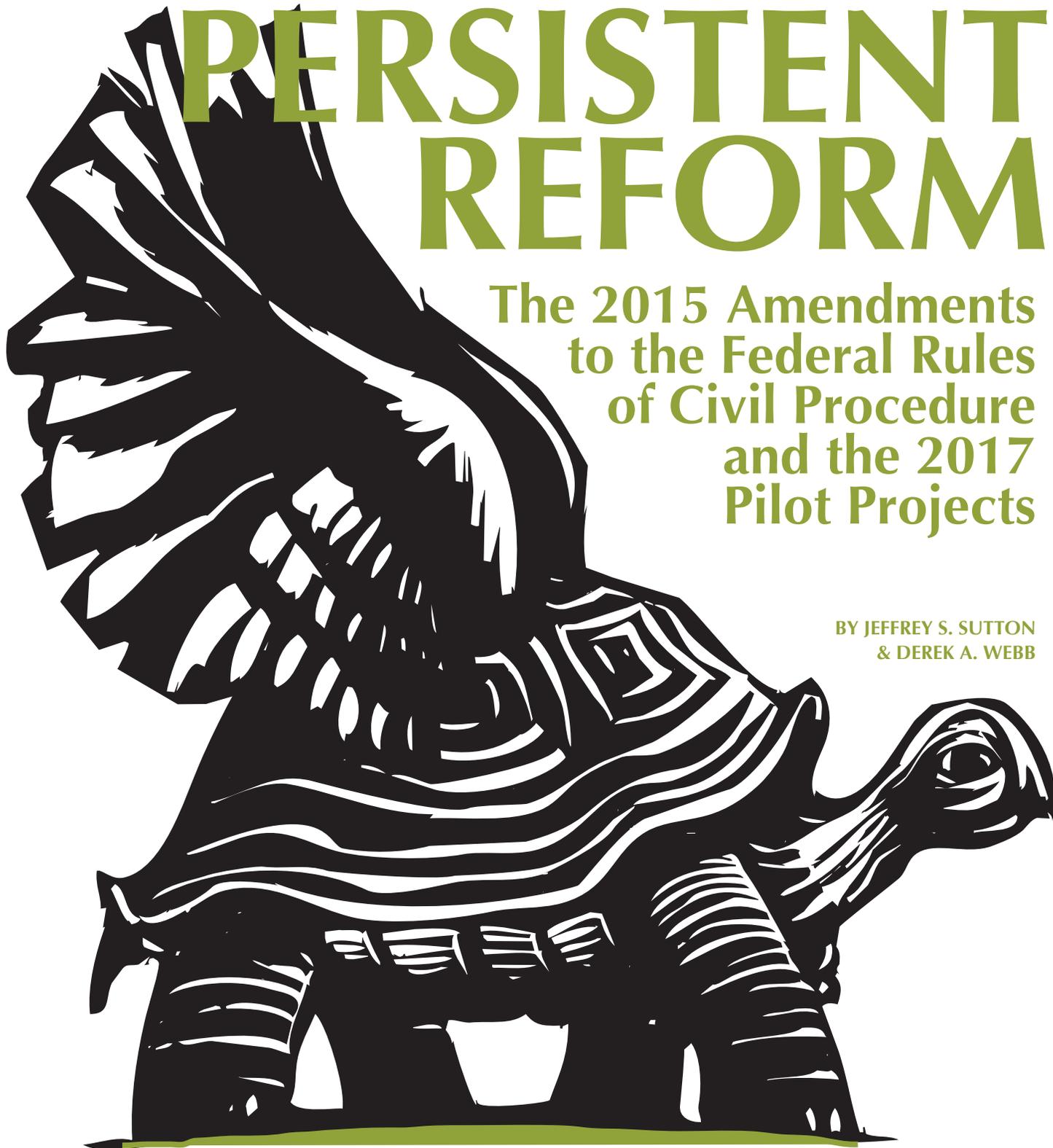


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BOLD AND PERSISTENT REFORM

The 2015 Amendments
to the Federal Rules
of Civil Procedure
and the 2017
Pilot Projects

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AT 6 P.M. ON NEW YEAR'S EVE, 2016, AS MOST AMERICANS WERE SETTling IN TO WATCH COLLEGE FOOTBALL GAMES OR PREPARING TO GO TO A NEW YEAR'S EVE PARTY, CHIEF JUSTICE JOHN ROBERTS RELEASED HIS YEAR-END REPORT ON THE FEDERAL JUDICIARY.¹ THE THEME OF THE 2016 REPORT WAS THE DISTRICT COURT JUDGE.

The Chief Justice highlighted the distinct challenges district court judges face. Working mostly outside the public eye, they “stand alone and unassisted,” carrying out their “crucial role” as the principal trial judges, perhaps indeed the principal judges, of the federal court system. Tasked with an enormous range of responsibilities, an effective district court judge must be a “jack of all trades.” Inside the courtroom, they serve as a “calm central presence,” making evidentiary rulings and resolving motions “without the luxury of calm consideration and research in the quiet of chambers.” Outside the courtroom, district court judges confront a “daunting workload” of some 500 cases waiting in the wings and must therefore be able administrators and astute and creative problem solvers as well. On or off the bench, the job “requires long hours, exacting skill, and

intense devotion — while promising high stress, solitary confinement, and guaranteed criticism.”²

The job also is not static. New types of cases, new ways of gathering and preserving evidence, and an ever-burgeoning caseload constantly add unanticipated stresses to the system. To keep up, district courts must be vigilant in updating the way they handle their case load. Just as a “lumberjack saves time when he takes the time to sharpen his ax,”³ district courts must continually refine their approaches to stay on top of a daunting docket.

The Chief Justice mentioned two ax-sharpening devices in his report: the 2015 amendments to the Federal Rules of Civil Procedure and the 2017 pilot projects authorized by the Judicial Conference of the United States to test other initiatives designed to improve the efficiency and fairness of civil litigation.⁴

The 2015 amendments include several reforms intended to streamline discovery and case resolution. They place a proportionality limit on discovery. They encourage district judges to meet promptly with the lawyers once the complaint is filed to confer about the needs of the case and to put together a case management plan. They suggest ways to expedite the resolution of pretrial discovery disputes. And they clarify the important issues relating to the preservation and loss of electronically stored information.⁵

The two pilot projects — an Expedited Procedures Pilot and a Mandatory Initial Discovery Pilot — propose additional reforms designed to promote the goals of Civil Rule 1: “the just, speedy, and inexpensive determination of every action and proceeding.” And both confront the risk that, when courts fail to resolve cases in a speedy and inexpensive way, it’s fair to question whether any such resolution can be just.

The two pilots take different paths. The Expedited Procedures Project requires litigants and judges to handle the discovery phase of each case more promptly through firm deadlines: a cap on the amount of time for discovery, a requirement that judges promptly resolve dispositive motions, and time limits for the final dispositions of cases. The Mandatory Initial Discovery Project requires initial disclosure of information helpful *and* harmful to the parties at the outset of the case and without prompting by formal discovery requests.

Each pilot project has historical roots worth recalling. Complaints about discovery are not new. And efforts to address those complaints have come in many forms. The failures of two earlier reform efforts, in 1980 and 1993, offer helpful lessons for today’s initiatives. Of special note are the dissenting statements of Justices Lewis Powell and Antonin Scalia in response to those efforts. ▶

Before describing the dissents and their relation to the 2015 Rules Amendments and the 2017 Pilot Projects, a word (or two) is in order about the Rules Enabling Act of 1934. The Act empowers the Supreme Court to “prescribe” rules of practice and procedure for the federal courts. It delegates responsibility for working out the details of those rules to the Judicial Conference of the United States, which in turn delegates that responsibility to a standing committee and various advisory committees composed of experienced judges, lawyers, and law professors. After the rules committees complete their work, typically in two to three years’ time, the Supreme Court must approve the rules. After that, the Court transmits the proposals to Congress. And if Congress does not reject or alter them within the seven months provided under the Act, they become law.⁶

In addition to approving or rejecting rules proposals as a group, individual justices from time to time have issued dissents. But it does not happen often, making the Powell and Scalia dissents noteworthy and worth revisiting.

BEYOND TINKERING: JUSTICE POWELL AND THE VIRTUES OF THINKING BIG

In the three decades after the Federal Rules of Civil Procedure were created in 1938, judges, practitioners, and scholars largely supported the expansive opportunities for discovery made possible by the new federal rules. The Supreme Court told lower courts and practitioners that the discovery rules should be accorded a “broad and liberal treatment.”⁷ “No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”⁸ Broad discovery makes a trial “less a game of blind man’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”⁹ If a trial is a search for the truth, broad discovery was perceived as its indispensable handmaiden.

But the thinking of the bench and bar began to shift by the 1970s. Many came to view the pretrial discovery phase as rife

with abuse, whether through unreasonable discovery demands or opposition to reasonable discovery demands. An exponential growth in discoverable information did not help. As the price of broad discovery grew in terms of time and money, it became easy to question the cost-benefit tradeoff. Rather than providing a preliminary X-ray of the merits of the parties’ claims, as originally intended, discovery had become a “self-contained universe with a life of its own.”¹⁰ If broad discovery had been the “Cinderella of changes” in the Rules of Civil Procedure of 1938, warned Professor Arthur Miller, the “carriage ha[d] turned into a pumpkin” by the 1970s, requiring “major changes” if the rules were ever “to be a carriage again.”¹¹

To address these concerns, Chief Justice Warren Burger convened the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice in April of 1976.¹² The three-day conference commemorated the 70th anniversary of Roscoe Pound’s 1906 address entitled “Popular Dissatisfaction with the Administration of Justice,” which had kick-started efforts to create the new federal rules of procedure, and met in the same room in the Minnesota State Capitol in which Pound had delivered the speech.¹³ Burger lamented the “sporting theory of justice,” first criticized by Pound, in which lawyers prioritized private advantage over justice in the pretrial writ system.¹⁴ Even though the Federal Rules of Civil Procedure had eliminated many forms of pleading-stage thrusts and parries, it had shifted “exaggerated contentiousness” to discovery.¹⁵ “[W]idespread complaints” had emerged among lawyers about discovery procedures that were “being misused and overused.”¹⁶ The problem fell hardest on “small litigants” who could not afford to wait out parties with “long purses” that protracted the early stages of litigation.¹⁷ Burger called for a reexamination of the discovery rules, urging the Judicial Conference and the Standing and Advisory Committees to reconsider them “boldly, not timidly.”¹⁸

At the turn of the last century, Burger observed, many lawyers would have taken

a trolley car or horse and buggy to the Minnesota State Capitol to hear Pound’s speech. But by 1976, the trolley car was gone and parking meters had replaced hitching posts. “Perhaps what we need now,” Burger added, “are some imaginative Wright brothers of the law to invent and Henry Fords of the law to perfect new machinery for resolving disputes.”¹⁹ Pound had worried that “we have been tinkering where comprehensive reform is needed.”²⁰ Burger called upon the legal community to seek “fundamental changes” and “major overhaul” rather than to settle for mere “tinkering.”²¹

Burger’s call for an overhaul set several wheels in motion. After the meeting, the ABA Board of Governors made three suggestions: (1) narrow the scope of discovery from material “relevant to the *subject matter* involved in the pending action” to material “relevant to the issues raised by the *claims* or *defenses* of any party”; (2) provide for a prompt discovery conference if requested by any party; and (3) limit interrogatories to 30.²² President Jimmy Carter’s Attorney General, Griffin Bell, approved all three suggestions,²³ and Chief Justice Burger urged the Rules Committee to hold hearings on “any proposals the legal profession considers appropriate.”²⁴

The Advisory Committee on Civil Rules moved to implement the suggestions and published the three amendments for comment. They received considerable feedback — and criticism.²⁵ Those criticizing the change in the scope of discovery from “subject matter” to “issues” or “claims and defenses” pointed out that the Advisory Committee had no evidence that the phrase “subject matter” caused courts to permit overly broad discovery.²⁶

In response to the negative comments from nearly 40 individuals and five bar groups, the Advisory Committee withdrew two of the proposals (narrowing discovery to issues and limiting interrogatories to 30) and left in place the third (holding a discovery conference).²⁷ The Committee Note mentioned the “widespread criticism of abuse of discovery” and said that the Committee had considered limiting the scope of discovery and

limiting the number of interrogatories.²⁸ But “abuse of discovery,” the Committee believed, “is not so general as to require such basic changes in the rules that govern discovery in all cases. . . . In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.”²⁹ With that, the Rules Committees and the Judicial Conference transmitted the revised package to the Court for its review.

The Supreme Court approved the package in 1980. Justice Powell, joined by Justices Potter Stewart and William Rehnquist, dissented, marking the first time that three justices had dissented from a rule proposal.³⁰ The issues were not new to Justice Powell. In delivering the inaugural Orison S. Marden Memorial Lecture before the New York City Bar Association in 1978, he had warned that “we have no more pressing duty than to fashion effective remedies for the twin evils of civil litigation — delay and expense. Abuse of discovery is a prime culprit.”³¹ In Court opinions, he had made similar points. In one, he targeted “the widespread abuse of discovery that is a prime cause of delay and expense in civil litigation” and highlighted the work of the Pound Conference and what he saw as promising rule

changes proposed by the ABA.³² “As the years have passed,” he added in another, “discovery techniques and tactics have become a highly developed litigation art — one not infrequently exploited to the disadvantage of justice.”³³ “The glacial pace of much litigation,” he added in a third, “breeds frustration with the federal courts and, ultimately, disrespect for the law.”³⁴

Justice Powell’s dissent from the 1980 rule proposal gave him an opportunity to express these concerns in the context of the concrete as opposed to the abstract, in the context of specific rules reforms rather

than general pleas for adaptation. “[T]he changes embodied in the amendments,” as he saw it, “fall short of those needed to accomplish reforms in civil litigation that are long overdue.”³⁵ Powell dissented not from what the new rules included but from what they left out. He discussed the steps by which the Committee had taken up the suggestions of the ABA and rejected two of them after the public comment period. At the same time that he acknowledged the Committee’s difficult task in trying to develop a consensus

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for all of the changes, he could not refrain from critiquing its final work product: “[W]hatever considerations may have prompted the Committee’s final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery.”³⁶

Although some discovery was essential to litigation, he added, the scope and duration of discovery had spread beyond reasonable bounds. “Delay and excessive expense now characterize a large percent-

age of all civil litigation.”³⁷ And “as every judge and litigator knows,” the culprit was discovery procedures.³⁸ “Lawyers devote an enormous number of ‘chargeable hours’ to the practice of discovery.”³⁹ In simple cases, discovery could take weeks. In complex cases, it could take years. And the length and cost discovery now regularly added to litigation stacked the deck in favor of wealthy litigants at the expense of the “average citizen” for whom access into federal court was becoming cost prohibitive:

[A]ll too often discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.⁴⁰

Modest and halting reforms, in his view, stood little chance of removing this shadow. Worse than that, they might delay effective reform for another decade. Because any single reform of a rule takes a minimum of three to four years to pass and confronts many blocking possibilities along the way,

the approval of minor changes diminishes the resolve needed to make major changes down the road. In Powell’s words: “The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.”⁴¹

Echoing Pound and Burger, Justice Powell warned that the 1980 reforms amounted to “tinkering changes” when ▶

true reform demanded a “thorough re-examination of discovery rules.” He did not stand alone. Others shared Powell’s disappointment with the Rules Committees’ tiny steps. The ABA Section of Litigation called the amendments “an insufficient response to a serious problem.”⁴² Scholars wrote articles faulting the Advisory Committee for not going further.⁴³ Others wrote pieces exploring how district court judges could pick up the pieces and control discovery abuse on their own.⁴⁴ Five years out from the modest reforms of 1980, one scholar remarked that “Justice Powell proved prophetic. The 1980 amendments did little to stem the rising tide of discovery abuse because they did not address the underlying causes.”⁴⁵

LOOKING BEFORE LEAPING: JUSTICE SCALIA AND THE VIRTUES OF EXPERIMENTATION

If the 1980 reforms suffered from a failure of resolve, the 1993 amendments suffered from an excess of ambition. Up to then, parties typically initiated discovery through formal requests. In an effort to “accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information,” the Advisory Committee proposed altering Rule 26 to require parties to turn over certain core pieces of information “relevant to disputed facts alleged with particularity in the pleadings.”⁴⁶ As proposed, the amendment required litigants to disclose the information regardless of whether it helped or hurt their side.

Since the late 1970s, judges and scholars had been considering the merits of mandatory initial disclosure, hoping it might prompt a cultural shift among lawyers.⁴⁷ The “sporting theory of justice,” thought Pound and Burger, had permitted, perhaps facilitated, a legal culture that shortchanged the prompt and fair resolution of disputes.⁴⁸ The result was an approach to discovery that often imposed additional costs without benefit and undue process without gain.⁴⁹

Mandatory initial disclosure, it was hoped, might address these problems. It

would help lawyers see themselves not only as partisan advocates of their clients but also as officers of the courts. And it would help them appreciate that they not only had obligations to the discovery of truth but also to the integrity of the judicial system — cousins to, if not siblings of, government lawyers in criminal cases under *Brady*.⁵⁰

Proponents of the plan thought that laying obviously relevant cards on the table up front would have other downstream benefits as well. It would permit parties to evaluate their cases more promptly, leading to early settlements in some cases and earlier trials in others.⁵¹ It would streamline and expedite any additional discovery, decreasing depositions and interrogatories in the process.⁵² It would save costs and weed out cases that should never have been filed in the first place.⁵³ And it would increase access to justice by reducing financial barriers to court.⁵⁴

In 1991, the Advisory Committee on Civil Rules sought public comment on a proposal that required plaintiffs and defendants to disclose information that was “likely to bear significantly on any claim or defense.”⁵⁵ Comments on the proposal were not favorable. Of the 264 written comments submitted to the Rules Committee, 251 opposed it.⁵⁶ Seventy people appeared at two public hearings to testify against the amendment on behalf of businesses, bar associations, and public-interest groups.⁵⁷ The American Bar Association, the American Corporate Counsel Association, Public Citizen Litigation Group, the American Civil Liberties Union, the American Institute of Certified Public Accountants, American Trial Attorneys, the NAACP Legal Defense Fund, the Defense Research Institute, and the Product Liability Advisory Council all opposed the amendment.⁵⁸

At the close of the public comment period, the Advisory Committee reconsidered the proposal and opted to remove the initial disclosure provision.⁵⁹ The proposed Committee Note said that further local experimentation was needed before proceeding further: “It is appropriate that any national standard prescribing

the type, form and timing of required disclosures not be adopted until some experience has been gained under these various local plans.”⁶⁰

Six weeks later, however, the Advisory Committee reversed course again and voted to proceed with the reform without waiting for local experimentation.⁶¹ As one judge put it, experimentation would push “the whole of the national amendment process back to 1996.”⁶² At the same time that the Advisory Committee moved forward with an initial discovery requirement, it narrowed the scope of it. The revised amendment did not require disclosure of anything that bears on a claim but only information “relevant to disputed facts alleged with particularity in the pleadings.”⁶³

The Court approved the reform on April 22, 1993, but with several asterisks. Chief Justice Rehnquist, in his transmittal letter to Congress, noted that the Court approved only the procedures by which the reform had been promulgated, not the substance of the reform itself.⁶⁴ Justice White penned a concurring statement, the first concurrence in the history of the federal rules, echoing Rehnquist’s agnosticism and questioning the Rules Enabling Act’s requirement that the Supreme Court approve the handiwork of the Advisory Committee and the Judicial Conference.⁶⁵

Justice Scalia, joined by Justices Clarence Thomas and David Souter, dissented.⁶⁶ Scalia worried that requiring lawyers to turn over information potentially harmful to their clients’ interests was at odds with the adversarial culture of the American legal system.⁶⁷ And he noted that the reform had met with near “universal criticism” “from every conceivable sector of our judicial system,” a set of criticisms that initially prompted the Advisory Committee to pull the reform back “in favor of limited pilot experiments” before they decided, six weeks later and without further public comment, to recommend a revised rule.⁶⁸

Justice Scalia focused his criticisms on timing and experience. He maintained that such a “novel” revision of the discovery rules should not be under-

taken without testing through local pilot projects.⁶⁹ In contending that the amendments were “premature,”⁷⁰ he used the reformers’ words against them. “It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, been subjected to any significant testing on a local level.”⁷¹ Instead of waiting for the results of a three-year pilot project, the Advisory Committee preferred “to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.”⁷²

Justice Scalia was not the only one to criticize the rulemakers’ refusal to rely on pilot projects. Professor Linda Mullenix observed that the Advisory Committee had little empirical data to draw upon in formulating its rule.⁷³ And Professor Stephen Burbank criticized the rulemakers for showing a “studied indifference to empirical questions.”⁷⁴

While Congress allowed the amendment to go into effect on Dec. 1, 1993, just barely,⁷⁵ the reform had a brief life. It remained unpopular. Anticipating that some district courts might not appreciate the reform, the Advisory Committee included an opt-out provision. Within four years, 45 out of the country’s 94 district courts exercised this right of first refusal.⁷⁶ Of the remaining districts, many of them made the disclosures voluntary. In view of the house-divided nature of the new discovery regime and a growing preference for a uniform set of rules on such an important feature of federal trial practice, the Advisory Committee amended the rule again in 2000. The new rule retained a framework for mandatory initial disclosure, but limited it, critically, to information that the party might “use to support *its* claims or defenses.”⁷⁷ That was a distant call from the 1993 requirement that parties

turn over all information at the outset of the case “relevant to disputed facts alleged with particularity in the pleadings.”

With that, the 1993 reforms came to an end. By pushing for bold reform against widespread opposition, armed with anecdotes and testimonials but without empirical data based on local testing, the Advisory Committee accomplished little. Justice Scalia had no problem

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with the idea that “[c]onstant reform of the federal rules to correct emerging problems is essential.”⁷⁸ But in carrying out that mission, Scalia emphasized the importance of looking before leaping—that the Rules Committees and Judicial Conference should experiment with ambitious rule reforms before adopting them nationwide. Under the Rules Enabling Act, the rulemakers have a duty to carry on “a continuous study of the operation and effect of the general rules of practice and procedure.”⁷⁹ But the duty of careful study, Scalia claimed, preceded the duty of recommendation, and sometimes that study required local experiments first. Had the Advisory Committee taken this route, had it tested the new regime of mandatory initial disclosure locally for three years from 1993 to 1996, a more enduring reform, one way or another,

might have been in place by 1998 — a timeline that may have looked slow in 1993 but looks positively swift today.

THE 2015 CIVIL RULES AMENDMENTS AND THE 2017 PILOT PROJECTS

At first glance, the themes of Justice Powell’s 1980 dissent and Justice Scalia’s 1993 dissent point in opposite directions. A recommendation that the Rules Committees act boldly and promptly to rectify problems with civil discovery is difficult to square with a recommendation that the Committees conduct local trials of significant reforms before adopting them. The former gets things done; the latter is a recipe for delay and runs the risk of waiting too long to implement any reform at all.

But the 2015 Civil Rules Amendments and the 2017 Pilot Projects, when examined together, embrace essential kernels of wisdom reflected in both perspectives. Before describing these reforms in more detail, it’s worth remembering why discovery reform remains as essential today as it was in 1980 and 1993 — perhaps more essential today than it ever has been.

Consider these observations and questions about American civil litigation circa 2017:

- Broad civil discovery may well have made sense in 1938, permitting each side to engage in a no-stone-unturned search for the truth, all paid for by the other side. But those rules were designed for what was then a discrete world of “paper” and “thing” discovery. With the creation of copying machines, the amount of paper discovery increased significantly. And with the development of the internet, the amount of discoverable information increased exponentially. There are a lot more stones than there used to be.
- In the face of this transformation of information creation and preservation, does our discovery system still honor the imperatives of Civil Rule 1: “the

just, speedy, and inexpensive determination of every action”? In many cases, it’s doubtful that we can respect a liberal model of fence-and-be-fenced discovery without slighting the goals of “speedy” and “inexpensive” litigation. In a world of electronic discovery, the kind of prolonged and costly search for the truth associated with a “just” resolution of each action at some point ends up at cross-purposes with that same goal.

- The American judicial system is the envy of the world. But what country has adopted our system of civil discovery? Not one to our knowledge. Other countries seem to be doing everything they can to avoid importing American discovery practices into their legal systems. Let’s hope that this is not what people mean when they refer to American exceptionalism.
- The ever-increasing globalization of business will lead to a growth in international disputes. As matters now stand, isn’t it likely that international businesses will be wary about litigation in American courts? If a company is based in a country that does not use our system of broad civil discovery — which is to say, all of them — it’s easy to wonder whether such companies will prefer dispute resolution in American courts.
- It’s not just that there is a striking contrast between discovery in this country and the rest of the world. There is also a remarkable contrast in this country between the discovery practices used in civil cases and in another set of cases devoted to a search for the truth: criminal cases. Try looking for an analogue to Civil Rules 26 through 37 in the Federal Rules of Criminal Procedure. You will not find one. Why? Do our courts resolve criminal cases less fairly, less justly, than civil cases? Or do we just insist on more process for disputes about money rather

than liberty? These questions deserve consideration and answers.

- One long-cherished value when it comes to American dispute resolution has been the right to a jury trial, reflected in the Sixth and Seventh Amendments to the United States Constitution. But as many point out, the number of civil jury trials is decreasing, if not disappearing in many courts.⁸⁰ For example, the

THE SLOW PLODDING TORTOISE DID WIN IN AESOP’S FABLE. BUT THE SPEEDY AND IMPATIENT HARE HAS HIS ROLE TO PLAY AS WELL. IN THE CONTEXT OF THE 2017 PILOT PROJECTS, DESIGNED TO IMPROVE THE SPEED, EFFICIENCY, COST-EFFECTIVENESS, AND OVERALL RESPONSIVENESS OF THE FEDERAL COURTS, IT MAY YET BE POSSIBLE TO PUT THE SLOW AND DELIBERATE PACE OF THE TORTOISE IN THE SERVICE OF THE FLEET-FOOTED HARE.

number of civil trials in all federal district courts dropped from 12,018 in 1984 to 3,555 in 2006.⁸¹ In 1962, juries resolved 5.5 percent of federal civil cases; since 2005, the rate has been below 1 percent.⁸² And in the 30-year period from 1970 to 1999, while the total number of civil filings in federal courts rose by 152 percent, the number of cases that were tried by federal judges dropped by 20 percent.⁸³ At the same time, there is a growing shortage of lawyers with the skill and experience to try civil cases, a development that should surprise no one. The skill set of most civil litigators now turns on managing discovery before motions for summary judgment rather than managing evidence

before jury trials. Our colleges and high schools have many mock trial programs but no mock discovery programs with mock depositions and mock interrogatories. And yet the latter would be far more useful (if a lot less interesting) to students than the former if they ever become lawyers, at least as things now stand.

- Just as the forces of creative destruction play out every day in American capitalism, with some businesses thriving and others exiting the stage, so the same may happen one day with American dispute resolution. If the federal bench and bar do not reform civil litigation, American businesses and individuals eventually will do it for them. The free market of dispute resolution will eventually punish lawyers and judges who fail to pay attention to what is happening and adjust to it.
 - One option will be the state courts, where plenty of innovation is already taking place. Two surveys show that civil litigators in Arizona prefer the state courts to the federal courts.⁸⁴ Arizona, by the way, has a 25-year-old system of mandatory voluntary disclosure much like the coming federal pilot.
 - Another option is mediation and arbitration, which minimizes (and sometimes eliminates) discovery. Statistics show that this is a growth industry, here and abroad.⁸⁵ That’s fine if it happens to be a better form of dispute resolution for a given conflict and a given set of parties. But that development is troubling if it merely reflects a frustration with the costs, delays, and uncertainties of federal civil litigation.
- Increased arbitration and mediation is not cost free. The American legal system is still a precedent-driven one. Arbitration and mediation generally do not create precedents, and certainly not binding ones. If court resolution ever becomes the “alternative” in alternative dispute resolution, one can fairly

worry about the necessary creation of precedents needed to guide lawyers and parties. It's not even clear that arbitration and mediation will work without a wellspring of judicial precedents.

As the above suggests, the concerns that animated the 1980 and 1993 Civil Rules amendments remain with us and, if anything, are more salient today. All of which explains the impetus behind the 2015 Civil Rules amendments and the 2017 pilot projects. And all of which takes us back to Justices Powell and Scalia.

Today's reforms fuse both pieces of advice — by thinking and acting boldly through the 2015 amendments and by testing other reforms at the local level through pilot projects before deciding to nationalize them. Taken together, the reforms seek to steer a prudent course between tinkering changes and sweeping overhaul.

The 2015 amendments were not timid. For starters, the amendments fully adopt one of the original 1980 proposals and improve on it. As amended, Civil Rule 26 refers to discovery not of “any matter relevant to the subject matter” of the action but only to information relevant to the parties’ “claims or defenses.”⁸⁶ It also eliminates language that referred to the discovery of any information “reasonably calculated to lead to the discovery of admissible evidence.”⁸⁷ Perhaps most critically, discoverable information not only must be relevant to the parties’ claims or defenses, but it also must be “proportional to the needs of the case.”⁸⁸

That's not all. For the first time since 1938, Civil Rule 1 places a responsibility upon the *parties* as well as the court to ensure the “just, speedy, and inexpensive determination of every proceeding.”⁸⁹ And the amendments shorten several crucial early deadlines. Plaintiffs must serve their complaint within 90 days (down from 120) after filing it.⁹⁰ And courts must issue their scheduling orders within 90 days (down from 120) after any defendant has been served, or 60 days (down from 90) after any defendant has appeared.⁹¹ To encourage active, in-person scheduling conferences between the court and counsel, the Rules Committee deleted

language that previously allowed the conference to occur “by telephone, mail, or other means.”⁹² On top of all that, the amendments clarified the parties’ preservation responsibilities when it comes to electronically stored information, limiting sanctions “to instances of intentional loss or destruction.”⁹³

The pilot projects offer the prospect of still more far-reaching reforms. The Expedited Procedures Pilot draws upon practices already employed by some judges and turns on the intuition that the less time courts give litigants to conduct discovery, the more they will focus on the reasonable discovery needs of each case.

The pilot has five features: (1) a scheduling conference as soon as possible but no later than 90 days after any defendant is served or 60 days after any defendant appears; (2) a time limit on discovery of no more than 180 days, with the possibility of one extension for good cause; (3) the prompt resolution of discovery disputes through conferences and short submissions rather than formal briefing; (4) the resolution of dispositive motions within 60 days of the filing of the reply brief; and (5) a firm trial date so that the trial starts within 14 months of service (for 90 percent of the cases) and within 18 months of service (for the remaining 10 percent of the cases).

By setting these time limits, the pilot aims to “concentrate the mind” of lawyers and judges alike to resolve disputes in as expeditious a manner as possible.⁹⁴ It may be difficult to draft rules that *require* reasonable behavior when it comes to discovery and other pretrial procedures. But it may be possible to *mandate* reasonable behavior by setting fixed time periods to undertake these activities — requiring lawyers and their clients to use weeks and months rather than years to focus on the essentials of a case.

The Mandatory Initial Discovery Pilot takes a different tack and is a refined outgrowth of the 1993 discovery proposal. Drawing upon court rules already used in several states and the Employment Law Protocols,⁹⁵ the pilot tests whether mandatory and immediate court-ordered

discovery prior to traditional party-initiated discovery will decrease expenses and delay. The pilot increases the amount of information parties must disclose at the outset of the case. Under the pilot, both parties must disclose information helpful *and* harmful to their position. In the language of the pilot's standing order, the parties would turn over information “relevant to *any party's* claims or defenses” as opposed to the current requirement under Rule 26 that they turn over information that the responding party “may use to support *its* claims.”⁹⁶

Each pilot is slated to last three years.⁹⁷ With the help of the data-collection capabilities of the Federal Judicial Center, the pilots will gauge whether the reforms increase the efficiency and fairness of the trial process and perhaps even gain popularity among lawyers and judges in the trial-run districts. In this way, the pilot projects may realize the vision of Justice Powell *and* Justice Scalia by adopting reforms that are bold yet empirical, far-reaching yet experimental.

This will take time, no doubt. And it is perhaps ironic that pilot projects designed to improve the speed and efficiency of federal litigation may delay reform. But that is the fair price of combining the virtues of thinking big and slow, of boldly attempting to transform judicial and legal culture surrounding the self-contained world of pretrial discovery based squarely upon empirical data mined from local experimentation. And it's a fair price for addressing the risk aversion and change aversion of lawyers. As Justice Powell pointed out in his 1980 dissent, “it often is said that the bar has a vested interest in maintaining the status quo.”⁹⁸ In order to increase the speed of litigation — one of the chief goals of Rule 1⁹⁹ and a problem lamented in the ages of Shakespeare and Dickens, a problem indeed dating back to Magna Carta¹⁰⁰ — one must first be prepared to go slowly and sometimes experimentally in the domain of rule reform and judicial administration.

These promising reforms call to mind another Year-End Report that Chief Justice Roberts penned, in 2014.¹⁰¹ ▶

Closing out his discussion of the pace with which federal courts adopt technological change, he drew his readers' attention to the often-overlooked east pediment of the Supreme Court facing Second Street. "It is flanked by imagery drawn from a well-known fable: A hare on one side sprints in full extension for the finish line, while a tortoise on the other slowly plods along. Perhaps to remind us of which animal won that famous race, Cass Gilbert placed at the bases of the Court's exterior lamp-posts sturdy bronze tortoises, symbolizing

the judiciary's commitment to constant but deliberate progress in the cause of justice."¹⁰² The slow plodding tortoise did win in Aesop's Fable. But the speedy and impatient hare has his role to play as well. In the context of the 2017 pilot projects, designed to improve the speed, efficiency, cost-effectiveness, and overall responsiveness of the federal courts, it may yet be possible to put the slow and deliberate pace of the tortoise in the service of the fleet-footed hare. ♦



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¹ CHIEF JUSTICE JOHN G. ROBERTS, 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2016); <https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf> [hereinafter 2016 YEAR-END REPORT].

² *Id.* at 3–8.

³ *Id.* at 7.

⁴ *Id.* at 6–7.

⁵ *Id.* at 6; see also Ted Hirt, *Important Amendments to the Federal Rules of Civil Procedure*, WASH. LAWYER, Oct. 2015.

⁶ 28 U.S.C. §§ 2072–2074 (1934).

⁷ *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

⁸ *Id.*

⁹ *United States v. Procter & Gamble*, 356 U.S. 677, 682 (1958).

¹⁰ Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery through Local Rules*, 30 VILLANOVA L. REV. 767, 771 (1985).

¹¹ CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 81, at 542 (4th ed. 1983).

¹² Judge Paul V. Niemeyer, *Revisiting the 1938 Rules*

Experiment, 71 WASH. & LEE L. REV. 2157, 2169 (2014).

¹³ For background on the influence of Roscoe Pound's speech on the creation of the Federal Rules of Civil Procedure, see for example, Austin Scott, *Pound's Influence on Civil Procedure*, 78 HARV. L. REV. 1568 (1965); Jay Tidmarsh, *Pound's Century, And Ours*, 81 NOTRE DAME L. REV. 513 (2006); Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead)*, 82 INDIANA L. J. 1193 (2007).

¹⁴ Chief Justice Warren Burger, *Agenda for 2000 A.D. – Need for Systematic Anticipation*, 15 JUDGES' J. 27, 29 (1976).

¹⁵ *Id.* at 31.

¹⁶ *Id.* at 33.

¹⁷ *Id.* at 32.

¹⁸ *Id.* at 28.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 32.

²² Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 754 (1998).

²³ *Id.* at 755.

²⁴ Burger, *supra* note 14, at 33.

²⁵ Marcus, *supra* note 22, at 758–59.

²⁶ *Id.* at 758.

²⁷ *Id.* at 759.

²⁸ Fed. R. Civ. P. 26(f), Advisory Committee's Note to 1980 Amendment.

²⁹ *Id.*

³⁰ Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980) (Powell, J., dissenting) [hereinafter Powell dissent].

³¹ Justice Lewis Powell, *Reforms – Long Overdue, Orison S. Marden Memorial Lecture*, 33 REC. A.B. CITY N.Y. 458, 461 (1978).

³² *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081, 1086–87 (1979).

³³ *Herbert v. Lando*, 441 U.S. 153, 179 (1979).

³⁴ *Roadway Express v. Piper*, 447 U.S. 752, 757 n.4 (1980).

³⁵ Powell dissent, *supra* note 30.

³⁶ *Id.* at 522.

³⁷ *Id.*

³⁸ *Id.* at 522–23.

³⁹ *Id.* at 523.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 458 (1991).

⁴³ Maurice Rosenberg & Warren King, *Curbing Discovery Abuse in Civil Litigation: Enough Is Enough*, 1981 BYU L. REV. 579 (1981).

⁴⁴ Wayne Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873 (1981); Frank F. Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1 (1983); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984).

⁴⁵ Cavanagh, *supra* note 10, at 780.

⁴⁶ Fed. R. Civ. P. 26(a), Advisory Committee's Note to 1983 Amendment.

⁴⁷ See, e.g., Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178 (1991).

⁴⁸ Brazil, *supra* note 47, at 1304.

⁴⁹ Judge Ralph Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 263–64 (1992); see also Schwarzer, *supra* note 47, at 178–79; Judge Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV.

- 635 (1989); Angela R. Lang, *Mandatory Disclosure Can Improve the Discovery System*, 70 IND. L. J. 657, 661-67 (1995).
- ⁵⁰ Brazil, *supra* note 47, at 1311-15, 1332, 1349; M. E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 U. COLO. L. REV. 51, 53-56 (1982); Wright & Miller, *Federal Practice & Procedure* § 2053 (3d ed. 2010) (drawing an analogy between disclosure requirements in criminal law and the civil discovery system).
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- ⁵² Schwarzer, *supra* note 47, at 183.
- ⁵³ Schwarzer, *New Discoveries*, *supra* note 51; Brazil, *supra* note 47, at 1357-58.
- ⁵⁴ Schwarzer, *supra* note 47, at 179.
- ⁵⁵ Lisa Trembly, *Mandatory Disclosure: A Historical Review of the Adoption of Rule 26 and an Examination of the Events that have Transpired Since its Adoption*, 21 SETON HALL LEGIS. J. 425, 438-39 (1997).
- ⁵⁶ Alfred W. Cortese & Kathleen L. Blaner, *A Change in the Rules Draws Fire: Litigators Fight to Stop Mandatory Disclosure*, NATIONAL L. J., Oct. 18, 1993.
- ⁵⁷ *Id.*
- ⁵⁸ Griffin B. Bell, Chilton Davis Varner, and Hugh Q. Gottschalk, *Automatic Disclosure in Discovery — The Rush to Reform*, 27 GA. L. REV. 1, 28-29, n. 110 (1992).
- ⁵⁹ Ann Pelham, *Judges Make Quite a Discovery; Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, LEGAL TIMES, March 16, 1992.
- ⁶⁰ Bell et al., *supra* note 58, at 35.
- ⁶¹ Minutes of the Apr. 13-15, 1992 Meeting of the Advisory Committee on Civil Rules, at 6-7.
- ⁶² Ann Pelham, *Panel Flips, OKs Discovery Reform*, LEGAL TIMES, Apr. 20, 1992.
- ⁶³ *Id.*
- ⁶⁴ Carl Tobias, *The Transmittal Letter Translated*, 46 FLA. L. REV. 127 (1994).
- ⁶⁵ Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 501-506 (1993) (White, J., concurring).
- ⁶⁶ *Id.* at 507 (Scalia, J., dissenting) [hereinafter Scalia dissent].
- ⁶⁷ *Id.* at 511.
- ⁶⁸ *Id.* at 512.
- ⁶⁹ *Id.* at 511-12.
- ⁷⁰ *Id.* at 510.
- ⁷¹ *Id.* at 511 (citation omitted).
- ⁷² *Id.* at 512. Congress had passed the Civil Justice Reform Act (CJRA) in 1990 that required pilots in the federal courts, and the civil rules changes became those pilots.
- ⁷³ Linda Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810 (1991).
- ⁷⁴ Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).
- ⁷⁵ William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1 (1993); Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 309 (1994).
- ⁷⁶ Donna Stienstra, Fed. Judicial Ctr., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (March 30, 1998).
- ⁷⁷ Fed. R. Civ. P. 26(a)(1)(A)(i) (emphasis added).
- ⁷⁸ Scalia dissent, *supra* note 66, at 512-13.
- ⁷⁹ 28 U.S.C. § 331. For a discussion of the singular role Ed Cooper, the Reporter of the Civil Rules Advisory Committee since 1992, has played in encouraging the committee to incorporate empirical analysis into its "continuous study" of the rules, see Mark R. Kravitz, David F. Levi, Lee H. Rosenthal, and Anthony J. Scirica, *They Were Made for Each Other: Professor Edward Cooper and the Rules Enabling Act*, 46 U. MICH. J. L. REFORM 495, 513-17 (2013).
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- ⁸² Civil Jury Project at NYU School of Law, available at <http://civiljuryproject.law.nyu.edu/about/> (last visited July 18, 2017).
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- ⁸⁴ AMERICAN COLLEGE OF TRIAL LAWYERS & INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS (Sept. 9, 2008); INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYS., SURVEY OF THE ARIZONA BENCH & BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 12 (2010); *see also*, Andrew D. Hurwitz, *Possible Responses to the ACTL/IAALS Report: The Arizona Experience*, 43 ARIZ. ST. L.J. 461 (2011).
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- ⁸⁶ Fed. R. Civ. P. 26(b)(1), Advisory Committee's Note to 2015 Amendment.
- ⁸⁷ *Id.*
- ⁸⁸ *Id.*
- ⁸⁹ Fed. R. Civ. P. 1, Advisory Committee's Note to 2015 Amendment.
- ⁹⁰ Fed. R. Civ. P. 4(m), Advisory Committee's Note to 2015 Amendment.
- ⁹¹ Fed. R. Civ. P. 16, Advisory Committee's Note to 2015 Amendment.
- ⁹² Fed. R. Civ. P. 16, Advisory Committee's Note to 2015 Amendment.
- ⁹³ Fed. R. Civ. P. 37(e), Advisory Committee's Note to 2015 Amendment.
- ⁹⁴ Report of the Advisory Committee on Civil Rules to the Standing Committee, Dec. 9, 2016, 13-14; *see also* Attachment 4 to the Report, "Description of the Expedited Procedures Pilot Project," in the Agenda Book of the Standing Committee on Rules of Practice and Procedure, Jan. 3, 2017, 97-98.
- ⁹⁵ "Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action," Federal Judicial Center, Nov. 2011.
- ⁹⁶ Report of the Advisory Committee on Civil Rules to the Standing Committee, Dec. 9, 2016, 14-15; *see also* Attachment 5 to the Report, "Mandatory Initial Discovery Pilot Project Standing Order with Introduction," in the Agenda Book of the Standing Committee on Rules of Practice and Procedure, Jan. 3, 2017, 101-06.
- ⁹⁷ Report of the Advisory Committee on Civil Rules to the Standing Committee, Dec. 9, 2016, 13-14.
- ⁹⁸ Powell dissent, *supra* note 30, at 521.
- ⁹⁹ Fed. R. Civ. P. 1 (stating that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").
- ¹⁰⁰ Magna Carta Art. 40 (1215) ("To none will we sell, to none will we deny, to none will we delay justice."); *see also* Niemeyer, *Revisiting the 1938 Rules Experiment*, *supra* note 12, at 2177 (suggesting a comparison between the sealing of Magna Carta in Runnymede in 1215 and the creation of the Federal Rules of Civil Procedure in Washington, D.C. in 1938).
- ¹⁰¹ CHIEF JUSTICE JOHN G. ROBERTS, 2014 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2014).
- ¹⁰² *Id.* at 11-12.