The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals

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I. INTRODUCTION

> *The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.*[1]
>
> —Grant Gilmore

The dark side of due process has cast a long shadow over civil procedure, hiding technical legal doctrine within a forbidding aura of obscurity. One need not go as far as Grant Gilmore's demonized view of

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1. GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

due process to recognize that procedure can complicate and confuse enforcement of the law. This observation would come as no surprise to generations of law students, who confronted unfamiliar and esoteric issues of procedure just as they began law school. Why procedure is unfamiliar and esoteric is another matter. The reason goes beyond the fortunate lack of experience most people have with the intricacies of civil litigation. As Learned Hand observed, "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[2] We can only hope that civil procedure courses do not generate this degree of anxiety and intimidation.

The intimidation they do generate arises from a systematic lack of transparency in the subject. Its opacity is much like the secrecy that Henry Sidgwick found at the heart of utilitarian morality. A utilitarian, Sidgwick argued, might approve of an otherwise immoral act in secret because one or a few such acts would maximize utility, while public approval would encourage many more such acts, which would cumulatively detract from utility.[3] He drew the following paradoxical conclusion about utilitarianism as an "esoteric morality": "the opinion that secrecy may render an action right which would not otherwise be so should itself be kept comparatively secret; and similarly it seems expedient that the doctrine that esoteric morality is expedient should itself be kept esoteric."[4] So, too, procedure might leave the occasional violation of a right without a remedy, but deny the remedy secretly so that the right would not be widely violated. And like a utilitarian, a proceduralist might want to keep the role of procedure in defeating enforcement secret. Procedure is, to use Sidgwick's term, esoteric—not by accident, but by design.

To look at procedure in this light reveals its essential mediating role in translating the many broadly defined and proliferating rights characteristic of American law into a workable scheme of enforcement. Not all rights need to be enforced all the time, and if they were, the system of civil justice would grind to a halt. Civil procedure provides the necessary brake against a descent into Gilmore's underworld composed entirely of law and due process. It creates a barrier that allows through claims most likely to be significant and most urgently in need of resolution. All others are screened out by the cost of litigation, consisting in no small part of the preliminary stages of procedure—pleading, discovery, and associated motions and objections.

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2. Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* LECTURES ON LEGAL TOPICS 1921–1922, at 87, 105 (1926).

3. *See generally* HENRY SIDGWICK, THE METHODS OF ETHICS 424–58 (7th ed. 1907).

4. *Id.* at 490.

Some have dismissed this role of procedural rules as an exercise in "plaintiphobia," exemplified by recent decisions of the United States Supreme Court on pleading, class actions, and arbitration.[5] This critique has much to be said for it so long as it recognizes that it raises questions of degree, not of kind. Some moderating mechanism remains necessary to translate any right into a realistic scheme of remedies.[6] Such "remedial equilibration," explored by Daryl Levinson as a pervasive constraint on constitutional rights,[7] has a more general counterpart in "procedural equilibration": the need for procedural rules that select disputes for litigation and serious settlement negotiations. Principles that determine the content of rights in the abstract must be moderated by considerations of policy and feasibility that determine when and how those rights will be enforced. Procedure does this, paradoxically, by invoking its own set of abstractions in the form of "due process" and "access to justice." As articulated and implemented to favor, respectively, defendants and plaintiffs, these abstractions cover their own tracks as necessary and pragmatic gatekeepers. As they disfavor or promote different kinds of claims, they obscure the murky compromises necessary to decide which cases go forward and which do not. From this perspective, the problem of procedure operates more as a feature than as a bug. The problem comes only from the failure to recognize that it is deliberately obscure.

This gatekeeping function works best when it works invisibly, just like the esoteric reasoning that Sidgwick found to support a utilitarian justification for widely accepted moral rules.[8] Procedure does the same thing by creating a veil of fairness and efficiency behind which the vexed and disquieting business of case selection occurs. Rule 1 of the Federal Rules of Civil Procedure[9] exemplifies this compromise perfectly. Until recently, Rule 1 stated the aims of the Federal Rules in admirably succinct terms: "They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[10] In 2015,

5. *See* Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 194–98 (2014). *See generally* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011).

6. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

7. *Id.* at 857–60.

8. *See* SIDGWICK, *supra* note 3, at 490.

9. *See* FED. R. CIV. P. 1.

10. FED. R. CIV. P. 1. (2014) (amended 2015).

Rule 1 was amended to add that the rules should be "construed, administered, and employed by the court and the parties" to secure these ends,[11] seemingly demoting the rule proper to mere means to serve the ends identified in Rule 1. For all its virtues as a concise summary of what the Federal Rules seek to achieve, this provision cannot be taken literally as a guide to interpretation. If Rule 1 tries to tell judges how to fill the gaps, resolve the inconsistencies, and solve the problems created by the other Federal Rules, it imposes an impossible demand—not just to try to bring some cases to a conclusion that is, in some respects, "just, speedy, and inexpensive," but to "secure" all these ends and to do so in "every action and proceeding."[12]

What appears at first glance to be a statement of noble aspirations turns out on examination to be an utterly unworkable guide to interpretation. On nearly every current view of the relationship between justice and efficiency, these two ideals come into conflict whenever individual rights collide with the interests of society as a whole.[13] And even when efficiency is disaggregated into speed and expense, as they are in Rule 1, tradeoffs between these two values are inevitable. Overnight express costs more than standard delivery. Speed might come at the expense of efficiency. In the realm of procedure, a complex class action requires intricate trade-offs between justice, expense, and delay for all the parties involved. If taken literally, Rule 1 imposes demands that are so unattainable as to verge on the incoherent. It cannot be given a literal interpretation as a canon of construction, so it must mean something other than what it says.

The key to understanding what it means lies in the recently elaborated directive to the court and to the parties that the Federal Rules "should be construed, administered, and employed" to serve the ends that Rule 1 identifies.[14] This command extends the influence of Rule 1 throughout the Federal Rules, and along with it, the inherent tensions identified in the rule. The leading treatises on federal procedure reach the same conclusion. They say: "There probably is no provision in the federal rules that is more important than this mandate. It reflects the spirit in which the rules were conceived and written, and in which they should be interpreted."[15] And, "[f]ederal courts often refer to this provision of Rule 1 as a statement of the fundamental policy that the district courts must follow in applying any of the Rules in any particular civil action or proceeding: a just, speedy,

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11. FED. R. CIV. P. 1.
12. *Id.*
13. *See* JOHN RAWLS, A THEORY OF JUSTICE 23–25 (rev. ed. 1999) (describing the views of "many philosophers").
14. FED. R. CIV. P. 1.
15. 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1029 (4th ed. 2018) (footnote omitted).

and inexpensive determination is essential to a fair and effective trial."[16] As Professor Robert Bone has said: "Rule 1 is critically important. It sets out a principle that is supposed to guide interpretation and application of all the Federal Rules."[17]

Even discounting these statements as a celebration of the Federal Rules as the victor over some long-vanquished version of formalism, they contain this grain of truth: Rule 1 cannot be minimized or dismissed as a prelude to the real rules that follow it. Instead, it identifies the "purpose" of the rules, as its title suggests.[18] Yet it does not succeed in identifying a single consistent purpose, but several contradictory goals, and it leaves judges to sort out the tensions between them. With the new amendment to its terms, the rule seeks to enlist the parties to litigation in this effort, apparently a case-by-case adjustment of the presiding principles of procedural reform.[19] Instead of giving guidance on how to make this adjustment, Rule 1 just restates the conflicting ambitions that animate the Federal Rules as a whole. It should come, then, as no surprise that judges have used their discretion as often to undermine the regime of liberalized procedure as to support it, and as often to obscure its actual operation as to clarify it. Discretion itself magnifies the esoteric tendencies in procedure by requiring a case-specific balance among a variety of different factors. To the extent they are reflected throughout the Federal Rules, the tensions inherent in Rule 1 cannot be relieved simply by minimizing its significance, or by repealing it altogether and leaving the remaining rules intact. The rule, instead, signals the need for a thorough rethinking of procedural reform. Now, eighty years after adoption of the Federal Rules, a search for an alternative vision of procedure has become long overdue—one which depends less on procedural aspirations and judicial discretion and more on a candid assessment of which claims deserve to go forward, and which do not, as a matter of substantive law.

This Article examines the tensions inherent in Rule 1. Part II begins with attempts to save the rule from itself, by interpreting it as something else: a preamble, a canon of construction, or a delegation of discretion to federal judges. Part III proceeds to the sources from which the rule was

16. 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 1.21(1)(a) (3d ed. 2008).

17. Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U.L. REV. 287, 308 (2010).

18. Per its title, Rule 1 provides the "Scope and Purpose" of the Federal Rules. FED. R. CIV. P. 1.

19. *See* FED. R. CIV. P. 1 advisory committee's note to 2015 amendment.

drawn and the problems that led the rulemakers to draft it the way they did. Although framed in positive terms that looked forward, the rule had its immediate effect in negative consequences that looked backward. It was almost wholly concerned with abolishing common law "technicalities," as the rulemakers called them, demoting them to the status of outmoded relics of a bygone era of legal reasoning, much like the formalities of "substantive due process" from the *Lochner* era. Part IV explores the traces of Rule 1 in other rules, which either explicitly call for a liberal interpretation or delegate discretion to district judges. These do not constitute the whole of the rules, most of which define procedural devices, like those used in discovery and motion practice, and then closely regulate how and when those devices are to be used. The latter provisions resist the purposive interpretation commanded by Rule 1, complicating any interpretation of the rule and the vision of liberalized procedure that it embodies. Part V then analyzes the handful of decisions in which the Supreme Court has relied on the rule. Like the terms of the rule itself, these point in opposite directions—both towards and away from liberalized procedure. These decisions, as well as those in the lower courts, reveal the same ambivalence that can be found throughout the rules. Provisions that counsel the exercise of judicial discretion in favor of liberalized procedure stand side by side, sometimes in the same rule, with provisions that admit little interpretative leeway and require strict compliance. Together they operate, sometimes in mysterious ways, to screen out the cases that deserve more litigation from those that deserve less, or none at all.

II. SAVING RULE 1

In tone, Rule 1 sounds like a preamble, with distant but discernible echoes of the Preamble to the Constitution. It sets out lofty goals, among them a reference to "just" outcomes and it promises "to secure" them just like the Preamble.[20] Judges must aspire to these goals, but no one expects them to be fulfilled, let alone in every case. The resonant language of Rule 1 defeats attempts to reframe it in more precise and realistic terms, as Bone attempted to do in a recent article. He would have required the rules "be construed and administered to distribute the risk of outcome error fairly and efficiently with due regard for party participation appropriate to the case, due process and other constitutional constraints, and practical limitations on a judge's ability to predict consequences accurately and assess

20. *Compare* FED. R. CIV. P. 1, *with* U.S. CONST. pmbl. ("We the People of the United States, in Order to . . . establish *Justice*, . . . promote the general Welfare, and *secure* the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution . . . .") (emphasis added).

system-wide effects."[21] His revision seeks to identify the factors that should go into interpretation of the rules without any compelling vision of what the rules seek to achieve.[22] If it were frankly identified as a preamble, or a "prayer" as Patrick Johnston has characterized it,[23] it would better serve as a statement of purpose. To take this step, however, would demote the operative effect of the rule from a canon that guides interpretation to a rhetorical preliminary with no force of its own at all.

Other saving strategies can be devised to preserve a degree of consistency and feasibility in the rule, but they all dilute its operative force. The rule might be limited to resolving the indeterminacy found in other rules, as determined by their own terms and other rules of construction. Rule 1 would then play a subsidiary role in filling in the blanks identified by other means. The range of cases covered by the rule, however, would then diminish from "every action and proceeding"[24] to just those in which problems with the rules could be independently identified. Moreover, no reason appears, other than anxiety over the consequences of the rule's general application, that would justify its subordination to other principles of construction. Along the same lines, the rule could be restricted to just those cases in which a "just, speedy, and inexpensive determination"[25] can be achieved without any trade-off among these values. The rule would apply only in cases in which other rules failed along all three of these dimensions. The drafters of the original rules might have found such cases to be more common, and less difficult to identify, than we do today. If restricted in this fashion, the rule would come into play in only a narrow range of seemingly uncontroversial cases, which does not at all fit the experience under the rule, as recounted later in Part IV. In any event, even this restrictive proposal would constitute an open-ended invitation to rewrite any of the other rules whenever their application seemed to defeat the goals identified in Rule 1.

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21. Bone, *supra* note 17, at 300. The Federal Rules of Evidence contain a similarly qualified statement of purpose: "These rules should be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the trust may be ascertained and proceedings justly determined." FED. R. EVID. 102.

22. *See* Bone, *supra* note 17, at 300–02.

23. *See generally* Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure* 1, 75 B.U. L. REV. 1325 (1995).

24. FED. R. CIV. P. 1.

25. *Id.*

The meaning and use of the rule oscillates between these extremes: the expression of noble goals suitable for a preamble and the identification of a way to achieve those goals suitable for a legal rule. To follow the former denies any operational effect to rule. To follow the latter heightens its problematic relationship with the rest of the rules. Perhaps its short but sweeping terms contrast too starkly with the detailed provisions found elsewhere in the rules, on such varied issues as service of process, pleadings, joinder of claims and parties, discovery, and pretrial and post-trial motions—many of which were the product of hard-fought compromises when the rules were first drafted and when they have since been amended. Does Rule 1 trump these detailed provisions or do they trump its abstract statement of goals? The rule either means too much or too little, resulting in continued uneasiness over whether it means anything at all.

The uneasiness over these tensions became apparent even before the Federal Rules took effect. Former Attorney General Mitchell, who did much to push the rules through, had this to say about Rule 1 at a national conference introducing the rules to a group of prominent attorneys in the summer of 1938:

> The Committee is rather embarrassed about that statement, because its sounds a little as if it would have that result. (Laughter.) Of course, we know better. The purpose of that provision was to impress upon the courts the need of giving these rules such an interpretation as would tend to induce just, speedy and inexpensive determination of every action. Many of us would probably not wish to have every action determined inexpensively. (Laughter.)[26]

No doubt Mitchell referred to the prospect of reduced attorney's fees earned by all the lawyers in attendance at the conference, but he invited the reaction that the rule could not be taken entirely seriously. Similar concerns accompanied the process of drafting Rule 1, with one member of the advisory committee simply referring to it as "bunk."[27] Charles Clark, the principal drafter of the rules, nevertheless insisted on including a general statement of purpose in the rule because similar statements were found in other reformed codes of procedure.[28]

Scholars of procedure have given Rule 1 the same mixed reception that it received from those who drafted it. They have endorsed it, but they have preferred not to dwell on it. They have begun their casebooks and treatises, not at the beginning of the Federal Rules, or even with the Federal Rules at all, but with jurisdiction, a topic that directly addresses judicial power

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26. AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 192 (William W. Dawson ed., 1938).

27. Johnston, *supra* note 23, at 1344 (quoting Letter from George W. Pepper to William D. Mitchell (Mar. 8, 1937)).

28. *Id.* at 1340.

and its limits.[29] Yet the same emphasis can be found just beneath the surface of Rule 1. The first sentence of the rule defines the coverage of the rules, extending them to most civil actions in federal court, and the second sentence then empowers judges to give a liberal, purposive interpretation to the rules. Who else will determine what constitutes "the just, speedy, and inexpensive determination of every action and proceeding"? And who else will determine how the rules "should be construed and administered"? The operative effect of the rule, to the extent that it can be ascertained at all, is to leave the hard questions of procedure to the discretion of judges. That judgment made good sense in 1938, when the rulemakers were preoccupied with the task of eliminating common law procedure. It makes less sense today, when we have the benefit of decades of experience under the rules and under new forms of substantive law scarcely imaginable when the rules were adopted. The next part of this Article turns to the origins of the rule.

III. SOURCES OF RULE 1

The original terms of Rule 1 were even more succinct than the current version. They required that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." In recent years, the terms "proceedings" and "administered"[30] were added to the rule, giving it a slightly bureaucratic air, which departed from the original intent of the rule to invoke earlier efforts at litigation reform.[31] The Advisory Committee note cites earlier statutes and the Equity Rules of 1912,[32] which permitted amendments to cure defects of form.[33] These sources sound the theme, repeated constantly by advocates for the new rules, that "technicalities" should not get in the way of "substantial justice." As this distinction was

29. *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS, at ix, ch. 2 (11th ed. 2013) (entitling the first chapter after the introduction as "Jurisdiction Over the Parties or Their Property"); FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE, at x, ch. 2 (5th ed. 2001) (entitling the first chapter after the introduction as "Proper Court in a Civil Action").

30. FED. R. CIV. P. 1.

31. Johnston, *supra* note 23, at 1327–30.

32. FED. R. CIV. P. 1 advisory committee's note from 1937. The Advisory Committee's entire discussion of the provision reads as follows: "With the second sentence compare U.S.C., Title 28, [former] §§ 777 (Defects of form; amendments), 767 (Amendment of process); Equity Rule 19 (Amendments generally)." *Id.*

33. *See* FED. EQUITY R. 35 (1912) (superseded 1938).

deployed, technicalities were associated with the common law and they were to be overcome by reliance upon the rules of equity.[34] Partly, this appeal to equity was strategic, because the Equity Rules of 1912 served as a model of simplified procedure accomplished through judicial rulemaking, but partly it reflected the dependence of the Federal Rules on distinctive equity procedures, notably discovery. "Equitable discretion"[35] as a form of judicial power figures in this mix of objectives, but as we shall see, more in framing what the rules rejected rather than what they endorsed.

By its own terms, Rule 1 serves only an auxiliary role in the interpretation of some other rule, and in that role, it is addressed primarily to judges. They are asked to forsake the technicalities of the common law and to construe the Federal Rules accordingly. This narrow focus fits with the concern of the rulemakers to educate judges in a new system of procedure and to prevent backsliding to the technicalities of common law procedure. They did not want to repeat the experience under the Field Code, in which procedural reform could not overcome the inertia of established practices and attitudes.[36] The message of Rule 1 was essentially negative: Do not return to the familiar rules of the common law.

For that reason, Professor James William Moore, who assisted in drafting the rules, characterized this provision in seemingly paradoxical terms, as the first among many in the rules that "temper the discretionary power of the court with instructions as to the liberality of its application, 'to the end that controversies may be speedily and finally determined according to the substantive rights of the parties.'"[37] This advice takes the rule in two different directions. On the one hand, it rightly recognizes the managerial discretion that judges need to keep control over cases with any degree of complexity. The exercise of such discretion requires a balance among the competing goals identified in the rule, with little to constrain judges in how they strike the balance among those goals. So, on the other hand, Moore reads the rule to "temper" judicial discretion in favor of a liberal interpretation,[38] which presupposes a background of technical rules that can be dispensed with. These are the rules of common law procedure that do not serve "the substantive rights of the parties."[39] Rule 1, and the Federal Rules as a whole,

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34. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules*

35. Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1379, 1399–1410 (2015).

36. *See* Charles E. Clark & James Wm. Moore, *A New Federal Procedure I: The Background*, 44 YALE L.J. 387, 390–91 (1935).

37. 1 JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE § 1.13 (1st ed. 1938) (quoting ILL. CIV. PRAC. ACT § 4 (1937)).

38. *Id.*

39. *Id.*

succeeded admirably in abolishing those rules. The ill-defined discretion that was left behind as a substitute has proved to be more problematic, giving rise to problems that have plagued the Federal Rules to this day.

Professor Moore, in the first edition of his treatise on the Federal Rules, elaborates upon the purpose of Rule 1 in remarkably specific terms. He identifies three purposes for the rule: first, to abrogate the maxim that statutes in derogation of the common law were to be narrowly construed; second, to establish a principle of harmless error; and third, as noted earlier, to limit the discretion of trial judges in favor of a liberal interpretation of the rules.[40] Avoiding a narrow construction of the rules allowed them to supersede procedures under the common law writs, just as the Rules Enabling Act provided that the rules superseded preexisting statutes with which they were inconsistent.[41] Other rules specifically abolished particular common law writs, notably Rule 2[42]—to be discussed shortly—and the particular form that objections had to take.[43] Establishing a principle of harmless error was also the subject of a separate rule, Rule 61, which Moore elevated to the status of "the chief provision in the Federal Rules with respect to the interpretation of the Rules and instructions for the guidance of the court in applying the Rules."[44] That rule required the court to "disregard any error or defect in the proceeding which [did] not affect the substantial rights of the parties."[45] These first two purposes make it easier to understand what Moore meant by the third purpose: constraining the discretion of the court. Judges were to decide cases without regard to errors purely of form, like those recognized by the common law. They were denied the discretion to decide cases based on "technicalities," concerned only with the way that claims and defenses, motions, and objections were

40. *Id.* The same purposes were canvassed in the advisory committee's deliberations over the drafting of the rule. Johnston, *supra* note 23, at 1336–37, 1340–41, 1346.

41. Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

42. FED. R. CIV. P. 2. This rule recognized only "one form of action—the civil action," rather than the variety of forms of action at common law. *Id.* Rule 81(b) specifically abolished other writs. FED. R. CIV. P. 81 (abolishing scire facias and mandamus). After 1948, Rule 60(e) abolished others. FED. R. CIV. P. 60 (abolishing writs of coram nobis, coram vobis, and audita querela, in addition to the equity bills of review and bills in the nature of bills of review).

43. *See* FED. R. CIV. P. 46.

44. MOORE & FRIEDMAN, *supra* note 37.

45. FED. R. CIV. P. 61. (2006) (amended 2007). Rule 61 reads much the same way today, although one reference to *substantial* justice in the rule has been shortened simply to "justice." FED. R. CIV. P. 61.

presented. "Substantial rights," by contrast, were those concerned with the merits. Glossed in terms of these purposes, Rule 1 had a perfectly definite, if predominantly negative, purpose: to clear away the unnecessary details of common law procedure.

What was to replace it were the equity procedures that applied to all claims by virtue of Rule 2, which merged actions in equity with those at law.[46] For Charles Clark, merger of law and equity was the key to procedural reform, and from this perspective, the terms of Rule 1 served primarily to safeguard the achievements of Rule 2.[47] In the legislative debates leading up to the passage of the Rules Enabling Act in 1934, the issue of merger came up repeatedly and eventually was resolved in favor of combining law and equity.[48] While preserving the right to jury trial, the act provided that "[t]he court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both."[49] Chief Justice Hughes followed up this grant of authority with the announcement that the Court had decided to act to unify law and equity, an announcement greeted by Charles Clark and James Moore with genuine enthusiasm.[50]

The immediate objective of merger now seems irrefutable: to dissolve the distinction between the "sides" of the federal court, with actions at law governed by state procedure under the conformity acts and actions in equity governed by the federal rules of equity. The conformity acts themselves established different benchmarks for state procedure, initially requiring "static conformity" to state procedures fixed in the past and then dynamic conformity with current state procedures,[51] but in each case creating a drastic contrast between state-to-state variations on the law side and nation-wide uniformity on the equity side.[52] Much therefore depended upon which side of the federal court should hear a case, with the risk of mistaken filings on one side or the other. As with the abolition of common law technicalities, abolition of this preliminary distinction made eminent good sense, but it, too, left open the question of what would replace the old procedural rules.

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46. *See* FED. R. CIV. P. 2 ("There is one form of action–the civil action."). Since 1966, this rule has extended to admiralty cases. 4 WRIGHT ET AL., *supra* note 15, § 1014.

47. *See* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1291–92 (1935).

48. *See, e.g.*, 78 CONG. REC. 9362, 10,866 (1934).

49. Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

50. *See* Clark & Moore, *supra* note 47, at 1291–92.

51. *See* Clark & Moore, *supra* note 36, at 399–401.

52. *See, e.g.*, Clark & Moore, *supra* note 47, at 1299–1300.

Clark, and his then assistant, Moore, argued for reform based on the model of the Equity Rules of 1912.[53] Those rules, according to an influential account at the time, departed from previous rules "in the direction of simplifying the pleadings, speeding causes for hearing, and lessening the cost of taking testimony, and of appeal."[54] The model of equity procedure was not taken from historical equity practice, which had been "constantly criticized, lampooned and ridiculed because of the complexity and delays of its procedure," leading to reforms first in England and then here.[55] The story of "how equity conquered common law" has been recounted elsewhere, with the perceptive caveat that equity has not managed to keep a secure hold on all the territory it conquered.[56] It might have won the war, but lost the peace or, more accurately, become part of a hybrid regime that combined elements previously associated with both law and equity. The selective influence of equity on procedure as we know it today has its counterpart in the selective version of equity that became the model for the Federal Rules.

That version of equity also had a basis in the reformed state codes of procedure. Those codes provided for unification of equity and law, and the drafters of the Federal Rules referred to these provisions as well as to statements in the codes that anticipated the provisions of Rule 1.[57] In other respects, the state codes were already binding on the federal courts under the regime of dynamic conformity for actions at law,[58] and so the drafters of the rules could invoke the principles of the reformed state codes to support reform at the federal level. Those principles only went so far, however. Rejecting the technicalities of the common law in favor of reformed procedures in equity still left federal judges with the need to determine what were the substantial rights now protected under the new, merged procedure. What the reformed state codes and the Equity Rules of 1912 rejected as the basis for procedural rulings was clearer than what they accepted, which could be worked out only as judges exercised their discretion under the new rules.

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53. *See generally* Clark & Moore, *supra* note 36, at 415–35.

54. JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES: PROMULGATED BY THE UNITED STATES SUPREME COURT AT THE OCTOBER TERM, 1912, at 34 (7th ed. 1930).

55. *Id.* at 7, 35–36.

56. *See generally* Subrin, *supra* note 34.

57. *See* FED. R. CIV. P. 2 advisory committee's note from 1937; MOORE & FRIEDMAN, *supra* note 37.

58. *See* Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.

The triumph of equity at this point seemed to endorse "equitable discretion" as a fundamental feature of the Federal Rules. Moore, as we have seen, denied that the rules gave unlimited discretion to judges, but insisted, instead, that they required judges to give a liberal interpretation to the rules.[59] He might well have made this point to defuse the historic objection to equity, repeated by opponents of the rules, that it gave too much power to judges.[60] That objection took on added force with the restrictions that the rules placed on the right to jury trial.[61] Although the rules could not override the requirements of the Seventh Amendment,[62] as the Rules Enabling Act itself emphasized,[63] they did put obstacles in the way of obtaining a jury trial, primarily by setting very short time limits on seeking a jury trial after the close of pleading on an issue.[64] Although the time limit was recently lengthened to fourteen days, it was originally ten days.[65] Clark and Moore were particularly concerned that "[t]o make the procedure completely workable, there should be adequate provisions for waiver of trial by jury."[66] In the absence of a timely demand, and in all cases in equity, the judge alone decided the case.[67] So, too, as pretrial proceedings became more complicated through liberalized pleading, joinder, and discovery, judges had more occasions to exercise a wider range of discretion. Contrary to what Moore asserted, the liberal approach to procedure did not constrain but expanded the scope of judicial discretion.

Clark himself worried about this tendency under the rules. Although his emphasis always was on avoiding technicalities, he readily conceded the role of determinate rules in establishing a system of procedure:

> The necessity of procedure in the sense of regularized conduct of litigation is obvious. Court trials, like other matters of human conduct involving continually recurring processes, must be systematized. In no other way can a great volume of business be done at all. In no other way can it be fairly done. If there are no rules upon which suitors can depend or rely, they can be trapped or misled, while the favored friends of the tribunal are securing special treatment.[68]

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59. *See* MOORE & FRIEDMAN, *supra* note 37.
60. *See* Subrin, *supra* note 34, at 926, 928, 999.
61. *See* Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064, 1064 ("That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate.").
62. U.S. CONST. amend. VII.
63. *See* Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).
64. *See* FED. R. CIV. P. 38(b) advisory committee's note to 2009 amendment.
65. *Id.*
66. *See* Clark & Moore, *supra* note 47, at 1297.
67. *See id.* at 1297–98.
68. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U.L.Q. 297, 299, 303 (1938).

Just as Clark's endorsement of equity practice selectively focused on reformed equity practice, his complaint with the common law focused on its perception and use as an unreformed system of rigid rules.[69] Although the common law allowed certain forms of general pleading, it was perceived as a system of rigid rules.[70] Clark's allegiance was not with equity over law but with substance over technicalities. He admonished against making "the mistake our forefathers made as to equity. They believed its process could be formless, until at length they found that they were caught in technicalities more rigid than ever found in law."[71] The correct balance for Clark required both definite rules and flexible application, even if he inclined at crucial points to favor the latter over the former.[72]

Such ambivalence over the form that procedural rules should take gave still greater scope to judicial discretion, either because particular rules delegated discretion to the judge or because the judge decided whether definite rules had to give way to indefinite standards. The fundamental need was to adapt the procedural system to the changing demands upon the legal system:

> The trend of procedural rules towards undue rigidity is often at variance with a developing substantive law. New political and economic forces are likely to force new relationships between persons, and new governmental attempts to control such relationships, while the process of enforcement becomes ever slower and more cumbersome.[73]

Because procedure was "the handmaid of justice,"[74] in Clark's antiquated phrase, it had a purely instrumental role—to serve ends given from outside the system of rules itself.[75] These came predominantly from substantive law, as Clark indicated in the passage just quoted, but could also come from constitutional rights. A judgment entered without notice and opportunity to be heard violates the Due Process Clause,[76] and for that reason, denies

69. *See id.* at 300–09.
70. *See id.* ("Lawyers and judges in the old days might appear to worship form and obey formal rules. Yet they had a penchant for getting things done, and so they used the rules, with the aid now and then of some convenient fiction or subterfuge, to accomplish results without unnecessary trouble.").
71. *Id.* at 303.
72. *See* Subrin, *supra* note 34, at 964, 976.
73. Clark, *supra* note 68, at 300.
74. *See generally id.*
75. *See* Bone, *supra* note 17, at 291.
76. U.S. CONST. amend. V.

"substantial justice,"[77] even though it involves a purely procedural right. The same holds true of denial of the right to jury trial. Clark did not believe that denial of these constitutional rights—procedural though they are—amounted to mere technicalities.[78] On the contrary, he found notice and opportunity to be heard to be fundamental to all procedural systems: "notice to the defendant and opportunity to present his side of the case is an essential to the beginning of a lawsuit."[79] His instrumental approach to procedure did not—and indeed, could not—deny inherently procedural values, which implicated "substantial rights."[80]

That concession further complicates the already problematic distinction between substance and procedure. In 1938, the then-recent decision in *Erie Railroad Co. v. Tompkins*[81] had raised related questions about the scope and validity of the Federal Rules, so much so that it might have figured in the opposition of Justice Brandeis—the author of *Erie*—to adoption of the Federal Rules.[82] The Rules Enabling Act provided that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[83] It is a commonplace now that the distinction between "substance" and "procedure" can be drawn at different points for different purposes, as can the distinction between "substantive rights" and "substantial rights." Putting all the intricacies of these distinctions to one side, they underline the still more basic point that the distinctions themselves are historically conditioned and dependent upon legal context. Clark's entire approach to procedure presupposed that judges could adjust to changed circumstances to draw the correct distinction

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77. Int'l. Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

78. *See* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 73 (2d ed. 1947).

79. *Id.* Clark failed to cover service of process and jurisdiction at greater length in his book on code pleading only because these topics fell outside the narrow scope of the subject. *See id.* at 75. He elaborated a little on the need for notice and opportunity to be heard at the conference on the Federal Rules, where he expressed his opposition to service by publication because "generally speaking, in the federal courts service by publication to acquire jurisdiction is not allowed by statute." AM. BAR ASS'N, *supra* note 26, at 382.

80. For an analysis of the "substantial rights" that justify reversal of a judgment under the current version of Rule 61, see 11 WRIGHT ET AL., *supra* note 15, § 2883 (3d ed. 2012).

81. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

82. The Federal Rules were transmitted to Congress on December 20, 1937, after certiorari had been granted in *Erie* on October 11, 1937, and before it was decided April 25, 1938. EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 135–36 (2000) (citations omitted). Justice Brandeis voted against approving the rules, based on his belief—like that underlying *Erie*—that they were an example of "unnecessary centralization" and federal law. *Id.* at 169 (citing LOUIS D. BRANDEIS, BUSINESS–A PROFESSION 135–37 (1914)).

83. Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

between technicalities and substantial rights. Yet circumstances changed with *Erie*[84] even as the Federal Rules were being adopted. Several decades later, with the benefit of hindsight, we can see that drawing this distinction —and the related distinction between procedure and substance—invited yet another exercise of judicial discretion.

The Federal Rules did limit that discretion but not in the broadly framed terms of Rule 1. These invited almost any compromise between the unproblematic goals that the rule identifies. Tradeoffs between the just, speedy, or inexpensive determination of a case can be made at any point in the proceedings along several different dimensions. If Rule 1 entrenched judicial discretion at the foundation in the Federal Rules, other provisions sought to limit it, either to certain key stages of litigation or by defining and regulating specific procedural steps. The next part of this Article goes into how these other rules relate to one another and to the vision of procedural justice embodied in the rules as a whole.

IV. DISCRETION IN A REGIME OF RULES

Scattered provisions throughout the rules repeat the command of Rule 1 in more specific terms. We have already seen how Rule 61, on harmless error, implements the general principles of liberalized procedure in concrete form.[85] Errors "that do not affect any party's substantial rights" should not affect the outcome of a case.[86] Similar provisions appear elsewhere in the Federal Rules, in crucial provisions on pleading, joinder, discovery, and pretrial conference, giving the judge discretion to control pretrial proceedings, whether it is exercised or not. To focus exclusively on these provisions, however, would neglect the many others that assume a far more directive role. Some are even shorter than Rule 1 and more peremptory. For example, Rule 3 provides that an action is commenced "by filing a complaint with the court."[87] It leaves no room for the exercise of discretion and little for interpretation.[88]

Many other rules engage in the complex task of defining exactly what a procedural device consists of, such as the rules identifying the stages of pleading and discovery. If any discretion results from the operation of

84. *Erie*, 304 U.S. 64.
85. *See supra* p. 11.
86. FED. R. CIV. P. 61.
87. FED. R. CIV. P. 3.
88. *See infra* notes 133–34 and accompanying text.

rules such as these, it does so indirectly, because the rules prolong and complicate an action so that the need for judicial management increases. This kind of structural discretion plays a prominent role early in litigation. As a case approaches trial or judgment, however, the liberalizing tendencies of the rules diminish dramatically. For instance, under Rule 16(e), a "court may modify the order issued after a final pretrial conference only to prevent manifest injustice,"[89] and under Rule 60, it may modify a judgment only on the grounds and subject to the time limits specified in that rule.[90] Although the latter rule nominally recognizes "any other reason that justifies relief" and "an independent action to relieve a party from a judgment,"[91] these grounds have been very narrowly construed.[92] Judicial discretion has less and less scope as a case comes closer to resolution. More exacting rules take over at that point.

Pleading has long received the most attention as the stage early in litigation that exemplifies the liberal approach of the Federal Rules. Rule 8(e) establishes a general principle of liberal interpretation of the pleadings: they "must be construed so as to do justice,"[93] or as the rule originally read, "substantial justice."[94] Rule 15(a) follows up by giving the court discretion to grant leave to amend, adding the admonition that "[t]he court should freely give leave when justice so requires."[95] And like Rule 1, these rules are clearer in what they reject than in what they accept. They abolish the common law requirement of strict adherence to the forms of action. They leave the positive content of the pleadings to Rule 8(a), whose key provision requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[96] The Supreme Court—to the consternation of many procedure scholars—recently read this rule in *Bell Atlantic Corp. v. Twombly*[97] and *Ashcroft v. Iqbal* to require that a complaint "state a claim to relief that is plausible on its face."[98] Critics of these decisions rightly

89. FED. R. CIV. P. 16(e).
90. FED. R. CIV. P. 60.
91. *Id.*
92. 11 WRIGHT ET AL., *supra* note 80, § 2857 ("The cases calling for great liberality in granting Rule 60(b) motions, for the most part, have involved default judgments.").
93. FED. R. CIV. P. 8(e).
94. FED. R. CIV. P. 8(f) (2006) (amended 2007).
95. FED. R. CIV. P. 15(a). Rule 15 also abolishes the common law doctrine of variance, which prevented evidence at trial from going outside the issues identified by the pleadings. *See* BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 432 (3d ed. 1923). The rule states that amendments should be freely permitted at trial "when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." FED. R. CIV. P. 15(b).
96. FED. R. CIV. P. 8(a).
97. 550 U.S. 544, 570 (2007).
98. 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 576).

point out that any such requirement is inconsistent with the liberal approach to pleading espoused by Clark and the other original rulemakers.[99] What the critics only implicitly acknowledge is the indeterminacy of the original rule, which in most respects has remained unchanged. Rule 8(a) does not say what "showing" an entitlement to relief amounts to.[100] Nor does Rule 8(e) say what "justice" requires.[101] That must be filled in by the judges. It should come as no surprise that, after seventy-five years of experience under the rules, that the Supreme Court has a different vision of justice than the rulemakers originally had.

The same resort to discretion to fill in the positive content of the rules, with the same consequences for evolving interpretation of the rules, can be found in those on discovery and pretrial conference. Discovery under the Federal Rules has always proceeded under the assumption that the parties can work out most of their disputes themselves. This expectation, however, has been disappointed as often as it has been fulfilled, leading to continued revision of the rules on discovery. Through all of these changes, one feature of the rules has remained constant: judges would step in and exercise their discretion to solve the problems that the parties could not. Under the original rules, the authority for the judge to do so appeared in rules governing particular discovery devices and sanctions for discovery violations.[102] It has since been consolidated in the general provisions on discovery in Rule 26, which give judges plenary authority to assess the burden, extent, manner, and timing of discovery,[103] augmenting the authority granted by more specific rules on discovery.[104] Uniting the provisions on discovery with those on pretrial conference, the rules now require the parties to confer

99. *See* SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY 3–5 (2013) (contrasting "Old Pleading" under the Federal Rules with "New Pleading" under *Twombly* and *Iqbal*).

100. FED. R. CIV. P. 8(a).

101. FED. R. CIV. P. 8(e).

102. *See* FED. R. CIV. P. 30(b), (d) (1934) (amended 1970) (protecting parties and deponents and terminating depositions); FED. R. CIV. P. 34 (1934) (amended 1980) (requiring a motion and good cause for production of documents); FED. R. CIV. P. 35 (1934) (amended 1970) (requiring a motion and good cause for medical exams); FED. R. CIV. P. 37 (1934) (amended 1970) (covering sanctions).

103. *See* FED. R. CIV. P. 26(b)–(d).

104. *See* FED. R. CIV. P. 30(d) (regulating length of depositions); FED. R. CIV. P. 33(a) (limiting number of interrogatories); FED. R. CIV. P. 37 (describing sanctions); FED. R. CIV. P. 45(c) (regulating subpoenas).

on a scheduling order[105] and the court to issue one early in the action.[106] This conference is in addition to the final pretrial conference ordered at the court's discretion.[107] At the end of a long list of subjects that address nearly every aspect of litigation, a pretrial conference can consider "facilitating in other ways the just, speedy, and inexpensive disposition of the action."[108] Pretrial conferences began as an entirely optional matter under the original rules,[109] but have now become a standard form of case management. As with discovery, judicial discretion has not diminished, but expanded into a routine feature of federal procedure.

The rules on joinder have a similar, although more uneven, history. The current Federal Rules contain the same liberal and discretionary provisions for some forms of joinder, but not others. Rule 21 gives the court nearly unlimited power to "at any time, on just terms, add or drop a party."[110] The court can "also sever any claim against a party."[111] Rule 42 continues in the same vein by providing for consolidation of cases that "involve a common question of law or fact" and granting the court the power to "issue any other orders to avoid unnecessary cost or delay."[112] The court can also order separate trials of separate issues "[f]or convenience, to avoid prejudice, or to expedite and economize"[113] or "to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party."[114] The parties themselves can liberally join claims against each other, to the extent that any claim may be joined with any other,[115] and they can join claims against new parties arising out of the same transaction or occurrence and presenting a common issue of law or fact.[116] As joinder moves from permissive to mandatory, however, it becomes more difficult. Intervention by third-parties, addition of necessary parties, and especially certification

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105. FED. R. CIV. P. 26(f).
106. FED. R. CIV. P. 16(b).
107. *See* FED. R. CIV. P. 16(e).
108. FED. R. CIV. P. 16(c).
109. *See* AM. BAR ASS'N, *supra* note 26, at 299. At the conference on the Federal Rules, one of the drafters, Edson Sunderland, responded to a question about why pretrial conferences were discretionary in these terms: "Because if the district judges didn't like it, it wouldn't work anyway. (Laughter.)" *Id.*
110. FED. R. CIV. P. 21.
111. *Id.*
112. FED. R. CIV. P. 42(a).
113. FED. R. CIV. P. 42(b).
114. FED. R. CIV. P. 20(b).
115. *See* FED. R. CIV. P. 18.
116. *See* FED. R. CIV. P. 20(a). A defendant can join a third-party defendant only if an additional requirement is met: the new party "is or may be liable to it for all or part of the claim against it." FED. R. CIV. P. 14(a).

of class actions, must overcome significant hurdles.[117] But once additional parties are before the court, their presence calls for the exercise of increased judicial management. In class actions under Rule 23, the judge has broad authority over the conduct of the action, appointment of class counsel, and approval of settlements.[118] The rules on joinder teach the same basic lesson as those on pleading, discovery, and pre-trial conferences: As a case becomes more complicated, the need for judicial discretion correspondingly increases.

This process must come to an end at some point, although not at the same point in every case. Cases can cross the line between "technicalities" and "substantial justice" as early as a motion to dismiss for lack of personal jurisdiction, which raises questions of judicial power and due process, or as late as a claim of harmless error, which can result in entry of a judgment despite errors earlier in the proceedings. Once this line is crossed, however, the tenor of the rules changes abruptly. Liberality and structural discretion yield to simplification and finality. As we have already seen, pretrial conferences, although permeated with discretion, result in an order that can be changed only to prevent "manifest injustice."[119]

Motions for summary judgment under Rule 56 now fall firmly on the side of *substantial justice*.[120] Although they were not always thought to do so, they resemble motions for judgment as a matter of law under Rule 50—formerly known as motions for a directed verdict or judgment notwithstanding the verdict—in their dependence on evidence and the substantive law.[121] Less frequently noticed, but equally important, is their resemblance to final pretrial orders.[122] They represent the last chance to impose some structure upon a case before it proceeds to trial, or more likely, serious settlement negotiations. Partial summary judgment, in particular, operates in much the same fashion as a pretrial order defining the issues that remain in the case.[123] Discretion in the sense either of freedom to decide regardless of legal rules or immunity from appellate review plays no role on summary judgment.[124] The same could also be said of motions to dismiss for failure to state a claim, but in the absence of a significant probability that dismissal

117. *See generally* FED. R. CIV. P. 19; FED. R. CIV. P. 23; FED. R. CIV. P. 24.
118. *See* FED. R. CIV. P. 23(d)–(e), (g).
119. FED. R. CIV. P. 16(e).
120. *See* FED. R. CIV. P. 56.
121. *Compare* FED. R. CIV. P. 56, *with* FED. R. CIV. P. 50.
122. *Compare* FED. R. CIV. P. 56, *with* FED. R. CIV. P. 16(e).
123. *See* FED. R. CIV. P. 56.
124. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 754–55 (1982).

actually will be granted, a motion on this ground has little chance of narrowing the case or bringing it to a conclusion. Before the recent decisions imposing a requirement of plausibility, motions to dismiss did not do nearly as much to reduce the complexity of litigation or the resulting need for judges to exercise discretion as the case continued.

Upon examination, many provisions in the Federal Rules not directly concerned with dispositive motions operate in the same manner as Rule 56. Rule 3, as noted earlier, specifies that an "action is commenced by filing."[125] Rule 5(d)[126] and Rule 6[127] then go into detail on what constitutes filing and how time is to be computed. Rule 4 specifies the manner and effectiveness of service of process.[128] Rule 7[129] and Rule 10 identify the pleadings and the form they must take[130] and Rule 11(c) specifies the sanctions that may be imposed for improper pleading and motion practice.[131] All these provisions define the pleading stage of litigation and regulate it in a manner that only occasionally allows for judicially approved departures.[132] Such examples could be multiplied, illustrating the pervasiveness of technical provisions in the rules, which often have a decisive effect on the outcome of litigation. Motions to dismiss for failure to satisfy the statute of limitations, or for improper service of process, or for sanctions because of baseless pleadings are all largely determined by these provisions. Yet no one would deny that they implicate matters of substantial justice rather than mere technicalities: the time limits for filing suit, the need for adequate notice, and punishment for misbehavior in litigation.

Clark crusaded against procedural rules that no longer served present purposes, but he did not identify technicalities any more precisely. The Federal Rules seem to leave further elaboration to judicial discretion, but that, too, remains systematically ambiguous. It might refer either to the discretion of individual judges in particular cases or to the discretion exercised by judges in the judicial system as a whole.[133] The former alternative risks begging the question in favor of ad hoc exceptions to clear-cut rules, eroding the very advantage that such rules were originally sought to achieve.

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125. FED. R. CIV. P. 3.
126. *See* FED. R. CIV. P. 5(d).
127. *See* FED. R. CIV. P. 6.
128. *See* FED. R. CIV. P. 4.
129. FED. R. CIV. P. 7.
130. *See* FED. R. CIV. P. 10.
131. *See* FED. R. CIV. P. 11(c).
132. *See* FED. R. CIV. P. 4(m) (permitting time for service of process to be extended for "good cause"); FED. R. CIV. P. 6(b) (extending time "for good cause"); FED. R. CIV. P. 7(a) (allowing a reply to answer "if the court orders one"); FED. R. CIV. P. 11(c)(1) (providing that a court "may impose" sanctions in narrowly defined circumstances).
133. *See* Friendly, *supra* note 124, at 754–55.

A judge who held that justice would be served by finding a complaint filed one day late to be timely would defeat the clarity the statute of limitations and Rule 3 were designed to achieve. The latter alternative accommodates the Federal Rules to shifting conceptions of substantial justice without posing the problem of the variable exercise of discretion by different judges. And the Supreme Court has in fact pursued this course in diversity cases when state law provides an action is commenced by service of process, reading into the rule an exception to safeguard substantive rights under state law.[134] Rule 1 works best when it works least at the level of individual judges and instead ratifies the interpretive powers of the judiciary as a whole. It entrenches these powers, as the next part discusses in detail, but ironically, not the vision of liberal procedure contemplated by the original rulemakers. On the contrary, it opens that vision up to reconsideration of how it serves contemporary conceptions of the ultimate ends of a procedural system.

V. RULE 1 IN THE COURTS

As a rule for interpreting other rules, we should not expect Rule 1 to appear by itself in judicial opinions. By its own terms, it has to operate with other provisions in the Federal Rules or, occasionally, with other sources of law. Nevertheless, its pairing with other rules readily gives rise to suspicions that it does not make any difference by itself. It might be that the other rule, and the considerations intrinsic to its interpretation, actually determine the outcome. In this respect, Rule 1 might resemble the "rule of lenity" in criminal cases, whose actual influence seems to be inversely proportional to the number of times it is cited.[135] When a court gives a lenient interpretation to a criminal statute, it finds other reasons for doing so; and when it does not, it also finds other reasons for failing to do so. The resemblance between Rule 1 and the rule of lenity has some truth to it. Neither rule guarantees a liberal interpretation, of procedural rules in one case or criminal laws in the other. Rule 1 has been invoked to support the regime of liberal procedure under the original rules, but it also has been invoked to revise that regime. Given the broad terms in which it is cast, it could hardly escape the destabilizing interpretations that it invites.

134. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751–52 (1980) (citations omitted); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949) (citations omitted).

135. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 382–89 (1995) (explaining the "rule of lenity" ranks low in conventions for interpreting federal criminal statutes).

The Supreme Court has relied upon Rule 1 in only a handful of decisions, which can be more or less equally divided between those taking a liberal approach and those taking a restrictive approach. The decisions that emphasize the need for a "just" determination tend to be favorable to plaintiffs while those that emphasize a "speedy" and "inexpensive" determination tend to favor defendants.[136] The latter have predominated in recent years, as has the use of Rule 1 by the lower federal courts to enhance their role in managing litigation.[137] This role was confirmed by amendments in 1993 that added "administered" to the terms of the rule, so that the other rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[138] Administration need not work exclusively to the benefit of either plaintiffs or defendants, although it does work to increase the discretion of the district court. The contrary trend, evident in the recent decisions on pleading, runs against judicial management as the substitute for definite rules of procedure.[139] These decisions effectively move discretion upward from the trial court to the appellate courts, which have now taken on a larger role in determining the sufficiency of pleadings.

Rule 1 made its initial appearance in the Supreme Court in decisions on the negative accomplishments of the Federal Rules and, in particular, on the consequences of the merger of law and equity. Before the merger, rulings on equitable defenses to actions at law would have counted as appealable orders granting or denying an injunction. After the merger, such rulings looked like any interlocutory order which, because it lacked finality, created the risk of multiple, piecemeal appeals in a single case. This result contradicted both Rule 2 on merger and Rule 1 insofar as it required efficient litigation. The argument to this effect at first received a mixed reception in the Supreme Court[140] but eventually prevailed over traditional doctrine premised on dividing a single federal court into a "law" side and an "equity" side.[141]

Another early decision recognized the liberal approach to amendment under the rules, rejecting the consequences of mistaken pleading at common law. *Foman v. Davis* reversed a decision that denied leave to amend a

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136. Bone, *supra* note 17, at 293, 297.

137. *See id.* at 294.

138. *Id.* at 287, 294 (quoting FED. R. CIV. P. 1).

139. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684–86 (2009) (rejecting "careful case management" approach as an alternative to stricter pleading standards (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007))); Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 900–03, 905, 908 (2009).

140. *Compare* Ettelson v. Metro. Ins. Co., 317 U.S. 188, 191 (1942) (rejecting argument against appealability based on Rule 1), *with* City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 257–58 (1949) (accepting the argument).

141. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283–84 (1988).

complaint.[142] The Court recognized that granting leave to amend was within the discretion of the district court under Rule 15(a), but it gave priority to the requirement that leave be "freely given."[143] As much as any other decision, *Foman* reveals the complicated relationship between liberal procedure and discretion. On the one hand, it required the court to neglect mistakes that do not affect the merits of the action.[144] On the other hand, it necessitated a decision by the court about what constitutes the merits of the case, and to the extent it is allowed to go forward, it required the exercise of further discretion at a later stage, such as discovery, which requires judicial management.[145]

Another decision along the same lines is *Surowitz v. Hilton Hotels Corp.*, which reversed the dismissal of a derivative action.[146] The dismissal had been based on the named plaintiff's verification of the complaint, under what is now Rule 23.1,[147] despite inadequate knowledge of its factual basis.[148] The Court found the knowledge of the attorneys assisting the plaintiff to be sufficient, paraphrasing the terms of Rule 1, without explicitly citing it.[149] The Court reasoned:

> The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court.[150]

Like *Foman*, *Surowitz* denied discretion to the district court in some respects—to inquire too closely into verification of the complaint—and augmented it in others—by requiring the derivative action to go forward to a stage requiring judicial management.

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142. 371 U.S. 178, 182 (1962). The Court also required the notice of appeal to be liberally construed for much the same reasons, although notices of appeal technically fall within the scope of the Federal Rules of Appellate Procedure. *Compare id.*, *with* FED. R. APP. P. 3.

143. *Foman*, 371 U.S. at 182. The provision now reads that "[t]he court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). Courts continue to rely upon Rule 1 to support liberal amendment of the pleadings. *See* McCauley v. City of Chicago, 671 F.3d 611, 628 (7th Cir. 2011) (Hamilton, J., dissenting).

144. *See Foman*, 371 U.S. at 181–82 (citing Conley v. Gibson, 355 U.S. 41, 48 (1957)).

145. *See id.* at 182.

146. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373–74 (1966).

147. FED. R. CIV. P. 23.1.

148. *See Surowitz*, 383 U.S. at 367.

149. *See id.* at 365.

150. *Id.* at 373.

The Supreme Court's turn away from the negative aims to the positive aims of the Federal Rules also signaled a turn away from decisions tending to favor plaintiffs and prolonging litigation to decisions with the opposite effect. *Celotex Corp. v. Catrett*[151] is the leading decision in this change of direction. It also accounts for much of the popularity that Rule 1 has subsequently enjoyed in the lower courts.[152] The Supreme Court quoted the rule in support of the proposition that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole."[153] The decision made it clear that a defendant, who did not have the burden of proof at trial, could prevail on summary judgment by pointing to the absence of evidence that the plaintiff had to produce in support of a crucial element in her case.[154] Failure to produce sufficient evidence went directly to the merits of the plaintiff's claim, unlike a defect in pleading that could be cured by amendment. The Court re-examined the balance among the ends identified in Rule 1 and found that they favored increased use of summary judgment under Rule 56.[155] In many subsequent decisions, the lower federal courts have cited *Celotex* and quoted its interpretation of Rule 1.[156]

In other decisions of the Supreme Court, Rule 1 made incidental appearances. It has been equated with the requirements of due process[157] and cited as a reason to control costs assessed against a losing party.[158] It has functioned also to enhance judicial control over discovery,[159] as well as to support—or at least not contradict—a literal reading of other rules.[160] In all these cases, the rule might be dismissed as a makeweight. It could hardly

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151. 477 U.S. 317 (1986).
152. *See* 4 WRIGHT ET AL., *supra* note 15, § 1029, at 170 n.17.
153. *Celotex*, 477 U.S. at 327.
154. *See id.* at 322–23.
155. *See id.* at 327.
156. 4 WRIGHT ET AL., *supra* note 15, § 1029, at 170 n.17.
157. *See* Nelson v. Adams USA, Inc., 529 U.S. 460, 465–66 (2000) (indicating error to simultaneously amend complaint and judgment to automatically impose liability on new defendant).
158. *See* Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 234–35, 235 n.5 (1964) (citing FED. R. CIV. P. 1) (finding the district court has discretion to deny excessive witness costs assessed against losing party).
159. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 542, 546 (1987) (resorting to international convention to conduct discovery overseas not required instead of other discovery devices subject to judicial supervision); Herbert v. Lando, 441 U.S. 153, 176–77 (1979) (emphasizing dictum on broad power of court to control discovery in libel case brought by public figure).
160. *See* Schiavone v. Fortune, 477 U.S. 21, 27 (1986) (discussing Rule 15(c) on relation back of amendments to a complaint); Delta Air Lines, Inc. v. August, 450 U.S. 346, 355–57 (1981) (explaining Rule 68 on offers of judgment). For further discussion of these cases, see Johnston, *supra* note 23, at 1359–72.

override the commands of the Due Process Clause;[161] it does not detract from the broad control that judges exercise over discovery and costs;[162] and it does not supersede the specific terms of other rules.[163] Yet these appearances of the rule are as important for what they do not say as for what they do. None of these decisions work simply to liberalize procedure, let alone systematically reduce the burdens on plaintiffs. Instead, as Bone has said, the lower courts recently "have used Rule 1 to justify restricting discovery, screening frivolous suits more aggressively, promoting settlement more strongly, and managing cases more actively."[164]

That use of the rule may explain how it fits with the recent decisions, *Twombly* and *Iqbal*, on pleading under the Federal Rules. Rule 1 did make an appearance in the second of these cases, but only by way of its sentence on the scope of the rules: that they applied uniformly to "all civil actions."[165] This provision led the Court to conclude that all pleadings, whether in antitrust actions like *Twombly* or civil rights actions like *Iqbal*, must meet the new standard of plausibility. The Court recognized that the Federal Rules rejected "the hypertechnical, code-pleading regime of a prior era,"[166] but critics of the decisions nevertheless have argued that it reinstated these technicalities by another name under the heading of "plausibility."[167] These criticisms were framed in terms that could have come right out of Rule 1: that the stricter standard increases the cost of litigation and results in the dismissal of meritorious cases, with only marginal gains in the speedy disposition of cases.[168] Empirical studies have yet to prove this claim, although almost all find some negative effect on plaintiffs resulting from these decisions.[169] While the jury remains out on the wisdom of *Twombly*

161. U.S. CONST. amend. V; *see Nelson*, 529 U.S. at 465.
162. *See Herbert*, 441 U.S. at 176–77.
163. *See Société Nationale*, 482 U.S. at 542–43.
164. Bone, *supra* note 17, at 298–99; *see also* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 6–22 (2011) (summarizing cases relying upon Rule 1 to increase judicial control over litigation, especially discovery); Johnston, *supra* note 23, at 1349–52, 1375–81 (discussing inconsistent use of Rule 1 by lower courts).
165. Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (quoting FED. R. CIV. P. 1).
166. *Id.* at 678.
167. DODSON, *supra* note 99, at 55, 79 (identifying justice effects and cost effects of *Twombly* and *Iqbal*).
168. *Id.* at 79.
169. *See, e.g.*, David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1213–33 (2013) (analyzing strengths and weakness of empirical studies of *Twombly* and *Iqbal*); *see also* DODSON, *supra* note 99, at 83–106.

and *Iqbal* as policy, the justices have clearly spoken on the balance of factors identified in Rule 1: "speedy" and "inexpensive" should have more weight, even if "just" retains the value it always had.[170]

The critics rightly sense that a different balance would have been struck by the original rulemakers.[171] But those same rulemakers invited just this kind of rebalancing by the terms of Rule 1 itself. Where they envisaged discretion by the district judge to be exercised in favor of liberality, the current Supreme Court takes the opposite view.[172] Seen in that light, *Twombly* and *Iqbal* simply extend the approach of *Celotex* from summary judgment to motions to dismiss for failure to state a claim. Screening out weak cases, so far as the pleadings can disclose them, now has acquired renewed urgency. This step does not, contrary to the critics of these decisions, return procedure to the regime of common law pleading. No particular form of words would have saved the complaints in *Twombly* and *Iqbal*—only allegations that could have been supported by further knowledge of the facts. The decisions raise the 21st century problem of asymmetrical access to evidence, not the 19th century problem of differential decisions based on counsel's skill as a writ-writer.[173] The Court might well have offered the wrong solution to the current problem, but its mistake was not in adopting the solution to the old problem. At several points in *Twombly*[174] and *Iqbal*, the Court confronted the cost of obtaining further evidence through discovery and made a determination that it was not worth the benefit in the absence of plausible pleading in the complaint.[175] The Court might well have guessed wrong in making this determination, and it might have aggravated its mistake by inviting other judges to guess wrong by asking them to assess plausibility based on judicial "experience and common sense."[176] Further studies might confirm such assertions, but, even if they do, they hardly establish that the Court reached results fundamentally at odds with the Federal Rules when it balanced factors that the rules themselves single out as controlling.

This is not to make Rule 1 part of the solution. It is part of the problem, not least because it can be cited on either side of the current controversy over pleading. Speed, expense, and justice all cut both ways on the desirability

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170. FED. R. CIV. P. 1.

171. *See, e.g.*, David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972–74 (1989) (noting the aim of the framers of the rules to sweep away technicalities of pleading with new rules).

172. *See* Bone, *supra* note 17, at 294, 297.

173. *See* DODSON, *supra* note 99, at 108–11 (explaining that new pleading requirements tend to screen out cases in which plaintiffs lack crucial information in the possession of defendants).

174. *See* 550 U.S. 544, 546–47 (2007).

175. 556 U.S. 662, 685–86 (2009).

176. *Id.* at 663–64 (citing *Twombly*, 550 U.S. at 556).

of screening cases more thoroughly before proceeding to discovery. The capacity of the rules to change, ideally by amendments after thorough study of the possible consequences, has diminished in recent decades. As with the current proposal to repeal the authorized forms for sufficient pleading, amendments to the rules follow interpretation rather than lead them. Rule 1 might be justified as a candid admission of the full range of conflicting considerations that must enter into any kind of procedural reform, but it offers too little guidance about how to analyze those conflicting considerations. Leaving the decision to the discretion of the courts, either at the trial level in administering the rules or at the appellate level in construing the rules, does not do enough to fill in the affirmative requirements of any workable procedural system. Rule 1 encapsulates the conflicting ambitions of procedural reform without doing enough to resolve the tensions between them.

VI. CONCLUSION

Charles Clark and the other framers of the Federal Rules offered a vision of procedure that has much to recommend it. Their fundamental insight—that past procedural forms may no longer serve present purposes—still has force today, and in many respects, it has outlived the particular reforms that it succeeded in bringing about. At the beginning of the bureaucratic age, the rulemakers could see the potential in judicial discretion to replace the outworn technicalities of the common law. After many decades under the Federal Rules, that postulate deserves to be re-examined, and to some extent it has, in the proliferation of detailed provisions in the rules themselves. The immediate aim of Rule 1 in superseding the technicalities of common law procedure has long since been accomplished, and with it, any need for judges to rely on this provision, or any other in the rules, as a source of freestanding values and unlimited discretion. Neither Rule 1, nor the Federal Rules as a whole, should any longer be taken to endorse a model of discretionary justice.

Rules laid down by appellate courts or derived from substantive law, as the rulemakers themselves recognized, can also define and limit judicial discretion. These decisions confirm the broad discretion that judges possess over procedure, but not at the trial level alone or through unstructured balancing of ultimate goals of a procedural system. Clark's instrumental approach to procedure—as the means to ends defined elsewhere—presupposes that those ends can be brought to bear in more structured and definite form. They include the substantive rights that he emphasized and the procedural rights, such as notice and opportunity to be heard, that he

tacitly accepted. If anything, the generation of legal scholars that followed him went too far in rejecting this insight, away from an instrumental theory toward independent procedural values. *Process theorists* saw procedure as the solution to too many problems.[177] They inadvertently demonstrated the opposite of what they sought to prove: not the power of general procedural theory, but its emptiness. The more abstract it becomes, the less guidance it has to offer.

Seen in this light, Rule 1 is just a prominent example of the diminishing returns from increasingly abstract procedural theory. Instead of looking for a thick theory of procedure that answers all the questions raised by litigation in the bureaucratic state, we would do well to look for a thin theory—one that takes its goals from values that have roots in substantive law and the right to notice and opportunity to be heard. The exercise of judicial discretion within a procedural code has to be informed by sources outside it, if judges are not to lose their way in abstractions that are otherwise impossible to pin down. Clark's instrumental vision of procedure, suitably qualified, offers this fundamental insight. A critical look at Rule 1 shows us how to get there, and to get beyond the terms of the rule itself.

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177. The classic statement is in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994):

> The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.