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## The limitations of transsubstantive procedure: an essay on adjusting the "one size fits all" assumption

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THE LIMITATIONS OF TRANSSUBSTANTIVE PROCEDURE:  
AN ESSAY ON ADJUSTING THE “ONE SIZE FITS ALL”  
ASSUMPTION

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INTRODUCTION

I have argued for three decades that the underlying transsubstantive philosophy of the Federal Rules of Civil Procedure is flawed.<sup>1</sup> Early on, such luminaries as Professors Geoffrey Hazard and Paul Carrington (former Reporter to the Federal Rules Advisory Committee) strenuously attacked my assault and the assault of others on the transsubstantive assumption.<sup>2</sup> This makes it particularly heartening that in March 2009, the Final Report of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System supported our position: “The ‘one size fits all’ approach of the current federal and most state rules is useful in many cases but rulemak-

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<sup>†</sup> Professor of Law, Northeastern University School of Law. My thanks to my friends Steve Burbank and Thom Main for their helpful comments on an earlier draft. Steve Burbank and I have been discussing many of the issues discussed in this Essay for twenty-five years. This past summer we worked on an unpublished manuscript entitled “Litigation and Democracy,” which again probes some of the same issues. At this point we are often uncertain which idea was initially whose. It is likely that the best points originated with Steve and more than likely that the mistakes are my own.

1. E.g., Stephen N. Subrin, Op-Ed, *The Law and the Rules*, N.Y. TIMES, Nov. 10, 1979, at 23 (“Applying the rules to all cases, big and small, has proved disastrous. . . . We need a less-expansive process. Otherwise, ordinary disputes will continue to blossom into Federal Cases.”); Stephen N. Subrin, *The Empirical Challenge to Procedure Based in Equity: How Can Equity Procedure Be Made More Equitable*, in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS 761, 788, 792 (Stephen R. Goldstein ed., 1992) [hereinafter Subrin, *Equity More Equitable*]; Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 187 (2007) [hereinafter Subrin, *Simplified Procedure*]; Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 41 (1994) [hereinafter Subrin, *Substance-Specific*]; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2038–43, 2048–51 (1989) [hereinafter, Subrin, *Federal Rules*]; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985 (1987) [hereinafter Subrin, *Historical Perspective*]. The possibility of different procedures for some cases for contemporary civil litigation is not “some newfangled idea.” Subrin, *Substance-Specific*, *supra*, at 55 (citing comments by Benjamin Kaplan when he was Reporter to the Advisory Committee suggesting consideration of different procedures for different cases, as well as similar suggestions by others). Stephen B. Burbank has urged modification of transsubstantive procedure on several occasions. Some of them are listed in Subrin, *Substance-Specific*, *supra*, at 28 n.4. For others who have discussed transsubstantivity, pro and con, see *infra* note 18. The term “trans-substantive” (many of us do not now use the hyphen) was probably first used by Robert Cover. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

2. Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068–69 (1989); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2238 (1989).

ers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently.”<sup>3</sup>

By transsubstantive, I mean two things: the notion that the same procedural rules should be available for all civil law suits: (1) regardless of the substantive law underlying the claims, or “case-type” transsubstantivity; and (2) regardless of the size of the litigation or the stakes involved, or “case-size” transsubstantivity. I use the term “transsubstantive” to cover both. One could have case-type transsubstantive procedure, but not have case-size transsubstantive procedure. For instance, large cases (however defined), regardless of the underlying substantive law, could have one set of procedures, and smaller size cases, regardless of the underlying substantive law, could have a modified set of procedures.

A “one size fits all” underlying assumption for procedural rules carries with it the necessity to decide the type of rules for all cases. When drafters of procedural rules decide to go the transsubstantive route, they have in effect made one decision that forces upon them another. The first decision is to have rules that will apply to all cases. The second is the overall nature of those uniform rules.

In this Essay, I explain both the nineteenth and twentieth century decisions to adopt transsubstantive procedure, borrowing from equity as the model. I then discuss the strengths and weaknesses of the transsubstantive/equity decision, and why, on balance, I think the combined decision needs readjustment. I end with suggestions for change, including a simpler procedural track for some cases and non-binding protocols for discovery and other procedural incidents for some of the more expansive and expensive case-types.

#### I. LAW AND EQUITY AND THE TRANSSUBSTANTIVE FIELD CODE DECISION

There were two major occasions in the past two centuries when decisions were made about the nature of the procedures to govern civil litigation in the United States. The first was the drafting of the Field Code in New York in the mid-nineteenth century. That code, adopted in New York in 1848, was copied by over half of the states; those states covered almost sixty percent of the country’s population.<sup>4</sup> The second was the

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3. AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 4 (2009), <http://www.du.edu/legalinstitute/pubs/ACTL-IAALS%20Final%20Report%20Revised%204-15-09.pdf> [hereinafter ACTL/IAALS, FINAL REPORT].

4. For the history of David Dudley Field and the Field Code, see Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988). The information on the number of states and people covered by the Field Code is found in Subrin, *Historical Perspective*, *supra* note 1, at 939 n.170.

drafting of the Federal Rules of Civil Procedure. The Advisory Committee that drafted the Federal Rules was appointed in 1935, and the drafting was essentially accomplished in 1935 through 1937. The Federal Rules became law in 1938.<sup>5</sup> About half the states adopted those rules in substantial degree, including their numbering. Most other states were influenced by them.<sup>6</sup>

In both instances, the drafters chose to create a transsubstantive procedural system, in the case-type sense and the case-size sense. The New York legislature appointed a committee that was given the task of drafting rules that merged what had previously been rules for law courts and rules for equity courts. To understand the transsubstantive preference of the Field Code, and later the Federal Rules, a little knowledge about historic law and equity, and their differences, is necessary.

Historically in England, there were two different procedural systems for major civil litigation: law and equity. The common law courts (called "law courts") required the plaintiff to confine his case to a single writ with limited joinder of parties.<sup>7</sup> Each writ covered what we would think of as one cause of action. There was a complicated pleading system that required the parties to go back and forth (declaration, answer, joinder, surrejoinder, etc.) until the case became limited to one legal or one factual issue. If factual, a jury decided it. If legal, the issue was left to judges. Depending on the writ chosen, there were different procedures. By choosing a writ, one knew what allegations had to be placed in it, as well as other matters, such as when procedural steps had to take place and what interim remedies were permitted. Monetary damages were the typical relief in common law cases. Procedure was so paramount to the English common law system that the legal anthropologist Henry Maine contended, "substantive law has at first the look of being gradually secreted in the interstices of procedure."<sup>8</sup> This was a non-transsubstantive procedural system: different procedural requirements for different substantive claims.

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5. See Subrin, *Historical Perspective*, *supra* note 1, at 973.

6. For the history of the Federal Rules of Civil Procedure and the Enabling Act that authorized the Rules, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) and Subrin, *Historical Perspective*, *supra* note 1, 943–75. The information on state adoption of the Federal Rules is found in Subrin, *Historical Perspective*, *supra* note 1, at 910 n.4.

7. For the history of the common law procedural system in England, see Subrin, *Historical Perspective*, *supra* note 1, at 914–18. A truly magnificent casebook (actually the most beautiful casebook I have ever seen) has just been published examining and explaining in detail (with pictures) the development of the common law and Anglo-American legal institutions. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009). For a description of the writ system and common law courts, see *id.* at 85–125. For a description of Chancery and the "Rise of Equity," see *id.* at 267–334.

8. HENRY SUMNER MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1886), *cited in* Subrin, *Historical Perspective*, *supra* note 1, at 915 n.28.

There was another way in which historic English procedure was non-transsubstantive. The second court for adjudicating major civil litigation in England was the Chancery Court, called “Equity.”<sup>9</sup> It had materially different procedure from the law courts. In Equity, the petitioner wrote his claim in narrative form, not restricted to common law technical pleading. The system permitted, and often required, the joinder of many parties. There was some of what we would call “pre-trial discovery” in Equity. There was no lay jury.<sup>10</sup> The Chancellor was given large discretion to decide an equity case in accordance with his understanding of fairness and justice. The Chancellor could grant injunctive relief.<sup>11</sup>

Each system had its benefits and burdens. Simply put, the common law case had the benefits of definition, confinement, and predictability, but the detriments of inflexibility and decision often based on procedural technicality. The equity case had the benefits of multiple parties, creative narrative pleading, some discovery, injunctive relief, and judicial discretion permitting justice based on the facts of the particular case. Not surprisingly, cases in Chancery Court were thought to be, and often were, cumbersome, expensive, and never-ending (think *Jarndyce v. Jarndyce* in Dickens’ *Bleakhouse*). The decision of one judge, the Chancellor, without a jury and without firm, rigorous rules, was often accused of being arbitrary.<sup>12</sup>

It may be that in a merged system of law and equity, drafters of procedure have to look to equity, with its more free-flowing narrative in pleadings, rather than to individualized writs that require different allegations for different types of cases. I have previously written how the 1848 Field Code in New York ended up with some equity procedure, although not with the latitude in pleading, joinder, and discovery inherent in the Federal Rules. Field and the other commissioners used equity as a model. Arphaxed Loomis, one of the original commissioners, described how he was forced to reject common law principles and turn to equity in order to draft a procedural code for a merged system of law and equity:

I prepared and submitted . . . about 60 sections of law, based on the Common Law System, abolishing forms of action and general issues and requiring all pleadings to be sworn to, as to belief. I found serious difficulty in applying it to Chancery cases and in framing fixed Common Law issues under it. I then abandoned it and drew up some

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9. For the history of the Equity procedural system in England, see Subrin, *Historical Perspective*, *supra* note 1, at 918–21.

10. *See id.* at 920.

11. *See id.* at 919.

12. For more detailed critiques of both law and equity, see *id.* at 917–18, 921, 974–75 and Subrin, *Equity More Equitable*, *supra* note 1, in which I compare burdens and benefits of law and equity, rule and discretion. Steve Burbank reminds me that common law pleading (because of the need to fit within the writ) was an invitation to fictional allegations and, coupled with no or little discovery, this led to surprise, ambush, and inefficiency at trial. This point was raised by those arguing for reform of the common law procedural system.

70 or 80 sections based on Chancery principles, abolishing forms of actions, applying it to all kinds of actions . . . . The system approaches and assimilates more nearly with the equity forms than with those of the common law.<sup>13</sup>

“[F]acts constituting a cause of action” was the pleading requirement in the Field Code.<sup>14</sup> Lawyers argued, and courts had to decide, what was a fact, evidence, or legal conclusion. This proved difficult and costly because defendants were understandably drawn to motions to dismiss for failure to meet the pleading requirement. Moreover, lawyers and judges, schooled in the common law system, often used writs and common law pleading as guides. The New York legislature amended the Field Code so much between 1848 and 1897 that the initial 392 provisions ballooned to 3,441 provisions, increasing in technicality as well as size.<sup>15</sup> For these and other reasons, such as the simplification of English procedure in the Judicature Acts of 1873 and 1875, there was momentum building by the end of the nineteenth century for a new attempt to simplify American civil procedure. This drive for simplification had particular force with respect to procedure for the Federal District Courts.<sup>16</sup> It is that history we must turn to in order to understand how transsubstantive procedure won the day in the twentieth century.

## II. THE FEDERAL RULES TRANSSUBSTANTIVE DECISION AND THE FURTHER TURN TO EQUITY

I have previously written in some detail about the historical background of the Federal Rules of Civil Procedure.<sup>17</sup> What is most important for this discussion is that, by the time the Advisory Committee that was to draft the Federal Rules met in 1935, there were deeply entrenched

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13. Subrin, *Historical Perspective*, *supra* note 1, at 933 (alterations in original) (quoting ARPHAXED LOOMIS, *HISTORIC SKETCH OF THE NEW YORK SYSTEM OF LAW REFORM IN PRACTICE AND PLEADINGS* 16, 25 (1879)).

14. 1848 N.Y. Laws ch. 379, § 120(2) (71st Sess. Apr. 12, 1848). For the provision, as amended, see 1851 N.Y. Laws ch. 479, § 142(2), *reprinted in* THE CODE OF PROCEDURE OF THE STATE OF NEW YORK, FROM 1848 TO 1871, at 104 (1870).

15. For critique of the Field Code and information about the increase to 3,441 provisions (the Throop Code), see Subrin, *Historical Perspective*, *supra* note 1, at 940–42. For a critique and defense of Field and the Field Code, see Subrin, *supra* note 4, at 338–45. For a description of the difficulties caused by the necessity to determine what was a cause of action, fact, conclusion, ultimate fact, or evidence, see, for example, *Rules of Civil Procedure for the District Courts of the United States: Hearing on H.R. 8892 Before the H. Comm. on the Judiciary*, 75th Cong. 94 (1938) (statement of Edgar B. Tolman, Secretary, Advisory Comm. on the Rules for Civil Procedure).

16. On the influence of the reformed English procedure and the Judicature Acts of 1873 and 1875, see Subrin, *Historical Perspective*, *supra* note 1, at 942–43. This article also gives a detailed description of the historical background of the Federal Rules and the lure of simplicity and equity. *See id.* at 943–73; *see also* Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990).

17. *See generally* Subrin, *Historical Perspective*, *supra* note 1; Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691 (1998) [hereinafter Subrin, *Discovery*]; Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115 (Peninah Petruck ed., 1991) [hereinafter Subrin, *Clark*].

ideas about the “ideal” procedure. First, procedure was thought to be materially distinct from substantive law; it should merely aid in the quest to have cases decided on the merits.<sup>18</sup> In the oft-quoted words of Charles Clark, the Reporter of the Advisory Committee, procedure and pleading should be the “handmaid rather than the mistress of justice.”<sup>19</sup> Second, procedure was to be simple and flexible. The Field Code, it was argued, had become too complicated.<sup>20</sup>

The simplification theme had another dimension. Since the founding of our country, there had been a series of acts that required the Federal District Courts to adhere to the procedure of the state in which the particular court sat, unless there was contrary federal statutory law.<sup>21</sup> Those who wanted uniform federal rules argued that this caused great confusion, because under the Conformity Act of 1872, the federal courts had only to conform “as near as may be” to the state procedure “in like causes.”<sup>22</sup> It was asserted that many federal judges departed from state procedure based on their own preferences, and it was difficult to know what procedure would apply to one’s case in federal court. It was also argued that not only was the mixture of state, federal, and judge-made procedure confusing, but the state procedure, whether based on the common law or Field Code, was too complicated and not fit for a modern industrial economy.<sup>23</sup>

At the initial behest of the American Bar Association, Congress finally passed the Rules Enabling Act in 1934 empowering the Supreme Court to promulgate uniform federal procedural rules to apply in all federal district courts.<sup>24</sup> If the new rules were drafted to apply to both law and equity cases, the statute required the Court to present them to Congress, with an opportunity to veto them before they became law. Charles

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18. For a detailed, sophisticated, and recent description of the importance of the separation of procedure and substantive law in order to support the transsubstantive nature of the Federal Rules, see David Marcus, *The Past, Present and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. (forthcoming 2010) (manuscript at 6 n.17), available at <http://ssrn.com/abstract=1428992> (Marcus provides a “nonexhaustive list of significant discussions of trans-substantivity”).

19. Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 542 (1925) (internal quotation marks omitted) (quoting *In re Coles*, [1907] 1 K.B. 4); see also Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938); Charles E. Clark, *Procedural Fundamentals*, 1 CONN. B.J. 67, 67–68 (1927); Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 819 (1924). A collection of Clark’s essays even bears the same moniker. PROCEDURE —THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK (Charles Alan Wright & Harry M. Reasoner eds., 1965). Clark was actually citing from an English case.

20. See Subrin, *Historical Perspective*, *supra* note 1, at 941.

21. For the history of these process and conformity acts, and the critique by Enabling Act proponents about their alleged failings, see Burbank, *supra* note 6, 1036–42.

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

23. In addition to Burbank’s description of the pro-Enabling Act position with regard to the process and conformity acts, see Subrin, *Historical Perspective*, *supra* note 1, at 957–58 & n.284.

24. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)). A reliable, thorough, and detailed history of the A.B.A.’s battle to have the Enabling Act adopted is found in Burbank, *supra* note 6, at 1043–98. I explore the politics and ideology leading to the Enabling Act in Subrin, *Historical Perspective*, *supra* note 1, at 943–70.

Clark, then Dean at Yale School, lobbied intensely (with the help of James William "Bill" Moore, who was studying at Yale) to have the Supreme Court authorize the drafting of rules for both law and equity cases.<sup>25</sup> They argued, quite persuasively, that it was inefficient to have two different systems, with both judges and lawyers frequently uncertain in which court a case should be brought. Moreover, it was costly to have the same factual situation considered, and sometimes tried, by two different courts. Clark carried the day, especially with the help of William D. Mitchell, who became the Chairman of the Advisory Committee. The Supreme Court appointed the Committee, with Clark as the Reporter and head draftsman. The Court authorized the committee to draft uniform rules for the Federal District Courts that would apply to both law and equity cases, thereby creating a merged system.<sup>26</sup>

It was almost inevitable that the Advisory Committee would draft transsubstantive rules, and that those rules would be equity based. Professors Stephen Burbank of the University of Pennsylvania Law School, David Marcus of the University of Arizona Law School, and I, have read the transcripts of the deliberations of this initial Advisory Committee.<sup>27</sup> We have not found any debate about whether the rules would be uniform in the sense that the same rules would apply to all cases. The Advisory Committee talked about uniformity in the sense that the same rules would apply in all Federal District Courts (one of the members of the Committee, Edson Sunderland, had argued that the Enabling Act permitted or obligated each District Court to continue to apply the procedure of the state in which it was located).<sup>28</sup> But they did not debate transsubstantivity,<sup>29</sup> rather, they assumed that the rules would apply uniformly to all cases.

Why was transsubstantive procedure virtually inevitable? First, it took the English centuries to evolve to the different writs with their different procedural incidents. What is the likelihood that the fourteen lawyers on the Advisory Committee either had the expertise to craft different procedures for different cases or that they could agree on which distinct procedures should apply to which cases? Second, the whole atmosphere in which the Enabling Act was passed was infused with talk of simplicity. Different rules for different case types, if done on a substantive law basis, is far from simple. There are non-transsubstantive features that one could beneficially blend with the current Federal Rule system, as I will argue later in this Essay. However, the view of simplicity at the time the

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25. I have told this story in detail in Subrin, *Clark*, *supra* note 17, at 116–37.

26. *Id.* at 138.

27. Much of what we found is explained in detail in Burbank, *supra* note 6, at 1132–84; Marcus, *supra* note 18, at 30–35; and Subrin, *Historical Perspective*, *supra* note 1, at 973–82. I have discussed this point with both other professors.

28. Burbank, *supra* note 6, at 1135–36; Subrin, *Clark*, *supra* note 17, at 135–37.

29. Subrin, *Historical Perspective*, *supra* note 1, at 974.



initial Federal Rules were drafted did not seem to allow for such a possibility. Thirdly, as Professor David Marcus has recently and convincingly shown, what made it possible to have a uniform set of procedural rules, conceptually, was the notion that procedure and substantive law were somewhat distinct legal categories.<sup>30</sup> If different rules were to be drafted for different types of substantive cases, then procedure and substance look considerably less distinct; it then looks like substance and procedure join together in sophisticated and nuanced ways to produce legal outcomes. It becomes apparent that procedure will be one major determinant of those outcomes.

Finally, on a related point, we now know that once one starts debating which procedures are best for which types of cases, it becomes obvious that political decisions are being made. If one requires, for instance, more rigorous pleading in securities cases in order to make such cases more difficult to bring, it is hard to say this is not a political decision with substantive results.<sup>31</sup> I do not know to what extent the initial Advisory Committee members saw this conundrum with clarity, but they did know that the Enabling Act specifically stated that “[s]aid rules shall neither abridge, enlarge, nor modify any substantive rights of any litigant.”<sup>32</sup> The initial Advisory Committee knew that by making the decision to merge law and equity they had triggered the Enabling Act language, which mandated that the rules be presented to Congress. They certainly did not want to raise congressional ire by overtly stepping into substantive areas of law—this was the province of elected officials.

Having assumed that the rules would be transsubstantive, the Committee still had to decide if the rules would look more like equity or common law procedure. But this decision, too, was largely inevitable. As Loomis had pointed out with respect to drafting the Field Code, it seems impossible to craft rules for both law and equity cases that would look like the common law system.<sup>33</sup> The writ and single issue pleading system forced cases into preexisting categories in a fairly rigid way. Equity invited petitioners to describe new situations requiring different types of analysis and relief. Equity lodged a good deal of discretion in the Chancellor. Equity permitted and often required the joinder of many parties.

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30. Marcus, *supra* note 18, at 13.

31. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101, 109 Stat. 737, 746–47 (codified as amended at 15 U.S.C. § 78u-4 (2006)) (requiring a heightened pleading standard for securities fraud actions). In 1988, at a conference on the fiftieth anniversary of the Federal Rules of Civil Procedure, Professor Judith Resnik explored the political and non-neutral aspects of civil rulemaking. Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2224–27 (1989). For a more recent exploration of the political nature of civil rulemaking, see generally Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001).

32. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

33. See *supra* text accompanying note 13.

This outlook was almost 180 degrees opposite to the common law procedural system.

In order to achieve the power from Congress to have the Supreme Court promulgate procedural rules, the proponents had asserted for decades that the common law and Field Code provisions were too complex and too inflexible. Those like Clark could hardly now choose anything that looked technical and rigid. And they did not want to, anyway. Clark had complained that the Field Code did not go far enough in the direction of equity procedure. In the areas of pleading and joinder, according to Clark writing as early as the 1920s, a wise procedure would be as permissive and expansive as equity.<sup>34</sup> And Edson Sunderland, another law professor on the Committee, had for many years extolled the glory of a plethora of discovery mechanisms.<sup>35</sup> Where Field had wanted to tie the hands of judges, because he abhorred judicial discretion, Clark (in the footsteps of Roscoe Pound and William Howard Taft) wanted to broaden the discretion of judges in order to permit them to do justice in the particular case.<sup>36</sup> The United States Federal Equity Rules of 1912 were commended.

Legal Realism was in full force at Yale Law School, where Clark was Dean.<sup>37</sup> An important underlying principle was that experts, if given all of the facts, would make wise, enlightened decisions. Moreover, considering the times in which the Advisory Committee was drafting, the Enabling Act was, in a very real sense, New Deal legislation: It was presented to Congress by Homer Cummings, President Roosevelt's Attorney General; it was passed by a largely Democratic Congress; and it was signed by President Roosevelt.<sup>38</sup> The Federal Congress was passing sweeping statutes that would require causes of action and interpretation not hampered by common law categories or rigorous pleading requirements. No constituency with power wanted constrictive procedure. Conservatives trusted the federal judiciary to do what they considered right and just. Liberals wanted more flexible law and more government. And they now had a President they trusted who would appoint the judges.<sup>39</sup> Perhaps lawyers saw the financial advantages for themselves of a procedural system that would permit creative lawyering with new causes of action, more parties, and extensive discovery. And they were told by

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34. For Clark's views, see Subrin, *Historical Perspective*, *supra* note 1, at 962–65.

35. For Sunderland's views on discovery, see Subrin, *Discovery*, *supra* note 17, at 714–17.

36. *Id.* at 693.

37. On the relationship of legal realism to the Federal Rules, see Subrin, *Historical Perspective*, *supra* note 1, at 965–66.

38. For this part of the history, see *id.* at 969–70.

39. Clark was, in fact, appointed by President Franklin D. Roosevelt to the prestigious Second Circuit Court of Appeals in 1939, one year after the Federal Rules of Civil Procedure became law. Stephen N. Subrin, *Charles E. Clark*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 107, 108 (Roger K. Newman ed., 2009).

Clark and others how easy it would be for them to practice under the new flexible system.

The members of the Advisory Committee came from elite law schools and what were then large firms. Throughout the committee deliberations, they used examples of big cases, such as admiralty, patent, rate-setting, and strike suits against corporations and their officers. “Although there was occasional concern expressed for costs, there was no one on the Committee who was a spokesperson for the small firm, the small case, or the small client.”<sup>40</sup> Law professors, particularly from the elite schools, had argued for decades that procedure should be simple, flexible, and like equity. And some of these law professors would soon be government administrators and federal judges who would have more leeway for action under a flexible system that gave great latitude to both lawyers and judges. I am uncertain the extent to which legislators knew it at the time the Enabling Act was enacted, but as they passed more federal laws, they would be calling on private lawyers and private litigation to enforce those laws in new and creative ways.<sup>41</sup> As I expressed it two decades ago: “Virtually every intellectual, cultural, and political signpost pointed to equity.”<sup>42</sup> The Advisory Committee did not consider, so far as I have been able to ascertain, rejecting case-size transsubstantive procedure. With their minds on the big case, and their insistence on simplicity and flexibility, they either failed to consider, or consciously chose not to consider, the effects of an all-equity procedural system on smaller cases.

So the transsubstantive decision brought equity in its wake. And given the emphasis on simplicity and flexibility at the time, the drafters—and in turn the Supreme Court—went a good deal further than the Field Code and even equity procedure in adopting the major provisions. Their choices included what became known as “notice pleading”: lenient joinder of parties, causes of action, theories, and remedies; every type of discovery formerly experimented with in states and then some; and ease of amendment.<sup>43</sup> The Supreme Court did very little to change what the Advisory Committee presented to them. The Rules became law by congressional inaction.

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40. Subrin, *Historical Perspective*, *supra* note 1, at 972. Professor Thom Main has suggested to me that given the amount in controversy requirement for all cases in the 1930s, and the value of a dollar at the time, there might not have been such a thing as a “small case” in federal court during the period that the Enabling Act was drafted.

41. Professor Stephen Burbank has brought to my attention the work of Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821 (2008). “[Farhang’s] evidence suggests that the phenomenon [of enormous growth of statutory litigation starting in the 1960s] may be the result of conscious congressional choices to empower private litigation through devices such as pro-plaintiff attorney fee-shifting and multiple damage provisions, thereby insulating congressional preferences from an ideologically distant executive (that would be able to subvert those preferences in a system of administrative enforcement).” Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 117 (2009).

42. Subrin, *Historical Perspective*, *supra* note 1, at 957.

43. Burbank, *supra* note 41, at 117, 119.

## III. THE GOOD AND THE BAD: ADVANTAGES AND DISADVANTAGES

As expected, the Federal Rules and state rules patterned after them have been able to accommodate new types of litigation and larger cases. It is difficult to imagine current negligence, antitrust, discrimination, and products liability law and litigation, to name a handful of areas, without the pleading, joinder, and discovery provisions introduced by the transsubstantive Federal Rules. The class action amendments of 1966,<sup>44</sup> permitting, if not encouraging, consumer and civil rights class actions, have added to the Federal Rules' accommodation of the large case. If one thinks that the advances in consumer protection, civil rights, product safety, and other areas are salutary, then one would conclude, I think, that the Federal Rules were a major advancement. Moreover, if one concludes that private litigation should be a major method of effectuating the laws passed by Congress, as opposed to intensified administrative agency activity or a more enhanced and expensive safety net (as are the norms in other Western democracies), then the liberality, flexibility, and attorney latitude provided by the Federal Rules seem to be crucial.

There are other advantages of the transsubstantive equity-based procedural system. For one, it does not require learning large numbers of different procedural rules, nor does it necessitate that lawyers and judges decide which rules will apply to which cases. That the rules are flexible, permit ease of pleading, broad joinder, and considerable discovery all seem like a good thing. On the pleading front, the drafters were probably right to conclude that more rigorous pleading rules will lead to endless and expensive disputes over what is a fact, evidence, or legal conclusion. The recent foray into this thicket, as evidenced by *Bell Atlantic Corp. v. Twombly*<sup>45</sup> and *Ashcroft v. Iqbal*<sup>46</sup>, unless changed quickly by Congress, will I fear, bear out my prediction. Nobody, to my knowledge, is arguing that the restrictive joinder provisions of the common law and the Field Code make sense. Although discovery can become burdensome, costly, and in fact ludicrous in some cases,<sup>47</sup> very few attorneys or judges think

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44. For a description of the changes brought by the 1966 amendments to the class action rule, FED. R. CIV. P. 23, see STEPHEN N. SUBRIN & MARGARET Y. K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 195–98 (2006).

45. 550 U.S. 544 (2007).

46. 129 S. Ct. 1937 (2009). These decisions, when taken together, apparently instruct Federal District Court Judges, upon considering a 12(b)(6) motion to dismiss, to disregard material in the complaint that the judge deems to be conclusory, and then to decide, looking at what remains in the complaint, whether the claim is plausible. It seems to this author, as it did to the four dissenting Supreme Court Justices in *Iqbal*, that this is a highly subjective test, destined to lead to unpredictable and unfair results. See *id.* at 1957 (Souter, J., dissenting). Bills are already being introduced in Congress to reverse the pleading requirement articulated in these cases.

47. For a description of the negative aspects of American discovery, see SUBRIN & WOO, *supra* note 44, at 143–46.

we would be better off with no discovery in our country, particularly given the importance of private litigation to enforce social norms.<sup>48</sup>

Moreover, to create a different procedural system for every area of law seems impractical in the extreme. First, how would Congress have the time or ability to fashion many different rules for many different types of cases? And Congress would have to do it, because once one tries to mesh particular procedures with particular areas of law, it becomes obvious that these are political questions requiring testimony, empirical evidence when available, and normative decisions. Second, as previously mentioned, it would be difficult for lawyers and judges to have to learn and operate under substantially different procedures for a large variety of cases. Third, substantive categories overlap, and distinctions would be debated at great length and cost. Those who cherish transsubstantive procedure are right that we do not want to return to anything like the writ system, even if we could.

But, it has now become obvious that these points of advantage have not been gained without substantial cost. Many, including me, have written for years about the detriments of this wide-open procedural system, as beneficial as that system is in many cases.<sup>49</sup> One cost is a loss of focus and incisiveness, which results in losses of time and money. Lawyers are trained to try to see every possibility, and our canon of ethics requires us to represent our clients zealously.<sup>50</sup> When a procedure that permits the joinder of so many claims, issues, and parties coalesces with this lawyer training and canon of ethics, and one also adds to the mix the widest array of discovery possibilities in litigation known to humankind,<sup>51</sup> the temptation to expand the litigation in terms of time, expense, and nuggets of information can prove irresistible. This is particularly true if there are either strategic reasons for expansion (like wearing out the other side or its resources), or one is being paid by the hour, or both. Years ago Wayne Brazil demonstrated the evils that can and do occur in discovery as a result of this mixture of attorney motivations, not the least of which is income maximization.<sup>52</sup>

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48. See *id.* at 147–48, 152. For data showing that the majority of cases has surprisingly little discovery, see Elizabeth G. Thornburg, *Giving the "Haves" A Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 246–49 (1999). For the "outlier" position that all discovery should be eliminated, see Loren Kieve, *Discovery Reform*, A.B.A. J., Dec. 1991, at 79, 79–81.

49. See, e.g., Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471–1486 (1987) (book review); Subrin, *Historical Perspective*, *supra* note 1, at 911–912, 973–975.

50. MODEL CODE OF PROF'L RESPONSIBILITY canon 7 (1983) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.").

51. See Subrin, *Discovery*, *supra* note 17, at 718–19; Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 300 (2002).

52. See Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 869–74 (1980); Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980

With these increases in time and monetary expense inherent in the transsubstantive, all-equity Federal procedural system, comes the legitimate desire of judges and rulemakers to constrain that system. But the cures exacerbate the disease. And thus we have seen added to the federal system increasing numbers of mandatory steps in the process, each of which causes attorney work and expense. These mandatory steps now include mandatory disclosure shortly after the commencement of a case, a discovery conference, an initial scheduling conference, disclosure of experts and their testimony, a pretrial conference or pretrial conferences, potential mandatory alternative dispute resolution, and pretrial documents (including witness summaries, and summaries of potential evidentiary issues). Add to these all of the multiple methods of discovery, local rules and standing order requirements, increased use of motions to dismiss for failure to state a claim encouraged by the decisions of lower court federal judges even before *Twombly* and *Iqbal*,<sup>53</sup> *Daubert*<sup>54</sup> hearings challenging the use of experts, and increased use of summary judgment motions.<sup>55</sup> A large number of federal cases, if not most of them, have always settled, and there is no evidence that all of the increased mandatory activity in federal court increases the number of settlements. But additional required procedural activity does increase the cost of what lawyers are required to do in their cases; some, if not most of those cases, would have settled without any or all of the additional up-front costs. There is a good deal of reason to believe that it is more expensive to litigate a case in federal court than the same case would cost for litigation in state court.<sup>56</sup>

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AM. B. FOUND. RES. J. 217, 230–35 (1980); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1303–1305 (1978).

53. Rigorous pleading requirements were required by many Federal District Court judges prior to *Twombly* and *Iqbal*. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988–89, 1002 (2003); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434–437, 492 (1986); Patricia W. Hatamyr, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1487764>. This phenomenon of the Supreme Court's following changes in procedure already accomplished by lower court judges can also be seen in expanded managerial judging preceding the amendment to Rule 16 explicitly permitting such expansion, and increased use of summary judgment preceding the Supreme Court trilogy of cases in 1986. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. OF EMPIRICAL LEGAL STUD. 591, 620 (2004); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1992 (1989); see also Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 156, 157 (1997) (noting rule change in the federal courts is frequently preceded by changes made by federal court judges supposedly operating under the previous, contrary rules or statutes).

54. *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).

55. Burbank, *supra* note 53, at 617–18. (“There probably is sufficient and sufficiently reliable evidence, however, to believe that the rate of case termination as a result of summary judgment rose substantially in federal first-instance courts as a whole in the period from 1960 to 2000, with one plausible (and perhaps conservative) range being from approximately 1.8 percent in 1960 to approximately 7.7 percent in 2000.”)

56. A 1983 Civil Litigation Project found that for all cases in which the amount of controversy was over \$10,000, state court was less expensive than either federal court or arbitration. Her-

The expense of discovery in federal court has helped lead to the evolution of pleading standards that will inevitably result in the dismissal of some meritorious cases. *Twombly*, the precursor to the more rigorous pleading standard made explicit in *Iqbal*, specifically spoke of the expensive discovery possibilities in antitrust litigation.<sup>57</sup> These dismissals will normally take place without discovery, discovery that is sorely needed in some lawsuits such as discrimination cases, where intent is a necessary element. The new “plausibility” test, to be applied after a judge strikes allegations that he or she thinks are conclusory, is an invitation to ad hoc decision making. Judges, like all of us, look at life’s occurrences through the lenses of personal experience. Justice Benjamin Cardozo noted this inescapable subjectivity:

Of the power of favor or prejudice in any sordid or vulgar or evil sense, I have found no trace, not even the faintest, among the judges whom I have known. But every day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as is revealed to each of us, is too often only the spirit of the group in which accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of mind will overthrow utterly and at all times the empire of these subconscious loyalties.<sup>58</sup>

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bert M. Kritzer & Jill K. Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUST. SYS. J. 6, 18 (1983) (ironically, for cases between \$5,000 and \$10,000, federal court was the least expensive of the three alternatives). Litigating in federal court is more expensive than in state court. See *Class Action Fairness Act of 2001: Hearing on H.R. 2341 Before the H. Comm. on the Judiciary*, 107th Cong. 38–39 (2002) (statement of Andrew Friedman, Partner, Bonnett, Fairbourn, Friedman & Balint, P.C.). “Studies have indicated that, generally, individual plaintiffs are likely to find state courts less expensive, more accessible, and easier to navigate.” Marc E. Montgomery, Comment, *Navigating the Back Channels of Salvage Law: Procedural Options for the Small Boat Salvor*, 83 TUL. L. REV. 1463, 1494–95 (2009). “Litigation in federal court is also generally more expensive and time consuming than most state court actions.” Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand Was Imminent?: Post-removal Litigation and the Waiver of the Right to Seek a Remand Grounded on Removal Defects*, FLA. B.J., Feb. 2000, at 22, 22, 24. “Removal to federal court made litigation more difficult, complex, expensive, time-consuming, and intimidating for the individual plaintiffs.” David A. Luigs, Book Note, 92 MICH. L. REV. 1700, 1702 (1994) (reviewing EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* (1992)); see also Subrin, *Simplified Procedure*, *supra* note 1, at 181 n.35; Michael Ena, Comment, *Jurisdictional Issues in the Adjudication of Patent Law Malpractice Cases in Light of Recent Federal Circuit Decisions*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 219, 256 (2008); Kevin N. Tharp, Note, *Federal Court Jurisdiction over Private TCPA Claims: Why the Federal Courts of Appeals Got It Right*, 52 FED. COMM. L.J. 189, 207 (1999); Gregory P. Joseph, *Trial Balloon: Federal Litigation—Where Did It Go Off Track?*, LITIG., Summer 2008, at 5, 62. Judith Resnik has explained how the additional procedural steps required in federal district courts, often promulgated as cost-saving reforms, have instead added to the costs of litigating in federal court. Resnick, *supra* note 53, at 194, 209.

57. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

58. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 174–75 (1921). On the inevitable bias of each of us, including judges, see Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009), and Judith Olans Brown, Stephen N. Subrin & Phyllis Tropper

The subjective nature of what constitutes a “conclusion” and “plausibility” insures that lower court judges, already inclined to reduce or eliminate discovery and decrease caseloads, will be prone to dismiss at the pleading stage the type of cases which their experience has led them to treat with skepticism. The result will be to deny some litigants, with cases that could be won after discovery and at trial, of their Seventh Amendment right to a jury trial—or any trial for that matter.

This is by no means the only place that discretion has been introduced into the federal civil litigation system. The transsubstantive decision inherent in the Federal Rules regime required the drafters to choose a wide-open, flexible system that would accommodate the largest of cases. There is discretion at every turn in the open-textured Federal Rules, from what constitutes the statement of a claim for which relief can be granted; to what constitutes conduct, transaction, or occurrence (as these concepts manifest themselves in different rules); to what is impairment as a practical matter in necessary party jurisprudence; to when discovery has become so onerous that judicial curtailment is in order; to when a Rule 11 sanction should be imposed; to what is a lack of sufficiency of potential evidence for summary judgment purposes.<sup>59</sup> Add to this the elasticity of major federal evidence rules, such as the *Daubert* standard for expert testimony, and you have a virtual riot of discretion, much of it rarely overturned by appellate courts.<sup>60</sup> Professor Burbank has pointed out: “Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense.”<sup>61</sup> To put it another way, in order to meet the goal of having the same rules for all cases, the drafters were forced to draft general rules, with a good deal of discretion inherent in them, giving little direction to judges and in turn, to lawyers. Consequently, similar cases and situations are apt to be treated quite differently, depending on the judge. Since we now know that procedural decisions can, and often do, materially influence substantive application, the rules cannot provide uniformity of result.

I am not contending that the drafters of initial Federal Rules could or should have foreseen all of the potential for expansiveness and expense that ultimately reached fruition in the federal courts, nor that they could have foreseen the costs of attempts through additional procedural

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Baumann, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L. J. 1488, 1492–1508 (1997).

59. Maurice Rosenberg concluded in 1971: “Of the eighty-six rules that comprise the Federal Rules of Civil Procedure, the term ‘discretion’ appears in ten or so. Nevertheless, appellate courts have held that review-restraining discretion is implicitly present in thirty other provisions of the Rules.” Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 655 (1971); see also Resnik, *supra* note 53, at 195 (discussing how judicial discretion pervades the activity of the federal judiciary).

60. See *id.*

61. Burbank, *supra* note 49, at 1474.



steps to constrain that procedure. After all, they could not have known about copying machines, faxes, computers, and cell phones. They probably would be astonished that there are more than a million lawyers in our country,<sup>62</sup> at the size of law firms and their litigation departments, and that the plaintiffs' tort bar has the resources to take on even the most well-heeled defendants and their lawyers.<sup>63</sup> Perhaps they did not realize that creative lawyers, particularly imbued with the profit motive, would be sorely tempted to seek one more question, one more document or digital bit of information, in the hopes that it will strengthen their case. Nor that the lawyers will usually be able to justify that search as legitimate, both to themselves and a court. The drafters would be particularly amazed that their simple procedural system, with its liberal pleading and broad discovery, has led to the opposite: a complex morass of mandatory procedural steps and rigorous pleading requirements, without any discovery, as evidenced by *Twombly* and *Iqbal*.

There is data, though, that may show that the picture I have painted is too bleak, at least with respect to discovery. Many studies have shown that the vast majority of cases do not have an inordinate amount of discovery.<sup>64</sup> About a half or a third of civil lawsuits (depending on the study) have no discovery, and the cases that utilize discovery frequently do not have more than two or three discovery incidents, perhaps a deposition or two and a set of interrogatories. The majority of cases, both at the state and federal level, are disposed of in less than a year or not more than two.<sup>65</sup> Such data would indicate that the lawyers themselves are doing a good job in adjusting their expenditure of time and money to the stakes involved in cases. In other words, the lawyers under this characterization are effectively sorting cases on a case-size basis, despite the transsubstantive, equity-like nature of the Rules.

But there are problems with the pretty picture I have just painted. Everyone seems to agree that there are a substantial number of cases in which the amount of discovery is overwhelming by any standard, involving dozens if not hundreds of depositions, thousands of pages of documents, and trillions of bytes of digitalized information.<sup>66</sup> We do not know if the so-called large cases constitute five percent, ten percent, or more of

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62. Clara N. Carson, *Lawyers in Profile: A Statistical Portrait of the U.S. Legal Profession*, 10 RESEARCHING L. 1, 7 (1999).

63. See Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 183, 198–99, 216 (2001); see also Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-first Century*, 51 DEPAUL L. REV. 219, 231–33 (2001).

64. For data on discovery, see, for example, Thornburg, *supra* note 48, at 246–49; and Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 *passim* (1994).

65. Subrin, *Equity More Equitable*, *supra* note 1, at 767–68.

66. *Id.* at 772–76; Subrin, *Substance-Specific*, *supra* note 1, at 45 n.124 (Judge Barefoot Sanders is quoted as saying that “relatively few cases require massive and constant intervention”).

the entire federal docket.<sup>67</sup> We do know that it is those cases that tend to occupy a good deal of the attention of federal judges and the press.<sup>68</sup> Of those cases, surely some do not merit as much process as the Federal Rules permit. More importantly, many of those cases that would settle without the multiple steps now required by the Federal Rules are made more costly than necessary. Moreover, the threat of the costs of the Federal system and some state systems surely results in meritorious cases not being brought because of the cost, or in settlements in which the true value is discounted because of the reality or threat of enormous cost.

When the Federal Rules became law, about eighteen percent of civil cases terminated in Federal Court were resolved by trial.<sup>69</sup> When I started practicing law in 1963, the figure was down to about twelve percent and in 2002 it was below two percent.<sup>70</sup> "More startling was the sixty percent decline in the absolute number of trials since the mid 1980s."<sup>71</sup> To anyone who believes in the jury trial and trial in open court, this is distressing. If one believes that cases should settle in the shadow of what would happen at trial, there is very little left to cast an intelligent shadow. Obviously, one cannot put all of this at the hands of transsubstantive all-equity procedure. The huge increase in federal civil cases, especially burgeoning in the 1980s, has not helped, and the expanse and priority of the criminal docket have also contributed.<sup>72</sup> But the high cost of the transsubstantive all-equity procedure in terms of time, money, and reduced focus and predictability, which in turn precipitates or forces settlement, has surely played a part in the diminution of trials.<sup>73</sup>

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67. See Subrin, *Substance-Specific*, *supra* note 1, at 45; see also Mullenix, *supra* note 64, at 1395–1400, 1407–09 (on the press) and 1404–07 (on lawyers and judges).

68. SUBRIN & WOO, *supra* note 44, at 147.

69. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 12 (2006) [hereinafter Galanter, *World Without Trials*]; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 (2004) [hereinafter Galanter, *Vanishing Trials*].

70. Galanter, *World Without Trials*, *supra* note 69, at 12; Galanter, *Vanishing Trials*, *supra* note 69, at 459.

71. Galanter, *Vanishing Trials*, *supra* note 69, at 459.

72. For charts showing the rise in federal civil dispositions in ten year intervals from 1962 through 2002, see *id.* at 462–63. For the increase in criminal cases and the impact on the civil docket of the Speedy Trial Act, see William W. Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651, 680 n.89 (1994); and Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 987–88 (1995).

73. Maybe more positive aspects of the transsubstantive/equity procedure have led to more settlements and fewer trials. Perhaps the discovery methods have in fact provided both sides with a realistic view of their respective cases, and thus made a trial unnecessary not because of unpredictability, but because the lawyers know what to expect and can thus achieve informed settlement. And perhaps the discovery, sometimes showing an insufficiency of evidence for at least one element of the plaintiff's cause of action, and sometimes showing that an affirmative defense or a claim in its entirety must be believed, has added to more summary judgment motions justifiably allowed; thus, this too, diminishes the number of trials.

#### IV. MAINTAINING STRENGTHS OF FEDERAL PROCEDURE WHILE REDUCING DETRIMENTS

There is no sensible reason why some cases cannot maintain the advantages of the Federal Rule wide-open, equity-based procedural system while others are handled with a more contained system that has the restraint advantages historically associated with common law procedure. To put it another way, one could have transsubstantive procedure in the case-type sense, without necessarily having it in the case-size sense. Many states utilize multi-track designation for different cases, some states having two tracks and some three.<sup>74</sup> There is often a track called “simple,” “expedited,” or “fast” in which there are restraints on permitted delay and amounts of discovery; some of these states previously have substantially adopted the Federal Rules as the model for their procedural rules.<sup>75</sup> Some federal courts have also adopted different case tracks.<sup>76</sup> Charles Clark, the major draftsman of the Federal Rules, thought all along that there were cases that did not require all of the process afforded by the then-new Federal Rules.<sup>77</sup> In the sections that follow, I will argue for a simple case track for the Federal District Courts, along with two other exceptions to the Federal Rule transsubstantivity. Let us first, though, consider options for achieving constraint in the Federal Rule procedural system.

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74. Seymour Moskowitz, *Discovery in State Civil Procedure: The National Perspective*, 35 W. ST. U. L. REV. 121, 128–32 (2007).

75. See, e.g., *id.* at 127–35. Five states vary the amount of permitted discovery for “low-stakes, economic litigation, cases.” Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1222 (2005). California, Colorado, Connecticut, Illinois, and Texas “define these cases by amount-in-controversy. . . . California’s amount-in-controversy cut-off is the lowest by a margin of \$25,000 to \$50,000. Kentucky’s Economic Litigation Docket includes specified classes of cases regardless of amount in controversy.” *Id.* For state variations on volume limits on a case-differentiated bases, see *id.* at 1222–23. The state procedural rules of Colorado and Kentucky have been called “Federal Rules Replicas.” John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356 (2003) (internal quotation marks omitted). Some states accomplish tracking through rules of civil procedure. E.g., CAL. CIV. PROC. CODE § 94(a) (West 2009); KY. R. CIV. P. 33.01(3), 93.01, 93.02; TEX. R. CIV. P. 190.1–5. Other states accomplish tracking through court rules. See, e.g., N.J. STAT. ANN. §§ 4:5A-1 to -2 (West 2009). Some states use court orders. E.g., MA. R. SUPER. CT. order 1-88; N.Y. NEW YORK COUNTRY COURTHOUSE PROCEDURES procedure V. For the Bureau of Justice Assistance Fact Sheet describing methods of Differentiated Case Management, see CAROLINE COOPER ET AL., U.S. DEP’T OF JUSTICE, DIFFERENTIATED CASE MANAGEMENT: IMPLEMENTATION MANUAL 9, 11–14 (1993), <http://www.ncjrs.gov/pdffiles/difm.pdf>.

76. See, e.g., FLA. U.S. DIST. CT. S. DIST. GENERAL RULE 16.1(a) (“Differentiated Case Management in Civil Actions”); MN. U.S. DIST. CT. RULES 1, 4, 6, 10–11 (allowing parties to agree to these rules, which, *inter alia*, restricts the amount and time for discovery, sets a certain trial date within six months of the date of the Pretrial Conference (which is to be within 30 days of the date in which the complaint was served), and grants each side only eight hours of trial time); MO. U.S. DIST. CT. E. DIST. L.R. 16-5.01 (“Case Management Tracks”); *In re* Standing Order Governing Civil Case Management Before the Honorable Frank D. Whitney, No. 3:07-MC-47 (W.D.N.C. May 14, 2007); OH. U.S. DIST. CT. N. DIST. CIVIL RULE 16.1 (“Differentiated Case Management”).

77. Subrin, *Clark*, *supra* note 17, at 148–49.

*A. Weaving Substance and Procedure*

There are at least four major ways in which those who craft procedural rules could try to aid restraint. First, they could try to intermesh substance with process in the manner that the common law evolved, similar to writs weaving procedure with substance and the use of multiple pleadings—like the single-issue pleading method—to try to define issues. There are at least three good reasons for why this will not occur. First, the chore is by its very nature highly political because the process will be seen to favor or disfavor certain types of cases. In a democracy, this means a legislature will have to do the crafting. No legislature is likely to want to craft substance and procedure rules for a large number of types of cases; this is a complex and controversial task. Second, the common law system was found sufficiently wanting, due to a lack of flexibility and a tendency to dispose of cases on technicalities unrelated to the merits. Thus, it was discarded in our country in the mid-nineteenth century. Third, there has been no constituency in the judiciary, the legal profession, legislature, or interest groups at large that has suggested that such a system is a good idea for large numbers of case-types.

*B. Tightening Transsubstantive Procedure*

A second major way to constrain the procedural system would be to stick with transsubstantive procedure, the same procedure for all case-types and case-sizes, but to make that procedure considerably more restraining than the current Federal Rules. This might include some combination of (1) more rigorous pleading requirements for all cases, such as so-called “fact pleading,” as under the Field Code or whatever the new pleading rule is under *Twombly* and *Iqbal*; (2) substantially reduced discovery; (3) reduced joinder possibilities, although to the best of my knowledge no one has seriously suggested curtailing the federal joinder of claims or parties rules, with the exception of making it more difficult to pursue class actions; (4) firm dates set shortly after the answer is filed for completing discovery and commencing trial; and (5) limitations on the duration of trial. But, as we have seen, there were good reasons for jettisoning fact-pleading—including the difficulty of knowing what is a fact, conclusion, or evidence. Some cases merit extensive discovery because of the stakes involved, the complexity of issues, and the hidden nature of important facts. Similarly, some cases require copious pre-trial time and preparation, as well as lengthy trials if the case is not disposed of through dispositive motions or settlement.

There is another important reason for rejecting fact-pleading or other more rigorous pleading requirements, substantially reduced discovery, or restrictive trial time on a transsubstantive basis. Our country relies heavily on private litigation to enforce legislatively-created social norms. We turn to private litigation, in large measure, to insure our safety, protect the environment, police untoward business conduct, and protect civil

rights, including the right of minority groups not to suffer discrimination. Unlike other nations, our country has chosen not to rely on a substantially enlarged bureaucratic state for enforcement of social norms. Similarly, we have chosen to supply a smaller safety net for the injured or those in need than many other Western countries. Congress has passed statutes permitting multiple damage awards for winning plaintiffs by mandating that defendants pay the legal fees of victorious plaintiffs, with the purpose of encouraging private law suits in order to effectuate national policy.<sup>78</sup> Many of these suits are the type in which a meritorious plaintiff lacks extensive facts at the commencement of a case that would allow for a rigorous pleading requirement to be met and for which extensive discovery is required. Think, for instance, of the “intent” element in employment discrimination cases. The unfairness of requiring rigorous pleading in this and similar instances is acknowledged in Federal Rule 9(b), which permits “state of mind” issues to be averred generally, and Rule 11, which permits a pleader to aver that a factual contention “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>79</sup>

In short, a transsubstantive restrictive procedure does not make sense in our country because many important lawsuits require the latitude and flexibility incorporated in the 1938 Federal Rule regime. Dismissing some types of lawsuits for a dearth of facts in pleading, before opportunity for discovery, flies in the face of our tradition of private law enforcement. Paul Carrington put it this way:

We should keep clearly in mind that discovery is the American alternative to the administrative state. . . . Every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accompanied by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery

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78. *E.g.*, 42 U.S.C. § 300aa-15 (2006) (awarding plaintiffs injured by vaccines damages and attorney fees); *see also* Burbank, *supra* note 41, at 118.

79. Unfortunately, the majority in *Iqbal* seems to have forgotten the importance of Rule 9(b) in cases involving the need to prove a defendant’s state of mind, and have apparently, by judicial fiat rather than the Enabling Act process, amended the Rule out of anything close to its prior existence. *See* Burbank, *supra* note 41, at 115. The disproportionate impact rigorous pleading requirements and current summary judgment practice has on plaintiffs in discrimination cases has been frequently and amply illustrated. *See, e.g., id.* at 117–18; Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 128 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709 (2007).

would diminish the disincentives for lawless behavior across a wide spectrum of forbidden conduct.<sup>80</sup>

Geoffrey Hazard put it succinctly in explaining that civil claims are “an integral part of law enforcement in this country. . . . [T]he scope of discovery determines the scope of effective law enforcement in many fields regulated by law.”<sup>81</sup> Patrick Higginbotham, the former Chair of the Federal Advisory Committee on Civil Rules, also emphasized the symbiotic relationship of discovery and the ability to enforce Congressional statutes in many areas of law:

Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the securities laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.<sup>82</sup>

To try to constrain the Federal Rule transsubstantive equity-based system by mandating, still on a transsubstantive basis, rigorous pleading prior to discovery, severely limited discovery, or greatly limited time for submitting evidence at trial, is too deep an assault on the historic role of civil litigation in our country.

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80. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997). Given the place in our country of private litigation to effectuate public norms, and the place of discovery in making this effectuation possible, plus the impossibility in some cases for meritorious plaintiffs to know in advance enough facts to comply with a rigorous pleading requirement since they have not yet engaged in discovery, a few of the proposals in the Final Report of the American College and the Institute that I mentioned at the beginning of this paper do not seem wise. Among them are replacing notice pleading with “fact-based pleading” and not permitting discovery after initial disclosures and additional limited discovery, absent agreement or a court order. ACTL/IAALS, FINAL REPORT, *supra* note 3, at 5, 9. How can a plaintiff in a civil rights suit rely on federal judges to permit the needed additional discovery, when many of these same judges took a dim view of these suits and required fact pleading before *Twombly* and *Iqbal*? See, e.g., Fairman, *supra* note 53, at 988. Moreover, how will plaintiffs in civil rights suits have the opportunity to move the court for any discovery in those cases dismissed at the pleadings stage? Perhaps the Final Report, by suggesting that “[p]leadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party’s claims,” means to protect a party that is unable to know material facts because the evidence is in the hands of the defendant, and that a motion to dismiss for failure to state a claim should not be granted when this is the case. ACTL/IAALS, FINAL REPORT, at 5. And perhaps the need to move the court for additional discovery as the normal rule can be alleviated by the Final Report’s acknowledgement of the need for special rules for some cases and the suggestion for discovery protocols for “certain types of specialized cases.” *Id.* at 11. I would, though, need to read these clarifications before concluding that the Final Report’s pleading and discovery recommendations reflect an understanding of the unique place of United States civil litigation in protecting societal norms established by legislatures.

81. GEOFFREY C. HAZARD, JR., SOUTHWESTERN LEGAL FOUND. & SOUTHERN METHODIST UNIV. SCHOOL OF LAW, REPORT OF THE CONFERENCE ON THE FEDERAL RULES OF CIVIL PROCEDURE 3 (1995).

82. Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997).

### C. Increasing Judicial Involvement

A third way to attempt to control mounting time and expense in civil litigation is through judicial case management. This has been the path of Federal Rule amendments, such as the expanded scope and utilization of pretrial conferences and scheduling orders in Rules 16 and by ad hoc supervision of discovery in Rule 26(b)(2). No one denies that rigorous case management is needed for large scale litigation. But this does not seem an appropriate solution for the bulk of litigation. State courts do not have the resources or personnel to manage each case. Even at the federal level, case management for all cases has the flaw of requiring a good deal of judicial time, whether by Article III Judges or by Magistrate Judges. Ironically, it is a constant complaint of the litigation bar that despite case management, judges show little inclination to enter the fray of discovery disputes, and it is discovery that probably requires the most constraint.<sup>83</sup>

Moreover, judicial case-by-case management introduces additional largely uncontrolled discretion that is itself the subject of major criticism.<sup>84</sup> When the system requires multiple conferences for most cases, case management also adds additional preparation time and expense in those cases that would settle without any judicial involvement. A Federal Judicial Center 1997 Report concluded: "Increased judicial case management is the means attorneys most often recommended for alleviating discovery problems and reducing discovery expenses, but multivariate analyses failed to detect an association between judges' case management approaches and disposition times or litigation costs."<sup>85</sup>

### D. The "Simple Track" Alternative

A fourth way to constrain civil litigation, and make it more efficient and fair, is one that many states and some federal courts continue to experiment with. In my mind, it is the method that makes the most sense. This method selects some cases for a special, simplified track on a case-size basis, thus eroding the transsubstantive principle in that respect.<sup>86</sup>

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83. THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 2 (1997). "In response to a list of thirteen changes that might potentially reduce litigation costs, the most frequent choice by the attorneys was to increase the availability of judges to resolve discovery disputes (54%)." *Id.* at 10. "About 40% of the attorneys reported unnecessary discovery expenses due to discovery problems." *Id.* at 5.

84. The classical article raising concerns about judicial case management is Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378-80 (1982).

85. WILLGING ET AL., *supra* note 83, at 2.

86. Many others have written about simple or fast tracks, see, for example, Michael A. Friedrichs, *Fast Track: A Panacea for a Delayed and Cluttered Court System?*, 1 S.D. JUST. J. 443, 443 (1993); Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431, 431-32 (1985); Steven Croley et al., *South Carolina's Fast Track Jury Trial: An Inventive and Inexpensive Way to Resolve Cases*, S.C. LAW., July 2009, at 14, 15; see also Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1798 (2002).

Notice, however, that the simple track solution maintains transsubstantivity of the case-type variety because the simple track will include cases based on a wide range of substantive laws. Moreover, the simple track would maintain the vast majority of procedural rules for the cases on that track, thus making it largely transsubstantive for most of the procedure. The simple track method would separate out cases that do not generally warrant the whole panoply of federal process. This method uses time limits and discovery limits to control the costs of litigation. It also eliminates some of the pre-trial steps that involve judicial involvement and require additional attorney time, such as multiple pre-trial conferences.

A simple track would set a trial date shortly after commencement that is perhaps no more than six or nine months from the date the answer is filed. A discovery cut-off date would be set at the same time. There would be only one required conference, to set the discovery-cut-off date and the firm trial date, and perhaps even this could be dispensed with if presumptive time standards were established. There would be limits on discovery for all cases on the simple track. Whether that would be two or three depositions, each one lasting no more than three or four hours, and ten or fifteen interrogatories, would be up to the drafters. The length of time before trials and discovery cut-off dates should also be left to the drafters, but it is important that once the dates and limitations are decided upon, they be kept firm, except for very good cause shown. Putting a sensible limit on document requests is difficult to draft because relevant documents come in so many forms and in unpredictable numbers. The drafters of the simple track should consider requiring more specificity for document requests than is currently the norm, as a means of reducing the burdens of this type of discovery.

The obvious reason for these limitations on time and discovery are to reduce delay and expense. So far as time limits go, there is some empirical evidence that a firm trial date—set relatively early and with a sensible amount of time until the trial is to commence, and a time limit in which discovery must be completed—tend to reduce the costs and delays of litigation.<sup>87</sup> Limits on the amounts of discovery (such as the number of interrogatories and depositions) can also reduce cost.<sup>88</sup> The drafters

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87. A RAND study of twenty federal district courts in the 1990s found that “[s]horter time from setting a discovery schedule to discovery cutoff is associated with both significantly reduced time to disposition and significantly reduced lawyer work hours.” JAMES S. KAKALIK ET AL., RAND, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 16 (1996), [http://www.rand.org/pubs/monograph\\_reports/2007/MR800.pdf](http://www.rand.org/pubs/monograph_reports/2007/MR800.pdf). They also found that work hours correlate with “costs to litigants in dollar terms.” *Id.* at 16. “Litigant data also show little difference in satisfaction between shorter and longer time to discovery cutoff.” *Id.* Early setting of a trial date results in an additional reduction of time, but does not significantly change lawyer work hours. *Id.* at 14. Further support for firm trial dates is found in Barbara J. Rouse & Stephen E. Neel, *Voice of the Judiciary: Firm, Fair Trial Date Initiative—An Update*, BOSTON B.J., Mar./Apr. 2007, at 7, 7–8.

88. A RAND study of twenty federal district courts in the 1990s found that limiting interrogatories had a significantly reduction of total lawyer work hours for hourly fee attorneys. JAMES S.



should also consider eliminating mandatory disclosure for simple track cases; there is some evidence that eliminating mandatory disclosures does not reduce formal discovery, nor save time or money.<sup>89</sup> Not having to prepare for and attend multiple pre-trial conferences also saves time and money. The drafters should also consider limits on the time that each side can have for the presentation of cases at trial.<sup>90</sup>

What cases should be included and excluded from such a simplified track? At the federal level, Congress has revealed a desire for energetic enforcement of some statutes by providing for multiple damages or fee shifting for successful plaintiffs.<sup>91</sup> In order to permit such vigorous enforcement, such cases should be excluded from the simple track. One could then set the limit for other cases to be excluded at over some figure, such as realistic damages of over \$500,000, with a provision that for very good cause shown a party could move to be removed from the simple track. The parties should also be able to opt into the simple track by consent, but not opt out, except through order of the court.

At the federal level, the Advisory Committee has decided in the past not to adopt rules for a simple track.<sup>92</sup> Congress may have to mandate a simple track through statute. At the state level, such tracking has often been accomplished by court rule. State legislatures can also create a simple track, excluding cases where vigorous private enforcement is the goal and such enforcement requires more time and more discovery.

The arguments used against such a simple track for federal trial courts, including those made when the issue has been addressed at Advi-

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KAKALIK ET AL., RAND, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA 48–50 (1998), [http://www.rand.org/pubs/monograph\\_reports/2009/MR941.pdf](http://www.rand.org/pubs/monograph_reports/2009/MR941.pdf). “These findings support the policy of limiting interrogatories as a means of limiting lawyer work hours because there is no statistical evidence that interrogatory limitations hurt, and they may help for several subsets of cases.” James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 664 (1998) [hereinafter Kakalik et al., *Discovery Management*]. The researchers did not have sufficient data to comment on whether reducing the number of depositions would reduce hours spent and consequently costs, but it is logical to believe that deposition reduction would result in reduction of lawyer hours spent and a consequent reduction in costs.

89. Kakalik et al., *Discovery Management*, *supra* note 88, at 659 (“We found no strong evidence that a policy of early mandatory disclosure reduced lawyer work time on any of the subsets of cases examined.”). The Final Report of the Joint Project reported: “Only 34 percent of the respondents said that the current initial disclosure rules reduce discovery and only 28 percent said they save the clients money. The initial-disclosure rules need to be revised.” ACTL/IAALS, FINAL REPORT, *supra* note 3, at 7.

90. Judge Keeton recommended this two decades ago. Robert E. Keeton, *Time Limits as Incentives in an Adversary System*, 137 U. PA. L. REV. 2053, 2055–56 (1989).

91. Professor Stephen Burbank suggested this idea to me. He was influenced by Sean Farhang. *See* Farhang, *supra* note 41, at 822, 824.

92. An initial attempt at drafting a more simplified procedure was rejected politely by the Advisory Committee, which ended its discussion of simplified procedure, after hearing from three Federal Judges, as follows: “The Committee expressed thanks to the panel members for their very informative and helpful presentations.” CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MINUTES: OCTOBER 16 AND 17, at 20–28 (2000), <http://www.uscourts.gov/rules/Minutes/CV10-2000-min.pdf> [hereinafter ADVISORY COMM.].

sory Committee meetings,<sup>93</sup> do not seem persuasive to me. One advanced at the Advisory Committee is that it takes a special legal culture to accept such restraint, and lawyers in some districts, accustomed to a different culture, would oppose a simple track.<sup>94</sup> The evidence for this proposition was that lawyers and judges in other districts would not approve of the so-called "rocket docket" in the Eastern District of Virginia.<sup>95</sup> But the bench and bar in that district have adjusted over time to this accelerated procedure, although the Eastern District of Virginia timetable may be too short and rigid for nationwide use. Many state bars have already adjusted to the designation of cases to tracks, including simple ones.

Another argument is that "any change should be preceded and supported by empirical study."<sup>96</sup> Myself and others have urged the importance of statistical research.<sup>97</sup> Empirical study, though, has already shown the advantages of firm trial dates and discovery cutoffs.<sup>98</sup> It is ironic to have Federal Judges at the Advisory Committee urging empirical study prior to adopting a simple track, when the Advisory Committee has adopted the vast majority of its amendments without empirical study, including several amendments that add to judicial power—such as tightening up Rule 11, enlarging the scope of Rule 16, and encouraging judicial ad hoc control over discovery in Rule 26.

Another argument made at the Advisory Committee was that lawyers have not taken advantage of a simple track when it was made available.<sup>99</sup> A major purpose of a simple track is to impose restrictions on lawyer behavior because of the activity of some lawyers in abusing the system. It does not tell us anything about the advantages of a simple track that mandates restraints on lawyers that lawyers do not voluntarily submit to such a track. The argument that federal courts already have the power under Rule 16 to "adopt simplified procedures for cases that deserve them"<sup>100</sup> has the failings of ad hoc judicial case management that I have discussed above.

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93. Subrin, *Simplified Procedure*, *supra* note 1, at 186–187. The current Reporter to the Advisory Committee on the Federal Rules of Civil Procedure drafted rules for a simple draft, and reported some of the problems he encountered and foresaw with such an enterprise. Cooper, *supra* note 86, at 1800–04.

94. See ADVISORY COMM., *supra* note 92, at 25–26; Subrin, *Simplified Procedure*, *supra* note 1, at 187.

95. ADVISORY COMM., *supra* note 92, at 24.

96. *Id.*

97. See, e.g., Subrin, *Simplified Procedure*, *supra* note 1, at 191 nn.62–63. Professor Burbank put the importance of empiricism in order to better understand civil litigation this way: "If those with the power of discretion are unwilling to surrender any of it, let us at least hope that they will also seek the power of facts." Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1963 (1989).

98. KAKALIK ET AL., *supra* note 87, at 26–28.

99. See ADVISORY COMM., *supra* note 92, at 27.

100. *Id.* at 22.

Perhaps the most annoying (or disingenuous) comment against a simple track in Advisory Committee minutes is this: “The Committee was reminded that RAND did a study of experience under the Civil Justice Reform Act. The ‘multiple tracks’ approach was not recommended.”<sup>101</sup> The reason the RAND study on the Civil Justice Reform Act *could not* recommend tracks was that the district courts, including pilot districts, did not experiment with tracking in any way that permitted RAND to empirically study the possibility.<sup>102</sup> One researcher of judicial activity under the Civil Justice Reform Act put the difficulty of assessment this way:

Nine out of ten pilot districts tracked few or no cases. As a result, “almost all general civil cases to which CJRA procedural principles might be relevant were placed in the standard track, if any track assignment was made.” These cases “were managed individually.” To put it mildly, “there was little actual ‘differential’ tracking of general civil cases in most districts that adopted a track model in their CJRA plan.” Pilot districts did not apply this principle in enough cases to draw any conclusions. As a result, “[the RAND investigators] have no basis for evaluating how the track method of [differential case management] affected time, cost, satisfaction, and views of fairness.”<sup>103</sup>

The failure of Federal District Court Judges to permit empirical study of tracking makes the argument of adopting a simple track system only after empirical study all the more hollow.

Another objection I have heard is that there is no sound way to assign some cases to a special, simple track. But why not? States have assigned cases to special tracks, often based on the amount of damages.<sup>104</sup> Placing lawsuits in the simple track which allege \$500,000 or less in damages (or for which the value of injunctive relief is deemed to be less than that amount) is of course arbitrary, as would be any other figure. But we have arbitrary numbers and dates for many things in procedure, such as the monetary amount required for diversity of citizenship jurisdiction, when an answer is due, when there must be a discovery conference, or for the number of pages for a brief. If a different monetary

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101. CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MINUTES: APRIL 7–8, at 36 (2008), <http://www.uscourts.gov/rules/Minutes/CV04-2008-min.pdf>.

102. See John Burritt McArthur, *Inter-branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551, 582–83 (1999).

103. *Id.* (quoting KAKALIK ET AL., *supra* note 87, at 12; KAKALIK ET AL., RAND, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 29(1996), [http://www.rand.org/pubs/monograph\\_reports/2007/MR801.pdf](http://www.rand.org/pubs/monograph_reports/2007/MR801.pdf)). McArthur is less polite than RAND about the judicial reluctance to truly allow tracking to be tested: “Ever tactful, RAND recorded complaints from judges and lawyers about the difficulty of putting cases into tracks. But it identified the more fundamental problem when it mentioned ‘judges’ desire to tailor case management to the needs of the case and to their style of management.’ Judges didn’t want to change their habits.” *Id.* at 583 (quoting KAKALIK ET AL., *supra* note 87, at 12).

104. Croley et al., *supra* note 86, at 16.

amount is a wiser one for the simple track, then the drafters of the track can surely make that decision. And if over time it turns out that another test for the simple track would work better, then it can be changed. The placement to the simple track of cases below the cut-off amount will probably have to be done by an assignment judge on the basis of the complaint and a required cover sheet.

Perhaps the most serious objection is that there will be second-rate justice for those cases on the simple track.<sup>105</sup> One thread of the objection might be that dramatically reduced discovery will prejudice fair resolution on the merits for such cases. But there is no rational reason why discovery in all cases should be almost totally unlimited at the whim of lawyers. It has been amply demonstrated that such uncontrolled discovery often spins out of control in terms of time and expense, with little or no additional benefit to the litigation process.<sup>106</sup> Lawyers, when paid, can always come up with reasons for an additional piece of discovery or additional reasons for extra time to prepare their case. Most cases settle; few cases reach trial under the present system. There is no such thing as a perfect procedural system or the perfect amount of discovery. The issue is whether overall the process is fair and perceived to be fair. So long as both sides are treated the same, have ample opportunity to prepare their cases, and can move for additional time or more discovery—for very good cause shown—and so long as judges ordinarily enforce the restrictions, it is difficult to see why a simple track for some cases will reduce fairness, or reduce the number of decisions or settlements that reflect the merits.

A simple track does not provide second class justice. In fact, in many cases it is better justice because the ultimate determination of the case will not so often depend on discounting or adding to the value of the case due to huge transaction costs. Lawyers will have to learn to focus their attention to the most meritorious of their claims and defenses. Furthermore, some meritorious cases that have not been brought in the past, because of expense, may now be brought. Judges, less burdened by con-

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105. Judge Niemeyer was sensitive to this potential critique when he introduced the simplified procedure question to the Advisory Committee. "The purpose is not to provide a second-class procedure to claims that are deemed unimportant. Instead, the purpose is to provide a procedure that will better enable these claims to be enforced." CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MINUTES: OCT. 14 AND 15, at 39 (1999), <http://www.uscourts.gov/rules/Minutes/1099mnCV.pdf>. Thom Main has pointed out to me that I have excluded cases in which Congress has mandated energetic enforcement and that this may well imply that simple track cases will not receive the advantage of energetic enforcement, thus implying second-rate justice. This is a fair point, but I think that "energetic enforcement" requires a balancing of costs and benefits. The diminution of costs in the simple track, and the reduction of delay, provide multiple benefits, as I argue; such benefits compensate for the decreased discovery and time limits. In those statutes in which Congress has shown intent for energetic enforcement, the cost-benefit analysis shifts, in my view, and it makes sense to have fewer restraints. In these cases, the private bar is substituting for executive or administrative enforcement and the broad range of resources that might have been made available for such government enforcement.

106. See, e.g., Thornburg, *supra* note 48, at 248.

ferences and huge amounts of discovery to consider at summary judgment, should have more time to preside over trials. If as a result of the simple track, more cases will reach trial (a welcome change given the drastic diminution of terminated cases that are now tried) and more judges are needed to conduct additional trials, this need should be presented to Congress.

The simple track erodes transsubstantive procedure in the case-size sense. Excluding some substantive cases from the simple track, because of legislative intent for rigorous enforcement, is a case-type exception and leaves those cases with the normal transsubstantive procedure. There is already case-type erosion to transsubstantive procedure at both the state and federal levels. For example, many states have specialized procedures for medical malpractice cases.<sup>107</sup> Congress, too, has instituted special procedural rules for securities and prisoner litigation.<sup>108</sup> In these instances, the purpose of the case-type specific procedure was to make it more difficult for plaintiffs and to discourage or eliminate what were thought to be meritless or unjustified litigation.

Legislators, though, could also draft special procedures to aid litigation in certain fields they decide require more vigorous enforcement, just as they have done in providing for multiple damages or fee-shifting. Congress has already passed numerous restoration statutes, some including procedural provisions, when they think that the Supreme Court has misunderstood congressional intent.<sup>109</sup> If Congress does not reverse *Twombly* and *Iqbal*'s more rigorous pleading requirement for all cases, as I think it should, then it would make sense to restore notice pleading in those areas of law in which Congress has already evidenced the intent for rigorous enforcement by providing multiple damages and/or shifting legal fees for the benefit of plaintiffs. If Congress reverses *Twombly* and *Iqbal*'s more rigorous pleading holdings, Congress could later erode transsubstantivity by requiring more rigorous pleading in a case-specific way for selected statutes, just as was done for securities litigation. This, of course, would erode the transsubstantive principle. In any of the possibilities I have mentioned, though, for a modest amount of procedural law/substantive law integration, the vast bulk of procedural rules remain intact. This is a far cry from the complexity of the common law writ system. Transsubstantivity remains the underlying norm.

Finally, substance-specific protocols may be in order for some types of litigation that have been excluded from the simple track.<sup>110</sup> Such pro-

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107. Moskowitz, *supra* note 74, at 124–26.

108. Fairman, *supra* note 53, at 988–89 & nn.6–7.

109. See e.g., JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 10–11 (2004); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332–36 (1991).

110. This is a proposal I made in 1994. Subrin, *Substance Specific*, *supra* note 1, at 48–56. In a letter dated September 22, 1997, Professors Subrin, Burbank, and Hazard made a similar proposal to

protocols would be suggestive and not binding, until a judge chose to mandate them or portions of them. Once it becomes obvious that a certain type of litigation, not assigned to the simple track because of the high stakes involved, is repetitive, time-consuming, and expensive (for example, product liability for specific products and antitrust cases), it would be helpful to judges and lawyers to provide norms through suggested standards or protocols for future litigation in the same fields.

The Advisory Committee could appoint representatives of the judiciary, plaintiff and defendant lawyers, and perhaps clients in such cases to discuss, negotiate, and compromise on what the normal pleadings and discovery should include, and what the ordinary times for discovery cutoff and trial dates should be. They might even decide what should be included in summary judgment motions and memoranda, what should normally be required to survive summary judgment and judgment as a matter of law, and what the ordinary length of trial should be. For those procedural issues they cannot agree upon, as well as those for which there is agreement, the Advisory Committee would decide on the final protocols. Such protocols, with the recommended norms published in advance by the Advisory Committee, would aid lawyers in advising their clients, and aid judges, by providing suggested standards to help inform their procedural decisions.<sup>111</sup> If the Advisory Committee believes that promulgating such substance-specific protocols, though only advisory, is beyond the power granted to it by the Supreme Court, or beyond the power granted by the Enabling Act, they should seek authority from the Supreme Court, or in turn, from Congress. It is difficult to think why such power would not be conferred.

#### CONCLUSION

With these three inroads to transsubstantive procedure—a simple track, procedural-substantive law integration for selected case-types, and procedural standards or protocols for special types of expensive, repetitive litigation—the procedural system can recapture what had been some of the benefits of more defining and confining common law procedure. At the same time, it can retain the benefits of the 1938 federal transsubstantive equity-based model for those cases that require such full proce-

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the Advisory Committee on the Federal Rules of Civil Procedure in a letter sent to then Chairman, the Honorable David F. Levi. On February 19, 2008, I made a proposal to the American Law Institute for a similar project on "Substance-Specific Procedural Standards." Neither the Advisory Committee nor the A.L.I. has responded to these proposals. The idea of protocols for discovery in particular subject-matter areas was mentioned at an Advisory Committee meeting in 1997: "Several bar groups and commentators have expressed support for some effort along these lines." CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MINUTES OCT. 6 AND 7 (1997), <http://www.uscourts.gov/rules/Minutes/cv10-97.htm>.

111. I urged such protocols (I called them "presumptive rules") in Subrin, *Substance Specific*, *supra* note 1, at 48, 52–56. For a positive response to my proposal, see Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 FLA. L. REV. 57, 58–60 (1994).

dural treatment. All cases, including those in the three categories I propose which depart from transsubstantivity, would continue to operate under the vast majority of the same procedural rules.