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The Revolution of 1938 and Its Discontents

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and
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THE REVOLUTION OF 1938 AND ITS DISCONTENTS

REX R. PERSCHBACHER* & DEBRA LYN BASSETT**

Introduction

All revolutions have their Thermidorian Reaction.¹ It is no different for the Federal Rules Revolution of 1938; it is just that the slow motion nature of the reaction has made it harder to see. The Federal Rules of Civil Procedure (the “Federal Rules”) have shown remarkable longevity, guiding the federal courts for nearly seventy years with relatively minimal modifications—an impressive feat. At times there have been additional bursts of creative reform, notably in 1966.² And parts of that revolution, such as discovery and dispositive motions, including summary judgment, are firmly in place throughout the United States procedural systems. In other ways, however, the years have taken their toll on the Federal Rules of Civil Procedure. Significant developments, particularly in the aims and goals of litigation in the federal courts, have undermined the ongoing vitality of the Federal Rules. It is our thesis that the moment of the 1938 Federal Rules of Civil Procedure is over.

Looking back from 2008, the moment of the Federal Rules is less dramatic than is sometimes suggested. The promulgation of the Federal Rules of Civil Procedure in 1938 should not be seen as a radical or revolutionary change, at least not in the dramatic and permanent sense that the title of this program, “The Revolution of 1938 Revisited: The Role and Future of the Federal Rules,” implies. The 1938 Federal Rules were a wonderful, innovative set of procedural rules for a court system that was just coming into its own. The

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1. A “Thermidorian Reaction,” as exemplified by the French Revolution, refers to a replacement of revolutionary aims and leadership by more conservative influences, sometimes including even a partial return to pre-revolutionary values. *See generally* CRANE BRINTON, *THE ANATOMY OF REVOLUTION* 203, 205-36 (1965).

2. *See* Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 *GEO. L.J.* 1204 (1966).

federal courts in 1938 were still a manageable system of approximately 180 district court judges, up from ninety-two in 1910.³ Today there are 678 federal district judges.⁴ In 1940, there were 68,136 cases filed in the United States district courts⁵; in 2006 there were 335,868.⁶ 1938 was the perfect time for a much-needed reform—a time to shift away from arcane and clumsy pleading rules that trapped the unwary and enriched the few who had encyclopedic knowledge of Code pleading and to institute a new vision of procedure employing much-simplified pleading rules that emphasized fact development and sought to resolve cases on the merits. The prevailing litigation values today are ease and speed of disposition, ending litigation at all costs. This goal was recently incorporated into Rule 1 (reading as of December 1, 2007): “[These rules] should be construed *and administered* to secure the just, speedy, and inexpensive determination of every action and proceeding.”⁷ The dramatic changes in purpose, courts, and context in the last seventy years—changes that have accelerated over the last twenty years—in fact signal the end of the procedural revolution of 1938 as we have traditionally understood it.

The great goals of the 1938 revolution, most vividly displayed in the Rules Enabling Act of 1934⁸ and the U.S. Supreme Court’s 1938 *Erie Railroad Co. v. Tompkins*⁹ decision, were to redraw the lines between the federal courts and the state courts in the application of both substantive and procedural law and in the realignment of vertical and horizontal uniformity. For the Federal Rules this meant a shift—from vertical uniformity to horizontal procedural uniformity—at the same time *Erie* shifted federal substantive practice from horizontal to vertical uniformity. The events of 1938 realigned approaches so that federal courts would employ their own procedures but would follow state substantive law in civil cases resting on diversity of citizenship.

The 1938 Rules were a success. They perfectly solved 1938’s problems and created horizontal procedural uniformity for the federal courts; they adopted a notice-based procedural system with generous discovery, and merged law

3. ARTICLE III JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, AUTHORIZED JUDGESHIPS-FROM 1789 TO PRESENT 5 (2008), <http://www.uscourts.gov/history/allauth.pdf> [hereinafter AUTHORIZED JUDGESHIPS].

4. *Id.* at 8.

5. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 391 (1996) (providing table of federal court case filings, 1892-1995).

6. STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 159 tbl.C-1, 214 tbl.D (2006), <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf> [hereinafter 2006 JUDICIAL BUSINESS].

7. FED. R. CIV. P. 1 (emphasis added).

8. Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2000)).

9. 304 U.S. 64 (1938).

and equity. The issues and aims motivating the 1938 Rules, however, simply do not reflect the issues and aims animating the federal judicial system today.

The Association of American Law Schools Section on Civil Procedure Program offers us the chance to “revisit the Revolution of 1938” and consider the “role and future of the Federal Rules.” So let us step back for a moment from what we have been doing, and ask, with the clarity of hindsight, what was going on in 1938 that enabled the creation of the Federal Rules. And simultaneously, let us ask whether, as is true of many good things that have been around for seventy years, perhaps the Rules ought not to be discarded outright, but would benefit from updating or tweaking.

In undertaking this “revisitation,” we ask four questions: First, how do the federal courts today, using the Federal Rules, differ from the federal courts of 1938 for which the Rules were created? Second, when we praise the universality of the Federal Rules—and their transsubstantivity—have we come to overlook their 1938 normative aims? Are these normative goals still viable? If not, they bring the entire Rules enterprise into question. Third, is there a counter-revolution today against the Federal Rules and the values they embodied when promulgated in 1938—or have there been changes occurring so gradually that those of us immersed in it have missed those changes? And fourth, what should we make of the enterprise that the Federal Rules have become? Is it a continuing revolution, or have we created a new enterprise—the “Federal Rules Revision Project”—that has gained a life of its own?

Throughout this article, we try to be mindful of our decidedly mixed (you could call it “conflicted”) embrace of the Federal Rules. The Federal Rules give us our job; we value them as a great achievement; we love what they stood for; and a number of colleagues whom we most respect in this field serve or have served on the Civil Rules Committee. But perhaps we can, or at least should, no longer ignore the Federal Rules’ distinct character. They arose from a particular time and place in the development of the federal courts and in the role of litigation generally. And what the drafters of 1938 hoped they would achieve may be nearly 180 degrees from what we ask of the federal courts today in civil litigation. Despite the many wonderful things about the creation and endurance of the Federal Rules, we are not convinced that they deserve unexamined adoration, either. Our view is that it is indeed fair to “revisit” them, and to examine whether the praise deserved in 1938 is still deserved today.

Accordingly, in the remainder of this article, we will “revisit” the Federal Rules by addressing the four questions that we have just identified. In doing so, we will first examine the various conditions leading to the promulgation of the 1938 Federal Rules, including federal court statistics, the Rules Enabling

Act, Conformity Act, the *Erie* decision, and writings about federal court procedure. We will then examine modern developments, including the goals of litigation today and various erosions of federal procedure.

I. Prequel: Before the 1938 Federal Rules

The first of our questions was how do the federal courts today, using the Federal Rules, differ from the federal courts of 1938 for which the Rules were created? Understanding the purposes behind the promulgation of the 1938 Federal Rules requires an understanding of the circumstances existing in, and before, 1938. Accordingly, this Part explores some statistics, some specific legislative enactments, some caselaw, and some writings from the legal literature to gain some insights into that period of time, both with respect to the federal courts generally, and with respect to the perceived procedural problems and issues of the federal courts specifically.

A. The Numbers: Federal Court Statistics

Although numbers do not tell the full story, certainly numbers provide a relevant starting point. In addition to discussing statistics for 1938 and 2006 (the latest year for which these statistics were available), we also discuss some 1909 statistics as a further point of comparison. Simply from a statistical point of view, the federal courts of 1938 and their business, and the federal courts of today, are distinctly different creatures.

In terms of the numbers of federal judges and federal cases, the federal court system was very different in 1938 than it is today. In 1938, the number of authorized Article III judgeships totaled 247. This tally included all U.S. Supreme Court Justices, all Courts of Appeals judges, and all federal district court judges, as well as the specialized federal courts, such as Court of Claims and Court of International Trade judges—a number roughly one-quarter of the total Article III judgeships in 2006.¹⁰ More specifically, in 1938, the number of authorized federal district court judgeships was 179, which represented more than a 100% increase from the eighty-nine federal district court judgeships authorized in 1909, and barely more than one-quarter of the 667 federal district court judgeships authorized in 2006.¹¹

The number of federal court cases is similarly pertinent. For the fiscal year ending June 30, 1938, 67,508 civil and criminal cases were commenced in the federal district courts (contrasted with 27,632 filings in 1909¹²), and a total of

10. AUTHORIZED JUDGESHIPS, *supra* note 3, at 5, 8.

11. *Id.*

12. POSNER, *supra* note 5, at 391 (providing table of federal court case filings 1892-1995).

101,045 cases were pending.¹³ These numbers provide a striking contrast with those for the 2006 fiscal year, in which 326,401 civil and criminal cases were commenced in the federal district courts (a nearly five-fold increase), and a total of 321,125 were pending (a more than three-fold increase).¹⁴

One additional statistical area of significance concerns the number of cases terminated before trial and the number of cases reaching trial. The growth in the numbers of federal courts, judges, and caseloads is certainly interesting. But perhaps the item of the most critical interest is the change from trying cases to essentially trying only the rarest of civil cases. Of the 38,340 federal civil cases terminated during fiscal year 1938, 6702 proceeded to a jury or bench trial; 30,048 were terminated before trial; and 1590 were not reported,¹⁵ such that 22.3% reached trial.¹⁶ Of the 272,644 federal civil cases terminated during fiscal year 2006, 3555 proceeded to a jury or bench trial, and 211,781 were terminated before trial, such that only 1.3% actually reached trial.¹⁷ This dramatic difference in the number of cases actually tried arguably has resulted in different missions for the federal courts of 1938 versus the federal courts of today.

These basic statistics provide a starting point, upon which we may superimpose additional context by examining some legislative enactments and some writings that discuss federal court procedure and practice in and around 1938. These additional considerations are explored in the next two Sections.

B. The Backdrop: The Rules Enabling Act, the Conformity Act, and the Impact of Erie

The Federal Rules of Civil Procedure did not spring fully-formed in 1938 without background or context. Although Congress had granted the Supreme Court the power to promulgate its own procedural rules in 1792,¹⁸ and had

13. U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 16-17 (1938).

14. 2006 JUDICIAL BUSINESS, *supra* note 6, at 156 tbl.C-1, 214 tbl.D.

15. U.S. DEP'T OF JUSTICE, *supra* note 13, at 231-33 tbl.2H.

16. This percentage is lower than the 30% mentioned by Judge Clark. See Charles E. Clark, *I. The Federal Rules of Civil Procedure: A New Federal Civil Procedure*, 44 YALE L.J. 387, 1291 (1935), reprinted in *PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK* 8, 46 (Charles Alan Wright & Harry M. Reasoner eds., 1965) (“Of all federal civil cases only a few over three per cent reach the stage of a jury verdict, and twenty-seven per cent reach the stage of court decision.”).

17. 2006 JUDICIAL BUSINESS, *supra* note 6, at 189 tbl.C-4A.

18. 1 Stat. 275, 276 (1792) (authorizing federal court practice “to such alterations and additions as the said courts (circuit and district) respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same”).

expanded that power in 1842,¹⁹ the Court had not used the power conferred by that legislation. When the Court had still failed to act some three decades later, Congress moved in a different direction, enacting the Conformity Act in 1872.²⁰ The Conformity Act provided:

That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.²¹

In an 1875 decision, the Supreme Court explained that the purpose of the Conformity Act was “to bring about uniformity in the law of procedure in the federal and state courts of the same locality.”²² Describing the Act’s purpose as “apparent upon its face” such that “[n]o analysis is necessary to reach it,”²³ the Court described the Act as intended to save lawyers from learning two different sets of rules, one for the federal courts and another for the local state court, observing that

[w]hile in the Federal tribunals the common law pleadings, forms and practice were adhered to, in the state courts of the same district the simpler forms of the local Code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things

19. Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518. This statute provided:
[T]he Supreme Court shall have full power and authority, from time to time, 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 the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.

Id.

20. Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197.

21. *Id.*

22. *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

23. *Id.*

is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the courts of the United States which it prescribes.²⁴

However, the Conformity Act did not serve to merge law and equity,²⁵ and did not apply to federal jurisdiction or other constitutional matters.²⁶ Moreover, over time, both Congress²⁷ and the courts created various

24. *Id.*; see Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 405 (1935) (“The purpose of the Conformity Act was not to lessen the separation of two procedures, but solely to adopt the state practice in law actions in like causes.”).

25. For further information, see Clark & Moore, *supra* note 24, at 424, noting, [T]he Conformity Act did not adopt a state practice allowing the joinder of legal and equitable causes of action, nor the practice permitting equitable defenses. If a plaintiff had both a legal and an equitable cause of action it was necessary to file an action on the law side and one on the equity

Id.; see also Note, *The Bar Favors Uniform State and Federal Rules of Civil Procedure*, 18 TEMP. L.Q. 145, 145 (1943) (noting that “lawyers were forced to learn three types of practice: (1) State Court, (2) Federal Equity and (3) Federal Common Law. Thus, conformity was far from achieved under the [Conformity] Act.”). As Professor Clark explained:

[T]he Federal Equity Rules of 1912 and the Law and Equity Act of 1915 had developed a considerable union of law and equity, wherein actions were readily transferred from one docket of the court to another and equitable defenses were permitted in actions at law. This trend, which was certainly in the right direction, nevertheless made still more difficult the application of the conformity principle, and retained vestiges of the old divided procedure to cause trouble and technical difficulties.

Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448-49 (1936).

26. See Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 559 (1939).

[The Conformity Act] could not apply to matters affecting the Federal Constitution, which meant that matters of Constitutional rights and matters of the jurisdiction of the Federal Courts were not affected. That took out all the matters concerning the beginning of suit. Conformity did not apply to matters of trial, including submission of evidence, ruling at trial, and so on, nor to matters on appeal. It only applied therefore to the subject of pleading. Then whenever Congress passed an act affecting pleading, it would to that extent cut down conformity.

Id. at 559-60.

27. See *id.* at 560.

Congress was more and more called upon to pass reform measures affecting a variety of desirable things, such as statutes providing for freedom of amendment. Whenever Congress passed such an act, then conformity was repealed in the area where the act applied. Hence the area wherein it applied was constantly being narrowed.

exceptions to the Conformity Act, such that procedures in the federal and state courts were not, in fact, in conformity.²⁸ To a significant degree, the 1934 Rules Enabling Act²⁹ and the 1938 Federal Rules were a reaction to the failures of the Conformity Act.

Id.

28. See Clark, *supra* note 25, at 448 (noting that “conformity had proved unsuccessful, for it was difficult to find when conformity to state procedure should be had and when uniformity was required by federal law. Of course conformity was never had on the equity side of the court.”); Note, *Ineffectiveness of the Conformity Act*, 36 YALE L.J. 853, 854 (1927) [hereinafter *Ineffectiveness*] (“No attempt shall be made to set forth all the numerous and ever-increasing instances of nonconformity by the federal law courts to state procedure.” (footnote omitted); see also 51 A.B.A. Rep. 524, app.E (1926) (providing list of Conformity Act exceptions). According to the U.S. Supreme Court,

The conformity is required to be “as near as may be,” not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.

While the Act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory.

Indianapolis & St. Louis R.R. Co. v. Horst, 93 U.S. 291, 301-02 (1876). Another source states, Since the Conformity Act provided but a general rule, the natural interpretation of the Act would confine the adoption of the state practice to matters not specifically governed by congressional action. . . . Instances of such controlling federal legislation are the statutes relating to: impaneling a jury and the number of challenges; the power to issue writs of scire facias; the prevailing party in an action at law is entitled to the *entire* costs in the trial court; the right of an injured party to sue on a marshal’s bond in his own name and for his sole use; the sealing and signing of “all writs and processes issuing from the courts of the United States thereof”; defects of form, which must be disregarded and amendments allowed; consolidation of cases of a like nature or relative to the same question; when the right to litigate in forma pauperis exists; when and how service by publication in law or equity may be had; when process of a district court will run into another district; in what district suit is to be brought; jurisdiction in the federal courts in law or in equity is not defeated by the suggestion that other parties are jointly liable with the defendants, provided such other parties are out of the jurisdiction of the court; in a removed cause the defendant has thirty days within which to plead after filing the record in the federal court.

Clark & Moore, *supra* note 24, at 409-10.

29. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (originally codified at 28 U.S.C. §§ 723(b), 723(c)). For a detailed examination of the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

The Rules Enabling Act gave the Supreme Court the power both to promulgate uniform procedural rules for federal civil actions at law and to merge law and equity, providing that:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.*³⁰

The Rules Enabling Act conferred the necessary power to the Supreme Court to promulgate the Federal Rules of Civil Procedure, and indeed, the Federal Rules followed soon thereafter. The Federal Rules, paired with *Erie Railroad Co. v. Tompkins*, which was also a product of 1938, are the twin great achievements of civil procedure.

Although the Conformity Act attempted to create uniform procedures in the federal and state courts, exactly the opposite was happening with respect to the substantive law employed in deciding cases. One of Civil Procedure's most famous cases, *Erie Railroad Co. v. Tompkins*,³¹ was decided in 1938, the same year that the Federal Rules of Civil Procedure were promulgated. Prior to *Erie*, however, the legacy of the Supreme Court's *Swift v. Tyson*³² decision had permitted the federal courts sitting in diversity to ignore state court decisions in favor of horizontal uniformity across the federal courts by creating federal common law. This led, in turn, to filing decisions based on potential

30. Rules Enabling Act of 1934, 48 Stat. 1064.

31. 304 U.S. 64 (1938).

32. 41 U.S. (16 Pet.) 1 (1842).

differences in the substantive law that would be applied, depending on whether the lawsuit was filed in state court or federal court. In essence, 1938's two major developments served to reverse the existing order—from vertical procedural uniformity and horizontal substantive uniformity, to horizontal procedural uniformity and vertical substantive uniformity in diversity cases.

Reactions to the idea of uniform federal procedural rules, and their tone, are found in writings in the legal literature and are examined in the next Section.

C. The Legal Literature: Writings About Federal Court Procedure

Our second question was: When we praise the universality of the Federal Rules—their transsubstantivity—have we come to overlook their 1938 normative aims? What were the 1938 drafters seeking? The great accomplishments of the Federal Rules—merging law and equity under one set of rules, simplification and uniformity, rules for the federal courts used throughout the country—these goals largely remain consistent and valid. But some aims are strikingly different, especially the emphasis in 1938 on trial and resolution on the merits, and the expressed hope of eliminating clever pleading and countering, such that discovery—not motions and pleadings—would lead to trial.

Just as statistics cannot tell the full story, writings have similar shortcomings. Every author brings his or her own perspective to the material—a perspective that may, or may not, be shared by others. Some authors are critical of proposals merely for the sake of being critical, whether to bring attention to themselves, to undermine the work of another, or both. Sometimes authors make erroneous assumptions or outright mistakes. Some individuals are more motivated to write about their opinions; some writings are placed well and command more attention; some opinions are expressed in lesser known or less respected publications and draw less attention. Thus, writings purporting to set out “the bar’s” support for—or dissatisfaction with—practices or procedures may, or may not, accurately reflect the opinions of the bar at large. Opinions, however, are of less interest than the practical problems and the goals identified in the commentary. With these caveats in mind, this Section summarizes some views published at or around the time of the promulgation of the 1934 Rules Enabling Act and the 1938 Federal Rules.

Praise for an existing system, without criticism and without call for change or reform, is not typically the purpose of articles published in the legal literature. Accordingly, as one might expect, commentary expressing dissatisfaction with the state of affairs under the Conformity Act is easy to find. Prominent commentator Charles E. Clark observed that “in actual effect the conformity principle operated in a restricted and not too clearly defined area; and there it operated to make theoretically possible at least one of some

forty-eight different state procedures.”³³ Another commentator opined in 1927 that attorneys would prefer to learn “two definite systems” over “the present situation which involves the necessity of mastering one system and its already long and ever-increasing number of exceptions, with no definite test to guide him as to when a new exception will be made.”³⁴ The Rules Enabling Act has been described as “the culmination of one of the most persistent and sustained campaigns for law improvement conducted in this country. . . .”³⁵ The Chief Justice of the U.S. Supreme Court, William Howard Taft, had called for merging law and equity, and for vesting power in the Supreme Court to prescribe federal procedural rules, in 1922.³⁶

The commentary identifies several underlying concerns and ultimate goals motivating the promulgation of the 1938 Federal Rules. At a nuts-and-bolts level, “[t]he confusion resulting [from the Conformity Act] made federal procedure a paradise for the expert and a pitfall for the ignorant”³⁷ More generally, the older, arcane pleading rules—rules that embraced the pleading of facts but not evidence—had been criticized³⁸ and were rejected in the 1938 Federal Rules in favor of notice pleading.³⁹ In terms of goals and philosophy, one such goal was to “assure more rapid advancement of law suits to the point of final decision on their merits.”⁴⁰ Another identified goal was to reduce delay.⁴¹ One commentator summarized one of “[t]he underlying

33. Clark, *supra* note 25, at 448.

34. *Ineffectiveness*, *supra* note 28, at 858.

35. Clark & Moore, *supra* note 24, at 388.

36. William Howard Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 35 (1922); William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 604 (1922).

37. Clark, *supra* note 25, at 448.

38. *See id.* at 450 (criticizing fact pleading as “logically indefensible, since the actual distinction is at most one of degree only” and as causing confusion in practice); *see also* James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 560 (1937) (“Litigation is not an art in writing nice pleadings.”).

39. *See* Moore, *supra* note 38, at 559 (“[T]he philosophy underlying the federal rules on pleadings is that they do little more than sketch the type of battle that is to follow. The theory of the common law was that the function of pleadings was to develop issues.”).

40. H. Church Ford, *More Expeditious Determination of Actions Under the New Federal Rules of Civil Procedure*, 1 F.R.D. 223, 223 (1939); *see id.* at 228 (“[T]he goal to be attained is the just determination of causes on their merits with a minimum of procedural encumbrance.”); Carl C. Wheaton, *Federal Rules of Civil Procedure Interpreted*, 25 CORNELL L. Q. 28, 29 (1939) (identifying one of the purposes of the Federal Rules as being “to reach decisions on the merits without unreasonable delay”); *see also* Moore, *supra* note 38, at 561 (“The real importance of . . . the Rules . . . deal[ing] with pleadings, is that it makes pleadings relatively unimportant. Cases are to be decided on the merits.”).

41. *See, e.g.,* Ford, *supra* note 40, at 223 (“Without minimizing the importance of any of the other objectives which the new rules seek to attain, it seems safe to say that the ultimate

philosoph[ies] of the new procedure” as being “a shift of emphasis from rigid adherence to a prescribed procedure to a distinct effort to bring about the disposition of every case on the merits without regard to compliance with detailed requirements of adjective law and overlooking any discrepancy or error that does not actually affect the substantive rights of the parties.”⁴²

Perhaps it is also useful to point out what at least one of the drafters thought was unimportant. Professor Clark wrote:

[P]re-trial is not intended as a substitute for trial; its whole tenor is that of proper preparation for trial. It is no mere chance that no provision is made for settlement negotiations; those are no part of proper pre-trial. . . . [T]he objective of litigation is a judgment settling rights after the process of fair trial⁴³

Of course, the 1938 drafters did not have a crystal ball, and they could not have anticipated some of the future’s more dramatic developments in civil litigation practice. The next Section examines some of the more significant changes.

II. The Sequel: Modern Developments

To understand the significance of the goals of the drafters of the 1938 Federal Rules requires turning now to modern developments, which includes changes in the goals of litigation, and intrusions and erosions into federal procedure from various sources.

A. The Goals of Litigation Today

The most distinctive difference between federal litigation practice in 1938 and federal litigation practice today is the change in the ultimate goal of federal litigation: a change from deciding cases on the merits to merely disposing of cases as expeditiously as possible—which runs counter to, and may even preclude a court from, determining the case on the merits. In sharp contrast to Judge Clark’s statement that “the objective of litigation is a

success of the Rules will be measured or judged more by the extent to which they eliminate delay than by any other single factor.”); *see also* Moore, *supra* note 38, at 561 (“The pleading rules are designed to eliminate delay . . .”).

42. Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1059 (1955).

43. Charles E. Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 454, 455-56 (1962) [hereinafter Clark, *To an Understanding*]; *see also* Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 157 (1948) (stating, with respect to Rule 16, “Some have stressed the bringing about of settlements of cases, a result which can be safely treated only as a by-product of clarification of the issues, not as an end in itself.”).

judgment settling rights after the process of fair trial,”⁴⁴ the remarkably small percentage of cases progressing to trial suggests that the objective of litigation today is the resolution of the parties’ dispute, with the odds heavily stacked in favor of the resolution occurring privately and short of actual trial.

The private resolution of disputes is facilitated by the growth in alternative dispute resolution methods generally, and arbitration and private judging in particular, that result in end runs around the law. Settlements certainly existed in 1938, but the basic concept of settlement is encouraged today in ways unknown in 1938. Professor Fiss, among others, has written about the dangers of settlement—dangers that often are overlooked in the characterization of settlement as involving a mutual agreement.⁴⁵

We often tend to assume that when parties settle a lawsuit, the result is one in which both sides made roughly equal compromises to achieve an outcome that was both fair and mutually satisfactory. However, these assumptions are not always correct. The assumption that the parties are of roughly equal bargaining power is not always true,⁴⁶ and the pressures sometimes exerted to achieve settlement are borne more readily by some than by others. As Professor Fiss has noted: “Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.”⁴⁷ In particular, some cases have the potential for repercussions beyond the litigating parties, and as Professor Fiss has explained, “Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality.”⁴⁸

When the motivation, and perhaps even the pressure, to settle a lawsuit comes from a judge, even more substantial concerns arise. In addition to the practical realities of large caseloads, congested dockets, and backlogs, formal procedures such as Rule 16 and court-annexed dispute resolution put judges

44. Clark, *To an Understanding*, *supra* note 43, at 456.

45. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (presenting arguments against the recent trend toward settlement of disputes); Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) (advocating lending a critical eye to settlements); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 15-32 (2004) (discussing the privatization of law resulting from settlements and other forms of alternative dispute resolution).

46. See Fiss, *supra* note 45, at 1076 (noting that alternative dispute resolution erroneously “asks us to assume a rough equality between the contending parties”).

47. *Id.* at 1075; see also Debra Lyn Bassett, *Three’s a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 440-42 (2001) (discussing the illusory nature of consent).

48. Fiss, *supra* note 45, at 1085.

in the position of encouraging settlement.⁴⁹ The judge's traditional role is one of impartiality, and thus if a judge offers an assessment of a case's strength or viability, the parties may accord such statements undue weight. Accordingly, the judge's participation in the process may exacerbate the pressure to settle.

Moreover, formal settlement conferences and informal discussions of settlement typically occur off the record and without evidentiary protections.⁵⁰ Such processes tend to shelter the judge's actions from scrutiny, and challenging the judge's perspective creates a potential risk for litigants. "Under the individual calendar system, a single judge retains control over all phases of a case. Thus, litigants who incur a judge's displeasure may suffer judicial hostility or even vengeance with little hope of relief."⁵¹

These general concerns and issues regarding settlement and settlement procedures also arise, along with some additional issues, in the context of arbitration and private judging. In some forms of arbitration, the parties may agree, before any dispute arises, to have a third party resolve any future civil disputes. Contracts between the parties typically define the arbitration parameters.⁵² Other forms of arbitration, especially judicially-annexed arbitration⁵³ and private judging, ordinarily come into play only after a dispute has arisen, and sometimes even after litigation has already begun.⁵⁴

49. Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 268 (1999) ("[C]ourts have an incentive to encourage settlement—namely, reducing their workloads."); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 536 (1986) ("ADR (in the form of court-annexed arbitration, judicial settlement conferences, summary jury trials, and mediation) offers not only an alternative to, but often a replacement for, adjudication. . . . [A]s judges engage in or supervise the various ADR processes, the line between adjudication and the other activities blurs.") (footnotes omitted)).

50. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 427 (1982) ("The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received ex parte, a process that deprives the opposing party of the opportunity to contest the validity of information received.").

51. *Id.* at 425.

52. See Ronald J. Offenkrantz, *Negotiating and Drafting the Agreement to Arbitrate in 2003: Insuring Against a Failure of Professional Responsibility*, 8 HARV. NEGOT. L. REV. 271, 276 (2003).

53. See Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 346 (1996) (defining judicially-annexed arbitration as "a requirement that certain claims be submitted to nonbinding arbitration as a prerequisite to adjudication").

54. See Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 486 (1997) ("[A]rbitration may be mandated by the state, or imposed on a 'take it or leave it' basis in contracts of adhesion. But in the run-of-the-mill case, the task of planning for dispute resolution necessarily requires a high level of party participation." (footnotes omitted)).

Unlike negotiated settlements, arbitration typically is a mandatory, binding determination from which the parties cannot walk away, and to which the parties have no alternative.⁵⁵ Moreover, judicial review of arbitration awards is extremely limited and, indeed, “among the narrowest known to the law.”⁵⁶

The increased use of arbitration clauses is well documented.⁵⁷ Although arbitration has been promoted as providing a speedier alternative to traditional litigation, this increased speed comes at a cost. Arbitration proceedings usually are private,⁵⁸ the Federal Rules of Evidence typically do not apply,⁵⁹ and discovery is not usually conducted.⁶⁰ Arbitrators typically do not issue

55. See *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 987 (5th Cir. 1992) (arguing that an arbitration agreement “ousts” a court of its jurisdiction to resolve the dispute).

56. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001) (citing *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)); see *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Comm’ns Int’l Union*, 973 F.2d 276, 278 (4th Cir. 1992) (citing *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89, 91 (1978)); see also *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (in reviewing an arbitration award, a “court will set that decision aside only in very unusual circumstances”); Diane P. Wood, *The Brave New World of Arbitration*, 31 CAP. U. L. REV. 383, 400 (2003) (“[S]traightforward review for mistakes of fact simply does not happen [in arbitration]. Parties on both sides should realize that when they bargain for arbitration, they are bargaining for the decision of one and only one body on the facts of their case.”); *id.* at 401 (“Courts also refuse to review arbitral awards for mistakes of law — or at least, for ordinary mistakes of law. Review of legal conclusions is not among the grounds listed in [the Federal Arbitration Act] section 10(a) . . .”).

57. See, e.g., Mary Flood, *Arbitration Not Always Fair, Cheap for Parties in Dispute*, HOUS. CHRON., Apr. 11, 2001, at 21 (“Most adults with a credit card, long-distance phone service, auto insurance or a new home have agreed in writing that if something goes wrong with that service, they waive all rights to sue in favor of binding arbitration”); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 302 (1999) (“Arbitration clauses are fast becoming a standard part of consumer contracts.”); Wood, *supra* note 56, at 405 (“[T]he field within which arbitration operates has expanded to cover virtually everything except the criminal law.”); *id.* at 411 (“[I]f you continue to use your telephone, you have agreed to arbitrate”). Legislation is currently pending in Congress that would rein in some mandatory arbitration provisions. See Richard Simon, *Bills Aim to Get Consumers Their Day in Court*, L.A. TIMES, Dec. 17, 2007, available at <http://www.latimes.com/news/nationworld/nation/la-na-disputes17dec17,0,3393259.story?coll=la-tot-national&track=ntothtml>.

58. See Miller, *supra* note 57, at 303 (explaining the private nature of arbitration proceedings); Wood, *supra* note 56, at 397 (“Everything [in arbitration], from the content of the demand for arbitration, through the materials submitted before the hearing, the hearing, and the ultimate reasons for the disposition, can be, and often is, maintained in absolute confidence.”).

59. See Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85, 96 (2002) (“[The] admissibility of evidence is generally much looser in an arbitration than in a courtroom.”).

60. See Kevin A. Sullivan, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509, 554 (2002);

opinions,⁶¹ but instead issue awards stating simply who prevailed and the remedies granted.⁶² Arbitrators are not required to provide any reasoning for their awards,⁶³ and absent the parties' consent, arbitrators are not bound by case precedent.⁶⁴

Private judging, commonly called "Rent-A-Judge,"⁶⁵ is a specific type of arbitration that is especially popular in California, where it is statutorily authorized.⁶⁶ In private judging, the parties hire a retired judge to try their case.⁶⁷ Although the parties thereby have a formal bench trial,⁶⁸ the proceedings are not public and the result is confidential.⁶⁹ Unlike traditional

see also Wood, *supra* note 56, at 397 ("One of the most important differences between arbitral procedures and court procedures is the absence of traditional American-style discovery in the former.").

61. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 387 (1978) ("Under the procedures of the American Arbitration Association awards in commercial cases are rendered usually without opinion," although written opinions are common in labor cases.); Wood, *supra* note 56, at 398 ("[T]he absence of any requirement in the [Federal Arbitration Act] or elsewhere in the law for arbitrators to offer an explanation of their decision has become a source of increasing attention.").

62. *See* Marc S. Dobin, *Appealing the Unappealable: Vacating Arbitration Awards*, BRIEF, Fall 1996, at 69, 69 ("Awards frequently identify nothing more than the name of the case, the prevailing party, and the relief granted to the prevailing party.").

63. *See, e.g.,* Eljer Mfg., Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1254 (7th Cir. 1994) ("[A]n arbitrator is simply not required to state the reasons for his decision. . . . Such a requirement would serve only to perpetuate the delay and expense which arbitration is meant to combat." (internal citations omitted)); *see also In re Sobel*, 469 F.2d 1211, 1214 (2d Cir. 1972) (noting that requiring arbitrators to explain their reasoning "would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement.").

64. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 6.01, at 6-9 (3d ed. 1999) ("The traditional doctrines, whether of stare decisis or broader principles of precedent, are said not to apply to *arbitrators*. They are free to substitute their concepts of fairness for the law, as long as the decision is not a 'manifest injustice.'").

65. Frances E. Zollers, *Alternative Dispute Resolution and Product Liability Reform*, 26 AM. BUS. L.J. 479, 490 (1988) ("The procedure of private judging has been dubbed Rent-A-Judge.").

66. CAL. CIV. PROC. CODE §§ 638-645 (West 2001). *See generally* Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981) [hereinafter Note, *Rent-a-Judge*] (discussing the benefits and drawbacks of the California private judging provisions).

67. *See* Zollers, *supra* note 65, at 490 ("The parties contract with a referee, often a retired judge, to hear the dispute and render a decision.").

68. *See* Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277, 290 (1996) (stating that in private judging "the parties actually have a formal bench trial").

69. *Id.* (stating that, in private judging, the "proceeding is private and the result is confidential").

arbitration, the Federal Rules of Civil Procedure and Evidence typically apply,⁷⁰ and a party may move for a new trial and may file an appeal.⁷¹ Despite its strong resemblance to a regular courtroom trial, private judging raises distinctive concerns because it is only available to litigants with financial resources,⁷² and it thereby enables wealthy litigants to hire their own personally-selected adjudicator, and then conduct their trial out of public view.⁷³

The growth in settlement rates, and in alternative dispute resolution more generally, was not something that the 1938 drafters of the Federal Rules of Civil Procedure should, or could, have predicted. Nevertheless, the popularity today of resolving formally filed litigation short of actual trial has a significant impact on civil litigation, changing the ultimate goal not only from trial to settlement, but also from a public resolution to a private one.

This change in the ultimate goal of litigation has prompted new priorities, and has created a domino effect. Due to today's focus on expeditious case disposal, efficiency has attained the new limelight; indeed, today's "efficiency" theme runs consistently throughout our system. We are bombarded with stories decrying the "litigation explosion" and complaining about "frivolous" claims, and we are told that court dockets are bursting and causing delays. Yet, as Marc Galanter's excellent work on "The Vanishing Trial" has shown us, in 2004 only 1.7% of the federal cases filed actually progressed to a trial on the merits,⁷⁴ and as discussed earlier, in 2006 the percentage dropped again, to 1.3%.

70. *See id.* ("Rules of evidence and courtroom formality are more closely adhered to than in arbitration."); *see also* Zollers, *supra* note 65, at 490 ("Private judging has the look and feel of a formal court proceeding . . .").

71. *See* Note, *Rent-A-Judge*, *supra* note 66, at 1597-99 (explaining that motions for a new trial are permitted and that appeals may be taken).

72. *See* Zollers, *supra* note 65, at 490 n.69 (noting that "[o]pponents indict private judging as a luxury for rich litigants"); *see also* Calkins, *supra* note 68, at 290 (suggesting that private judging "permits [the parties] to avoid the long delays often encountered in many court systems"). *See generally* Robert Gnaizda, *Secret Justice for the Privileged Few*, 66 JUDICATURE 6 (1982).

73. *See* Calkins, *supra* note 68, at 290 (stating that private judging "keep[s] the matter private and not subject to the scrutiny of the press"); Zollers, *supra* note 65, at 490 (asserting that, in private judging, "the resolution is private and has no precedential value unless appealed"); Note, *Rent-A-Judge*, *supra* note 66, at 1598 (explaining that in private judging, "the parties are under no obligation to admit the general public").

74. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7-8 ("In 2004, when there were five times as many cases filed [as had been filed in 1962], there were only 3,951 trials, making up 1.7 percent of terminations."). *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

The focus on “efficiency” has undermined the very heart of the 1938 Federal Rules, which, at their core, reflected a belief that cases should be allowed to proceed and that subsequent discovery would “weed out” non-meritorious claims. Just imagine trying to adopt a set of Federal Rules with that publicized purpose today. Today, a rules system based on such goals would be vigorously opposed and easily rejected. The first Federal Rules were not based on a bias or hatred for encouraging litigation; they had the opposite purpose.⁷⁵ The idea was to give the litigant every opportunity to clear the pleading stage, and the merits would get sorted out during discovery.

B. Intrusions and Erosions into Federal Procedure

This Section chronicles two specific intrusions and erosions into federal procedure that have gradually but permanently altered the 1938 Federal Rules of Civil Procedure. These two developments include congressional tinkering through the enactment of federal statutes that modify the application of the Federal Rules, and local rules that permit the courts to modify broader interpretations of the Federal Rules.

One of the distinctive features of the Federal Rules is their transsubstantivity—the application of one common set of procedural rules regardless of the substance of the claim. However, Congress has sometimes elected to enact federal legislation controlling not only the substance of a federal claim, but also specifying the procedures to be used in litigating such claims. Sometimes these procedural requirements serve to modify the manner in which the Federal Rules of Civil Procedure ordinarily would apply to the case. One prominent example is the imposition of higher pleading standards for certain kinds of claims. Rule 8 of the Federal Rules of Civil Procedure contains the general federal civil pleading standard, requiring only “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁷⁶ The exception to this standard is set forth in Rule 9, which contains a number of “special matters” requiring specific allegations or particularity.⁷⁷ However,

75. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). The *Dioguardi* decision was authored by Judge Charles Clark, who played a prominent role in the drafting of the 1938 Federal Rules, and reversed the dismissal of a complaint filed by an inarticulate plaintiff appearing in propria persona, refusing to deprive him “of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting.” *Id.* at 775.

76. FED. R. CIV. P. 8(a)(2). Rule 8 also requires “a short and plain statement of the grounds upon which the court’s jurisdiction depends” and “a demand for judgment for the relief the pleader seeks.” *Id.* 8(a)(1), (a)(3).

77. *Id.* 9. Rule 9, entitled “Pleading Special Matters,” sets forth exceptions to the Rule 8 pleading standard for allegations of fraud or mistake, conditions precedent, and special damages, among others. *Id.*

Congress has not always been willing to abide by these pleading standards, and the Private Securities Litigation Reform Act presents one of the more blatant examples.⁷⁸

In 1995, Congress enacted the Private Securities Litigation Reform Act in response to a perceived problem with abusive securities litigation. The Act imposes significant procedural requirements on federal securities litigation, including class actions based on securities fraud. Among these procedural requirements is a heightened pleading standard that requires plaintiffs to plead specific facts when alleging securities fraud.⁷⁹ The Act also sets forth procedural requirements that exceed those in Rule 23, including a provision creating a rebuttable presumption that in selecting the lead plaintiff, the court should select the individual(s) with the “largest financial interest in the relief sought.”⁸⁰ Provisions such as these, of course, undermine the 1938 framers’ intent that the Federal Rules of Civil Procedure would be transsubstantive, rather than developing separate procedural rules that are dependent upon the substance of the claim.

The second development of intrusions and erosions into the Federal Rules of Civil Procedure is the proliferation of local rules promulgated by the federal district courts. Rule 83 of the Federal Rules of Civil Procedure gives each federal district court the power to promulgate local rules, so long as those local rules are consistent with the Federal Rules.⁸¹

Despite Rule 83’s prerequisite that any local rules must be consistent with the Federal Rules, problems arose from the outset with federal district courts promulgating local rules that deviated from the provisions of the Federal Rules.⁸² Moreover, despite the 1938 framers’ intention that such local rules

78. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. §§ 77-78 (2000)).

79. 15 U.S.C. § 78u-4(b)(1), (2) (2000).

80. *Id.* § 78u-4(a)(3)(B)(iii)(I)-(bb).

81. Rule 83 of the Federal Rules of Civil Procedure provides, in pertinent part:

Each district court, acting by authority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicate of—Acts of Congress and rules adopted under 28 U.S.C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

FED. R. CIV. P. 83(a)(1).

82. See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1309 (2007) (“Despite Rule 83, which explicitly forbids district courts and judges from establishing local or standing rules inconsistent with the Federal Rules, conflicting rules have proliferated. Most famously, the Local Rules Project of the Judicial Conference cataloged eight hundred potentially conflicting local rules.” (footnotes omitted)); Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-*

would be narrow and few in number,⁸³ the district courts have not adhered to this intended usage of Rule 83. In 1960, the Supreme Court held that the federal district courts could not institute “basic procedural innovations” through the promulgation of local rules,⁸⁴ but despite this proscription the district courts continued to “arrogate[] to themselves powers not delegated to them.”⁸⁵ Over the years, federal district courts promulgated local rules governing topics as varied as limiting the number of interrogatories, providing for six-member juries, and addressing e-discovery.⁸⁶

The late Professor Charles Alan Wright criticized the “[u]se by lower courts of their local rulemaking power . . . [as being] for the most part an unmitigated disaster.”⁸⁷ Professor Wright and Professor Arthur Miller advocated restrictions on the promulgation of such local rules:

Unfortunately many of the products of this well-intentioned effort are either invalid on their face or intrude unwisely into areas that should be dealt with on a national basis by rules made by the Supreme Court. The great goals of a simple, flexible, and uniform procedure in federal courts throughout the nation will be seriously compromised unless an effective check is put on the power to make local rules.⁸⁸

It is unlikely that the 1938 drafters would have anticipated the degree to which the district courts have promulgated such local rules or the sheer number of local rules now in existence.⁸⁹ Even when local rules are completely consistent with the Federal Rules, detailed and numerous local

2006, 78 U. COLO. L. REV. 817, 828 (2007) (observing that despite the mandate of Rule 83, local rules have “often deviated from the federal rules in many particulars”). See generally Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213 (1981).

83. See Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253-59 (1967) (asserting that the local rules were intended to be narrow and few in number).

84. *Miner v. Atlass*, 363 U.S. 641, 650 (1960).

85. Flanders, *supra* note 82, at 217.

86. See, e.g., Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1, 22 (2007) (observing that “many federal district courts proposed or adopted local rules to grapple with cumbersome electronic discovery issues”); Flanders, *supra* note 82, at 237-41 (discussing local rules regarding, *inter alia*, limiting the number of interrogatories and providing for six-member juries).

87. Charles Alan Wright, *Book Review*, 9 ST. MARY’S L.J. 652, 657 (1978).

88. 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3152, at 223 (1973) (footnotes omitted).

89. Approximately twenty-five years ago, Steven Flanders described the number of local rules as “total[ling] about one and one-half million words in two large loose-leaf volumes.” Flanders, *supra* note 82, at 261.

rules certainly undermine the goal of a standardized federal procedural practice.

III. Postscripts: Revolution and Development Today

We now turn to our remaining two interrelated questions in our examination of today's challenges that erode and undermine the Federal Rules.

A. Of Counter-Revolution and Evolution

Our third question was: is there something of a counter-revolution occurring today, or are we just seeing an evolution of the Rules? From the perspective of a "counter-revolution" is the addition of the word "administer" in Rule 1, which reads, as of December 1, 2007: "[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."⁹⁰ Management elements now dominate the Rules, particularly in Rule 16, but also in discovery generally.

Would the 1938 drafters have imagined the judge as "manager"? Indeed, would the 1938 drafters ever have imagined the federal courts of today—federal courts as pretrial resolution machines that are supporting the enterprise of pretrial litigation? Nearly every case has Rule 12 motions; every case of any weight has discovery, summary judgment motions, and other dismissal requests. The "all roads lead to settlement" approach has created a modern "litigator" that often is not a trial lawyer. Trial experience is sufficiently rare that even some law firm partners have little, and sometimes no, such experience.

Are the Federal Rules merely reflecting the change in civil litigation's focus from trial to private dispute resolution, and the change in the judge's major role from presiding over trials to managing pretrial issues and proceedings? Or are the Federal Rules actually facilitating and promoting these changes? These inquiries lead us to our final question, which examines the Federal Rules enterprise.

B. The Federal Rules Enterprise

Our fourth and final question was: what should we make of the enterprise that the Federal Rules have become? We have a permanent revision project. Is this a good thing? Does this fit with the idea of a simplified system of rules to be understood and applied with uniformity across all federal courts? There is no doubt that some of the "best and brightest" serve or have served on the permanent revision project, but is there some value in living with the rules for

90. FED. R. CIV. P. 1.

awhile between revisions, rather than pursuing revisions of some sort on a constant basis?

At least one of the 1938 drafters anticipated the necessity for subsequent modifications to the Federal Rules of Civil Procedure. Judge Clark wrote:

[I]t is not sufficient merely to establish a simple and effective system controlled by rules of court. Unless some permanent machinery is provided whereby continual supervision and change can be made, little is gained over legislative control of the functioning of the Court. It must be recognized that procedure is not an end in itself, but merely a means to an end, a tool rather than a product, and that procedural rules must be continually reexamined and reformed in order to be kept workable. It is to be hoped, therefore, that the Court will develop some permanent means whereby changes and improvements in the rules may be suggested and adopted as experience points to their necessity. . . . It would seem possible and desirable for the Court to suggest some permanent committee of the federal bar to recommend to it necessary changes (footnotes omitted).⁹¹

Certainly an ongoing standing committee charged with revising the Federal Rules indeed seems preferable to the alternative of leaving such revisions to Congress, an elected legislative body that might be prompted to act only when politically expedient.⁹² However, the most recent project undertaken by the Civil Rules Committee—the so-called “restyling” amendments to the Federal Rules of Civil Procedure—have been criticized as an unnecessary set of amendments creating a potential for unintended consequences.⁹³ This, in turn,

91. Clark & Moore, *supra* note 24, at 392; *see also* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 304 (1938) [hereinafter Clark, *Handmaid of Justice*] (“[I]n procedural law, while there should be rules clear enough to be understood and applied, yet these should be changed as soon as they are found by experience to be hampering. Even good rules may become a nuisance when lawyers discover how to use them as instruments of delay. The element of flexibility and adjustability to newly developing needs is therefore important.”).

92. *See* Clark, *Handmaid of Justice*, *supra* note 91, at 305 (“[M]odern legislatures are concerned with all sorts of matters other than judicial procedure, and rarely take action as to it unless it be to pass some limited and particularistic measure at the behest of a politically potent attorney. It is now apparent that if detailed practice reforms are to be left to legislative initiative, they will not take place.”); *see also* Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 (1958) (“[A]n Advisory Committee only occasionally stimulated into activity on an *ad hoc* basis is not wholly adequate. It cannot keep as consistent or wise an over-all watch on procedural developments as is needed; and it is not in a position to fend off attacks from interested groups or defend its work when completed.”).

93. *See* Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006).

raises the question of whether the Committee should limit its amendments to those necessary to correct errors, to address new procedural issues, or to accomplish innovative reform; and perhaps it also raises the question whether, other than correcting errors, the Committee should propose amendments with more limited frequency, such as only once every five to ten years rather than on what has sometimes been an annual basis.

Our four questions, of course, overlap and dovetail with each other. Professor Oakley has tied the “disuniformity of procedure within the federal courts,” to the “general disinclination of states to conform to the ever-changing contours of the FRCP,” observing that “[f]ederal procedure is less influential in state courts today than at anytime in the past quarter-century.”⁹⁴ We would note that the increase in the federal courts’ caseload contributed to delays in the ability to bring cases to trial quickly, which in turn contributed to the growth in settlement and alternative dispute resolution as parties sought a speedier resolution of controversies. The federal courts’ increased caseload similarly contributed to judges’ willingness—perhaps even eagerness—to facilitate settlement and better manage their caseloads. These developments encouraged greater focus on settlement and management in the Federal Rules, which in turn also encouraged ongoing changes to the Federal Rules to address such features, especially with respect to discovery.

Conclusion

With greater barriers to litigation on the merits, and with the increasing privatization of law, the Federal Rules risk becoming not only less central to litigation, but also becoming truly mere procedural rules to be bent and adapted to the greater goals of managing and concluding litigation. In the end, perhaps the final irony is that the Federal Rules, whose creation we greeted with a bang (despite, in some ways, being a relatively modest shift), are perhaps going out with a whimper (despite a more drastic change in the litigation environment).

94. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003).