1913) (“One great crying need in the United States is cheapening the cost of litigation by simplifying judicial procedure and expediting final judgment.”).

19. See Subrin, *Fishing Expeditions*, *supra* note 5, at 692–97 (discussing complaints about procedure, discovery, and other litigation delays).

20. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

as to secure one form of civil action and procedure for both.”²¹ And this effort produced results. In 1935, the Supreme Court appointed an Advisory Committee to draft new rules under the authority of the Enabling Act, naming the former Attorney General William D. Mitchell as chair and Yale Law School Dean Charles E. Clark as reporter.²²

Clark was then of the view that “most lawyers were [not] sufficiently skilled to meet rigorous pleading requirements” of the time and that “elaborate pleadings were [not] a useful way to expose facts or narrow issues.”²³ He had advocated simple, flexible rules that combined law and equity and afforded broader discovery.²⁴ It was indeed true that the availability of discovery at the time was minimal, even though it was thought to be necessary to achieve justice. As George Ragland Jr., author of the then-famous 1932 book, *Discovery Before Trial*, had observed, “The lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray.”²⁵ Both Clark and Ragland believed that greater clarity in the definition of the issues would be obtained by greater discovery, adopting the views of Professor Edson R. Sutherland of the University of Michigan, who wrote, as a foreword to Ragland’s book:

False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial. . . . All this is well recognized by the profession, and yet there is a wide-spread fear of liberalizing discovery. Hostility to “fishing expeditions” before trial is a traditional and powerful taboo.²⁶

Against this background, the Advisory Committee began in earnest and, after circulating two drafts to the public, proposed

21. *Id.* (emphasis added).

22. See Subrin, *Fishing Expeditions*, *supra* note 5, at 710–12 (discussing the members and formation of the 1935 Advisory Committee).

23. *Id.* at 711 n.133.

24. See *id.* at 712 (noting that in various publications Clark argued for simpler rules that would also provide greater discretion to trial judges).

25. GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 251 (1932).

26. Edson R. Sunderland, *Foreword* to GEORGE RAGLAND JR., *DISCOVERY BEFORE TRIAL*, at iii (1932).

what ultimately became the 1938 Federal Rules of Civil Procedure.²⁷

* * *

The new Rules were bold and dramatic. As announced in Rule 1, they were designed “to secure the just, speedy, and inexpensive determination of every [civil] action”²⁸ and with that understanding, they were well received, indeed praised, at least by judges and academics. Chief Judge John Parker of the Fourth Circuit stated, perhaps with some hyperbole, that the new Rules were “the best code of practice that is to be found anywhere in this country, or for that matter anywhere in the world.”²⁹

The 1938 Rules created one form of action known as a civil action;³⁰ provided for simplified pleading³¹ and simplified pretrial proceedings that included a provision for a pretrial conference;³² provided liberal discovery through the largest range of discovery mechanisms that had ever been authorized by a set of procedural rules;³³ provided for joinder;³⁴ and included a summary judgment procedure.³⁵ But the basic elements of this new regime, as the Supreme Court has described them, were “notice pleading,” coupled with “broad and liberal” discovery.³⁶ The role of pleading

27. See Subrin, *Fishing Expeditions*, *supra* note 5, at 729 (describing the proposal and promulgation of the 1938 Rules).

28. FED. R. CIV. P. 1. (1938).

29. John J. Parker, Book Review, 57 HARV. L. REV. 735, 736 (1944).

30. See FED. R. CIV. P. 2 (1938) (“There is one form of action—the civil action.”).

31. See FED. R. CIV. P. 8 (1938) (providing general rules and standards for pleading).

32. See FED. R. CIV. P. 16 (1938) (establishing rules for pretrial conferences and scheduling).

33. See FED. R. CIV. P. 26–37 (1938) (elaborating on the range of discovery provisions).

34. See FED. R. CIV. P. 18–20 (1938) (allowing joinder of claims and parties).

35. See FED. R. CIV. P. 56 (1938) (describing summary judgment procedures).

36. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (describing the role of notice pleading); *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957) (describing the requirements of notice pleading and its relationship to liberal discovery); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (endorsing liberal discovery procedures).

was thus downplayed and the role of discovery, enhanced. Under the new order, the tasks of defining and shaping a case were moved from the shoulders of a pleading practice and placed in the arms of the multiple forms of discovery and a motions practice.

Let me amplify this a bit. Before 1938, the role of pleadings was four-fold. Pleadings were designed (1) to *give notice* of the nature of a claim or defense; (2) to *state the facts* each party believed to exist; (3) to *narrow the issues* that were to be litigated; and (4) to provide a means for the *early and speedy disposition* of sham claims.³⁷ The only traditional role of pleadings that survived in the new 1938 rules was the role of giving fair notice of a claim or defense.³⁸ This minimalization of pleadings' role can be best appreciated by looking at Rule 84 and the forms attached to the Civil Rules. Rule 84 provided that the forms attached to the new rules were designed to indicate "the simplicity and brevity" intended by the Rules.³⁹ Thus, one sample form provided: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant C.D. or defendant E.F., or both defendants C.D. and E.F. willfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway."⁴⁰ With the addition of a demand for damages, that was it for a negligence complaint. Similarly, the form of complaint given for a claim for goods sold and delivered was even shorter: "Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936."⁴¹ Evaluating candidly what was envisioned, we might conclude today that notice pleading hardly even gave notice.

The 1938 Rules moved the other functions of traditional pleading to later pretrial procedures. Thus, getting facts was

37. See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 88 (3d ed. 2004) (describing the historical functions of pleading and the importance of those functions).

38. See *Conley*, 355 U.S. at 47 ("[A]ll the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

39. FED. R. CIV. P. 84. (1938).

40. FED. R. CIV. P. Form 10 (1938).

41. FED. R. CIV. P. Form 5 (1938).

committed to discovery; narrowing the issues was committed to pretrial motions, a pretrial conference, and summary judgment; and the speedy disposition of sham claims was similarly committed to a motions practice under Rules 12 and 56.⁴²

As a consequence, the 1938 Rules, for the first time, at any time and any where, gave a plaintiff almost unrestricted access to court and its process, leaving other gatekeeping roles of traditional pleading to be fulfilled by later procedures.⁴³

At the same time that pleadings were minimalized, discovery was significantly expanded and liberalized. Before 1938, any available discovery was afforded by the rules of equity or by the various state procedures incorporated into federal practice. Discovery was minimal and conducted only with the discretion of the court.⁴⁴ And the mechanisms for discovery that did exist were complex and difficult to use.⁴⁵ By contrast, the 1938 Rules greatly facilitated and broadened discovery, allowing a dazzling array of discovery mechanisms, including oral depositions, depositions by written interrogatories, depositions before an action was commenced, interrogatories to parties, discovery of documents and things, the physical and mental examination of parties by physicians, and requests for admissions of fact.⁴⁶ The discovery rules also broadened the scope of discovery to cover any matter relevant to or material to *the subject matter* involved in the action.⁴⁷

42. See Niemeyer, *Simplified Rules*, *supra* note 4, at 675 (describing the general impact of the 1938 Rules on traditional pleading).

43. See *id.* at 676–77 (describing the discovery-centered practice which has developed since the 1938 Rules).

44. See Subrin, *Fishing Expeditions*, *supra* note 5, at 698–99 (noting that use of discovery was strictly limited before 1938).

45. See *id.* at 698–701 (describing discovery procedures in federal courts prior to the 1938 rules).

46. See FED. R. CIV. P. 26–37 (1938) (describing discovery procedures and policies).

47. See FED. R. CIV. P. 26(b), 34 (1938) (“Unless otherwise ordered by the court . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .”); FED. R. CIV. P. 34 (1938) (granting the court discretion to order inspection, copying or photographing of a variety of materials which contain “evidence material to any matter involved in the action”).

In addition, the 1938 Rules authorized attorneys to obtain blank subpoenas without leave of court, which allowed the attorneys to compel, without prior court authority, the attendance of witnesses and the production of documentary evidence.⁴⁸ As Paul Carrington, a former reporter to the Civil Rules Committee, later noted with some cynicism: “We now have 900,000 attorneys running about with almost unrestrained subpoena power.”⁴⁹

Over the years, the new devices introduced in the 1938 Rules were enhanced. While notice pleading remained as originally promulgated in 1938, discovery was expanded in scope and facility through amendments made in 1946, 1963, 1966, and 1970.⁵⁰ The 1946 amendments expanded discovery’s scope to allow discovery of even *inadmissible* evidence, so long as it was calculated to lead to the discovery of admissible evidence.⁵¹ The amendments also eliminated the need to obtain leave of court for taking depositions.⁵² Eliminating court approval for document requests was accomplished by the 1970 amendments.⁵³

In the spirit of the new rules, the Supreme Court in 1947 issued its seminal opinion in *Hickman v. Taylor*,⁵⁴ which directed courts to accord discovery “a broad and liberal treatment.”⁵⁵ The Court explained, “No longer can the time-honored cry of ‘fishing

48. See FED. R. CIV. P. 45 (1938) (“The clerk shall issue a subpoena . . . signed and sealed but otherwise in blank, to a party requesting it who shall fill it in before service.”).

49. Niemeyer, *Simplified Rules*, *supra* note 4, at 677 (internal citations omitted).

50. See 8 WRIGHT & MILLER, *supra* note 37, § 2002, at 34 (discussing the history of Federal Discovery rules and elaborating on amendments to the rules).

51. See FED. R. CIV. P. 26(b)(1) (1946) (“Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).

52. See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 32–34 (June 1946) (eliminating the need for a court’s permission to obtain depositions).

53. See 8 WRIGHT & MILLER, *supra* note 37, § 2207, at 137 (discussing the 1970 Amendment to Rule 34 and its impact on procedures for requesting documents).

54. 329 U.S. 495 (1947).

55. *Id.* at 507.

expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."⁵⁶

In sum, the 1938 Rules shifted procedural battles from the pleading stage of litigation to the newly created discovery stage and reassigned the responsibility for resolving discovery disputes from the court to the attorneys.⁵⁷ This latter innovation was especially surprising in the context of America's strong *adversarial* system.⁵⁸ The Rules demanded that the warring parties work out these differences. Because this new structure of procedure had never before been created or used, it was indeed a bold experiment, albeit a well-intended one, to replace the highly restrictive and complex pretrial process that had existed prior to 1938.⁵⁹

* * *

Rule commentators applauded the new direction as a triumph of American law.⁶⁰ Indeed, Armistead Dobie, the Dean of the University of Virginia School of Law, who later became a judge on the Fourth Circuit, characterized the new Rules as "revolutionary."⁶¹ But it was received with substantial hesitation by those practicing under the rules. Trial lawyers, who were familiar with the traditional procedures, were understandably somewhat hostile to the new ideas. In response to this resistance, efforts were undertaken to educate the bar and to sell the new regime. District Judge Louis E. Goodman, recognizing that lawyers and judges considered the former practice as

56. *Id.* (footnote omitted).

57. *See* Niemeyer, *Simplified Rules*, *supra* note 4, at 677 (noting that parties were expected to resolve differences outside of court).

58. *See id.* at 676 (commenting that modifying discovery practices is "enigmatic" given the adversarial context of U.S. legal practices).

59. *See supra* note 4 and accompanying text (discussing the changes brought about by the 1938 rules).

60. *See* 4 WRIGHT & MILLER, *supra* note 37, § 1008, at 54–55 (describing the enthusiastic reception of the Federal Rules of Civil Procedure).

61. *See* Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 275 (1939) ("If the term 'revolutionary' can be correctly applied to any part of the new rules, that part is discovery.").

“sacrosanct,” sought to persuade them by packaging his message with the aspiration of achieving justice for the litigating parties.⁶² As he explained to reluctant lawyers and judges in California:

The adroit procedural maneuvering of the earlier days in the pleading stage, often invoked to deprive a litigant of his day in court, is now relegated to the archives. . . . Thus the complaint and the answer need do no more than, in colloquial manner, state on the part of the complaining party, “you did” and on the part of the answering party, “I did not.”

* * *

But pleadings no longer determine the issues to be tried. In effect, all they do is generally apprise the parties of the nature of the claim and the defense. Thus time and effort and expense is saved. Much of the reluctance to accept the philosophy of the new procedure was due to a failure on the part of many lawyers and some judges to distinguish between the pleading stage in litigation and the trial preparation stage. Information in the pleadings stage is widely different from information as to evidentiary matters necessary for proper trial preparation.

Whereas simplification is made the keynote of pleadings, wide opportunity and liberality in the obtaining of information as to factual matters needed for the trial is made the keynote of the discovery rules.⁶³

The efforts to sell the 1938 Rules were successful, and even now few question their success.

* * *

My thesis today, however, intends to open up some basic questions about them. Despite their original benign purpose to secure the speedy and inexpensive resolution of cases, the 1938 Rules, as applied in the ever-changing context of civil litigation, have over the years actually increased both the length of the litigation process and its cost.⁶⁴ And, as a happy-for-some

62. See Louis E. Goodman, *The New Spirit in Federal Court Procedure*, 7 F.R.D. 449, 449 (1947) (advocating for change to secure results based on justice, rather than results determined by procedure).

63. *Id.* at 450.

64. See Niemeyer, *Simplified Rules*, *supra* note 4, at 677 (describing increased costs and delays due to changes brought about by the 1938 Rules).

byproduct, the 1938 Rules have vastly increased the income to trial attorneys⁶⁵—those who, ironically, were originally reluctant to embrace the Rules.

Let me first address some of the changing contexts. Based on a growing recognition that substantial sums may be awarded for pain and suffering and for punishment—something that was almost impossible in 1938—litigation has become an enticing lottery in which attorneys have come to participate as entrepreneurs.⁶⁶ In that context, a jury awarding \$10 million for pain and suffering to a severely burned plaintiff is taken to be appropriate—but so would another jury's award of \$1 million for the same level of pain and suffering.⁶⁷ Similarly, an award of \$5 billion in punitive damages can be found as appropriate as would another jury's award of \$50 million for the same conduct.⁶⁸ These are the tort law's irrational aspects—by which I mean subjective aspects that cannot be predicted or measured by objective standards—and they have amplified the effects of the liberal procedural devices adopted in 1938.⁶⁹

Another major change in the legal landscape occurred in 1966, with the adoption of Rule 23, the current class action rule, which was, at the time, intended only to codify and make efficient a procedural practice that had been employed in equity.⁷⁰ But the 1966 changes had unintended consequences, and beginning in the 1980s when the rule was employed more robustly, it began to tax the limits of many other procedural rules and even to take on a quasi-legislative role.

65. See *id.* at 676 (arguing that disputes stemming from expected self-regulation delay lawsuits and enhance attorney compensation).

66. See Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of our Tort System*, 90 VA. L. REV. 1401, 1405 (2004) (discussing the financial incentives to practice in the tort system).

67. See *id.* at 1403 (discussing the arbitrary and irrational nature of pain and suffering awards).

68. See *id.* at 1409 (arguing that punitive damages are arbitrary and based on a jury's reactions, rather than a rational basis).

69. See *id.* at 1401 (discussing the lack of rational criteria in measuring damages in the tort system).

70. See 7 WRIGHT & MILLER, *supra* note 37, § 1753 (describing the impact of the 1966 amendment on Rule 23).

Finally, technology has exacerbated procedural problems, especially in the area of discovery. The invention of xerography in 1960 made documents substantially more numerous and discovery therefore more expensive.⁷¹ And the proliferation of email and electronic document storage beginning in the early 1990s multiplied that effect exponentially, creating millions of documents relevant to a typical commercial case.⁷² When I came to the bar in the late 1960s, I can remember that a serious commercial case might have then generated several banker's boxes of documents that could readily be reviewed within a reasonable time. The same case today, however, might generate a warehouse of documents and millions of emails saved on hard drives with programs and operating systems rendered obsolete by newer technologies, making the identification, recovery, and review of potentially relevant documents almost intolerably expensive.

* * *

Beginning in the 1970s, the bar and the public, as well as public officials, began to complain about the judicial process afforded in federal courts. While the complaints were indeed directed at delay and expense, they focused on judicial management, targeting only indirectly the Federal Rules of Civil Procedure.⁷³ In 1976, Chief Justice Warren Burger convened the Pound Conference in order "to assess the troubled state of litigation."⁷⁴ In addressing discovery, the Conference concluded that "[w]ild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm."⁷⁵

71. See Niemeyer, *Simplified Rules*, *supra* note 4, at 677 (describing increased costs due to enhanced document production).

72. See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 314–15 (S.D.N.Y. 2003) (describing the complexities of electronic data storage, large amounts of documents generated by email, and attendant costs of retrieval).

73. See Niemeyer, *Simplified Rules*, *supra* note 4, at 678 (noting proposals to modify the Federal Rules of Civil Procedure by the ABA, the Supreme Court, and other organizations).

74. Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 9 (1992).

75. William H. Erickson, *The Pound Conference Recommendations: A*

And similarly, in 1977 the American Bar Association embarked on a major effort to persuade the Civil Rules Committee to make changes to restrict the broad scope of discovery authorized by Rule 26.⁷⁶ When its efforts failed, the American College of Trial Lawyers proposed similar changes in the 1990s.⁷⁷

Around the same time, the President's Council on Competitiveness issued a report claiming that the judicial system had become burdened with excessive costs and long delays.⁷⁸ The report claimed that each year the United States was spending an "estimated \$300 billion as an indirect cost of the civil justice system"⁷⁹ and "\$80 billion a year in direct . . . costs."⁸⁰ The report blamed discovery as the chief culprit. It claimed that "over 80% of the time and cost of a typical lawsuit involves pretrial examination of facts through discovery."⁸¹

In 1988, Congress enacted the Judicial Improvements and Access to Justice Act⁸² as a renewal of the long-standing goal that federal court systems secure the "just, speedy and inexpensive determination of every action."⁸³ Congress identified as culprits delay, insufficient support services in the courts, spiraling costs caused by litigation expenses and attorneys' fees, and unfair and inconsistent decisions brought on by pressures placed on judges who had to cope with the torrent of litigation.⁸⁴ In addition to the

Blueprint for the Justice System in the Twenty-First Century, 76 F.R.D. 277, 288 (1978).

76. See *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 149, 157 (1980) (discussing proposed changes to Rule 26, including limiting discovery to "issues," not subject matter).

77. See Niemeyer, *Simplified Rules*, *supra* note 4, at 679 (describing the College's proposed amendment).

78. See Dan Quayle, *Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 979 (1991) (discussing the need for civil justice reform).

79. *Id.*

80. *Id.* at 980.

81. *Id.* at 981.

82. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended at 28 U.S.C. §§ 101–1023 (2012)).

83. FED. R. CIV. P. 1.

84. See H.R. REP. NO. 100-889, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5892, 5893–94 (describing findings of the Subcommittee on Courts, Civil

enactment of the 1988 Act, Congress enacted the Civil Justice Reform Act of 1990, again to reduce costs and delay in litigation.⁸⁵ Actions authorized and directed by the 1990 Act led to the modest 1993 and 2000 amendments to the Civil Rules relating to case management and discovery.⁸⁶

During this period of public comment and criticism, the Supreme Court began to address costs and delay in civil procedure through its decisions. For the first time, the Court retreated from its earlier endorsement of broad-discovery, as articulated in *Hickman v. Taylor*.⁸⁷ For example, in *Blue Chip Stamps v. Manor Drug Stores*,⁸⁸ decided in 1975, the Court explicitly lamented the potential for abuse “of the liberal discovery provisions of the Federal Rules of Civil Procedure.”⁸⁹ In *Herbert v. Lando*,⁹⁰ decided in 1979, the Court noted that “mushrooming litigation costs” were in large part due to pretrial discovery, declaring that “[t]here have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus.”⁹¹ In 1987, the Court in *Anderson v. Creighton*⁹² expanded qualified immunity based in substantial part on the disruptive effect of “broad-ranging discovery.”⁹³

Liberties and the Administration of Justice regarding federal court functions).

85. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5090 (codified as amended at §§ 28 U.S.C. 471–82 (2012)) (“Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens . . . it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.”).

86. See 8 WRIGHT & MILLER, *supra* note 37, § 2003, at 41–42 (describing the 1993 and 2000 amendments to the Federal Rules of Civil Procedure).

87. See Niemeyer, *Simplified Rules*, *supra* note 4, at 682 (noting that the Supreme Court began demonstrating reluctance towards broad discovery rules in the 1970s).

88. 421 U.S. 723 (1975).

89. *Id.* at 741.

90. 441 U.S. 153 (1979).

91. *Id.* at 176.

92. 483 U.S. 635 (1987).

93. *Id.* at 646 n.6.

In addition to focusing on the breadth and cost of discovery, the Court also began to recognize the benefits of enhanced pleading and summary judgment procedures. In *Celotex v. Catrett*,⁹⁴ the Court encouraged the broader use of the summary judgment process as a protection of the rights of defendants faced with meritless claims in a notice pleading system.⁹⁵ And in *Bell Atlantic Corp. v. Twombly*,⁹⁶ the Court addressed directly how the pleading stage could mitigate potential abuses of discovery. As the Court explained:

[I]t is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage” much less “lucid instructions to juries”; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.⁹⁷

Indeed, the Court cited a letter I had written as Chair of the Civil Rules Committee to the Chair of the Standing Committee, reporting on a RAND Institute finding that “discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed.”⁹⁸ A few years later, in 2009, the Court in *Ashcroft v. Iqbal*⁹⁹ again took another step in that same direction, holding that to survive a motion to dismiss, a complaint “must contain sufficient *factual* matter, accepted as true, to state a claim to relief that is plausible on its face.”¹⁰⁰ This heightened pleading requirement was new—indeed, shockingly new to some—and was, I suggest, nothing less than a retreat from the minimalism of notice pleading.

To be sure, these responses by Congress, the Civil Rules Committee, and the Supreme Court have, on a small scale, targeted some of the problems inherent in the 1938 design. But

94. 477 U.S. 317 (1986).

95. *See id.* at 327 (noting that “with the advent of ‘notice pleading,’ the motion to dismiss seldom fulfills th[e] function” of preventing factually insufficient cases from going to trial).

96. 550 U.S. 544 (2007).

97. *Id.* at 559.

98. *Id.* (citation omitted).

99. 556 U.S. 662 (2009).

100. *Id.* at 678 (emphasis added) (internal quotation marks omitted).

they have not questioned the larger structure. And, I submit, an inappropriate level of cost and delay still persists in civil procedure.

It seems to me that Article III of the Constitution must be construed to require that the Third Branch provide citizens with an effective and efficient court system that resolves disputes in a speedy and inexpensive manner. Indeed, this harkens back to the Magna Carta itself, which provides: “*Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum* [To no one will we sell, to no one will we deny, or *delay* right or justice].”¹⁰¹ Is it acceptable that we have a civil procedure for resolving disputes that allows even routine commercial disputes to linger in a trial court for three years or more and that costs the litigants in the hundreds of thousands of dollars? Most people and small businesses cannot afford to use such a procedure. In large measure because of this, our citizens continue to flee from courts for the resolution of their disputes, running to employ private arbitration, mediation, and private settlement courts with the hope of resolving their disputes in a timely and efficient manner. Must we not understand this flight as nothing less than the public’s condemnation of the court procedures that we are now providing?

* * *

When I was Chairman of the Civil Rules Committee, I appreciated the scope of these problems. And I also appreciated the reality that basic changes could probably not, for political reasons, then be accomplished. The promulgation of federal rules had by that time become a public, legislative process, with lobbyists representing various positions actively engaged in the process. For better or worse, long lost were the days when an advisory committee, holed up in a conference room, could accomplish its work in private, focusing only on the public good as it saw it.

101. King John, MAGNA CARTA, Art. 40 (1215), reprinted in SOURCES OF OUR LIBERTIES 17 (Richard L. Perry & John C. Cooper eds., rev. ed. 1991) (emphasis added).

But I did have extended discussions about the subject with Professor Edward Cooper, our Reporter, and Professor Geoffrey Hazard, who was leading the American Law Institute's effort in designing Transnational Rules of Civil Procedure. We explored what features might be considered essential to civil process, what might be considered baggage, and what a fair and inexpensive process might look like. In the end, we came upon the idea of promulgating a set of parallel rules that would provide a simplified and efficient procedure for at least some cases. And I thought privately that if a set of parallel simplified rules were to work, maybe someday such rules could even replace important aspects of the original 1938 Rules.

When we broached the idea of a set of parallel simplified rules to the entire Civil Rules Committee and to the Standing Committee, everyone who expressed a view welcomed the idea, as did the Chief Justice in private conversations.

Professor Cooper undertook to begin the drafting process along the lines that we had discussed. His draft included, as its "central feature," "a major transfer of pretrial communication away from discovery and to fact pleading and disclosure."¹⁰² This central feature addressed directly the course correction necessary, but only for a limited class of cases. The draft proposed the mandatory application of the simplified rules to all *small* money-damage actions and an elective application to *larger* money-damage actions.¹⁰³ It did not provide for application to proceedings in equity.

The basic elements of the proposal were these:

First, the draft would require pleadings to become more detailed, enabling an earlier serious look at the merits of a case. Under the proposal, a complaint would state "the details of the time, place, participants, and events involved in the claim," and would have attached to it "each document the pleader may use to support the claim."¹⁰⁴ This approach, to some extent, anticipated

102. Edward H. Cooper, *Simplified Rules of Procedure?*, 100 MICH. L. REV. 1794, 1800–01 (2002).

103. *See id.* at 1805 (describing the application to small and large money damage actions).

104. *Id.* at 1808.

the approach that the Supreme Court later took in *Twombly* and *Iqbal*. The proposal also authorized the immediate disposition of some claims through the use of verified complaints and answers and a mini-summary judgment process.¹⁰⁵ Under the proposal, the answer would likewise have to state the defendant's position with the same detail required for the complaint, including the factual basis for any avoidances and affirmative defenses.¹⁰⁶

Second, the draft would enhance early discovery disclosures, which would have to be made within twenty days of the filing of the last pleading.¹⁰⁷ While retaining Rule 26's requirements in part, the draft would mandate a greater level of disclosure, more closely imitating what would amount to a basic form of discovery, but without the need for a request.¹⁰⁸ Combined with the enhanced pleadings, this second proposal would "front-load" pretrial communications so as to enable earlier and less expensive disposition of cases.

Third, the draft would restrict discovery, presumptively authorizing only three three-hour depositions, ten interrogatories, and only requests for documents and intangible things that "specifically identify" the matters requested.¹⁰⁹

Fourth, the draft would reduce the burden of the motions practice, requiring that all motions be combined and filed early in the proceedings—within thirty days of the last pleading—and providing that their filing not suspend any other time limitation established by the rules.¹¹⁰

Fifth and finally, the draft would require that upon the filing of a complaint, the clerk of the district court would schedule the trial of the case not later than six months after the filing date, and that the specific trial date would be included in the summons

105. *See id.* at 1811 (describing the documentation requirements for a demand for judgment).

106. *See id.* at 1808 (describing the requirements for an answer to a claim for relief).

107. *Id.* at 1813.

108. *See id.* at 1813–15 (describing the procedures and rationales behind the modified disclosure provisions).

109. *Id.* at 1816.

110. *See id.* at 1812 (describing motion practice under the proposed draft).

served with the complaint.¹¹¹ Incidentally, this one change, as found by a study conducted by the Institute for Civil Justice at RAND, would constitute the single best practice for reducing costs and delay in litigation.¹¹²

The Civil Rules Committee was never able to begin a debate on the project, as my tenure as Chair, which had already been extended once by the Chief Justice, expired. Had I been able to continue with the project, however, I would have introduced three additional ideas for consideration.

First, I would have asked that the proposal expand the scope of the simplified rules' applicability, making them *available* for *all* damage actions and some equity actions and *mandatory* for a larger segment of actions.

Second, I would have directed an effort of exploring whether incentives could be established to encourage both plaintiffs' and defendants' attorneys to elect to use the simplified rules when their use was not mandatory. Making the simplified rules mandatory or leveraging incentives would address the problems identified by the 2010 Conference on Civil Litigation at Duke University, which concluded that "few lawyers would opt for a simplified track and . . . many would seek to opt out if initially assigned to it."¹¹³ Alternatively, I might have even suggested that the Committee consider a proposal that a judge review all civil complaints as part of his authorizing process to issue, enabling the judge to control the application of the simplified rules to the case.

Third, I would have initiated a discussion aimed at trimming down the scope of the summary judgment practice under Rule 56. That rule now allows, even encourages, expensive mini-trials within the pretrial phase of the larger case, and its use results in

111. *See id.* at 1818 (describing the procedure to set a trial date on filing).

112. *See* James S. Kakalik et al., *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, INST. FOR CIVIL JUSTICE 56 (1996), http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR800.pdf (noting that shorter discovery time reduces attorney work hours and data on costs is consistent with data on work hours).

113. JUDICIAL CONFERENCE ADVISORY COMM., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 9 (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf>.

disproportionately large costs and delay. Indeed, as a trial lawyer, I had concluded in the later years of trying cases that it was often more efficient and less costly (and usually strategically superior) to press for trial without engaging in the summary judgment process. District Judge Brock Hornby has agreed with me on this, as he wrote in a 2010 article, *Summary Judgment Without Illusions*.¹¹⁴

* * *

Wherever we now go—and I believe that there is currently some movement in the Civil Rules Committee to resurrect the simplified rules project—we must recognize that as matters currently stand, federal civil procedure is simply too time-consuming and costly, by a large margin. While the goals of the 1938 experiment were laudable in the context of the legal practice that existed when they were conceived and adopted, it is now time to review the experiment. And I suggest that a good starting point would be to begin with the simplified rules project that Professor Cooper and I initiated in 1999. In any event, I firmly believe that nothing short of a serious dialogue on reform is now in order to begin addressing the judiciary’s current unmet responsibilities under Article III.

I should add that it surely would be naive of me to suggest that promulgating simplified rules would solve all of the current problems in civil procedure. Today’s litigation world has become too complex for such a hope. But, such an undertaking would undoubtedly refocus attention on the big picture, as was done in 1215 at Runnymede, and in 1938 in Washington, D.C. Who knows, such new attention might open the way to a completely new and better thinking on judicial process for the modern world. And maybe, the students at Washington and Lee could be the early facilitators.

Thank you for this privilege of addressing you.

114. See D. Brock Hornby, *Summary Judgment Without Illusions*, 3 GREEN BAG 2D 273, 287 (2010) (“[W]hen in doubt whether facts or inferences (not law) support summary judgment, judges should ‘just say no’ and let the case proceed to trial or settlement.”).