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Patrick J. Johnston



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PROBLEMS IN RAISING PRAYERS TO THE LEVEL OF RULE: THE EXAMPLE OF FEDERAL RULE OF CIVIL PROCEDURE 1

PATRICK JOHNSTON*

How should rules of civil procedure direct the dispute-resolution processes of our courts? For over fifty years, Rule 1 of the Federal Rules of Civil Procedure has attempted to guide civil litigation in the United States district courts by associating the Rules with a set of overarching values.¹ Since 1938, the second sentence of Rule 1 has mandated that courts construe the Rules to "secure the just, speedy, and inexpensive determination of every action."² Despite the longevity of Rule 1, we have yet to examine closely the problems presented by a rule that attempts to direct through the recitation of process values.³ This Article

* Associate Professor of Law, Widener University School of Law; J.D. University of Chicago School of Law 1980. I would like to thank Professors Jean Macchiaroli Eggen, Robert Hayman, and Mary Brigid McManamon for their comments on this Article. I also would like to thank Constance Clarke, Jason Cohee, and Matthew Zamites for their research assistance in preparing this Article.

¹ Future references to the Federal Rules of Civil Procedure, either in whole or in part, will be by "Rule."

² From 1938 until its amendment in December 1993, the second sentence of Rule 1 provided that "[t]hey [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." *E.g., Proposed Amendments to the Federal Rules of Civil Procedure and Forms*, reprinted in 146 F.R.D. 535 (1993). The current text of Rule 1 is set forth *infra* note 10. For purposes of the following discussion, references to Rules that were later amended will be cited to the applicable Rule and the year in which the relevant language was effective. In other words, a citation to a Rule followed by a particular year will indicate that the Rule was amended subsequent to the year indicated.

³ For general discussions of values associated with dispute resolution procedures, see Robert A. B. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893, 908-21 (describing the goals of the civil justice processes as including resource allocation, social justice, fundamental rights protection, public order, human relations, legitimacy of governing institutions, and efficient administration of social enterprises); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172-77 (describing "litigation values" including "dignity values, participation values, deterrence values, and . . . effectuation [of rights] values"); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 845-59 (1984) (identifying "valued features" for litigants, decision makers, and the decision making process itself); Thomas D. Rowe, Jr., *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*,

undertakes that examination.

The federal courts have not stood alone in preaching the trinity of procedural virtues identified in Rule 1.⁴ Securing the "just, speedy, and inexpensive determination" of disputes is not an exclusive credo for civil litigation in the federal district courts. Rather, the litany has become a widely adopted mechanism for assessing the value of dispute resolution generally.⁵ Indeed, the trinity has become so imbedded in our traditions of dispute resolution that even critics of the federal courts have chanted the trinity refrain to bolster agendas for reform.⁶ In short, the trinity is perceived as a basic tenet of modern dispute resolution, an article of faith

1989 DUKE L.J. 824, 847-50 (American Law Institute Background Paper) (identifying procedural values and goals including fairness in treatment of litigants, accuracy in fact finding, decisions in accord with applicable norms, and administrative efficiency).

⁴ Throughout this Article I will refer to the phrase "just, speedy, and inexpensive determination of every action" as the "Rule 1 trinity" or the "trinity."

⁵ For dispute resolution systems that have adopted the trinity or a text similar to the trinity, see FED. R. BANKR. P. 1001; ALA. R. CIV. P. 1(c); ALASKA R. CIV. P. 1; ARIZ. SUPER. CT. R. CIV. P. 1; ARK. R. CIV. P. 1; COLO. R. CIV. P. 1; DEL. SUPER. CT. R. CIV. P. 1; DEL. CODE ANN. tit. 10, § 561(b) (1995); D.C. SUPER. CT. R. CIV. P. 1; FLA. R. CIV. P. 1.010; GA. CODE ANN. § 9-11-1 (Michie 1993); HAW. R. CIV. P. 1; IDAHO R. CIV. P. 1(a); IND. R. TRIAL P. 1; IOWA R. CIV. P. 67; ME. R. CIV. P. 1; MASS. R. CIV. P. 1; MICH. CT. R. 1.105; MINN. R. CIV. P. 1; MISS. R. CIV. P. 1; MO. SUP. CT. R. CIV. P. 41.03; MONT. R. CIV. P. 1; NEV. R. CIV. P. 1; N.M. MAGIS. CT. R. CIV. P. 2-101; N.M. METRO. CT. R. CIV. P. 3-101; N.Y. CIV. PRAC. L. & R. 104 (McKinney 1990); N.D. R. CIV. P. 1; OKLA. ST. ANN. tit. 12, § 2001 (West 1993); OR. R. CIV. P. 1(B); PA. R. APP. P. 105; R.I. SUPER. CT. R. CIV. P. 1; S.C. R. CIV. P. 1; TENN. R. CIV. P. 1; UTAH R. CIV. P. 1; VT. R. CIV. P. 1; WASH. SUPER. CT. CIV. R. 1; W. VA. R. CIV. P. 1; WIS. STAT. § 801.01(2) (1994); WYO. R. CIV. P. 1; *see also* FED. R. EVID. 102 ("These rules shall 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 truth may be ascertained and proceedings justly determined.").

Commentators have also viewed the trinity as embodying the essential purpose of government dispute resolution systems. *See, e.g.,* Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 853 (1989) (describing the trinity as stating the "central objective of rules of procedure in the judicial system"); Richard L. Marcus, *Myth & Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 1 (1983) (referring to the "central goal of the Federal Rules of Civil Procedure articulated in Rule 1"); Mark A. Nordenberg, *Foreword to Symposium, The Future of Federal Litigation*, 50 U. PITT. L. REV. 701, 702 (1989) (characterizing the trinity as reflecting "timeless and worthy aspirations" useful in assessing the effectiveness of the Rules).

⁶ For example, Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990)—referred to as the Civil Justice Reform Act of 1990—mandates the implementation of "civil justice expense and delay reduction plans" in each district court for the purpose of "ensur[ing] the just, speedy, and inexpensive resolution of civil disputes." 28 U.S.C. § 471 (1994).

in Anglo-American civil procedure.⁷ As stated in one of the early district court opinions referring to the Rule 1 trinity, "with that provision no one can complain."⁸

In December 1993, Congress and the Supreme Court reaffirmed their faith in the trinity by amending Rule 1 to broaden the scope of its application.⁹ The amendment provided that the Federal Rules of Civil Procedure shall be "administered" as well as "construed" to secure the trinity.¹⁰ The Advisory Committee note¹¹ accompanying amended Rule 1

⁷ See, e.g., REPORT OF THE U.S. JUDICIAL CONFERENCE, AD HOC COMMITTEE ON ASBESTOS LITIGATION 10 (1991) (reporting that "[t]he volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice . . . speedy and inexpensive resolution of cases"). Professor Paul Carrington has opined that the Rule 1 trinity articulates the "lofty aims" of the century-old reform movement that cumulated in the passage of the Rules Enabling Act of 1934. Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 299. Professor Carrington has also suggested that the seeds of the trinity can be found in early nineteenth century English jurisprudence. *Id.* at 299 n.122 (quoting a "more florid version of Rule 1" found in 2 SPEECHES OF HENRY, LORD BROUGHMAN 485 (1938)).

⁸ *Schick Dry Shaver, Inc. v. General Shaver Corp.*, 26 F. Supp. 190, 191 (D. Conn. 1938).

⁹ The change was part of a series of amendments proposed by the Judicial Conference Advisory Committee on Civil Rules (the "Advisory Committee") and published in August 1991 as a preliminary draft for public comment by the Committee on Rules of Practice and Procedures of the Judicial Conference of the United States (the "Standing Committee"). The Standing Committee published proposed amendments to Rules 1, 11, 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 43, 54, 56, 58, 83, and 84. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, reprinted in 137 F.R.D. 53, 53-155 (1991) [hereinafter *Proposed Amendments: 1991*]. Prior to publication, the Advisory Committee had informally circulated most of the proposed amendments to various groups and individuals for comments and suggestions. See Letter from Sam C. Pointer, Jr., Chairman of the Advisory Committee, to Honorable Robert E. Keeton, Chairman of the Standing Committee (June 13, 1991), reprinted in 137 F.R.D. 63 (1991) [hereinafter *Pointer/Keeton Letter*]. The Advisory Committee gave final approval to amended Rule 1 on April 15, 1992, and forwarded it to the Standing Committee on May 1, 1992, prior to submission to the Supreme Court. See Letter from Sam C. Pointer, Jr., Chairman of the Advisory Committee, to Honorable Robert E. Keeton, Chairman of the Standing Committee (May 1, 1992) (copy on file with author). The Supreme Court adopted the amendment to Rule 1 on April 22, 1993. See Letter from Chief Justice William H. Rehnquist to Honorable Thomas S. Foley, Speaker of the House of Representatives (Apr. 22, 1993), reprinted in 146 F.R.D. 403 (1993). Amended Rule 1 became effective on December 1, 1993. Notice Concerning Amendments to Federal Rules, reprinted in 151 F.R.D. 145 (1994). For a complete account of the 1993 amendments, see David D. Siegel, *The Recent (Dec. 1, 1993) Changes in the Federal Rules of Civil Procedure: Background, the Question of Retroactivity, and a Word About Mandatory Disclosure*, reprinted in 151 F.R.D. 147 (1994).

¹⁰ Rule 1 currently provides:

describes the purpose of the amendment as highlighting the duty of judges and attorneys to ensure that civil litigation is "resolved not only fairly, but also without undue cost or delay."¹²

The Advisory Committee had intended the amended trinity to serve a weightier role than the current Advisory Committee note suggests. The Committee envisioned amended Rule 1 as a proclamation of the "central theme and purpose" for a host of rule amendments proposed with the amendments to the trinity in 1991.¹³ Among the underlying goals of this "theme and purpose" were: changing practices to achieve the Rule 1 trinity more effectively; reducing excessive delays and expense in civil litigation; curtailing and eliminating frivolous claims and defenses; reducing

SCOPE AND PURPOSE OF RULES

These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed *and administered* to secure the just, speedy, and inexpensive determination of every action.

FED. R. CIV. P. 1 (new matter indicated by emphasis). Included in the December 1993 amendments was a change to Rule 16 that echoed the trinity. The amendment to Rule 16 provided in pertinent part:

PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

....

(c) Subjects for Consideration at Pretrial Conferences

At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

....

(16) such other matters as may *facilitate* the just, speedy, and inexpensive disposition of the action.

FED. R. CIV. P. 16 (new matter indicated by emphasis). Neither the Advisory Committee note accompanying the proposed amendment to Rule 16, *Proposed Amendments: 1991*, *supra* note 9, at 86, nor the new FED. R. CIV. P. 16 advisory committee's note (1993), specifically address the changes noted above. However, both notes do suggest that pretrial conferences are "most effective and productive when the parties participate in a spirit of cooperation and mindful of their responsibilities under Rule 1." *Proposed Amendments: 1991*, *supra* note 9, at 86 (note accompanying proposed amendments to Rule 16); FED. R. CIV. P. 16 advisory committee's note (1993).

¹¹ The notes of the Advisory Committee are informative and may be given considerable weight in interpreting the Rules, but they do not provide conclusive interpretations. *E.g.*, *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946).

¹² The full text of the Advisory Committee note reads:

The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to assure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

FED. R. CIV. P. 1 advisory committee's note (1993).

¹³ Pointer/Keeton Letter, *supra* note 9, at 64; *see also id.* at 66 (describing the proposed addition to Rule 16, *supra* note 10, as capturing this theme).

burdens on litigants; and preserving scarce judicial resources.¹⁴

Despite the hope that amended Rule 1 would proclaim a procedural gospel, the public demonstrated little interest in the proposed amendment. In May 1992, the Advisory Committee prepared a summary of public comments concerning the amendments proposed in August 1991.¹⁵ The summary consists approximately of sixty-two, single-spaced pages, but comments concerning Rule 1 occupy only ten lines of the text.¹⁶ The Advisory Committee also held public hearings on its proposed rule amendments.¹⁷ Again, although the recorded testimony occupies 827 pages¹⁸—incorporating comments from seventy participants—a scant

¹⁴ Pointer/Keeton Letter, *supra* note 9, at 64. The statement above is consistent with an earlier draft of a note for amended Rule 1 prepared by the Reporter for the Advisory Committee, Professor Paul D. Carrington:

The purpose of the revision is to reflect numerous changes in these rules and in their operation that recognize an affirmative duty of the court to employ the authority conferred by these rules to diminish the cost and delay of civil litigation. While it is not the proper role of the court under these rules to assume the role of counsel to the parties, neither is it proper for the court to allow its scarce energies and resources to be wasted, nor should it allow these rules to be employed for the purpose of imposing avoidable costs and delay on opposing parties or, especially, on persons not before the court.

Letter from Honorable Robert E. Keeton to Professor Patrick Johnston, Widener University School of Law (Aug. 3, 1994) (attachment) (copy on file with author). The text of an earlier draft of amended Rule 1 to which Professor Carrington's note referred was identical to the text of the amended Rule first published in August 1991 that became effective in December 1993. *Id.*; see also Letter from Professor Paul D. Carrington, Duke University School of Law, to Professor Patrick Johnston (July 10, 1994) (copy on file with author).

¹⁵ ADVISORY COMM. ON THE CIVIL RULES, JUDICIAL CONFERENCE OF THE U.S., *Comments Received on Proposed Amendments Published for Comment in August 1991* (May 1992) [hereinafter *Public Comment Summary*] (copy on file with author).

¹⁶ *Id.* at 2. The text of the Summary with respect to Rule 1 contains only cursory indications of support or opposition to the proposed amendment. *E.g., id.* ("The American Civil Liberties Union supports this revision. ATLA opposes this revision as incompatible with the aims of the Rules by increasing judicial discretion. The Association of the Bar of the City of New York (ABCNY) committee approves this change. The Beverly Hills Bar Association supports this revision.").

¹⁷ The Advisory Committee held the first set of public hearings in Los Angeles on November 21, 1991. COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., *Hearings on Proposed Amendments to the Federal Rules of Civil Procedure and Rules of Evidence* (Los Angeles, Ca., Nov. 21, 1991) [hereinafter *Los Angeles Transcript*] (copy on file with author). The Advisory Committee also held hearings in Atlanta on February 19-20, 1992. COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., *Hearings on Proposed Amendments to the Federal Rules of Civil Procedure and Rules of Evidence* (Atlanta, Ga., Feb. 19-20, 1992) [hereinafter *Atlanta Transcript*] (copy on file with author).

¹⁸ The transcript of the Los Angeles hearing consists of 288 pages, excluding cover pages and indices of Advisory Committee members and speakers. *Los Angeles Tran-*

twenty-five lines concern the amendment to Rule 1.¹⁹

This Article demonstrates that the Rule 1 trinity deserves more attention than it received during the course of its recent amendment. Courts that have used the trinity view it as more than a mere recitation of "loftily stated purposes."²⁰ The Rule 1 trinity has provided inspiration for both expansive and restrictive interpretations of the Rules.²¹ Courts have employed the trinity to limit a court's discretion to the circumstances described by the language of particular Rules as well as to expand court authority beyond such language.²² Courts also have experienced the Rule 1 trinity as a source of confusion, as a mandate for values that courts cannot always harmonize.²³ And so, before we venerate the trinity any longer, we should evaluate the effects of our faith.²⁴

This Article assesses the Rule 1 trinity by examining its origins and subsequent use at different times in the federal courts.²⁵ Part I examines

script, *supra* note 17. The transcript of the Atlanta hearings consists of 539 pages, excluding cover pages and indices of Advisory Committee members and speakers. *Atlanta Transcript*, *supra* note 17.

¹⁹ *Los Angeles Transcript*, *supra* note 17, at 95-96 (testimony of Charles A. Adamek, National Association of Railroad Trial Counsel) (criticizing proposed amendment to Rule 26 and calling the Committee's attention to Rule 1, opining that justice, speed, and inexpensive determinations are not of equal merit, and asserting that we should not compromise on the quality of justice in order to serve speed at any expense); *Atlanta Transcript*, *supra* note 17, at 75 (testimony of Sam Witt, Lawyers for Civil Justice) (suggesting that the "modest change to Rule 1" shifts the "current balance of responsibility"); *id.* at 82 (testimony of Bill Wood, Lawyers for Civil Justice) (suggesting a problem with "Rule 1," but the context suggests that he may have been referring to the proposed amendment to Rule 26(a)(1)); *id.* at 106 (testimony of Professor Jeffrey Stempel, Association of the Bar of the City of New York) (referring to "the new Rule 1" in context of proposed amendments to Rule 11); *id.* at 208 (testimony of Alfred F. Belcoure, Federal Bar Association) (supporting the Advisory Committee objective of making Rule 1 "a living rule"); *id.* at 257 (testimony of Robert Remar, Alliance for Justice and the National Legal Aid and Defender Association) (arguing for the abolition of Rule 11 on grounds that it "result[s] in just litigating side issues and detracting from the just and speedy resolution of cases").

²⁰ *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986).

²¹ See *infra* notes 106-19, 258-81 and accompanying text.

²² See *infra* notes 90-105, 120-26, 140-41, 282-98, 320-35 and accompanying text.

²³ See *infra* notes 127-34, 353-62 and accompanying text.

²⁴ Professor Laurens Walker has recommended a similarly critical approach to the promulgation of civil rules. Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993). Walker has called for a comprehensive reform of federal civil rulemaking by employing a "comprehensive" rationality model for rulemaking. *Id.* at 464, 480-81, 488. Professor Walker's model would require civil rulemaking to be based on adequate information concerning the need for and consequences of any proposed rule. *Id.*

²⁵ Several commentators have recognized the need to assess the historical development of procedure in order to understand modern procedural problems and condi-

the genesis of the trinity by reviewing the records of the original Advisory Committee for the Federal Rules of Civil Procedure. Part II considers the initial impact of the trinity by analyzing its use in district court opinions from 1938 through 1940. Part III recounts the schismatic twists added to Rule 1 jurisprudence by the Supreme Court. Part IV studies district court invocations of the Rule 1 trinity following the 1993 amendment.²⁶ This Article concludes that articulating broad procedural goals in contexts such as the Rule 1 trinity complicates rather than simplifies dispute resolution in federal trial courts. Moreover, the conclusion suggests that the trinity's manifestation in the form of a rule of civil procedure is inherently inconsistent with a procedure described by rules. In other words, it may have made more sense to amend Rule 1 in 1993 by deleting the trinity altogether.

I. THE GENESIS OF THE TRINITY THROUGH THE ADVISORY COMMITTEE

The Rules that became effective in September 1938 resulted primarily from the work of an Advisory Committee appointed by the Supreme Court in 1935.²⁷ Pursuant to Congressional mandate,²⁸ the Court charged

tions. See, e.g., Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 4 (1989) (exploring the "normative framework" of procedural reform rhetoric from the 1848 Field Code to the 1938 Federal Rules of Civil Procedure and its impact on the party structure of a lawsuit); Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 444 (1935) (describing the value of studying legal history to demonstrate the falsity of rationalizations offered by lawyers and judges for legal doctrines); Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 395 (1910) (stating that an understanding of the causes that produce conditions appearing to demand reform is "of first importance in law reform"); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 912 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*] (describing how "pressing problems in contemporary civil procedure" arise from basing the Federal Rules of Civil Procedure on rules of equity rather than common law procedure).

²⁶ This Article will not consider the use of the Rule 1 trinity in the United States Courts of Appeal for several reasons. First, reviewing the use of the trinity by the United States Supreme Court and the United States District Courts provides sufficient and consistent examples of the broad range of uses of the trinity over time. Second, district courts generally have not relied upon appellate opinions—or any precedent—when employing the trinity.

²⁷ Order of June 3, 1935, 295 U.S. 774 (1935). The original members of the Advisory Committee were William D. Mitchell (Chair); Scott M. Loftin, President of the American Bar Association; George W. Wickersham, President of the American Law Institute; Wilbur H. Cherry, Professor of Law at the University of Minnesota; Charles E. Clark (Reporter), Dean of the Law School, Yale University; Armistead M. Dobie, Dean of the Law School, University of Virginia; Robert G. Dodge; George

the Advisory Committee to:

Donworth; Joseph G. Gabel; Monte M. Lemann; Edmund Morgan, Professor of Law at Harvard University; Warren Olney, Jr.; Edson R. Sunderland, Professor of Law at the University of Michigan; and Edgar B. Tolman. By order of February 17, 1936, the Supreme Court appointed George Wharton Pepper to replace the deceased George Wickersham. Order of Feb. 17, 1936, 297 U.S. 731 (1936).

The Advisory Committee appointments were not the Supreme Court's first efforts to draft a set of rules under the Rules Enabling Act of 1934, Pub. L. No. 73-415, ch. 651, §§ 1-2, 48 Stat. 1064 (current version at 28 U.S.C. § 2071-74 (1994)). Because the Court believed that judges and attorneys from different districts would have varying opinions concerning the advantages and disadvantages of particular procedures their local courts had employed, the Court first tried to gather the opinions of local benches and bars. Minutes of the 5th Annual Meeting of the Federal Judicial Conference of the 4th Circuit June 6-Aug. 1935 (statement of Chief Justice Hughes), *microformed on* RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES 1935-1988, No. CI-3718-57 to CI-3718-62 (Congressional Info. Serv. 1991) [hereinafter CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE]. Accordingly, at a conference of senior circuit judges in September 1934, Chief Justice Hughes recommended that the circuit judges invite district judges to appoint committees to recommend procedures and practices to be included in the new rules. Informal Proceedings in the Conference of Senior Circuit Judges (September 27-28, 1934) (statement of Chief Justice Hughes), *microformed in* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra*, at No. CI-4623-87 to CI-4623-88. Because the Supreme Court had no appropriations or personnel to handle the drafting of a comprehensive set of rules, Chief Justice Hughes and Attorney General Homer Cummings agreed to form a staff within the Office of the Attorney General to facilitate the organization and classification of recommendations from the local court committees. *Id.* at No. CI-4623-89; Draft of Report to Supreme Court Advisory Committee for its Session of June 20, 1935, at 1-2, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra*, at No. CI-1314-35 to CI-1314-36. The Attorney General appointed Edgar B. Tolman, then Editor-in-Chief of the American Bar Association Journal, to supervise the work of the Department of Justice in preparing materials from the local committees. The Attorney General also formed his own "advisory committee" composed of members of his staff, members of the bar, and law school professors to assist Mr. Tolman. Department of Justice Press Release (Jan. 24, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra*, at No. CI-1314-92. The Supreme Court directed the local committees appointed through the Circuit Court judges to focus on rules of procedure for civil actions at law rather than in equity. Draft of Report to Supreme Court Advisory Committee for its Session of June 20, 1935, at 5-6, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra*, at No. CI-1314-39 to CI-1314-40. After reconsideration—and lobbying by interested parties such as Dean Clark—the Court concluded that preserving the historic distinction between cases in law and equity did not make sense. Remarks of Chief Justice Hughes before the American Law Institute (May 9, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra*, at No. CI-3719-67, CI-3719-70 to CI-3719-74; Letter from Charles E. Clark to Edgar B. Tolman (Jan. 11, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra*, at No. CI-4507-48 (advocating "a complete procedure for law and equity"); Letter from

undertake the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States . . . so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.²⁹

The Advisory Committee held "frequent and protracted meetings."³⁰

Charles E. Clark to Edgar B. Tolman (Jan. 4, 1935), *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra*, at No. CI-4507-51 (same).

Although the Supreme Court welcomed the "aid of the Bench and Bar, of the Department of Justice, and of all those interested in the improvement of procedure," the Court concluded that it "must itself assume the responsibility for preparing the rules." Remarks of Chief Justice Hughes, *supra*, *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra*, at No. CI-3719-73 to CI-3719-74. However, to "aid the court in this undertaking," the Supreme Court appointed the Advisory Committee to "be called upon for such assistance as the Court may from time to time require." *Id.* at No. CI-3719-74; *see also* Minutes of the 5th Annual Meeting of the Federal Judicial Conference of the 4th Circuit *supra*, *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra*, at No. CI-3718-62 (noting the need for a "compact body directly responsible to the Court" for preparation of tentative drafts).

²⁸ Under the Rules Enabling Act of 1934, *supra* note 27, Congress authorized the Supreme Court to promulgate "for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law." 28 U.S.C. § 723b (1934). Further, the Act also provided for the unification of procedures for actions at law and equity. *Id.* § 723c. For extended discussion of the history and effect of the 1934 Act, *see* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387 (1935).

²⁹ Order of June 3, 1935, 295 U.S. 774 (1935).

³⁰ Order of Jan. 17, 1938, 302 U.S. 783, 784 (1938). The Advisory Committee held formal meetings on the following dates: June 20, 1935 (transcript *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-101-01 to CI-103-29 [hereinafter Advisory Committee Transcript: June 1935]); November 14-20, 1935 (transcript *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-103-61 to CI-125-93 [hereinafter Advisory Committee Transcript: November 1935]); February 20-25, 1936 (transcript *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-125-95 to CI-129-26 and No. CI-201-01 to CI-215-11 [hereinafter Advisory Committee Transcript: February 1936]); August 28-September 2, 1936 (minutes *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-130-58 to CI-131-21 [hereinafter Advisory Committee Minutes: August-September 1936]); October 22-27, 1936 (minutes *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-131-22 to CI-132-62 [hereinafter Advisory Committee Minutes: October 1936]); February 1-4, 1937 (transcript *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-132-68 to CI-134-01 [hereinafter Advisory Committee Transcript: February 1937]); and November 1-4, 1937 (transcript *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-134-02 to CI-135-01 [hereinafter Advisory Committee Transcript: November 1937]).

Those meetings produced a number of drafts, two of which the Committee formally submitted to federal judges, the bar, and the public for comment.³¹ The Advisory Committee submitted its final report to the Supreme Court in November 1937.³²

The Advisory Committee did not consider the trinity at the Committee's first formal meeting in June 1935. However, Charles Clark, then Dean of Yale Law School and the appointed Reporter for the Committee,³³ raised an issue that ultimately provided a basis for including the

ENCE, *supra* note 27, at No. CI-220-67 to CI-221-84 [hereinafter Advisory Committee Transcript: November 1937]). A subcommittee on form and style also held meetings on April 16-20, 1936 (minutes *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-130-01 to CI-130-58 [hereinafter Subcommittee Minutes: April 1936]) and again on April 12-17, 1937 (minutes *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-215-13 to CI-216-72 [hereinafter Subcommittee Minutes: April 1937]).

³¹ Order of Jan. 17, 1938, 302 U.S. 783, 784 (1938). The drafts of the Advisory Committee included the following: Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States (May 1936), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-816-19 to CI-818-31; and Proposed Rules of Civil Procedure for the District Courts of the United States (Apr. 1937), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-6201-01 to CI-6203-97.

³² 302 U.S. at 784. After making a few changes to the Rules, the Supreme Court transmitted the Rules to the Attorney General of the United States for submission to Congress in January of 1938. *Id.* For a report of the changes made by the Supreme Court in the Rules presented in the Advisory Committee's final report, see AMERICAN BAR ASS'N, FEDERAL RULES OF CIVIL PROCEDURE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 429-34 (William W. Dawson ed., 1938) [hereinafter ABA: ORIGINAL RULES & PROCEEDINGS].

³³ Order of June 3, 1935, 295 U.S. 774 (1935). Particularly for the early meetings of the Advisory Committee, Clark played a significant role in shaping the Committee's actions by submitting outlines and drafts of rules that typically set the parameters for Committee discussions and votes. At the first meeting of the Advisory Committee on June 20, 1935, Warren Olney, Jr. suggested that few members of the Committee had a "broad, comprehensive idea" of the task given to the Advisory Committee. Advisory Committee Transcript: June 1935, *supra* note 30, at 32, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-101-45. Olney suggested, therefore, that the Committee first instruct Clark to prepare an "outline" of the particular subjects that the Committee might address. *Id.* Clark agreed to provide the "outline" as a manner of framing the Committee members' considerations, and directed the Committee to two articles he published in 1935 in order to give them something to "shoot at." *Id.* at 64-65, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-101-78 to CI-101-79. The articles to which Clark referred the Committee were: Charles E. Clark & James W. Moore, *A New Federal Procedure: I. The Background*, 44 YALE L.J. 387 (1935); and Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291 (1935). Clark actually brought copies of the first article to the Committee meeting for distribution to the Committee's members. Advisory Commit-

trinity in the Rules. Clark asked whether he should use terms of procedure from existing procedural systems familiar to judges and lawyers, or whether he should "try to improve upon" such language in drafting rules for the Committee's consideration.³⁴ Clark was concerned that some well-worn terms, such as "cause of action" and "ultimate facts," had generated only controversy and uncertainty in the past.³⁵ However, the consensus of the Committee was to avoid unfamiliar terms because new terms would make acceptance of the Rules by the bench and the bar a more difficult task.³⁶ Consequently, the Committee instructed Clark to adopt a conservative view and use familiar terms initially.³⁷ Clark later

tee Transcript: June 1935, *supra* note 30, at 64-65, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-101-78 to CI-101-79.

Clark later described his role as "draftsman responsible for the initial drafts both of the original rules and of the later proposed amendments throughout the life of the Committee." Charles E. Clark, *The Federal Rules of Civil Procedure: 1938-1958, Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 436 (1958); *see also* Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 555, 556 (1939) (describing Clark's work on drafts for the Advisory Committee). For general discussions of Clark's role as reporter for the Advisory Committee, *see* Peter C. Hoffer, *Text, Translation, Context and Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee*, 37 AM. J. LEGAL HIST. 409, 413-19 (1993); Steven N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115, 115-52 (Peninah Petruck ed., 1991).

³⁴ Advisory Committee Transcript: June 1935, *supra* note 30, at 152-53 (statement of Charles E. Clark), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-102-70 to CI-102-71. Professor Hoffer has cautioned that particular statements taken from the dialogue between members of the Advisory Committee must be understood in the "context of exchanges over a longer period of time," that conversations must be viewed as "situational" (depending on what was said before), and in terms of group dynamics. Hoffer, *supra* note 33, at 420, 431-33.

³⁵ Advisory Committee Transcript: June 1935, *supra* note 30, at 152 (statement of Charles E. Clark), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-102-70.

³⁶ *Id.* at 153-58 (statement of Charles E. Clark), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-102-71 to CI-102-76. At various points during the tenure of the original Advisory Committee, Clark expressed concerns about acceptance of the Rules by the public. *See, e.g.,* Letter from Charles E. Clark to the Honorable William D. Mitchell (Sept. 10, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1203-44 to CI-1203-46 (identifying public acceptance as a "chief problem" in drafting the new rules and the utility of "a measure of local independence" in gaining public support); Letter from Charles E. Clark to Edward H. Hammond (Sept. 21, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-802-23 (describing Clark's enthusiasm for the idea of asking district court judges for their suggestions and noting that many of the judges' suggestions supported the Committee's ideas).

³⁷ Advisory Committee Transcript: June 1935, *supra* note 30, at 152-58, *micro-*

invoked the legal community's expectations based on prior experiences to support including the trinity in Rule 1.³⁸

Clark expressed some uncertainty about the extent to which procedural rules should attempt to define their own "ends or objectives."³⁹ Clark feared that words used to describe broad purposes would become subject to narrow and rigid interpretations.⁴⁰ Nevertheless, throughout the Advisory Committee process, Clark's drafts contained language describing

formed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-102-70 to CI-102-76. Even outside of the proceedings of the Advisory Committee, proponents of the Rules emphasized the Rules' derivation from the "best" of existing procedures. See, e.g., ABA: ORIGINAL RULES & PROCEEDINGS, *supra* note 32, at 181 (statement of William D. Mitchell) (noting that the Rules were largely derived from existing federal statutes, equity rules, English rules, and the "best that is found in the codes in those states which have the code system"); *id.* at 196 (statement of Charles E. Clark) (observing that the "new procedure really consists of the equity rules of 1912, applied to *all* actions and brought down to date by such new developments as have occurred since 1912").

³⁸ See *infra* notes 49, 54, 59, 79 and accompanying text. Other members of the Advisory Committee also supported the use of broad statements concerning the ends sought to be accomplished by the Rules. Early in the drafting process, Committee Secretary Edgar B. Tolman advocated "an interpretative rule which would state the objectives and purposes of the rules." Memorandum from Edgar B. Tolman to Dean Clark (Sept. 27, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-802-15. Among these objectives, Tolman included the following:

3. To prevent delay, uncertainty and expense in the administration of justice;
4. To strip procedure of unnecessary forms, technicalities and distinctions and permit the advance of causes to the decision of their merits, with a minimum of procedural encumbrances;
5. To prevent retrials and rehearings, except for errors prejudicially affecting the outcome of the proceeding and to grant such retrials or rehearings only on that part of the case thus prejudicially affected;
6. In case of any doubt, or the possibility of two constructions, these rules are to be interpreted so as to most fully to aid in the accomplishment of the objectives above set forth.

Id. at CI-802-18 to CI-802-19. Tolman advocated his "interpretive rule" by noting that "a good preface sometimes helps to enlist the sympathy of the reader and placate the critics." Letter from Edgar B. Tolman to Dean Charles E. Clark (Oct. 3, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1203-31; see also Letter from Edgar Tolman to Charles E. Clark (July 8, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1203-68 (referring to precedent for an introductory declaration of the scope, objectives, and interpretation of the Rules and for an introductory rule containing definitions).

³⁹ See Letter from Charles E. Clark to Edgar B. Tolman (Sept. 3, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1203-35 (responding to Tolman's suggested "interpretive rule," *supra* note 38, and indicating Clark's reluctance to make the Rules seem too much like statutes).

⁴⁰ *Id.*

values to be served by the Rules.⁴¹ For example, Clark's earliest drafts provided that "[t]hese rules shall be liberally construed for the purpose of effectuating a simple, uniform, and efficient procedure, and may be known and cited as the Uniform Rules of Civil Procedure."⁴²

During the third meeting of the Advisory Committee in February 1936, Committee members specifically discussed whether it was appropriate to include statements of "laudable purposes" in the Rules.⁴³ George Whar-

⁴¹ By June 28, 1935, Clark had prepared a Topical Outline of Proposed Rules, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1203-72 to CI-1203-79. On September 21, 1935, Clark and his staff produced a first "tentative draft" and circulated it to certain members of the Committee. Tentative Draft of Uniform Rules of Civil Procedure (Sept. 20, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-802-25 to CI-802-65 [hereinafter September 1935 Preliminary Draft]; *see also* Letter from Charles E. Clark to William D. Mitchell (Sept. 21, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at CI-802-24 (cover letter accompanying same); Letter from Charles E. Clark to Edward H. Hammond (Sept. 21, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at CI-802-23 (noting Clark's reluctance to send the tentative draft to members of the Advisory Committee until Clark had received comments on the draft from Committee Chair William D. Mitchell and Committee Secretary Edgar B. Tolman). On October 18, 1935, Tolman distributed Parts I and II of a tentative draft of rules submitted by Clark on October 15, 1935. Letter from Edgar B. Tolman to Members of the Advisory Committee (Oct. 18, 1935), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at CI-2001-01 to CI-2004-82 [hereinafter Tentative Draft I]. Thereafter, the Committee established a pattern of having Clark and others submit drafts for the Committee members' review before each meeting of the Advisory Committee. Subsequent drafts generated between meetings would reflect the substance of the Committee's decisions with respect to particular rules at the previous meeting.

⁴² Clark had made this text the second sentence in Rule 1 of his September 20, 1935, preliminary draft. September 1935 Preliminary Draft, *supra* note 41, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-2001-17. It remained unchanged when Clark submitted Tentative Draft I in October 1935. Tentative Draft I, *supra* note 41, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-2001-12. Other rules in Tentative Draft I also made broad references to ends and goals. *See, e.g.*, Tentative Draft I, *supra* note 41 (Rule 3) (authorizing the District Courts to enact local rules "for the purpose of effectuating a simple and efficient procedure"), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-2001-27; Tentative Draft I, *supra* note 41 (Rule 18) (providing that pleadings are to be "liberally construed, with a view to substantial justice between the parties"), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-2002-57.

⁴³ The Advisory Committee discussed Rule 1 of Tentative Draft I on the first day of their November 1935 session, but a transcript for the first ninety minutes does not exist due to the late arrival of the stenographic reporter. Advisory Committee Transcript: November 1935, *supra* note 30, at 3a, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-103-65. Accordingly, the ex-

ton Pepper suggested that the Committee should "limit all aspirations on legislation."⁴⁴ He contended that "admonitions" have more to do with "temperament" and "principles upon which a man administers the judicial office" and are "questions not susceptible of statement in rule as such."⁴⁵ Other Committee members also voiced concern about expressing "admonitions" in the form of a rule.⁴⁶ Clark expressed his hope that the Committee would not eliminate all such "prayers"⁴⁷ from the Rules in

tent of discussion—if any—concerning the second sentence of Rule 1 from Tentative Draft I is uncertain. We do know that Clark's redrafts to accommodate changes suggested during the November 1935 meeting did not change the language of the sentence although it did change its position. In a Tentative Draft II prepared and distributed by Clark in December 1935, Clark submitted a rule identified as "A36" that included the following as a second paragraph: "These rules shall be liberally construed for the purpose of effectuating a simple, uniform, and efficient [procedure][practice], and may be known and cited as the [Uniform Rules of Civil Procedure][United Rules of Civil Procedure][Rules of Civil Practice][Federal Rules of Civil Practice]." Tentative Draft II: VI. Trials (Dec. 26, 1935) (Rule A36), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-4104-93. The notes provided with this rule make reference to "Rule 1, T.D.I." *Id.* at CI-4104-94.

⁴⁴ Advisory Committee Transcript: February 1936, *supra* note 30, at 44 (statement of George W. Pepper), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-201-48. Senator Pepper clarified his objection by pointing to language included in Rule 2 of Tentative Draft II, which had been prepared after the Advisory Committee's meeting in November of 1935. The rule provided, in part:

At any stage of the proceedings *when the ends of justice so require*, the court *on such terms as may be just*, shall: relieve a party from the results of accident, surprise, misfortune, or excusable neglect, or from the fraud or misrepresentation of an adverse party

. . . .

And to the end that decisions shall be on the merits

Tentative Draft II (Dec. 23, 1935) (Rule 2), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-4103-24. Senator Pepper later made similar objections to the trinity. *See infra* note 77. He may not have been contemplating the trinity when he made his objection to statements of "laudable purposes," because he later referred to the trinity's precursor as a rule of interpretation designed to limit the application of the long-standing rule of statutory interpretation that statutes in derogation of the common law should be construed narrowly. Advisory Committee Transcript: February 1936, *supra*, at 1492-93, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-214-55 to CI-214-56.

⁴⁵ Advisory Committee Transcript: February 1936, *supra* note 30, at 60, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-201-64.

⁴⁶ *Id.* at 53, 56 (objections of Warren Olney, Jr.), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-201-57, CI-201-60.

⁴⁷ *Id.* at 45 (statement of Charles E. Clark), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-201-49.

light of their "effect as admonitions to the judges in passing on matters of discretion"⁴⁸ and because people might miss such general statements, which had become "usual in the codes."⁴⁹ The Advisory Committee eventually delegated the issue to a subcommittee on form and style charged, in part, with drafting a "general admonition at the appropriate place."⁵⁰ Clark initially recommended a rule that served as the prototype for the Rule 1 trinity.⁵¹

In response to the Advisory Committee's directions and in preparation for the first meeting of the subcommittee on form and style, Clark drafted a "general admonition" to give "tone and color to the rules."⁵² On March 12, 1936, Clark circulated a proposed "Rule 2. Decision to be on the Merits," in which he specifically tied his earlier version of the trinity to rendering decisions on the merits.⁵³ Clark offered several rationales in

⁴⁸ *Id.*

⁴⁹ *Id.* at 60 (statement of Charles E. Clark), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-201-64. Later in life, Clark would criticize the use of "pure abstractions, without content except as injected by the immediate user" for procedural standards. *See, e.g.,* Charles E. Clark, *The Federal Rules of Civil Procedure: 1938-1958*, 58 COLUM. L. REV. 435, 450 (1958) (criticizing the use of "fair notice" as the standard for pleadings in a proposed rule of New York civil procedure).

⁵⁰ Committee Chair William D. Mitchell appointed Messrs. Olney, Pepper, and Morgan as the members of the subcommittee, and himself and Edgar B. Tolman as *ex officio* members. Letter from William D. Mitchell to Members of the Advisory Committee (Feb. 27, 1936), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-3714-95. Clark, in his capacity as Reporter, generally also attended the subcommittee's meetings.

⁵¹ Advisory Committee Transcript: February 1936, *supra* note 30, at 61 (statement of Clark recommending Rule A36 from Tentative Draft II), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-201-65; *see also supra* note 43 (quoting language of Rule A36).

⁵² *See* Tentative Draft III of Federal Rules of Civil Procedure (Mar. 12, 1936) (Note to Rule 2), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-808-25; Letter from Charles E. Clark to Edgar B. Tolman (Mar. 12, 1936) (accompanying portions of Tentative Draft III), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-808-18.

⁵³ Rule 2 of the March 12, 1936, Tentative Draft III read:

Rule 2. Decision on the Merits. These rules shall be liberally construed for the purpose of effectuating a simple, uniform, and efficient procedure to the end that decisions shall be on the merits. The courts at every stage of the proceeding must disregard any error, defect or irregularity therein which does not affect the substantial rights of the parties; and shall, when the ends of justice so require, relieve a party from the results of accident, mistake, surprise, or inadvertence on his part, and from the results of fraud, misrepresentation or other misconduct of an adverse party.

Tentative Draft III (Rule 2), *supra* note 52, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-808-23.

support of this proposal. He initially noted that "a general provision of similar substance is common in the codes."⁵⁴ Clark also believed that such a rule would be useful in "changing the rule of common law that statutes in derogation thereof are to be strictly construed."⁵⁵ Finally, Clark hoped that his trinity precursor would temper the discretionary power given to judges by the Rules "to the end that controversies may be speedily and finally determined according to the substantive rights of the parties."⁵⁶

Before submitting the trinity to the entire Advisory Committee, Clark reformulated it in a way that heightened the correlation between "justice" and decisions on the merits, while limiting the significance of speed and expense. Rule 2 of a "Tentative Draft III" circulated to the Committee on March 24, 1936, provided that "[t]hese rules shall be liberally construed for the purpose of securing the just determination of every case upon its merits as speedily and inexpensively as possible."⁵⁷

⁵⁴ *Id.* (Note to Rule 2), *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. at CI-808-24. In the note, Clark cited various state and federal provisions as examples of this approach. *Id.* (citing 28 U.S.C. § 391 (1935) ("On the hearing of any appeal, certiorari, or motion for a new trial, . . . the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.")); CAL. CIV. PROC. CODE § 452 (West 1931) ("In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."); ILL. ANN. STAT. ch. 110, para. 128 (Smith-Hurd 1936) (mandating liberal construction of rules regarding civil practice "to the end that controversies may be speedily and finally determined according to the substantive rights of the parties, and the rule that statutes in derogation of the common law must be strictly construed shall not apply to this Act or to the rules made pursuant thereto"); N.Y. CIV. P. §§ 2-3 (1935) (similar); 2 WASH. REV. STAT. §§ 144, 303 (1932) (providing for liberal constructions of procedural rules, amendment of pleadings, and relief from judgments arising from "mistake, inadvertence, surprise, or excusable neglect").

⁵⁵ Tentative Draft III (Note to Rule 2), *supra* note 52, *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-808-25.

⁵⁶ *Id.* The Advisory Committee's actions generally do *not* support an argument that the Committee intended the Rule 1 trinity as a source of unbounded discretion for the district courts. For example, the Committee did draft and submit a rule that permitted district courts to make local rules and "[i]n all cases not provided for by rule . . . to regulate their practice." Proposed Rules of Civil Procedure for the District Courts of the United States (Apr. 1937), *microformed on CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE*, *supra* note 27, at No. CI-6203-60. The Committee and the Supreme Court, however, required such "local rules" to be "not inconsistent with these rules." ABA: ORIGINAL RULES & PROCEEDINGS, *supra* note 32, at 172 (quoting original Rule 83); *id.* at 193 (statement of William D. Mitchell) (observing that the Rules are meaningless if a judge could just disregard them).

⁵⁷ Tentative Draft III of Federal Rules of Civil Procedure (Mar. 24, 1936) ("Rule 2. Decision on the Merits"), *microformed on CIS RECORDS OF THE U.S. JUDICIAL CON-*

The reasons for Clark's changes in the trinity between March 12⁵⁸ and March 24, 1936, are not certain. Despite the changes, Clark continued to offer the rationales of familiarity and control of judicial discretion in support of the trinity.⁵⁹

The subcommittee on form and style met in April 1936 and modified the trinity language proposed by Clark on March 24. The subcommittee moved the trinity to its current position as the second sentence of Rule 1.⁶⁰ The subcommittee also redrafted the text to provide that the Rules were "to be construed in all particulars so as to further and secure as speedily, simply, and inexpensively as possible the just determination of every action."⁶¹ Although the subcommittee heightened the trinity's prominence by placing it ahead of the other Rules, the subcommittee also deleted the trinity's explicit ties to liberal constructions and decisions on the merits. The subcommittee also reinstated the goal of simplicity in the trinity mix.

The subcommittee based its April 1936 changes on the suggestions of subcommittee member Warren Olney, Jr.⁶² Mr. Olney objected to "liberally" construing the Rules because a judge could " 'liberally' construe[] in favor of or against some one."⁶³ Mr. Olney opined that "[w]hat is really meant is that the rules are to be construed in all particulars in furtherance of the end of securing a just decision."⁶⁴ Moreover, Olney thought that simplicity was more important than concern about expense,⁶⁵ but he apparently agreed to retain both ends in the trinity.⁶⁶

With the permission of the Supreme Court, in May 1936 the Advisory

REFERENCE, *supra* note 27, at No. CI-5301-13. The remainder of Rule 2 included the provisions on harmless error set forth in *supra* note 53.

⁵⁸ *Supra* note 53.

⁵⁹ Tentative Draft III (Note to Rule 2), *supra* note 57, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-5301-14 (including the notes for the draft of Rule 2 on March 12, 1936, as described in *supra* note 54).

⁶⁰ Subcommittee Minutes: April 1936, *supra* note 30, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-130-04.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Mr. Olney's Comments on Rules as Contained in Tentative Draft 3 (Apr. 6, 1936) (attached to Letter from Warren Olney to Edgar B. Tolman (Apr. 6, 1936)), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1309-57 to CI-1309-58.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Subcommittee Chair George W. Pepper reported to William D. Mitchell that the conclusions of the subcommittee "were, with a very few exceptions, unanimous." Letter of George W. Pepper to Honorable William D. Mitchell (Apr. 29, 1936), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1312-40 to CI-1312-42.

Committee published a "Preliminary Draft" of the Rules for public comment.⁶⁷ The Preliminary Draft suggests that the subcommittee had deleted from the trinity Clark's reference to decisions on the merits because the subcommittee considered the references to decisions "on the merits" and "just determinations" to be redundant. The Preliminary Draft contained the Rule 1 trinity as formulated by the subcommittee in April 1936.⁶⁸ The Preliminary Draft also included a note to Rule 1 that suggested a correlation between the trinity and the resolution of disputes on the basis of substantive law rather than procedure.⁶⁹ The note compared the Preliminary Draft trinity with 28 U.S.C. § 777 (Defects of form; amendments), 28 U.S.C. § 767 (Amendment of process), and Equity Rule 19 (Amendments Generally).⁷⁰ These trinity ancestors provided for amendments to cure defects in process, proceedings, and judgments upon such terms as a court deemed just and when amendment would not injure the opposing party.⁷¹ The cited authority also required courts to disre-

⁶⁷ Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States (May 1936), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-816-19 to CI-818-31 ("Preliminary Draft").

⁶⁸ *Id.* at No. CI-816-44 (Rule 1); *see also supra* notes 60-61 and accompanying text.

⁶⁹ Presenting procedure as subordinate to substantive law was consistent with Clark's perception of the relationship between procedural and substantive law. *See, e.g.,* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938).

⁷⁰ Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States (May 1936) (Note to Rule 1), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-816-45.

⁷¹ Between 1934 and 1940, 28 U.S.C. §§ 767 and 777 provided:

§ 767 Amendment of process.

Any district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues.

§ 777 Defects of form; amendments.

No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.

28 U.S.C. §§ 767, 777 (1934). Equity Rule 19 authorized amendment of any process, proceeding, pleading, or record "in furtherance of justice, upon such terms as may be just." Equity Rule 19, *reprinted in* JAMES L. HOPKINS, *THE NEW FEDERAL EQUITY RULES* 159 (6th ed. 1929). The rule also required courts to "disregard any error or

gard procedural errors not affecting the substantial rights of the parties.⁷² The same note has accompanied Rule 1 since its formal adoption in 1938.

The Advisory Committee adopted the next significant changes to the Rule 1 trinity—again initiated by the subcommittee on style and form—in April 1937.⁷³ The subcommittee reconfigured the trinity to diminish the relative preeminence of justice with respect to speed and expense, and eliminated the reference to simplicity. As restructured, the trinity provided that the Rules “shall be construed to secure, so far as possible, the just, speedy, and inexpensive determination of every action.”⁷⁴ The Supreme Court published the reconfigured trinity for public comment soon thereafter.⁷⁵

The reasons for the changes made in April 1937 are not apparent from

defect in the proceeding which does not affect the substantial rights of the parties.” *Id.*

⁷² *Supra* note 71.

⁷³ Between May 1936 and April 1937, the Advisory Committee held three meetings. Those meetings occurred in August and October 1936 and in February 1937. For citations to meeting transcripts, see *supra* note 30. The Committee made no changes to the trinity in August 1936. Advisory Committee Minutes: August/September 1936, *supra* note 30, at 1 (reflecting changes to Rule 1), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-130-62. At the October 1936 meeting, the Committee discussed striking “further” from the May 1936 trinity language providing that the Rules would be construed to “further and secure as speedily, simply, and inexpensively as possible the just determination of every action.” Revised Draft, Rules 1-30 (Rule 1), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-5407-96, CI-5408-01; Letter from Edgar B. Tolman to Advisory Committee Members, Dec. 11, 1936, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-5407-97 (noting that revised draft reflects changes from October 1936 meeting). The Committee confirmed the deletion of “further” at the Committee’s meeting in February 1937. Advisory Committee Transcript: February 1937, *supra* note 30, at 9, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-132-83. The Advisory Committee then referred the Rules to the Subcommittee on Form and Style. *Id.* at 48, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-220-64.

⁷⁴ Style Committee Draft (Apr. 1937) (Rule 1), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-901-03; see also Proceedings of the Meeting of the Subcommittee on Form and Style (Apr. 12-17, 1937) *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-134-05 to CI-134-06 (recording the striking of “in all particulars” and the change from “are to be construed” to “shall be construed”); Style Committee Draft, *supra*, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-5107-39, CI-1125-34, CI-1125-47 (documenting the change from “as possible” to “so far as possible”).

⁷⁵ See Proposed Rules of Civil Procedure for the District Courts of the United States (April 1937), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-6201-01 to CI-6203-97.

the Advisory Committee's files.⁷⁶ However, the records do reflect a continuing difference in opinion among committee members concerning the utility of the trinity. Senator Pepper referred to the trinity as "the bunk."⁷⁷ Another member referred to the trinity as a "pious hope," while still favoring its inclusion.⁷⁸ Charles Clark responded by maintaining the importance of the trinity as a means of "lin[ing] up the rules with the present traditions of American code pleading."⁷⁹

At its last formal meeting in November 1937, the Advisory Committee made a final change to the trinity by deleting the qualification "so far as possible" from the obligation to secure the just, speedy, and inexpensive determination of every action.⁸⁰ Because the transcript of the meeting only provides summaries of the Committee's actions, the rationale for the Committee's decision is not clear.⁸¹ In any event, the Supreme Court

⁷⁶ By the time the subcommittee met in April 1937, the transcripts of the Advisory Committee and subcommittee meetings reflected only summaries of the proceedings. The transcript for the April 1937 subcommittee meeting mentions only a few minor changes made to Rule 1 early in the meeting. Subcommittee Minutes: April 1937, *supra* note 30, at 2-3, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-215-16 to CI-215-17 (approving William D. Mitchell's suggestion to strike "in all particulars," and approving Mr. Velde's suggestion to substitute "shall" for "are to"). Much later, the transcript recites the changes described in the text above without identifying a source or explaining a rationale. *Id.* at 118, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-216-63.

⁷⁷ Letter from George W. Pepper to Honorable William D. Mitchell (Mar. 8, 1937), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-5012-45. On a "Style Committee Draft" dated April 1937, it appears that Pepper queried whether "Amen" should be attached to the end of proposed Rule 12(f), which provided that "[a]ll pleadings shall be so construed as to do substantial justice." CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1310-25 (handwritten note).

⁷⁸ Memorandum for the Style Committee Prepared by E.M. Morgan Concerning the Rules 1 (Apr. 2, 1937), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-5011-78.

⁷⁹ Letter from Charles E. Clark to Edgar B. Tolman (Mar. 17, 1937), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1205-55.

⁸⁰ Advisory Committee Transcript: November 1937, *supra* note 30, at 1, *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-220-68.

⁸¹ Adolph J. Rodenbeck of New York had suggested this change in response to the April 1937 Preliminary Draft. Letter from Adolph J. Rodenbeck to Edgar B. Tolman (Aug. 16, 1937) (enclosing comments on proposed rules), *microformed on* CIS RECORDS OF THE U.S. JUDICIAL CONFERENCE, *supra* note 27, at No. CI-1718-71 to CI-1718-73. Judge Rodenbeck became familiar with procedural reform as Chair of a board constituted to revise practice in New York courts in 1904. *See* CHARLES E. CLARK, CLARK ON CODE PLEADING 46-47 (2d ed. 1947) (describing Judge

approved the Advisory Committee's final draft of Rule 1 in 1938.⁸²

Assigning specific intents or purposes to any action taken by a committee is difficult at best. It is useless to try to do so when the committee makes only limited efforts to describe its goals or takes action after individual members suggest a variety of approaches.⁸³ Such are the circumstances in which the records of the Advisory Committee leave us with respect to the role the Committee intended the trinity to serve.⁸⁴ Some

Rodenbeck's role in reforming New York procedure in 1904); Adolph J. Rodenbeck, *A Procedural Programme*, 32 JUDICATURE 79, 81 (1948) (providing a brief description of procedural reform in New York).

⁸² See ABA: ORIGINAL RULES & PROCEEDINGS, *supra* note 32, at 429 (describing the changes the Supreme Court made to rules proposed in the Advisory Committee's Final Report).

⁸³ Peter Hoffer also has cautioned against using Advisory Committee records to derive a "single, objective, authoritative history that recovers the truth about the past." Hoffer, *supra* note 33, at 409. Rather than revealing a single truth, sources such as the Advisory Committee records should be reviewed for what they reveal about human actions. *Id.* at 413-14. Hoffer has also described the Rules submitted by the Advisory Committee in 1937 as "like a piece of legislation" reflecting compromises made amongst Committee members. *Id.* at 437; see also *The Rules of Civil Procedure for the District Courts of the United States: Hearings on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 10 (1938) [hereinafter *House Hearings*] (statement of Charles E. Clark) (noting his lack of authority to "say finally what these rules mean"); ABA: ORIGINAL RULES & PROCEEDINGS, *supra* note 32, at 191 (statement of William D. Mitchell) (suggesting that comments by members of the Advisory Committee be taken with a grain of salt because, officially, nobody but the Supreme Court knows what the Rules mean); Subrin, *How Equity Conquered Common Law*, *supra* note 25, at 925 (noting that "cause and effects, as with other historical questions, are virtually impossible to disentangle"). *But cf.* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of the State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1374 n.39 (1986) (suggesting that the trinity be considered both as "Clark's ideal" and the theme of the Rules); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1813 (1992) (suggesting that the drafters of the Federal Rules had correctly ordered the elements of the trinity).

⁸⁴ After the Advisory Committee submitted its final draft to the Supreme Court in 1937, Committee members had opportunities to explain their understandings of what they hoped to accomplish in drafting the Rules. Again, however, little of that commentary did much to clarify the Committee's intentions or expectations with respect to the trinity. See, e.g., *House Hearings*, *supra* note 83, at 72-73 (statement of Edgar B. Tolman) (commenting on Rules in sequence and discussing only the union of law and equity when commenting on Rule 1). William D. Mitchell provided the following observations concerning the trinity:

The Committee is rather embarrassed about that statement [the trinity], because it sounds a little bit as if it would have that result. 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.

members clearly believed that the trinity served little, if any, purpose. Charles Clark suggested that the trinity was a political necessity, a check on judicial discretion, and a direction to resolve disputes on the merits. The Advisory Committee Note implies that the trinity could provide an excuse for non-compliance with the Rules in the absence of prejudice to an opposing party.

The trinity tradition began with an uncertain message lying somewhere between hope and suspicion. One fact is certain, however: the Advisory Committee decided to present the trinity in the form of a "rule" rather than a prefatory "admonition" or "prayer." The Committee left it to the courts to develop the meaning of the trinity as a rule of civil procedure.

II. EARLY APPLICATIONS BY THE DISTRICT COURTS⁸⁵

The district courts wasted little time in utilizing the Rule 1 trinity. References to the trinity began to appear in district court opinions within two weeks of the date on which the Rules became effective.⁸⁶

Despite the district courts' immediate use of the Rule 1 trinity, judges did not always indicate what role the trinity—or its component parts of justice, speed, and expense—played in their holdings. Often, judges merely quoted the Rule 1 trinity at the beginning or end of their analyses as if it were a necessary invocation⁸⁷ or benediction⁸⁸ of procedure. It was also common for courts to set forth the Rule 1 trinity in a separate,

ABA: ORIGINAL RULES & PROCEEDINGS, *supra* note 32, at 192.

⁸⁵ This Part analyzes 29 opinions reported between September 16, 1938, and 1940 in which United States District Court judges specifically referred to the Rule 1 trinity. The opinions were written by 19 different judges in 19 different district courts. Hereinafter, I refer to these cases as the "early district court opinions."

⁸⁶ *E.g.*, *Nichols v. Sanborn Co.*, 24 F. Supp. 908, 910 (D. Mass. 1938) (decided September 30); *Moore v. Illinois Cent. R.R.*, 24 F. Supp. 731, 738 (S.D. Miss. 1938) (decided October 3).

The 29 cases analyzed in this Part reflect an infrequent use of the Rule 1 trinity from its adoption in 1938 through 1940. In contrast, by the end of 1939, approximately 650 decisions resolved questions of procedure under the new Rules. *See* Edgar B. Tolman, *Foreword* to ALEXANDER HOLTZOFF, *NEW FEDERAL RULES OF CIVIL PROCEDURE AND THE COURTS* at iv (1940). In addition, the Administrative Office of the United States Courts published the following data on civil cases for the fiscal years ending on June 30, 1939, 1940, and 1941:

1939: Commenced — 33,531 Terminated — 37,463 Pending — 31,940

1940: Commenced — 34,734 Terminated — 37,367 Pending — 29,478

1941: Commenced — 38,477 Terminated — 38,561 Pending — 29,394

REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS 50 (1941).

⁸⁷ *E.g.*, *Michels v. Ripley*, 1 F.R.D. 332, 332-33 (S.D.N.Y. 1939) (commencing review of discovery motion with the Rule 1 trinity prior to discussing applicable discovery rules); *Babcock & Wilcox Co. v. North Carolina Pulp Co.*, 25 F. Supp. 596, 597 (D. Del. 1938) (quoting the trinity prior to discussing discovery practices at issue); *Nich-*

unconnected paragraph in their opinions.⁸⁹ As described below, however, the early district court opinions do reflect common attitudes with respect to the trinity.

Some district courts appeared to tie the Rule 1 trinity to the specific language of other Rules. More than one district court suggested that adherence to the literal language of Rules 2 through 86 gave rise to a presumption of compliance with the mandate expressed in the trinity.⁹⁰ For example, in *Miller v. Hoffman*,⁹¹ a third-party defendant had filed a counterclaim against the original defendant.⁹² Before filing an answer to the counterclaim, the defendant filed a motion for summary judgment based upon an earlier release and settlement provided by the counterclaimant.⁹³ Although the facts of the release and settlement were undisputed, the counterclaimant argued that the court should deny the motion for summary judgment because it was "technically impossible" to enter summary judgment until after the defendant pled the settlement and release as an affirmative defense under Rule 8(c).⁹⁴ The district court noted that the language of Rule 56 provided that a defendant could move for summary judgment at "any time,"⁹⁵ and determined that "the summary judgment

ols, 24 F. Supp. at 910 (quoting Rule 1 trinity before proceeding to analyze discovery rules applicable to the defendant's objection to interrogatories).

⁸⁸ E.g., *Miller v. Hoffman*, 1 F.R.D. 290, 292 (D.N.J. 1940) (quoting the trinity as a separate, penultimate paragraph before granting motion for summary judgment); *Green v. Gravatt*, 35 F. Supp. 491, 493 (W.D. Pa. 1940) (quoting Rule 1 as the last substantive statement in an opinion finding a motion for stay of proceedings appropriate under the Rules); *Kohloff v. Ford Motor Co.*, 27 F. Supp. 803, 804 (S.D.N.Y. 1939) (penultimate paragraph); *Thomas v. Goldstone*, 27 F. Supp. 297, 297 (S.D.N.Y. 1939) (quoting Rule 1 trinity immediately prior to ultimate decision on discovery motion).

⁸⁹ E.g., *Lewis v. United Air Lines Transp. Corp.*, 31 F. Supp. 617, 619 (W.D. Pa. 1940) (quoting the trinity as part of a laundry list of Rules possibly bearing on motion to compel deposition testimony from an adverse expert); *United States v. 20.08 Acres of Land*, 35 F. Supp. 265, 267 (W.D. Pa. 1940) (quoting the Rule 1 trinity in separate paragraph preceding denial of the government's motion for new trial); *Nekrasoff v. U. S. Rubber Co.*, 27 F. Supp. 953, 955 (S.D.N.Y. 1939) (quoting the trinity as part of a series of Rules bearing on defendant's discovery motions); *Schick Dry Shaver, Inc. v. General Shaver Corp.*, 26 F. Supp. 190, 191 (D. Conn. 1938) (using separate paragraph to note references to the trinity during argument and opining, "with that provision no one can complain").

⁹⁰ For an annotated copy of the original Rules, see ABA: ORIGINAL RULES & PROCEEDINGS, *supra* note 32, at 3-173.

⁹¹ 1 F.R.D. 290 (D.N.J. 1940).

⁹² *Id.* at 291.

⁹³ *Id.*

⁹⁴ *Id.* Rule 8(c) provided: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . release, . . . and any other matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c) (1940).

⁹⁵ 1 F.R.D. at 292. Rule 56(b) provided that "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at

rule may be used at any time where it clearly appears that a party to an action has no valid claim or defense."⁹⁶ The court in *Miller* then concluded by quoting the Rule 1 trinity and granting the defendant's motion for summary judgment.⁹⁷

Particularly with respect to decisions concerning the scope of discovery, the early district court cases demonstrate an affinity between the Rule 1 trinity and careful attention to the language used in other Rules. Some courts cited the trinity as grounds for refusing to restrict discovery when the objecting party failed to demonstrate clearly the circumstances required by the language of Rules limiting the scope of discovery.⁹⁸ For example, in *Chemo-Mechanical Water Improvement Co. v. City of Milwaukee*,⁹⁹ the court had authorized depositions by the defendant in a suit involving patent claims.¹⁰⁰ The plaintiff moved for a protective order under Rule 30(b), which provided for such orders "upon notice and for good cause shown."¹⁰¹ The protective order would have prohibited questions relating to the dates on which the invention of the patent in question was made unless the defendant simultaneously disclosed the date, character, and identity of any prior uses on which it intended to rely at

any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." FED. R. CIV. P. 56(b) (1940) (emphasis added).

⁹⁶ *Miller*, 1 F.R.D. at 292.

⁹⁷ *Id.* For additional cases associating literal readings of the Rules with observance of the trinity, see *Society of European Stage Authors & Composers v. WCAU Broadcasting Co.*, 1 F.R.D. 264, 265-66 (E.D. Pa. 1940) (granting leave to amend to add new plaintiffs because the language of Rules 20 and 21 authorized joinder, noting that joinder would be a step towards effectuating the purposes of Rule 1); *Kuenzel v. Universal Car Loading & Distrib. Co.*, 29 F. Supp. 407, 409-11 (E.D. Pa. 1939) (noting that the language of Rule 13(b) plainly and unambiguously permits a defendant sued in tort to assert a counterclaim in assumpsit; later citing the trinity to allow Rule 13 counterclaim); see also *Elliott v. United Employers Casualty Co.*, 35 F. Supp. 781, 782 (S.D. Tex. 1940) (quoting the trinity prior to allowing depositions on motion for new trial under Rules 43(e) and 59(a)(2)).

⁹⁸ In particular, Rules 26(b) and 30 limited the scope of discovery. Rule 26(b) entitled parties to depose witnesses "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" unless otherwise ordered by the court under Rule 30(b) and (d). FED. R. CIV. P. 26(b) (1938). Rule 30(b) authorized courts to prohibit or otherwise limit the scope of a deposition "for good cause shown" or "make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." FED. R. CIV. P. 30(b) (1938). Rule 30(d) entitled parties to request the termination of an ongoing deposition "upon a showing that the examination is being conducted in bad faith or in such a manner as to unreasonably annoy, embarrass, or oppress the deponent or party." FED. R. CIV. P. 30(b) (1938).

⁹⁹ 29 F. Supp. 45 (E.D. Wis. 1939).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; see also *supra* note 98.

trial.¹⁰²

The court in *Chemo-Mechanical* noted that other courts had "made provisions somewhat similar to those requested by the plaintiff" and it observed that Rule 30(b) authorized protective orders as justice required.¹⁰³ Nevertheless, the court denied the motion on grounds that such a "narrow or limited construction [of the discovery rules] would be contrary to the spirit" of the Rules as set forth in the Rule 1 trinity.¹⁰⁴ Given the plaintiff's failure to produce *any* evidence that the defendant would use discovery to perpetrate a fraud, the spirit of the Rule 1 trinity prohibited the court from restricting discovery to protect against *possible* abuse without "good cause" actually shown.¹⁰⁵

Not only did the trinity lead the early district courts to pay careful attention to the language in the Rules, it also provided a tool for interpreting the Rules. The trinity literally provided a rule of construction applicable to the remaining rules of civil procedure.¹⁰⁶ It is not surprising, then, that the early district courts commonly used the Rule 1 trinity in this fashion.¹⁰⁷ In particular, the courts often read the Rule 1 trinity to require a

¹⁰² The plaintiff worried that if it disclosed its date of invention in the deposition, the defendant could fabricate uses of the patented item prior to that date. *Chemo-Mechanical*, 29 F. Supp. at 45.

¹⁰³ *Id.* at 45-46.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* For additional discovery cases equating a literal reading of the Rules with observance of the trinity, see *Lewis v. United Air Lines Transp. Corp.*, 31 F. Supp. 617, 619 (W.D. Pa.) (ordering responses to expert witness deposition questions in light of proponent's failure to demonstrate under Rule 26(b) that the questions sought privileged information), *modified*, 32 F. Supp. 21 (W.D. Pa. 1940) (narrowing mandated disclosure by expert upon proponent's showing that much of the information sought fell within the definition of privilege); *Michels v. Ripley*, 1 F.R.D. 332, 332-33 (S.D.N.Y. 1939) (citing trinity prior to denying motion to limit scope of plaintiff's deposition of defendant because the court would not presume the deposition was sought in bad faith or to annoy, embarrass, or oppress); *Nekrasoff v. U. S. Rubber Co.*, 27 F. Supp. 953, 955-56 (S.D.N.Y. 1939) (finding that defendant seeking protective order had failed to make the showing required under Rule 30(d) that the requested deposition would require disclosure of secret processes or necessarily lead "into the field of speculation or argumentation"); *Fox v. House*, 29 F. Supp. 673, 676 (E.D. Okla. 1939) (quoting the trinity prior to allowing liberal discovery practices under Rules 45 and 26 "until such time as it is apparent" that discovery is being sought in bad faith or for an improper purpose). *But see Babcock & Wilcox Co. v. North Carolina Pulp Co.*, 25 F. Supp. 596, 597-98 (D. Del. 1938) (invoking trinity to condition defendant's rights to obtain answers to interrogatories concerning dates of invention on defendant's providing a statement of dates it would rely upon for purposes of showing anticipation or prior use).

¹⁰⁶ FED. R. CIV. P. 1 (1938) (providing in the original text that the Rules "*shall be construed* to secure the just, speedy, and inexpensive determination of every action" (emphasis added)).

¹⁰⁷ *E.g.*, *Louisiana Farmers' Protective Union, Inc. v. Great Atl. & Pac. Tea Co.*, 31

"liberal" interpretation of the Rules so as to simplify procedure, facilitate resolution of disputes on the merits, and break with procedural complexities and technicalities that had developed under common law systems and equity practice.¹⁰⁸

F. Supp. 483, 493 (E.D. Ark. 1940) (motion for a bill of particulars under Rule 12(e)); *United States v. Schine Chain Theaters, Inc.*, 1 F.R.D. 205, 207 (W.D.N.Y. 1940) (motion for a bill of particulars under Rule 12(e)); *Anheuser-Busch, Inc. v. Dubois Brewing Co.* 1 F.R.D. 406, 406 (W.D. Pa. 1940) (motion for more definite statement under Rule 12(e)); *Lewis*, 31 F. Supp. at 617 (motion to compel answers to deposition questions); *Society of European Stage Authors & Composers v. WCAU Broadcasting Co.*, 1 F.R.D. 264, 265 (E.D. Pa. 1940) (motion for leave to file an amended and supplemental complaint to add new plaintiffs under Rules 17, 19, 20, and 21); *United States v. 20.08 Acres of Land*, 35 F. Supp. 265, 267 (W.D. Pa. 1940) (harmless error under Rule 61); *Elliott v. United Employers Casualty Co.*, 35 F. Supp. 781, 781-82 (S.D. Tex. 1940) (request for depositions to support motion for new trial under Rule 59); *SEC v. Time Trust, Inc.*, 28 F. Supp. 34, 41 (N.D. Ca. 1939) (Rule 8(a)); *Michels*, 1 F.R.D. at 332 (Rule 26); *McCrate v. Morgan Packing Co.*, 26 F. Supp. 812, 813 (N.D. Ohio 1939) (Rule 36); *Fox*, 29 F. Supp. at 676 (discovery rules); *Kuenzel v. Universal Car Loading & Dist. Co.*, 29 F. Supp. 407, 410 (E.D. Pa. 1939) (Rule 13); *Chemo-Mechanical*, 29 F. Supp. at 46 (discovery rules); *Jessup & Moore Paper Co. v. West Virginia Pulp & Paper Co.*, 25 F. Supp. 598, 599 (D. Del. 1938) (motion for bill of particulars under Rule 12(e)); *Nichols v. Sanborn*, 24 F. Supp. 908, 910 (D. Mass. 1938) (Rule 33); *Moore v. Illinois Cent. R.R.*, 24 F. Supp. 731, 733 (S.D. Miss. 1938) (Rule 15).

¹⁰⁸ E.g., *Schine Chain Theaters*, 1 F.R.D. at 206 ("The purpose in the adoption of the New Rules of Civil Procedure was to unify and simplify the procedure in . . . civil actions."); *Time Trust*, 28 F. Supp. at 42 (considering defendant's objections to plaintiff's complaint in light of the "liberal spirit of the new Rules"); *Nekrasoff*, 27 F. Supp. at 955 (describing Rules as adopted not only to simplify procedure but to "relieve rather than add to the burden" of the judge); *McCrate*, 26 F. Supp. at 813 (noting that the trinity performs the useful function of making clear that the common law rule that statutes in derogation thereof are to be strictly construed, does not apply to the Rules); *Fox*, 29 F. Supp. at 676 (recognizing purpose of simplifying procedure and applying a "liberal interpretation" to discovery rules); *E.I. DuPont de Nemours & Co. v. Dupont Textile Mills, Inc.*, 26 F. Supp. 236, 236 (M.D. Pa. 1939) (describing purpose of the Rules as expedition and simplification of proceedings); *Kuenzel*, 29 F. Supp. at 410 (noting that the "entire spirit of all the rules as adopted is to the effect that controversies shall be decided upon the merits") (quoting from *Moore v. Illinois Cent. R.R.*, 24 F. Supp. 731, 733 (S.D. Miss. 1938)); *Chemo-Mechanical*, 29 F. Supp. at 46 (noting that "liberality rather than restriction of interpretation" is necessary to fulfill the purpose and spirit underlying the new Rules); *Nichols*, 24 F. Supp. at 910, 911 (noting that "liberality rather than restriction of interpretation" should be the guiding principle); *Moore*, 24 F. Supp. at 733 (noting that purposes of the Rules include "settling" controversies on their merits rather than to have them dismissed on technical points"); see also *20.08 Acres of Land*, 35 F. Supp. at 267 (citing the trinity and Rule 61 for authority to correct a "technical defect" in jury verdict which did not affect the substantial rights of the parties, rather than granting a new trial or setting aside the verdict).

*Fox v. House*¹⁰⁹ provides an example of equating the trinity with “liberal” interpretations. In *Fox*, heirs brought an action for an accounting relating to the estate and they sought discovery from a non-party bank and its agents.¹¹⁰ The defendants sought to delay discovery until after the court heard evidence as to whether the plaintiffs were entitled to an accounting.¹¹¹ The court began its analysis by contrasting the purposes of the new Rules—as set forth in the Rule 1 trinity—with earlier procedures under which the court would have stayed the discovery.¹¹² The court also recognized the necessity of determining the plaintiffs’ entitlement to an accounting before granting such relief.¹¹³ Nevertheless, the court refused to require the plaintiffs to conduct discovery in a piecemeal fashion when the Rules permitted discovery to prepare for all phases of a case.¹¹⁴ A “liberal interpretation of the rules” prohibited the court from preventing the parties from proceeding “until such time as it is apparent that the purpose [of the discovery] is unreasonably to annoy, embarrass or oppress the deponent or a party to the action and that the proceeding is in bad faith.”¹¹⁵

Early references to the Rule 1 trinity did not always coincide with tradition-breaking, “liberal” interpretations designed to foster adjudications on the merits. At least one district court used the trinity to justify a narrow construction of the pleading rules.¹¹⁶ Another cited the trinity and practices under the former Equity Rules to limit discovery absent a “con-

¹⁰⁹ 29 F. Supp. 673 (E.D. Okla. 1939).

¹¹⁰ *Id.* at 674.

¹¹¹ *Id.* at 676.

¹¹² *Id.* On this note, the court observed:

If we think in terms of prior procedure the contention of the defendant has much merit. But if we start with the proposition that these rules were enacted for the purpose of simplifying procedure and getting rid of technicalities; that it is their purpose to provide a just, speedy and inexpensive determination of a law suit, we must come to the conclusion that the rules providing for . . . [discovery] should not be restricted at their inception by orders of court attempting to prescribe and define the activities of parties in their proper use.

Id.

¹¹³ *Id.*

¹¹⁴ The court noted that the discovery sought by the plaintiffs might assist in determining whether an accounting would be worthwhile and so aid the plaintiffs in considering whether to pursue their claim any further. *Id.*

¹¹⁵ *Id.*

¹¹⁶ In *Anheuser-Busch, Inc. v. Dubois Brewing Co.*, 1 F.R.D. 406 (W.D. Pa. 1940), the court required the plaintiff in a trademark infringement suit to set forth in its pleading the specific names of those who made representations or sales that allegedly constituted acts of infringement and the dates of such acts. The court stated that the more definite statement of facts “will enable the parties to know, specifically, the issues they are to try at the trial, and that the granting of the motion will tend to secure the just, speedy and less expensive determination of this action.” *Id.* at 407.

temporaneous exchange" of information by the parties.¹¹⁷ Further, in *Baker v. Sisk*,¹¹⁸ the court adopted a similarly narrow reading of Rule 8(c) regarding affirmative defenses. Rather than an interpretation that would have led to an adjudication of the substantive merits of the claim, the court's restrictive interpretation led to the conclusion that the applicable statute of limitations barred the plaintiff's claim.¹¹⁹

Although the early district court opinions sometimes treated the trinity as a guide for interpretation, they also presented the trinity more broadly as an expression of the objectives of the new Rules as a whole.¹²⁰ View-

¹¹⁷ *Babcock & Wilcox Co. v. North Carolina Pulp Co.*, 25 F. Supp. 596, 597-98 (D. Del. 1938). In *Babcock*, the defendant in a patent infringement action submitted interrogatories to discover the dates when the plaintiff invented the patented chemical recovery machinery and methods at issue. The court noted that "[w]ith knowledge of the dates upon which plaintiff would rely, defendant could manufacture evidence to meet those dates." *Id.* at 597. Although the rule governing interrogatories did not specifically condition or limit such requests by a party, the court concluded that it retained the power to administer the Rules "in a manner fair to both parties." *Id.* at 598. Accordingly, the court required the defendant to produce its own statement of the dates it would rely upon for showing application or prior use at the same time as plaintiff would be required to produce the dates requested by the defendant. *Id.*

¹¹⁸ 1 F.R.D. 232 (E.D. Okla. 1938).

¹¹⁹ The plaintiff in *Baker* filed a tort claim subject to a two-year limitations period. The defendant removed the case to federal court, and then moved to dismiss the complaint for failure to state a claim within the limitations period. *Id.* at 234. Before entry of an order by the court concerning the statute of limitations, the parties were "advised" of the court's intention to grant the defendant's motion. *Id.* at 236. Before entry of a formal order, the plaintiff filed a motion to dismiss without prejudice so that plaintiff could refile the claim in state court, presumably in the hope of obtaining a different ruling on the statute of limitations issue. *Id.* Rule 41 entitled the plaintiff to obtain an order of dismissal without prejudice by filing a motion of dismissal at any time before service of an "answer." *Id.* at 237. After service of an "answer," however, the plaintiff could obtain a dismissal without prejudice only "upon order of court and upon such terms and conditions as the court deems proper." *Id.* The court read Rule 8(c) to provide "that the statute of limitations is an affirmative defense to be set forth in a pleading rather than a motion." *Id.* at 236. The court concluded that because the statute of limitations could not be raised in a motion, the defendant's motion to dismiss based on the statute should be treated as an "answer." *Id.* Accordingly, because the plaintiff did not seek a dismissal without prejudice until after defendant filed its "answer" (motion), such a dismissal required an order from the court. *Id.* at 237. Because the court had held a hearing on the defendant's motion and concluded that the statute of limitations barred the plaintiff's claim, the court concluded that to grant the dismissal sought by the plaintiff so that she could try again in state court "would violate every purpose and intent of the new rules as expressed in Rule 1." *Id.* The court denied the plaintiff's motion to dismiss and granted summary judgment in favor of the defendant based upon the statute of limitations. *Id.* The district court later set aside its judgment and remanded the case to the state court, although its rationale for doing so is not clear. *Id.* at 237 n.1.

¹²⁰ E.g., *Barkeij v. Don Lee, Inc.*, 34 F. Supp. 874, 876 (S.D. Ca. 1940) (noting that

ing the Rule 1 trinity as a statement of general purposes rather than merely a rule of construction empowered district courts to resolve issues not covered explicitly by the language of the Rules. For example, in *Green v. Gravatt*,¹²¹ the district court utilized the Rule 1 trinity to stay proceedings pending resolution of duplicative proceedings in another court. At issue in *Green* was a dispute between the American Federation of Labor ("AFL") and the Committee for Industrial Organization ("CIO") over funds allegedly transferred to the CIO by a union while the union was affiliated with the AFL.¹²² The plaintiffs first brought suit in the district court for the District of Columbia. Two years later, the plaintiffs filed a second suit in the Western District of Pennsylvania involving the same parties and issues found in the District of Columbia suit.¹²³ In response to the second suit, the defendants filed a motion to stay the proceedings pending the outcome of the first suit.¹²⁴ The court cited case law to support its authority to stay proceedings generally, but the court also noted that Rule 12(b) did not apply to the motion to stay the proceedings because a stay was not a "defense within the meaning of said rule."¹²⁵ The reference to Rule 12(b) apparently arose because the defendants in the second suit had sought the stay by means of a motion to dismiss in response to the complaint. Nevertheless, without citing to any other Rule for authority, the district court granted the stay and concluded

"[t]he primary object of this new procedural scheme is stated at the outset of it to be 'to secure the just, speedy, and inexpensive determination of every action' "; *Maryland v. Pan-American Bus Lines, Inc.*, 1 F.R.D. 213, 214 (D. Md. 1940) (noting "the purpose of effecting just, speedy and inexpensive *termination* of every action" (emphasis added)); *United States v. Schine Chain Theaters, Inc.*, 1 F.R.D. 205, 207 (W.D.N.Y. 1940) (referring to the "purposes" and "end" of the Rules); *Society of European Stage Authors & Composers v. WCAU Broadcasting Co.*, 1 F.R.D. 264, 265 (E.D. Pa. 1940) (referring to "purpose"); *SEC v. Time Trust, Inc.*, 28 F. Supp. 34, 42 (N.D. Ca. 1939) (referring to "liberal spirit of new Rules" as a guide to their interpretation); *Cumberland Corp. v. McLellan Stores Co.*, 27 F. Supp. 994, 994 (S.D.N.Y. 1939) (referring to "purpose"); *Michels v. Ripley*, 1 F.R.D. 332, 332 (S.D.N.Y. 1939) (referring to "declared purpose"); *Chemo-Mechanical Water Improvement Co. v. City of Milwaukee*, 29 F. Supp. 45, 46 (E.D. Wis. 1939) (echoing sentiment of the court in *Unlandherm v. Park Contracting Corp.*, 26 F. Supp. 743, 745 (S.D.N.Y. 1938), that "to keep in step with the purpose and spirit underlying the adoption of these rules, it is better that liberality rather than restriction of interpretation be the guiding rule"); *Jessup & Moore Paper Co. v. West Virginia Pulp & Paper Co.*, 25 F. Supp. 598, 600 (D. Del. 1938) (observing that the trinity "expresses the general objective of all such rules").

¹²¹ 35 F. Supp. 491, 493 (W.D. Pa. 1940).

¹²² *Id.* at 492.

¹²³ *Id.* at 491-92.

¹²⁴ *Id.* at 491.

¹²⁵ *Id.* at 492-93.

by quoting the trinity.¹²⁶

One final observation arising from the early uses of the trinity merits notice. In *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co.*,¹²⁷ the court observed that perceptions of justice, speed, and inexpensiveness may occasionally pull a court in different directions. The plaintiff, an association of strawberry growers, claimed that the defendants, owners and operators of large grocery store chains, had violated the antitrust laws by employing "loss leaders" to undermine competitors and in that way control outlets for the sale of strawberries.¹²⁸ In response, the defendants filed a motion for a bill of particulars, then permitted under Rule 12(e).¹²⁹ The court interpreted the motion as seeking, in part, to compel the plaintiff to identify the exact times and places of the defendants' unlawful conduct.¹³⁰ The court recognized that the information would assist the defendants in preparing for and avoiding surprise at trial.¹³¹ Nevertheless, the court concluded that Rule 12(e) should not be construed to "permit either party to put the other to such expense and delay as to make the seeking of justice a profitless thing."¹³² The court resolved the apparent dilemma suggested in the Rule 1 trinity by recalling Justice Holmes's observation that "[w]e must steer between these opposite difficulties as best we can."¹³³ After weighing the defendants' ability to prepare for trial against the costs of requiring the plaintiff to comply

¹²⁶ *Id.* For examples of other cases suggesting the Rule 1 trinity as supporting the exercise of broad powers not addressed by the Rules, see *Barkeij v. Don Lee, Inc.*, 34 F. Supp. 874, 876 (S.D. Ca. 1940) (referring to the trinity to support the assertion of ancillary jurisdiction over a claim brought against a third-party defendant); *Schick Dry Shaver, Inc. v. General Shaver Corp.*, 26 F. Supp. 190, 191 (D. Conn. 1938) (permitting each party to submit additional evidence after a case had been under consideration by a court for seven months, because the court believed that "the only just and speedy and proper manner of deciding this case will be to take further testimony"); see also *Lewis v. United Air Lines Transp. Corp.*, 32 F. Supp. 21, 23 (W.D. Pa. 1940) (equating the deposition of an opponent's expert with a deprivation of property and a violation of the trinity).

¹²⁷ 31 F. Supp. 483 (E.D. Ark. 1940).

¹²⁸ *Id.* at 487.

¹²⁹ Rule 12(e) provided that "[b]efore responding to a pleading . . . a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial." FED. R. CIV. P. 12(e) (1940).

¹³⁰ *Louisiana Farmers'*, 31 F. Supp. at 493. The motion for a bill of particulars included requests for more detailed averments on fifteen separate allegations made by the plaintiffs. *Id.* at 488-89.

¹³¹ *Id.* at 492 (noting in particular that the plaintiff had alleged that defendants operated thousands of stores nationwide).

¹³² *Id.* at 493 (quoting *E.I. DuPont de Nemours & Co. v. DuPont Textile Mills, Inc.*, 26 F. Supp. 236, 237 (M.D. Pa. 1939)).

¹³³ *Id.* (quoting *Swift v. United States*, 196 U.S. 375, 396 (1905)).

with the defendants' demand, the court ordered the plaintiff to give only the names of the cities in which it claimed that the defendants had acted to undermine competition and the years in which the acts took place.¹³⁴

Attempts to use the early district court opinions as evidence of a "tradition" developed under the Rule 1 trinity may be viewed with suspicion. One might object to the relative paucity of cases invoking the trinity and note that more than fifty years have passed since the district courts issued their opinions. One also might question the utility of the early cases because, even when issued, they were of limited value as precedent. Each was the opinion of a single district judge, rulings that did not bind even other judges in the district. Moreover, the logic of the Rule 1 application was often murky at best. In fact, the tone of some opinions is consistent with a perception that courts viewed the Rule 1 trinity as a harmless and relatively meaningless prayer.¹³⁵

Despite these limitations, the early district court opinions reflect the first steps in the development of trinity jurisprudence. The opinions provide an empirical record of reactions to and use of the trinity language. That record begins to identify the range of circumstances in which courts assume the trinity applies. Moreover, the patterns of the initial applications reappear more than fifty years later.¹³⁶

The issues and problems suggested by the early district court opinions represent only the earliest stage of the Rule 1 tradition. As set forth in the next Part, a review of the Supreme Court's use of the trinity helps to clarify the picture of doctrinal permutations generated by the trinity.

III. THE TRINITY AND THE SUPREME COURT

If the Rule 1 trinity suggests the ultimate standards by which all issues of procedure should be judged,¹³⁷ one might expect that the Supreme Court would have had reason to refer often to the trinity since 1938.¹³⁸

¹³⁴ *Id.*

¹³⁵ See *supra* notes 87-88 and accompanying text (discussing use of the trinity as an invocation and benediction).

¹³⁶ See *infra* Part IV.

¹³⁷ See *supra* notes 4-8, and accompanying text.

¹³⁸ I am not suggesting that concerns with justice, speed, and cost did not occupy the attention of the courts before the adoption of the Rules. *E.g.*, *Ex parte Russell*, 80 U.S. (13 Wall.) 664, 671 (1871) (concluding that holding hearing on motion to dismiss before the term to which the record ought to be returned "would be likely to prevent great delays and expense, and further the ends of justice"); *Brown v. Aspden's Adm'rs*, 55 U.S. (14 How.) 25, 27 (1852) (declining to adopt the English Court of Chancery's practice on rehearings because, as a result of the practice, "expense and delays of the court have become a byword and reproach to the administration of justice"); *Oliver v. Alexander*, 31 U.S. (6 Pet.) 143, 146 (1832) (noting that the privilege extended to seamen in courts of admiralty to sue jointly for wages served "to save the parties from oppressive costs and expenses, and to enable speedy justice to

Instead, a striking feature of trinity jurisprudence is the infrequency with which the Court has invoked Rule 1.¹³⁹

Despite the paucity of references to the trinity, the circumstances in which the Supreme Court has used it demonstrate some of the same perceptions and problems that arose in early district court opinions. For example, various justices have characterized the Rule 1 trinity not just as a guide for construing other Rules, but more broadly as a general recitation of the purposes and goals of civil dispute-resolution processes.¹⁴⁰ Further, the Court has occasionally associated the trinity with a fundamental power of courts to manage their dockets generally.¹⁴¹

be administered to all who stand in a similar predicament"); *Boyd's Lessee v. Cowan*, 4 U.S. (4 Dall.) 138, 140-42 (1794) (reporting advisory opinion issued by the Supreme Court of Pennsylvania holding that both mesne profits and land could be recovered in an action in ejectment even though precedent created some doubt, because the court had the power to institute any rules not contrary to positive law which "answer[ed] more fully the ends of justice and convenience, by avoiding unnecessary delay, a circuity of action, and a double expense to suitors").

¹³⁹ I researched the use of the Rule 1 trinity in Supreme Court opinions through August 31, 1995. I found 18 cases in which the Court has invoked the language of the trinity. Half of the references appear after 1980. Five references appear in dissenting opinions; one appears in a concurring opinion.

The 18 cases that form the basis of the following analysis are set forth below in chronological order: *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254 (1949); *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 240 (1958) (Frankfurter, J., dissenting); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Foman v. Davis*, 371 U.S. 178 (1962); *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227 (1964); *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1977); *Herbert v. Lando*, 441 U.S. 153 (1979); *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981); *Heckler v. Edwards*, 465 U.S. 870 (1984); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 163 (1984) (Stevens, J., dissenting); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 716 (1986) (Stevens, J., dissenting); *Schiavone v. Fortune*, 477 U.S. 21 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, S. Dist. Iowa*, 482 U.S. 522 (1987); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 319 (1988) (Scalia, J., concurring); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 409 (1990) (Stevens, J., dissenting); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 904 (1990) (Blackmun, J., dissenting).

¹⁴⁰ *E.g.*, *Societe Nationale*, 482 U.S. at 543 (describing the trinity as an "overriding interest"); *Celotex Corp.*, 477 U.S. at 327 (describing the Rules as "designed to secure" the trinity); *Edwards*, 465 U.S. at 880 n.12 (referring to the exercise of judicial discretion in administering caseloads in order to secure the trinity); *Farmer*, 379 U.S. at 234 n.5 (referring to Rule 1 as reflecting a "national policy to minimize the cost of litigation" strongly emphasized in the Rules); *Brown Shoe Co.*, 370 U.S. at 306 (referring to "touchstones of federal procedure"); *F. & M. Schaefer Brewing Co.*, 356 U.S. at 240 (Frankfurter, J., dissenting) (referring to "general purpose"); *Royal Ins. Co.*, 337 U.S. at 257 (referring to the trinity as expressing one "purpose, among others"); *Ettelson*, 317 U.S. at 191 (referring to "objectives").

¹⁴¹ *E.g.*, *Societe Nationale*, 482 U.S. at 542 (referring to the trinity in declining to

Even when the Supreme Court has treated the trinity as a guide for interpreting other Rules, the Court has described it as a mandate for liberal interpretations that require only substantial compliance with the language of particular Rules.¹⁴² *Foman v. Davis*¹⁴³ provides one example of a perceived mandate for "liberal interpretation" sometimes found by the Supreme Court in the Rule 1 trinity. Following the dismissal of Foman's complaint, Foman had filed motions in the district court seeking to vacate the dismissal and seeking leave to amend the complaint.¹⁴⁴ While the motions were pending, Foman also filed a notice of appeal from the district court's original dismissal.¹⁴⁵ When the district court denied the mo-

adopt a general rule requiring parties to first resort to international convention procedures for discovery in light of attendant delay and expense); *Edwards*, 465 U.S. at 880 n.12 (describing the court's construction of 28 U.S.C. § 1252 to hear appeals of the whole case when reviewing judgments holding acts of Congress unconstitutional as consistent with the principle of case management expressed in the trinity); *Brown Shoe Co.*, 370 U.S. at 306 (utilizing the Rule 1 trinity to construe the term "final judgment" under the Expediting Act of 1903); *Royal Ins. Co.*, 337 U.S. at 257-59 (invoking the trinity to deny appeal from the denial of a request for jury trial because piecemeal appeals would "ill serve the stated purposes of the Rules of Civil Procedure"); see also *Link v. Wabash R.R.*, 370 U.S. 626, 629-30 (1962) (concluding that Rule 41(b) should not be interpreted to limit a district court's inherent authority to avoid congestion and delay by dismissing a case *sua sponte* without citing to the Rule 1 trinity).

¹⁴² For opinions associating the Rule 1 trinity with liberal constructions of the Rules in order to facilitate adjudication on the merits, see *Bankers Trust Co.*, 435 U.S. at 386-87 (per curiam) (citing the trinity and the non-technical, "common sense" approach of *Foman v. Davis*, 371 U.S. 178 (1962), to allow parties to waive Rule 58 separate judgment requirement); *Foman*, 371 U.S. at 182 (invoking the trinity to reach the merits of the case, even though a technical reading of the applicable Rule would have led to dismissal); see also *Lujan*, 497 U.S. at 904-05 (Blackmun, J., dissenting) (asserting that the majority's dismissal for lack of standing "reflects an insufficient appreciation of both the realities of complex litigation and of the admonition" contained in the trinity); *Cooter & Gell*, 496 U.S. at 412-13 (Stevens, J., dissenting) (arguing for "sensible interpretations of Rules designed to secure the trinity"); *Torres*, 487 U.S. at 316-17 (reaffirming "the important principle for which *Foman* stands—that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits"); *Icicle Seafoods, Inc.*, 475 U.S. at 716 (Stevens, J., dissenting) (arguing that Rule 52(a), in light of the trinity, does not require a court of appeals to remand matters to the district court for entry of formal findings of facts admitted during argument on appeal); *Baldwin County Welcome Ctr.*, 466 U.S. at 163-65 (Stevens, J., dissenting) (observing that adherence to the "first procedural rule" would have led to prompt adjudication of plaintiff's discrimination claims, rather than extended litigation over technicalities in pleading requirements).

¹⁴³ 371 U.S. 178 (1962).

¹⁴⁴ *Id.* at 179.

¹⁴⁵ *Id.*

tions to vacate and for leave to amend, Foman filed a second notice of appeal addressing only the denial of the motions to vacate and for leave to amend.¹⁴⁶ The court of appeals concluded that the first notice of appeal was premature due to the pendency of the motions to vacate and for leave to amend.¹⁴⁷ The court of appeals also refused to hear an appeal on the merits of the original dismissal because the second notice of appeal designated only the denial of the motions to vacate and for leave to amend as the issues on appeal.¹⁴⁸

The Supreme Court reversed on grounds that the court of appeals had construed the second notice of appeal too narrowly.¹⁴⁹ Although the Court acknowledged the "defect" in the second notice of appeal and characterized that notice as "inept," the Court found the second notice sufficient to preserve Foman's appeal of the original dismissal.¹⁵⁰ The Court observed that the defect in the second notice of appeal had neither misled nor prejudiced the defendant, because both parties had briefed and argued the merits of the dismissal in the context of the second appeal.¹⁵¹ The Supreme Court concluded:

[I]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such technicalities. . . . The Rules themselves provide that they are to be construed "to secure the just, speedy, and inexpensive determination of every action."¹⁵²

¹⁴⁶ *Id.* at 178-79.

¹⁴⁷ The Court of Appeals determined that, in the absence of a specific designation of a Rule under which the motion to vacate was filed, the court would treat it as filed pursuant to Rule 59(e), under which the time for perfecting an appeal was suspended. *Id.* at 180.

¹⁴⁸ At the time, Rule 73 provided, in part, that an appeal was to be taken by filing with the district court a notice of appeal "designat[ing] the judgment or part thereof appealed from." FED. R. CIV. P. 73(b) (1962) (current version at FED. R. APP. P. 3(c)). The Court of Appeals considered the second notice only as an appeal from the denial by the district court of the motions to vacate and amend, and found no abuse of discretion in the district court's refusal to permit the requested amendment. *See Foman*, 371 U.S. at 180-81 (noting determination of lower court).

¹⁴⁹ *Id.* at 181.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 181-82. The Court also concluded that the district court had abused its discretion in refusing to grant leave to amend the complaint. *Id.* at 182 ("[O]utright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the Federal Rules."); *see also* Bankers Trust Co. v. Mallis, 435 U.S. 381, 386-87 (1977) (per curiam) (dismissing grant of certiorari but citing *Foman* to support conclusion that parties to an appeal may waive the separate judgment requirement of Rule 58). *But see* Torres v. Oakland Scavenger Co., 487 U.S. 312, 316-17 (1988) (distinguishing *Foman* by finding that failure to specifically name a party as an appellant in a notice

Although the Supreme Court has utilized rhetoric presenting the trinity as a champion of liberal, non-technical constructions of the Rules, the existence of such a characterization can be misleading. Despite the rhetoric—and sometimes even in conjunction with it—the Supreme Court also has employed literal or narrow constructions of the Rules. On more than one occasion only a dissenting opinion has recalled the path of liberal discretion forged under the Rule 1 trinity.¹⁵³

Three cases decided in the past fifteen years provide examples of the Court's move toward restrained constructions of the Federal Rules of Civil Procedure despite the contrary indications of the trinity. In *Delta Air Lines, Inc. v. August*,¹⁵⁴ the plaintiff alleged that the defendant had violated Title VII of the Civil Rights Act of 1964¹⁵⁵ by discharging the plaintiff because of her race.¹⁵⁶ Prior to trial, the defendant-employer made an offer of judgment that the plaintiff refused.¹⁵⁷ The plaintiff lost at trial and the district court entered a judgment in favor of the defendant.¹⁵⁸ The district court also directed each party to bear its own costs.¹⁵⁹ Subsequently, the defendant sought to modify the judgment under Rule 68, arguing that it was entitled to recover costs incurred after the plaintiff refused the defendant's "offer to have judgment taken against" it.¹⁶⁰ The district court denied the motion to modify, finding that the defendant had not made the offer of judgment in good faith.¹⁶¹

The Court of Appeals affirmed the district court's refusal to construe Rule 68 as the defendant requested, holding that the Rule's cost-shifting

of appeal as then required under FED. R. APP. P. 3(c) constituted failure to comply with a jurisdictional requirement rather than a "mere technicality").

¹⁵³ See *supra* note 142 (collecting cases in which dissenting Justices invoked the trinity).

¹⁵⁴ 450 U.S. 346 (1981).

¹⁵⁵ 42 U.S.C. § 2000e to e-17 (1988).

¹⁵⁶ *Delta*, 450 U.S. at 348.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 349.

¹⁵⁹ At the time of judgment, Rule 54(d)(1) provided that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." FED. R. CIV. P. 54(d)(1) (1981).

¹⁶⁰ *Delta*, 450 U.S. at 348-49. At the time, Rule 68 provided:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the *judgment finally obtained by the offeree* is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

FED. R. CIV. P. 68 (1981) (emphasis added); see also *Delta*, 450 U.S. at 348 n.1.

¹⁶¹ *Delta*, 450 U.S. at 349.

mechanism applied only if a defendant's settlement offer justified "serious consideration" by the plaintiff.¹⁶² The court of appeals decided that a "liberal" rather than "technical" reading of Rule 68 was required in the context of Title VII cases.¹⁶³ Under its "liberal" interpretation, the court of appeals concluded that the semantically mandatory language of Rule 68 became discretionary when an offer of judgment was not made in good faith and did not bear a reasonable relationship to the amount at issue, the risks of the litigation, and the expenses involved in the case.¹⁶⁴ The court was concerned that if it ruled otherwise, "minimal Rule 68 offer(s) made in bad faith could become a routine practice by defendants seeking cheap insurance against costs."¹⁶⁵ The court of appeals worried that such "sham" offers would be made because they would cost the defendants very little, and, if the plaintiff lost, would guarantee defendants the recovery of costs under the language of Rule 68.¹⁶⁶ Construing Rule 68 to endorse "sham offers" also would deny district courts discretion in awarding costs as provided in Rule 54,¹⁶⁷ and would discourage settlements.¹⁶⁸

Unlike the lower courts, the Supreme Court did not focus on the propriety of a "reasonableness" requirement for Rule 68 offers. Instead, the Court identified the "threshold" question to be whether Rule 68 applied *at all* in a case in which a judgment is entered *against* a plaintiff.¹⁶⁹ The Court concluded that the "plain language, the purpose, and the history of Rule 68" dictated a negative answer.¹⁷⁰

The Supreme Court in *Delta Air Lines* focused its "plain language" analysis of Rule 68 on the phrase "judgment finally obtained by the offeree . . . not more favorable than the offer."¹⁷¹ The Court observed that because the Rule referred only to a "judgment obtained by the offeree," it "would not normally be read by a lawyer to describe a judgment in favor of the other party."¹⁷² Turning to Rule 68's reference to a defend-

¹⁶² *August v. Delta Air Lines, Inc.*, 600 F.2d 699, 701 (7th Cir. 1979), *cert. granted*, 446 U.S. 907 (1980), *and aff'd*, 450 U.S. 346 (1981).

¹⁶³ *Id.* at 702.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 701.

¹⁶⁶ *Id.*

¹⁶⁷ *See supra* note 159 (quoting relevant portions of Rule 54 (d)).

¹⁶⁸ *August*, 600 F.2d at 701-02 (associating "the useful vitality of Rule 68" with encouraging settlement, avoiding protracted litigation, and relieving courts of vexatious litigation).

¹⁶⁹ *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350 (1981). *But see id.* at 366 (Rehnquist, J., dissenting) (contending that the question on which the Court had agreed to grant certiorari was: "whether the [C]ourt of [A]ppeals erred in nullifying the clear and unambiguous mandatory imposition of costs under Rule 68").

¹⁷⁰ *Id.* at 350.

¹⁷¹ *Id.* at 351; *see also supra* note 160 (quoting text of Rule 68).

¹⁷² *Delta*, 450 U.S. at 351 (contrasting the broader scope of the Rule if it referred to "any judgment").

ant who offers to have a "judgment . . . taken against him," the Court reasoned that because the phrase "judgment taken" against a defendant implies a judgment for the plaintiff, then a "judgment finally obtained by the offeree" also must imply a judgment for the plaintiff.¹⁷³ Thus, the Court concluded, the language of Rule 68 clearly contemplates "only . . . offers made by the defendant and only . . . judgments obtained by the plaintiff."¹⁷⁴

Writing for the Court, Justice Stevens suggested that the "plain language" approach—or a "literal interpretation" of Rule 68—was consistent with the Rule 1 trinity. Addressing the lower courts' concern with "sham offers," Justice Stevens noted that a "literal interpretation [of Rule 68] totally avoids the problem, because such an offer will serve no purpose, and a defendant will be encouraged to make only realistic settlement offers."¹⁷⁵ Having justified the majority's "literal interpretation" of Rule 68, Justice Stevens then invoked the Rule 1 trinity. Justice Stevens suggested that any other reading of Rule 68 would be inconsistent with the trinity and "hardly fair or evenhanded."¹⁷⁶

The logic of Justice Stevens' juxtaposition of the argument for "literal interpretation" and the Rule 1 trinity is not clear.¹⁷⁷ As a result, the union of the two could prompt several different inferences concerning the trinity. *Delta Air Lines* could be interpreted as a notice that one need only read a Rule's "plain language" to understand and comply with the

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 352. Despite the "clarity" of its conclusions regarding the "plain language" of Rule 68, the Court apparently felt obliged to go on to describe how its interpretation was consistent not only with the history and purposes of Rule 68, but also with interpretations offered by commentators. *Id.* at 352-62.

¹⁷⁵ *Id.* at 355-56. In other words, if Rule 68 does not apply when judgment is rendered for a defendant, then a defendant who makes a "sham" offer will be entitled to recover costs under Rule 68 only when judgment is rendered for plaintiff for an amount less than the "sham" offer, presumably a nominal amount. In the Court's opinion, the possibility of such narrow circumstances occurring did not require a deviation from the "plain language" of Rule 68.

¹⁷⁶ *Id.* at 356-57. Justice Stevens stated:

The Federal Rules are to be construed to "secure the just, speedy, and inexpensive determination of every action. . . . If a plaintiff chooses to reject a *reasonable offer*, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered. But it is hardly fair or evenhanded to make the plaintiff's rejection of an utterly *frivolous* settlement offer a watershed event that transforms a prevailing defendant's right to costs in the discretion of the trial judge into an absolute right to recover the costs incurred after the offer was made.

Id. at 355-56 (emphasis added) (footnote omitted).

¹⁷⁷ For a discussion of similar problems in understanding the placement of the Rule 1 trinity in the district court opinions from 1938 through 1940, see *supra* notes 87-89 and accompanying text.

trinity's mandates.¹⁷⁸ That inference may be undercut, however, by Justice Stevens' comments immediately following his reference to the trinity.¹⁷⁹ In those comments Justice Stevens distinguished the effects of "reasonable" and "frivolous" offers on the application of Rule 68.¹⁸⁰ As such, it seems plausible to infer that Justice Stevens recognized Rule 1 as the source of a broad discretion to insert such qualifying terms into Rule 68. Recall, however, that the Supreme Court rejected the lower court's attempts to import the same qualifications into the text of Rule 68.¹⁸¹

Perhaps, then, the Supreme Court's opinion in *Delta Air Lines* should be viewed as presenting the trinity as lying somewhere between unlimited discretion and narrow construction. Justice Stevens may have been suggesting that the use of all language involves some degree of personal interpretation and that the trinity should guide the discretion inevitably employed in those tasks.

The Supreme Court's opinion in *Schiavone v. Fortune*¹⁸² also demonstrates the peculiar effects of applying a "plain language" approach to the Federal Rules of Civil Procedure while attempting to recognize the Rule 1 trinity. In *Schiavone*, the plaintiffs filed amended libel complaints identifying the defendant as "Fortune, also known as Time Inc."¹⁸³ In their original complaints, plaintiffs had identified "Fortune" as the sole defendant.¹⁸⁴ However, Fortune was not an entity separate from Time; "Fortune" was only a trademark and the name given to an internal division of Time, Incorporated.¹⁸⁵ Time filed motions to dismiss the amended complaints on grounds that the plaintiffs had failed to name Time specifically as a defendant before the applicable one year limitations period had expired.¹⁸⁶ The plaintiffs argued that their amended complaints were timely under Rule 15(c), which provided for the "relation back" of amended

¹⁷⁸ Note that Justice Rehnquist's dissent in *Delta Air Lines* illustrates how Rule 68 could have a "plain language" meaning contrary to the interpretation dictated by the majority's reasoning. *Delta*, 450 U.S. at 366-80 (Rehnquist, J. dissenting) (contending that the "plain meaning" of Rule 68 applies to *all* judgments—prevailing and adverse—obtained by an offeree and characterizing the majority's interpretation as "wooden" and "perverse").

¹⁷⁹ *Supra* note 176.

¹⁸⁰ *Id.*

¹⁸¹ *Delta*, 450 U.S. at 355 (noting that "the plain language of the Rule makes it unnecessary to read a reasonableness requirement into the Rule").

¹⁸² 477 U.S. 21 (1986).

¹⁸³ *Id.* at 23. In *Schiavone*, the plaintiffs claimed that they had been libeled by the cover story in the May 31, 1982, edition of *Fortune* magazine. *Id.* at 22.

¹⁸⁴ *Id.* Paragraph 2 of each original complaint described Fortune as "a foreign corporation having its principal offices at the Time and Life Building, Sixth Avenue and 50th Street, New York, New York, 10020." *Id.* at 23 (internal quotation omitted).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 23-24.

pleadings to the date of the original pleading. At the time, Rule 15(c) provided:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, *within the period provided by law for commencing the action against him*, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.¹⁸⁷

The district court granted the motions to dismiss,¹⁸⁸ and the Third Circuit affirmed.¹⁸⁹

In *Schiavone*, the Supreme Court concerned itself primarily with the phrase "within the period provided by law for commencing the action against him"¹⁹⁰ found in Rule 15(c). Time asserted that, because of the phrase, the notice required under Rule 15(c) must occur within the applicable period of limitations.¹⁹¹ Conversely, the plaintiffs argued that the phrase "within the period provided by law" included not only the applicable limitations period but also the time allotted under Rule 4 for service of process when a plaintiff files a complaint before the statute of limitations has run.¹⁹²

The Supreme Court began its analysis by quoting the Rule 1 trinity and Rule 8(f), which provided that "[a]ll pleadings shall be construed as to do substantial justice."¹⁹³ The Court also invoked the instruction of Jus-

¹⁸⁷ FED. R. CIV. P. 15(c) (1985) (emphasis added).

¹⁸⁸ The Court noted that the district court held that the amendments did not relate back to the filing of the original complaint because the plaintiffs had not shown that Time received notice of the suits "within the period provided by law for commencing the action" as required for timely amendments under Rule 15(c). *Schiavone*, 477 U.S. at 24. The district court granted Time's motion to dismiss, noting that dismissals related to statutes of limitations were always somewhat arbitrary. *Id.*

¹⁸⁹ *Schiavone v. Fortune*, 750 F.2d 15, 16-18 (3d Cir. 1984) (holding plaintiff's claims time barred in light of the "clear and unequivocal" language of Rule 15(c) under which a defendant added by means of an amended complaint must receive notice of the action within the applicable period of limitations), *cert. granted*, 474 U.S. 814 (1985), *and aff'd*, 477 U.S. 21 (1986).

¹⁹⁰ FED. R. CIV. P. 15(c).

¹⁹¹ *Schiavone*, 477 U.S. at 26.

¹⁹² *Id.* At the time, Rule 4(j) provided that service of a complaint must occur within 120 days of filing. FED. R. CIV. P. 4(j) (1984).

¹⁹³ *Schiavone*, 477 U.S. at 27 (citing FED. R. CIV. P. 8(f) (1984)).

tice Hugo Black that the " 'principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.' " ¹⁹⁴ Nevertheless, with an apologetic preface of "despite these worthy goals and loftily stated purposes," ¹⁹⁵ the majority in *Schiavone* chose the narrower construction of Rule 15(c) advocated by the defendant. The Court's construction of Rule 15 operated to bar the plaintiffs' claims.

The Court found that the "plain language" of Rule 15(c) required that notice to a party added by amendment must occur within the applicable period of limitations. ¹⁹⁶ In effect, the Supreme Court held that the phrase "within the period provided by law for commencing the action" was the "plain language" equivalent of "within the applicable period of limitations." The Court read the language of Rule 15(c) as leaving it with no other choice:

We do not have before us a choice between a "liberal" approach toward 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the rule as meaning what it says.

We are not inclined, either, to temper the plain meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint. ¹⁹⁷

The Court acknowledged an element of arbitrariness in its decision, but excused that element as "characteristic of any limitations period" and as one "imposed by the legislature and not by the judicial process." ¹⁹⁸

In dissent, Justice Stevens argued that the majority failed to explain why a "plain language" reading of the words "period provided by law for commencing the action against him" could only mean "within the applicable period of limitations." ¹⁹⁹ Justice Stevens concluded that the phrase from Rule 15(c) at issue rationally could be read to include two components: "the time for *commencing* the action by the filing of a complaint and the time in which the action '*against him*' must be implemented by

¹⁹⁴ *Id.* (quoting Order Adopting Rules of the U.S. Supreme Court, 346 U.S. 945, 946 (1954)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 29.

¹⁹⁷ *Id.* at 30. The Supreme Court also stated that the 1966 Advisory Committee notes to Rule 15(c) resolved any possible doubt about the meaning of Rule 15(c) even though the Court admitted that the Advisory Committee note was not binding. *Id.* at 30-31 (citing *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946)); see also FED. R. CIV. P. 15(c) advisory committee's note (1966). The note specifically referred to notice "within the applicable limitations period." *Id.*

¹⁹⁸ *Schiavone*, 477 U.S. at 31.

¹⁹⁹ *Id.* at 32 (Stevens, J., dissenting).

service of process."²⁰⁰

Justice Stevens also pointed out an anomaly resulting from the majority's "plain language" reading of Rule 15(c).²⁰¹ In jurisdictions where timely service of process can occur even after the statute of limitations has run, a defendant properly named in an original complaint might not receive notice of suit until after the limitations period expired. However, in the same jurisdiction under the majority's reading of Rule 15(c), a defendant added by amendment of the complaint would be entitled to notice of the suit *before* the statute had run.²⁰²

As with *Delta Air Lines*,²⁰³ it is difficult to determine the significance of *Schiavone*'s references to the Rule 1 trinity. The Court's initial recitation of the trinity and invocation of Justice Black's guidance²⁰⁴ suggests a recognition of the trinity as a source of interpretations designed to foster adjudications on the merits.²⁰⁵ Recall, however, that the majority followed those recitations with somewhat wistful statements of how the Court fostered liberal interpretations "in the early days of the federal civil procedure rules,"²⁰⁶ along with dismissive phrases such as "despite these worthy goals and loftily stated purposes."²⁰⁷ One might read such comments to suggest that the Rule 1 trinity is no more than a statement of good intentions, rather than practical realities. Or, given the result in *Schiavone*, a plausible inference could be that the mandates of the Rule 1 trinity are most closely approximated by adopting a limited reading of the Rules narrowly circumscribed by the Rules' language.²⁰⁸

*Lujan v. National Wildlife Federation*²⁰⁹ provides the most recent example of the Supreme Court's use of a "plain language" approach and a

²⁰⁰ *Id.* at 37; see also *supra* note 178 (identifying competing "plain language" interpretations of the phrase "judgement obtained by the offeree").

²⁰¹ In *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1980), Justice Rehnquist also argued that the majority's literal interpretation of Rule 68 in that case led to anomalous results. *Id.* at 375 (Rehnquist, J. dissenting).

²⁰² *Schiavone*, 477 U.S. at 37 n.4 (1986) (quoting *Ingram v. Kumar*, 585 F.2d 566, 571-72 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979)).

²⁰³ See *supra* notes 154-81 and accompanying text.

²⁰⁴ See *supra* note 194 and accompanying text.

²⁰⁵ Justice Stevens noted the "irony in the way the Court gives 'lip service' to its duty to construe the Federal Rules of Civil Procedure in a way that will facilitate a proper decision on the merits." *Schiavone*, 477 U.S. at 39 n.6. In particular, he contrasted the approach of the majority in *Schiavone* with the approach of the Court in *Foman v. Davis*. *Id.* For a discussion of *Foman*, see *supra* notes 143-52 and accompanying text.

²⁰⁶ *Id.* at 27 (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957) and *Foman v. Davis*, 371 U.S. 178, 181 (1962)).

²⁰⁷ *Id.*

²⁰⁸ Rule 15(c) was subsequently amended to change the result in *Schiavone*. FED. R. CIV. P. 15(c)(3) and advisory committee's note (1991).

²⁰⁹ 497 U.S. 871 (1990).

critique of that approach in light of the trinity.²¹⁰ The defendants in *Lujan* had filed a motion for summary judgment based, *inter alia*, on the alleged lack of standing of the plaintiff, the National Wildlife Federation ("NWF").²¹¹ After a hearing on the motion, the district court requested additional briefing from the parties.²¹² NWF used the opportunity of post-hearing briefing to submit new affidavits supplementing the affidavits it had filed prior to the hearing.²¹³ The district court rejected the new affidavits as untimely and granted the motion for summary judgment.²¹⁴

The court of appeals reversed the grant of summary judgment,²¹⁵ concluding that NWF's first set of affidavits was sufficient to avoid summary

²¹⁰ In *Lujan*, the National Wildlife Federation ("NWF") sued various federal parties alleging that the defendants had violated certain laws governing the management of lands within the public domain. *Id.* at 875. NWF sought to have certain acts of the defendants set aside under the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"). *Id.* at 879. In the lower court proceedings, the defendants first filed an unsuccessful motion to dismiss the complaint based upon NWF's alleged failure to demonstrate standing under the APA. *National Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 277 (D.D.C. 1985). The court of appeals affirmed. *National Wildlife Fed'n v. Burford*, 835 F.2d 305 (D.C. Cir. 1987). The court of appeals found two elements of the complaint relevant to standing and sufficient to deny the motion to dismiss. First, the complaint alleged that NWF's members used environmental resources that would be damaged by the defendants' actions. *Id.* at 312-13. In addition, the court of appeals identified two affidavits from NWF members who claimed use of land "in the vicinity" of the specific land identified in the complaint as improperly managed. *Id.* at 313. On rehearing, the court of appeals affirmed the denial of the motion to dismiss and instructed the district court to "proceed with . . . dispatch." *National Wildlife Fed'n v. Burford*, 844 F.2d 889, 890 (D.C. Cir. 1988). During this appeal, a motion for summary judgment by the defendants had been pending in the district court.

²¹¹ *Lujan*, 497 U.S. at 881. The defendants had filed their motion for summary judgment in September of 1986. *Id.* at 894. The hearing on the motion was delayed for almost two years due to an ongoing appeal discussed *supra* note 210.

²¹² *Lujan*, 497 U.S. at 881.

²¹³ *Id.* The defendants apparently challenged NWF's right to submit additional affidavits, and NWF responded in a reply brief. *Id.* at 909 n.10 (Blackmun, J. dissenting). NWF sought to justify the submission of new affidavits on grounds that it had relied on the earlier denial of the government's motion to dismiss and that it was entitled to an opportunity to supplement its showing if the court intended to reverse its earlier decision on standing. *Id.*

²¹⁴ *Id.* The district court held that neither its earlier decision denying the motion to dismiss nor the court of appeals' affirmance of that decision controlled its ruling on the motion for summary judgment, because of the different issues raised by motions under Rules 12(b)(6) and 56. *National Wildlife Fed'n v. Burford*, 699 F. Supp. 327, 329 (D.D.C. 1988). The district court also found that even the initial affidavits that aided in defeating the motion to dismiss could not support NWF's claim to standing with respect to the 1250 land management decisions about which NWF complained. *Id.* at 331-32. Finally, the district court characterized the submission of the additional affidavits as "in violation of the [briefing] order." *Id.* at 328 n.3.

²¹⁵ *National Wildlife Fed'n v. Burford*, 878 F.2d 422 (D.C. Cir. 1988).

judgment.²¹⁶ The appellate court also found an abuse of discretion in the district court's refusal to consider the supplemental affidavits.²¹⁷

The Supreme Court in *Lujan* reversed the judgment of the court of appeals.²¹⁸ The Court held, in part, that the district court did not abuse its discretion in refusing to consider the supplemental affidavits.²¹⁹ The Court found that the submission of post-hearing affidavits was untimely under several of the Rules. The Court first noted that Rule 56(c) "requires that affidavits in opposition to a motion for summary judgment be served prior to the day of hearing."²²⁰ The Court also invoked Rule 6(d), which provides that "[w]hen a motion is supported by affidavit, . . . opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time."²²¹

The Supreme Court next focused its attention on Rule 6(b), which gives district courts discretion to extend deadlines "for cause shown."²²² The Court also noted that the Rule specifies "the mechanism by which that discretion is to be invoked and exercised."²²³ In particular, the Court highlighted and contrasted the conditions specified for granting extensions of time when a party seeks an extension before a deadline has passed, versus the conditions for extensions sought after the deadline. The Court noted that extensions sought before a deadline may be had "with or without motion or notice" and that extensions sought after a deadline must be "upon motion" and made necessary by "excusable neglect."²²⁴ Based upon this language, the Court concluded that the district court could have accepted NWF's supplemental affidavits only under the following conditions: (1) if the district court considered the filing of the

²¹⁶ *Id.* at 430.

²¹⁷ *Id.* at 433.

²¹⁸ *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

²¹⁹ *Id.* at 894. Before considering whether the district court abused its discretion, the Supreme Court found that NWF's initial set of affidavits was insufficient to withstand summary judgment and that the additional affidavits would not suffice to afford standing with respect to all of the defendants' actions that NWF sought to challenge. *Id.* at 885-94.

²²⁰ *Id.* at 895.

²²¹ *Id.*

²²² *Id.* at 895-96. Rule 6(b) provides:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for *cause shown* may at any time in its discretion (1) *with or without motion or notice* order the period enlarged if the *request* therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) *upon motion made after the expiration of the specified period* permit the act to be done where the failure to act was the *result of excusable neglect*

FED. R. CIV. P. 6(b) (emphasis added).

²²³ *Lujan*, 497 U.S. at 895-96.

²²⁴ *Id.* at 896.

affidavits to be a "motion made;" (2) if the district court interpreted "cause shown" to mean only "cause;" and (3) if the district court found that the failure to file on time was the result of "excusable neglect."²²⁵

The Supreme Court in *Lujan* felt restricted to some extent by the terms used in Rule 6(b). The court stated:

To treat all post-deadline "requests" as "motions" . . . would eliminate the distinction between predeadline and postdeadline filings that the Rule painstakingly draws. Surely the postdeadline "request," to be even *permissibly* treated as a "motion," must contain a high degree of formality and precision, putting the opposing party on notice that a motion is at issue and that he therefore ought to respond. The request here had not much of either characteristic.²²⁶

The extent to which the Court felt bound by the language of Rule 6(b) is unclear, however. By using phrases such as "permissibly treated" and "characteristic," the Court suggested that something like "substantial compliance" with the language of the Rule would be acceptable. The Court did not provide any further guidance as to where the boundaries of such compliance might lie, apart from its conclusion that it was not an abuse of discretion for the district court to have excluded the supplemental affidavits.²²⁷

Justice Blackmun's dissent in *Lujan* employed the Rule 1 trinity to criticize the majority. Justice Blackmun chided the majority for demonstrating "an insufficient appreciation both of the realities of complex litigation and of the admonition that the Federal Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'"²²⁸ Justice Blackmun agreed that the technical requirements of the Rules must be obeyed, but he also pointed out that the relevant Rules in this case *expressly* permitted the district court to exercise discretion in deciding whether to accept the plaintiff's affidavits.²²⁹ Justice Blackmun contended that when a Rule expressly provides for such discretion, then the district court must consider the purposes underlying the particular Rule.²³⁰ He concluded that the refusal to consider the additional affidavits failed to advance the purposes of either Rule 56 or Rule 6.²³¹

²²⁵ *Id.*

²²⁶ *Id.* at 896 n.5.

²²⁷ *Id.* at 898.

²²⁸ *Id.* at 904-05 (Blackmun, J., dissenting).

²²⁹ *Id.* at 905.

²³⁰ *Id.*

²³¹ *Id.* at 906. In summary, the dissent found that the time limitations on submitting affidavits set forth in Rule 56 were intended to insure that the opposing party had a meaningful opportunity to respond. *Id.* at 911. In this case, the dissent found that the defendants had that opportunity as demonstrated by the motions and brief they filed in opposition to the supplemental affidavits. *Id.* at 911-12. The dissent also

The dissent in *Lujan* continued by arguing that it was inconsistent with the spirit of Rule 1 to “abort” the case on technical grounds after three years of litigation involving significant time and expense,²³² particularly where the defendants did not prove any prejudice arising from the supplemental affidavits.²³³ Justice Blackmun concluded first by chastising the district court and the Supreme Court for “fail[ing] to recognize the guiding principle of the Federal Rules of Civil Procedure, the principle that procedural rules should be construed pragmatically so as to ensure the just and efficient resolution of legal disputes.”²³⁴ Justice Blackmun continued:

Some provisions of the Rules strip the district courts of discretion, and the courts have no choice but to enforce these requirements with scrupulous precision. But where the Rules expressly confer a range of discretion, a district court may abuse its authority by refusing to take account of equitable concerns, even where its action violates no express command.²³⁵

The use of the Rule 1 trinity by the dissent in *Lujan* again suggests multiple perceptions of the trinity. At times Justice Blackmun characterizes the Rule 1 trinity as a source of discretion affording opportunities for liberal, pragmatic interpretations of the Rules.²³⁶ However, in the same breath, Justice Blackmun seems to echo the majority’s concern with following the language used in the Rules, particularly when that language explicitly directs the district court to exercise discretion.²³⁷ Finally, Justice Blackmun suggested—as Charles Clark had suggested in 1936—that the trinity should serve to direct the discretion afforded by the language of other Rules.²³⁸

However one reads Justice Blackmun’s references to the Rule 1 trinity in *Lujan*, the approach followed by the majority should not have come as a surprise. Justice Scalia, the author of the *Lujan* opinion, had articulated his “plain meaning” approach to the Rules and a role for the trinity two

found that the circumstances of the case demonstrated “good cause/excusable neglect” because the district court and the court of appeals repeatedly had taken actions during the three-year history of the case from which NWF reasonably could infer that the issue of standing had been settled. *Id.* at 906-08 (discussing various times and procedural circumstances in which the courts addressed issues related to standing).

²³² *Id.* at 904; see also *supra* notes 210-11.

²³³ *Lujan*, 497 U.S. at 905-06; *id.* at 909 n.10 (noting the government’s opportunities to argue against acceptance of the additional affidavits).

²³⁴ *Id.* at 912.

²³⁵ *Id.* at 912-13 (internal footnote omitted).

²³⁶ See *supra* notes 232-35 and accompanying text.

²³⁷ See *supra* notes 229-30 and accompanying text.

²³⁸ See *supra* note 234 and accompanying text; *supra* note 48 and accompanying text.

years earlier. In *Torres v. Oakland Scavenger Co.*,²³⁹ Justice Scalia wrote a concurring opinion mocking the majority's lip service to the notion of liberal constructions of the Rules designed to foster adjudication on the merits.²⁴⁰ In addition to disagreeing with the majority's reasoning in *Torres*,²⁴¹ Justice Scalia also criticized mandates for "liberal constructions" generally, because such mandates provided opportunities for ignoring the language of the Rules.²⁴² Justice Scalia then explained the "plain meaning" analysis that led him to concur in the Court's holding and presaged his opinion in *Lujan*. Justice Scalia first opined that "all rules of procedure are technicalities" and that "securing a fair and orderly process enables more justice to be done in the totality of cases."²⁴³ Accordingly, he concluded that the Rules should be construed neither "liberally" nor "stingily."²⁴⁴ Instead, Justice Scalia would interpret the Rules according to their "apparent intent."²⁴⁵ Where the apparent intent provides for judicial discretion, a "permissive construction" is appropriate; where the intent is to be strict, a permissive construction is "wrong."²⁴⁶ Justice Scalia concluded his discussion by noting that the Rule 1 trinity does not prescribe that the Rules are to be "liberally" construed, but only that they are to be "construed to secure the just, speedy, and inexpensive

²³⁹ 487 U.S. 312 (1988).

²⁴⁰ *Id.* at 318 (Scalia, J., concurring). The majority concluded that a party not specified by name in a notice of appeal failed to meet "jurisdictional" requirements for perfecting a timely appeal under FED. R. APP. P. 3(c). *Id.* at 317. *Torres* was one of 16 plaintiffs who had their claims dismissed by the district court. *Id.* at 313. Both the notice of appeal and the resulting order of the appellate court reversing the dismissals omitted *Torres's* name, although the caption contained the denomination "et al." *Id.* at 313, 317. No one disputed that the omission of *Torres's* name from the notice of appeal was solely the result of a clerical error by a secretary for the appellants' attorney. *Id.* at 313.

Writing for the Court, Justice Marshall first noted that FED. R. APP. P. 3(c) required that a notice of appeal specify the parties named in the appeal. *Id.* at 314. The majority found the specificity requirement of the rule mandatory and jurisdictional. *Id.* at 315. Accordingly, mere substantial compliance with the rule would not suffice to perfect an appeal. *Id.* at 315-16. The *Torres* Court professed allegiance to the "important principle for which *Foman* stands—that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Id.* at 316. However, the Court distinguished *Foman* by noting that the language of FED. R. APP. P. 3(c) constituted jurisdictional requirements which the court could not waive. *Id.* at 317.

²⁴¹ *Id.* at 318 (Scalia, J., concurring) (arguing that a "liberal" construction would have led to a different result).

²⁴² *Id.* at 319.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

determination of every action.”²⁴⁷ Although suggesting differences between “liberal constructions” and applications of the trinity, Justice Scalia did not describe the effects of those differences on the process of identifying the “apparent intent” of a Rule.

What useful conclusions can one draw from the Supreme Court’s uses of the Rule 1 trinity? Is the trinity a reservoir of discretion that permits courts to accept something less than full compliance with the language of the Rules so that cases may be determined on the merits rather than on points of procedure? The earlier opinions adopt such a stance,²⁴⁸ and the Court has been unwilling to publicly disavow that attitude.²⁴⁹ More recent opinions, however, raise at least a suspicion that the Court’s understanding of the trinity has evolved to support a more confined, “plain language” jurisprudence.²⁵⁰ Alternatively, perhaps we should conclude from the paucity of trinity references by the Court during the last fifty years that the Court always has viewed the trinity as a fanciful aspiration rather than a set of practical objectives.²⁵¹

Certainly, practitioners subject to the mandate of the trinity have

²⁴⁷ *Id.* The Supreme Court’s recent construction of the Federal Rules of Civil Procedure in *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 113 S. Ct. 1160 (1993), is consistent with the Court’s trend towards literal, non-expansive constructions of the Rules. In *Leatherman*, plaintiffs filed suit under 42 U.S.C. § 1983 against local government officials in their official capacities, a county, and two municipal corporations. *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 755 F. Supp. 726, 728 (N.D. Tex. 1991). The plaintiffs alleged that the conduct of local police in searching their homes for narcotics violated the Fourth Amendment and that the municipality failed to adequately train its officers. *Id.* The district court dismissed the complaints, holding that the plaintiffs failed to meet “heightened pleading standards” that required the plaintiffs to state with factual detail and particularity the bases for claims under § 1983. *Id.* at 729-31. The Fifth Circuit upheld the dismissals. *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 954 F.2d 1054 (5th Cir. 1992).

The Supreme Court reversed, finding that the pleading standard imposed by the lower courts for claims of municipal liability could not be reconciled with the liberal system of “notice pleading” established under the language of FED. R. CIV. P. 8(a)(2). *Leatherman*, 113 S. Ct. at 1163. The Court suggested that it might make sense to require heightened pleading requirements for such civil rights claims, but it concluded that such a result could not be achieved by way of judicial interpretation. *Id.* Chief Justice Rehnquist delivered the opinion for a unanimous Court without reference to the Rule 1 trinity.

²⁴⁸ *Supra* notes 142-52 and accompanying text (discussing the Court’s treatment of the Rule 1 trinity in *Foman*).

²⁴⁹ *See supra* note 240 (discussing *Torres*).

²⁵⁰ *See supra* notes 182-202 and accompanying text (discussing *Schiavone*); *supra* notes 154-81 and accompanying text (discussing *Delta Air Lines*).

²⁵¹ Recall the Supreme Court’s reference to the trinity in *Schiavone* as “worthy goals and loftily stated purposes.” *Supra* note 195 and accompanying text.

grounds to claim confusion as to what compliance with Rule 1 entails.²⁵² It seems safe to say that clear guidance is not to be found in the opinions of the Supreme Court. Advocates might turn for guidance to the district courts in which they practice.

IV. RECENT APPLICATIONS BY DISTRICT COURTS²⁵³

One might expect district courts that utilize the Rule 1 trinity to rely upon the trinity jurisprudence that has developed since 1938. The opinions that refer to the trinity since its amendment in 1993 are remarkable, however, for the absence of citations to prior opinions employing or explaining the trinity.²⁵⁴

²⁵² See *supra* notes 9-14 and accompanying text (discussing the most recent amendment to Rule 1 as designed to highlight the role of the courts and attorneys in securing the ends of the trinity).

²⁵³ This Part analyzes 124 opinions reported during the period from December 1, 1993, through August 31, 1995. The opinions were issued by 65 different judges and magistrate judges sitting in 25 different United States District Courts.

In addition to those opinions, I found 309 opinions that used the Rule 1 trinity in the context of motions for summary judgment. Most of those summary judgment cases merely recited the Supreme Court's statement in *Celotex Corp. v. Catrett* that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" 477 U.S. 317, 327 (1986). Given their number and tendency to merely recite the *Celotex* admonition without any analysis, I have excluded those cases from the discussion in the text.

In addition to excluding opinions that used the Rule 1 trinity only in the context of summary judgment, I also excluded cases in which references to the trinity were made only by a party or others and not clearly adopted by the district court rendering the opinion.

The reader also should note that opinions from the United States District Court for the Southern District of New York constitute 57 (41%) of the cases analyzed for this Part, and 50 of the 124 opinions (40%) were issued under the name of Judge Vincent Broderick of the Southern District of New York. Judge John S. Martin signed ten of the opinions issued under Judge Broderick's name, and Judge Goettel signed four of the opinions issued under Judge Broderick's name.

²⁵⁴ District courts tied their use of the trinity to prior opinions in only 20 cases. *Pache v. Wallace*, No. 93-5164, 1995 U.S. Dist. LEXIS 3511, at *4 (E.D. Pa. Mar. 20, 1995); *In re Akron Beacon Journal*, No. 94 Civ. 1402, 1995 U.S. Dist. LEXIS 5183, at *39 (S.D.N.Y. Apr. 20, 1995); *Bayer AG & Miles, Inc. v. Barr Lab., Inc.*, 162 F. Supp. 456, 461 (S.D.N.Y. 1995); *Gropp v. United Airlines, Inc.*, 847 F. Supp. 941, 946 (M.D. Fla. 1994); *West v. Boeing Co.*, 843 F. Supp. 670, 676 (D. Kan. 1994); *Fountain v. L & M Botruck Rental, Inc.*, No. 93-0379-L, 1994 U.S. Dist. LEXIS 2790, at *3 (E.D. La. Mar. 3, 1994); *Kenny Enterprises, Inc. v. Balfour Beatty de Venezuela C.A.*, No. 93-1630, 1994 U.S. Dist. LEXIS 3124, at *2 (E.D. La. Mar. 10, 1994); *Barbieri v. Hartsdale Post Office*, 856 F. Supp. 817, 820 (S.D.N.Y. 1994); *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543, 546 (S.D.N.Y. 1994); *Fontaine v. Ryan*, 849 F. Supp. 242, 246

Although generally not relying on precedent, recent use of the Rule 1 trinity by district courts in many ways mirrors the early district court references to the trinity. For example, district courts continue to present the Rule 1 trinity in the form of unexplained invocations and benedictions.²⁵⁵ Some courts continue to include the trinity in separate but unconnected paragraphs.²⁵⁶ District courts also continue to use the trinity as a rule for construing the language of other Rules.²⁵⁷ In particular, district courts

(S.D.N.Y. 1994); *Reilly v. Metro-North Commuter R.R.*, No. 93-Civ. 7317, 1994 U.S. Dist. LEXIS 6693, at *3 (S.D.N.Y. May 20, 1994); *Stewart v. IBM Corp.*, 867 F. Supp. 238, 271 (S.D.N.Y. 1994); *Thompson v. Shalala*, 868 F. Supp. 621, 624 (S.D.N.Y. 1994); *Agostino Ferrari, S.p.A v. Antonacci*, 858 F. Supp. 478, 481 (E.D. Pa. 1994); *Mines v. City of Philadelphia*, No. 93-3052, 1994 U.S. Dist. LEXIS 9776, at *7 (E.D. Pa. July 13, 1994); *Qualcomm, Inc. v. Interdigital Communications Corp.*, No. 94-3042, 1994 U.S. Dist. LEXIS 13104, at *2-*3 (E.D. Pa. Sept. 30, 1994); *Carbon Fuel Co. v. USX Corp.*, 867 F. Supp. 414, 419 (S.D. W. Va. 1994) (quoting *Jonas v. Conrath*, 149 F.R.D. 520, 523-24 (S.D. W. Va. 1993)); *United States v. Neman Bros. & Assocs.*, No. 89-07-00444, 1994 Ct. Int'l Trade LEXIS 30, at *1 (Feb. 7, 1994); *Mancuso v. Consolidated Edison Co.*, No. 93 Civ. 0001, 1993 U.S. Dist. LEXIS 17731, at *6 (S.D.N.Y. Dec. 13, 1993); *SGI Goup, Inc. v. Dilenschneider*, No. 92 Civ. 5387, 1993 U.S. Dist. LEXIS 18386, at *5 (S.D.N.Y. Dec. 15, 1993).

²⁵⁵ For recent opinions presenting the Rule 1 trinity as an invocation, see *Harp v. City*, 161 F.R.D. 398, 401 (E.D. Ark. 1995); *Barnett v. Daley*, No. 92 C 1683, 1995 U.S. Dist. LEXIS 1673, at *1 (N.D. Ill. Feb. 9, 1995); *Morsey v. Chevron U.S.A., Inc.*, No. 94-1301-WEB, 1995 U.S. Dist. LEXIS 7000, at *12 (D. Kan. Feb. 7, 1995); *Chase Manhattan Bank, N.A. v. T & N plc.*, No. 87 Civ. 4436, 1995 U.S. Dist. LEXIS 1290, at *3 (S.D.N.Y. Feb. 2, 1995); *Applied Telematics, Inc. v. Sprint Corp.*, No. 94-CV-4603, 1995 U.S. Dist. LEXIS 2191, at *10 (E.D. Pa. Feb. 22, 1995); *Doe v. Hersemann*, 155 F.R.D. 630, 630 (N.D. Ind. 1994); *Feliciano v. Dubois*, 846 F. Supp. 1033, 1038 (D. Mass. 1994); *Perry v. ICN Pharmaceuticals*, 86 Civ. 6776, 1994 U.S. Dist. LEXIS 3120, at *2 (S.D.N.Y. Mar. 14, 1994); *Jeffrey A. Singer, P.C. v. Capanna*, No. 91-2062, 1994 U.S. Dist. LEXIS 1348, at *2 (E.D. Pa. Jan. 12, 1994); *Local 715, United Rubber, Cork, Linoleum & Plastic Workers v. Michelin Am. Small Tire*, 840 F. Supp. 595, 596 (N.D. Ind. 1993); *Heggan v. PCM Dev. Co.*, No. 92 Civ. 1369, 1993 U.S. Dist. LEXIS, at *2 (S.D.N.Y. Dec. 13, 1993).

For recent opinions presenting the trinity as a benediction, see *Micro Designs Software Corp. v. Saxon*, 93 Civ. 7091, 1994 U.S. Dist. LEXIS 767, at *5 (S.D.N.Y. Jan. 24, 1994); *Day v. NLO*, No. C-1-90-67, 1994 U.S. Dist. LEXIS 20457, at *3 (S.D. Ohio Mar. 21, 1994); *In re IBM Corp. Sec. Litig.*, No. 92 Civ. 9076, 1993 U.S. Dist. LEXIS 20041, at *6 (S.D.N.Y. Dec. 8, 1994); *E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co.*, 860 F. Supp. 124, 127 (S.D.N.Y. 1994).

For similar uses of the trinity by the early district courts, see *supra* notes 87-88 and accompanying text.

²⁵⁶ See, e.g., *Dobbs v. Lamonts Apparel, Inc.*, 155 F.R.D. 650, 652 (D. Alaska 1994); *Anton/Bauer, Inc. v. Energex Sys. Corp.*, No. 93 Civ. 4682, 1994 U.S. Dist. LEXIS 3195, at *4 n.1 (S.D.N.Y. Jan. 11, 1994); *Singer*, 1994 U.S. Dist. LEXIS 1348, at *2. For similar uses of the trinity by the early district courts, see *supra* note 89 and accompanying text.

²⁵⁷ See, e.g., *Harp*, 161 F.R.D. at 401 (FED. R. Civ. P. 30(d)(1)); *Roberts & Schae-*

fer Co. v. Hardaway Co., No. 95-590-CIV-T-17E, 1995 U.S. Dist. LEXIS 10667, at *4 (M.D. Fla. July 25, 1995) (FED. R. CIV. P. 10); Oliphant v. Perkins Restaurants Operating Co., 885 F. Supp. 1486, 1495 (D. Kan. 1995) (FED. R. CIV. P. 51); Eisenach v. Miller-Dwan Medical Ctr., 162 F.R.D. 346, 349 (D. Minn. 1995) (FED. R. CIV. P. 8(a)(2)); Zane S. Blanchard & Co. v. PSPT Ltd., No. 92-660-SD, 1995 U.S. Dist. LEXIS 7289, at *19 (D.N.H. May 18, 1995) (FED. R. CIV. P. 30(b)(7)); Lee v. Regal Cruises, Ltd., No. 94 Civ. 7687, 1995 U.S. Dist. LEXIS 38, at *4 (S.D.N.Y. Jan. 4, 1995) (FED. R. CIV. P. 11(c)); Time Prods., plc. v. J. Tiras Classic Handbags, Inc., No. 93 Civ. 7865, 1995 U.S. Dist. LEXIS 8322, at *2 (S.D.N.Y. June 16, 1995) (FED. R. CIV. P. 15(a)); *In re* Orthopedic Bone Screw Prod. Liab. Litig., MDL No. 1014, 1995 U.S. Dist. LEXIS 10138, at *20 (E.D. Pa. July 17, 1995) (FED. R. CIV. P. 20); North River Ins. Co. v. Greater New York Life Mut. Ins. Co., 872 F. Supp. 1411, 1412 (E.D. Pa. 1995) (FED. R. CIV. P. 26(b)(1) and 37); *Pache*, 1995 U.S. Dist. LEXIS 3511, at *4 (FED. R. CIV. P. 12(b)(6)); Pasternak v. Cumberland Farms Inc., No. 92-1842, 1995 U.S. Dist. LEXIS 3701, at *6 (E.D. Pa. Mar. 22, 1995) (FED. R. CIV. P. 15(c)(3)); *Dobbs*, 155 F.R.D. at 652 (FED. R. CIV. P. 26(b)(3)); Barrett v. Qual-Med, Inc., 153 F.R.D. 653, 655 (D. Colo. 1994) (FED. R. CIV. P. 15(a)); TRW, Inc. v. Derbyshire, 157 F.R.D. 59, 60 (D. Colo. 1994) (FED. R. CIV. P. 4(e)); *Gropp*, 847 F. Supp. at 946 (FED. R. CIV. P. 15(a)); Petralia v. Centennial Life Ins. Co., No. 93-1425-CIV-T-17c, 1994 U.S. Dist. LEXIS 4832, at *5 (M.D. Fla. Mar. 30, 1994) (FED. R. CIV. P. 8(a)(2) and 12(e)); Vakharia v. Swedish Covenant Hosp., No. 90 C 6548, 1994 U.S. Dist. LEXIS 2712, at *2 (N.D. Ill. Mar. 2, 1994) (FED. R. CIV. P. 26(b)(2)); Mellon Bank, N.A. v. Miglin, No. 92-C-4059, 1994 U.S. Dist. LEXIS 15439, at *12 (N.D. Ill. Oct. 25, 1994) (FED. R. CIV. P. 15(a)); *Hersemann*, 155 F.R.D. at 630 (FED. R. CIV. P. 45(b) and (17)); Edward Kraemer & Sons, Inc. v. City of Kansas City, No. 94-2215, 1994 U.S. Dist. LEXIS 19042, at *4 (D. Kan. Dec. 13, 1994) (FED. R. CIV. P. 4(m)); Freeze-Dry Prods., Inc. v. Metro Park Warehouse, Inc., 159 F.R.D. 45, 46 (D. Kan. 1994) (FED. R. CIV. P. 4(m)); *Kenny Enterprises*, 1994 U.S. Dist. LEXIS 3124, at *2 (FED. R. CIV. P. 26(b)); Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 853 F. Supp. 843, 847 (D. Mass. 1994) (FED. R. CIV. P. 12(b)(2) and 8(a)(2)); *Anton/Bauer*, 1994 U.S. Dist. LEXIS 3195, at *4 (FED. R. CIV. P. 65); Audiotext Communications Network, Inc. v. US Telecom, Inc., No. M8-85, 1994 U.S. Dist. LEXIS 185, at *4 (S.D.N.Y. Jan. 11, 1994) (FED. R. CIV. P. 45(c)(3)(A)); Chemical Bank v. Affiliated FM Ins. Co., 154 F.R.D. 91, 94 (S.D.N.Y. 1994) (FED. R. CIV. P. 26(c)); Diaz v. Shalala, 871 F. Supp. 180, 181 (S.D.N.Y. 1994) (FED. R. CIV. P. 60); Kahn v. General Motors Corp., 865 F. Supp. 210, 214 (S.D.N.Y. 1994) (FED. R. CIV. P. 39); Mareno v. Jet Aviation of Am., Inc., 155 F.R.D. 74, 76 (S.D.N.Y. 1994) (FED. R. CIV. P. 11); McFadden v. Grand Union, 154 F.R.D. 61, 62 (S.D.N.Y. 1994) (FED. R. CIV. P. 19); Pay Tel Sys., Inc. v. Seiscor Technologies, Inc., 850 F. Supp. 276, 278 n.1 (S.D.N.Y. 1994) (FED. R. CIV. P. 11); Peckham Materials Corp. v. Raima Corp., No. 90 Civ. 4134, 1994 U.S. Dist. LEXIS 8056, at *2 (S.D.N.Y. June 13, 1994) (FED. R. CIV. P. 15(a)); Sadowski v. Technical Career Insts., Inc., No. 93 Civ. 0455, 1994 U.S. Dist. LEXIS 15590, at *16 (S.D.N.Y. Nov. 16, 1994) (FED. R. CIV. P. 15(a)); Schelmety v. Insera Supermarkets, Inc., No. 92 Civ. 6627, 1994 U.S. Dist. LEXIS 4764, at *5 (S.D.N.Y. Apr. 11, 1994) (FED. R. CIV. P. 25); Sussman v. Stern, No. 93 Civ. 4017, 1994 U.S. Dist. LEXIS 5816, at *2 (S.D.N.Y. May 5, 1994) (FED. R. CIV. P. 26(d)); Tilcon Minerals, Inc. v. Orange & Rockland Utils., Inc., 851 F. Supp. 529, 531 (S.D.N.Y. 1994) (FED. R. CIV. P. 56); Walker v. Rockland Psychiatric Ctr., 865 F.

still assume that the trinity mandates liberal interpretations of the Rules to facilitate resolutions on the merits.²⁵⁸

References to the Rule 1 trinity and "liberal" interpretations of other

Supp. 124, 126 (S.D.N.Y. 1994) (FED. R. CIV. P. 56); *Agostino Ferrari*, 858 F. Supp. at 481 n.1 (FED. R. CIV. P. 15); *Interdigital Technology Corp. v. Oki America, Inc.*, No. 93-2004, 1994 U.S. Dist. LEXIS 4129, at *2-*3 (E.D. Pa. Mar. 31, 1994) (FED. R. CIV. P. 26(c) and 30(b)(6)); *Singer*, 1994 U.S. Dist. LEXIS 1348, at *2 (FED. R. CIV. P. 6 and 12(a)); *Jackson v. Nicoletti*, 875 F. Supp. 1107, 1112 (E.D. Pa. 1994) (FED. R. CIV. P. 3 and 5(e)); *Mines*, 1994 U.S. Dist. LEXIS 9776, at *7 (FED. R. CIV. P. 16); *Qualcomm*, 1994 U.S. Dist. LEXIS 13104, at *2 (FED. R. CIV. P. 15(a)); *Seidman v. American Mobile Sys., Inc.*, 157 F.R.D. 354, 366 (E.D. Pa. 1994) (FED. R. CIV. P. 23(b)(3)); *Carbon Fuel*, 867 F. Supp. at 419 (FED. R. CIV. P. 21).

²⁵⁸ See, e.g., *Pasternak*, 1995 U.S. Dist. LEXIS 3701, at *6 (noting that courts should construe rules of procedure in a liberal manner); *Time Prods., plc.*, 1995 U.S. Dist. LEXIS 8322, at *2 (noting that the purpose of the Rules is to foster adjudication of suits on the merits rather than on procedural minutiae); *Barrett*, 153 F.R.D. at 655 (following invocation of the trinity by noting goal of the Rules as "decision of cases on the merits rather than technicalities"); *TRW*, 157 F.R.D. at 60 (citing trinity in support of liberal construction of Rule 4(e) service of process requirements); *Petralia*, 1994 U.S. Dist. LEXIS 4832, at *5 (construing pleadings liberally); *Fields v. Feldmann*, No. 92 C 1952, 1994 U.S. Dist. LEXIS 11396, at *10 (N.D. Ill. Aug. 11, 1994) (permitting defendants to raise in motion under Rule 12(b)(6) issues properly raised under Rule 12(c)); *Kimbrell v. Adia, S.A.*, No. 92-4225, 1994 U.S. Dist. LEXIS 12172, at *7 (D. Kan. Aug. 19, 1994) (noting that defendant's failure to comply with requirement of certifying good faith efforts to resolve discovery disputes before seeking protective order is a matter of form and should not be basis to deny motion to compel); *Sadowski*, 1994 U.S. Dist. LEXIS 15590, at *16 (construing papers filed by *pro se* plaintiff as motion for leave to amend under Rule 15(a)); *Fallowfield Dev. Corp. v. Strunk*, Nos. 89-8644 and 90-4431, 1994 U.S. Dist. LEXIS 12758, at *21-*22 (E.D. Pa. Sept. 2, 1994) (citing Rule 1 trinity to justify decision to consider merits of plaintiff's motion to correct findings of fact under Rule 60(a) rather than the technically correct Rule 52(b)); *Sara Lee Corp. v. Conagra, Inc.*, No. 1:92-CV-646, 1993 U.S. Dist. LEXIS 18881, at *8 (W.D. Mich. Dec. 14, 1993) (rejecting approach that would make one misstep in pleading decisive); see also *Ebeh v. Trithart*, No. 94-1238-Civ-T-17A, 1995 U.S. Dist. LEXIS 3649, at *2 (M.D. Fla. Mar. 15, 1995) (tying the trinity to principle of preferring substance over form); *In re E.I. du Pont de Nemours & Co. Benlate Litig.*, No. 4:95-cv-36, 1995 U.S. Dist. LEXIS 12175, at *53 (M.D. Ga. Aug. 21, 1995) (noting that "adversarial machinations surrounding the discovery process are often at odds with the [trinity]"); *Schafer v. Buhl*, No. 4:94-CV-130, 1994 U.S. Dist. LEXIS 16349, at *7 (W.D. Mich. Oct. 21, 1994) (finding entry of a default judgment inappropriate where alleged technical failures in defendant's response did not demonstrate prejudice to plaintiff); *Jackson v. Novell, Inc.*, No. 94 Civ. 3593, 1995 U.S. Dist. LEXIS 4162, at *3-*4 (S.D.N.Y. Mar. 31, 1995) (citing trinity to elevate substance over form in connection with requirement of written document requests); *Chemical Bank*, 154 F.R.D. at 94 (holding that technical but harmless violations of confidentiality order insufficient to pursue contempt); *Diaz*, 871 F. Supp. at 181 (noting court's disfavor with procedural arguments used to constrict rather than advance analysis of the merits).

Rules to secure resolutions on the merits can be misleading, however. Recently, district courts also have used the Rule 1 trinity to limit the scope of activity under Rules that courts have construed broadly in the past. One such area concerns amendment of pleadings under Rule 15(a). Since its adoption in 1938, Rule 15(a) has provided that "leave [to amend] shall be *freely* given when justice so requires."²⁵⁹ Moreover, in *Foman v. Davis*,²⁶⁰ the Supreme Court set forth a broad interpretation of Rule 15(a) that favored granting leave to amend, thereby facilitating adjudication on the merits.²⁶¹

In contrast, several district courts have used the Rule 1 trinity to counterbalance the presumption favoring amendment recognized by the Supreme Court in *Foman*. In two recent cases, district courts refused to grant leave to amend because doing so would require the court to extend discovery and trial deadlines.²⁶² Although neither court made much effort to explain why the deadlines could not be extended, both opined that extensions would be inconsistent with the Rule 1 trinity.²⁶³ In a third

²⁵⁹ FED. R. CIV. P. 15(a) (emphasis added); see also ABA: ORIGINAL RULES & PROCEEDINGS, *supra* note 32, at 35-36 (quoting original text of Rule 15(a)).

²⁶⁰ 371 U.S. 178 (1962). For a discussion of *Foman v. Davis*, see *supra* notes 143-52 and accompanying text.

²⁶¹ In *Foman v. Davis*, the Supreme Court described the appropriate application of Rule 15(a) as follows:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182.

²⁶² In *Agostino Ferrari, S.p.A. v. Antonacci*, 858 F. Supp. 478 (E.D. Pa. 1994), the court denied leave to amend to add a RICO claim four weeks before the scheduled trial date, even though the court recognized that leave to amend usually should be freely granted. *Id.* at 480-81. The court found that amendment would substantially prejudice the defendant's position in that the defendant had not conducted discovery or otherwise prepared its case in light of a RICO claim. *Id.* Further, the district court found that the proposed RICO claim was futile. *Id.* at 481. In *Qualcomm, Inc. v. Interdigital Communications Corp.*, No. 94-3042, 1994 U.S. Dist. LEXIS 13104, at *1 (E.D. Pa. Sept. 30, 1994), the plaintiff sought to amend its patent infringement complaint one year after filing its original complaint. The request came two months before the discovery deadline and five months prior to the scheduled trial date. *Id.* at *3. The district court denied the motion to amend because the proposed amendment would cause the defendant "extreme prejudice." *Id.*

²⁶³ In *Agostino Ferrari*, the court observed that "[w]hile reopening discovery may arguably lessen the prejudice," it concluded that "the concomitant lengthening of the litigation would be injurious to the public interest in the 'just, speedy, and inexpensive determination' of this action. Essential to such a resolution is the adherence to firm, early deadlines for discovery and trial." *Agostino Ferrari*, 858 F. Supp. at 481 n.1. In

case, a district court refused to grant leave to amend to add an additional natural person as a defendant because the *plaintiff* had failed to demonstrate that it would be unable to obtain full relief from the original defendant.²⁶⁴ Despite the language of Rule 15(a) directing that amendments be freely granted,²⁶⁵ the court concluded that adding new defendants to litigation "where not necessary to afford full relief is contrary to the purposes of [Rule 1]."²⁶⁶

District courts also have invoked the Rule 1 trinity recently to limit the scope of acceptable pleading under Rule 8(a)(2).²⁶⁷ In *Conley v. Gib-*

Qualcomm, the court recognized its obligation to allow Rule 15(a) amendment when in the interests of justice, but "a court may deny such a motion when undue delay or prejudice would result." *Qualcomm*, 1994 U.S. Dist. LEXIS 13104, at *2. The court then quoted the trinity and denied the motion. *Id.*; see also *Morse/Diesel, Inc. v. Fidelity & Deposit Co.*, No. 86 Civ. 1494, 1995 U.S. Dist. LEXIS 8264, at *17 (S.D.N.Y. June 15, 1995) (citing *Foman* and the trinity in denying leave to amend a counterclaim on the eve of trial and nine years after the filing of the original claim); *Mellon Bank, N.A. v. Miglin*, No. 92-C-4059, 1994 U.S. Dist. LEXIS 15439, at *11-*18 (N.D. Ill. Oct. 25, 1994) (denying leave to amend answer 19 months after filing because of likelihood that proposed affirmative defenses would require new discovery). But see *Time Prods., plc. v. J. Tiras Classic Handbags, Inc.*, No. 93 Civ. 7865, 1995 U.S. Dist. LEXIS 8322, at *2 (S.D.N.Y. June 16, 1995) (finding that freely granting leave to amend "comports well with the permissive spirit of the Rules as encapsulated by Rule 1's directive"); *Pasternak v. Cumberland Farms Inc.*, No. 92-1842, 1995 U.S. Dist. LEXIS 3701, at *5-*6 (E.D. Pa. Mar. 22, 1995) (stating that it would liberally construe Rule 15(c)(3) requirements in reviewing "mistake condition" for allowing relation back of amended pleadings).

²⁶⁴ *SGI Group, Inc. v. Dilenschneider*, No. 92 Civ. 5387, 1993 U.S. Dist. LEXIS 18386, at *1 (S.D.N.Y. Dec. 15, 1993). The suit arose out of the sale of a business by the defendants to the plaintiff. In denying leave to amend, the district court specifically mentioned that the plaintiff failed to demonstrate that the original defendant was either insolvent or not fully responsible for conduct alleged in the amended complaint. *Id.* at *4; accord *Donato v. Rockefeller Fin. Serv.*, No. 93 Civ. 4663, 1994 U.S. Dist. LEXIS 17709, at *9-*10 (S.D.N.Y. Dec. 12, 1994) (denying plaintiff's motion to amend to add individual defendant because plaintiff would suffer no prejudice from proceeding only against individual's solvent employer); *Stewart v. IBM Corp.*, 867 F. Supp. 238, 241-42 (S.D.N.Y. 1994) (granting summary judgment for individual defendants in employment discrimination suit against both employer and employees in absence of reason for "incurring additional confusion, expense and delay by retaining unnecessary natural person defendants").

²⁶⁵ See *supra* note 259 and accompanying text.

²⁶⁶ *SGI Group*, 1993 U.S. Dist. LEXIS 18386, at *5 (citing *Archer v. Globe Motorists*, 833 F. Supp. 211, 214 n.2 (S.D.N.Y. 1993) and *Lederman v. Marriott Corp.*, 834 F. Supp. 112, 114 (S.D.N.Y. 1993)). The court noted that adding a new defendant would require certain discovery to be repeated in order to permit the new party to defend the lawsuit. *Id.* at *4.

²⁶⁷ Rule 8(a)(2) provides that "[a] pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall con-

son,²⁶⁸ the Supreme Court set forth the standard for assessing the sufficiency of a pleading under Rule 8(a)(2):

[W]e follow . . . the accepted rule that a complaint should not be dismissed . . . unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . . [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.²⁶⁹

The Supreme Court has continued to support the *Conley* pleading standard.²⁷⁰

Despite the history of tolerant pleading standards, the district court in *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*²⁷¹ ("MSL") used the trinity to support an interpretation of Rule 8(a)(2) that heightens the opportunity for a claim's dismissal for deficient pleading. In that case, a law school sued institutional and individual defendants after the American Bar Association denied the school's request for accreditation.²⁷² The complaint generally alleged that the defendants had engaged in a series of combinations, conspiracies, and agreements for the purpose of acquiring monopoly power.²⁷³ The complaint also alleged that the defendants conspired to fix faculty salaries, restrict output, raise tuitions, and foreclose opportunities for people in lower socio-economic classes to obtain a law school education.²⁷⁴

The district court granted the individual defendants' motion to dismiss for lack of personal jurisdiction.²⁷⁵ On plaintiff's motion to reconsider,

tain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

²⁶⁸ 355 U.S. 41 (1957).

²⁶⁹ *Id.* at 45-47 (emphasis added) (internal footnotes omitted).

²⁷⁰ See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 113 S. Ct. 1160, 1163 (1993) (reaffirming the *Conley* standard).

²⁷¹ 853 F. Supp. 843 (E.D. Pa. 1994).

²⁷² *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 376 (E.D. Pa.) (earlier opinion containing a detailed account of plaintiff's allegations), *aff'd on reconsid.*, 853 F. Supp. 843 (E.D. Pa. 1994).

²⁷³ *Massachusetts School of Law*, 853 F. Supp. at 846.

²⁷⁴ *Massachusetts School of Law*, 846 F. Supp. at 376.

²⁷⁵ *Id.* at 377-79. The district court found that the plaintiff could not meet its burden of proving with reasonable particularity the existence of sufficient contacts between the individual defendants and the state of Pennsylvania. *Id.* at 377. The plaintiff also had argued that courts in Pennsylvania had jurisdiction over the individual defendants because of contacts of the institutional defendants in furtherance of the conspiracy. *Id.* at 379. The district court, however, found the principle of co-conspirator jurisdiction inapplicable because the plaintiff had not alleged the occurrence of any acts in Pennsylvania in furtherance of the conspiracy. *Id.*

the district court found that new evidence offered by the plaintiff also failed to demonstrate sufficient contacts with the forum state in furtherance of the alleged conspiracy.²⁷⁶ The district court went further, however. It stated that an "even more important reason" for affirming the dismissal was the fact that plaintiff had failed to meet Rule 8(a)(2) pleading requirements.²⁷⁷ The district court noted "the Supreme Court's admonition that courts should not impose heightened pleading requirements in the absence of such requirements in the Federal Rules."²⁷⁸ The court also acknowledged the possibility that the individual defendants could have conspired with each other as a matter of law.²⁷⁹ Nevertheless, the court found these considerations insufficient to sustain the complaint due to the plaintiff's failure to "allege which of them [the individual defendants] conspired with others, and to do what."²⁸⁰

The district court ultimately turned to the Rule 1 trinity to support its finding of pleading insufficiency:

The rule [the trinity] should be more than an idea or fuzzy, though noble, abstraction. If the plaintiff cannot state a claim against one or more of these individual defendants, that individual should not be subjected to the expensive and time consuming arsenal of interrogatories, document demands, and depositions that plaintiff will understandably use in the hope of establishing a basis for personal jurisdiction.²⁸¹

In other words, according to the district court, Rule 1 suggested that in assessing the sufficiency of pleadings under Rule 8(a)(2), a court should consider the type of discovery to which a defendant could be subject if the court finds the complaint sufficient. The court in MSL could have

²⁷⁶ In its motion for reconsideration, the plaintiff asserted that it had new evidence of the alleged co-conspirators' contacts with Pennsylvania and sought additional discovery on the issue. *Massachusetts School of Law*, 853 F. Supp. at 845.

²⁷⁷ *Id.*; see also FED. R. CIV. P. 8(a)(2) (requiring a "short and plain statement of the claim showing that the pleader is entitled to relief").

²⁷⁸ *Massachusetts School of Law*, 853 F. Supp. at 847 n.9 (citing *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 113 S. Ct. 1160, 1163 (1993)).

²⁷⁹ *Id.* at 847 (acknowledging the individual defendants' independent interests as professors, administrators, and practitioners); cf. *id.* at 846 (initially observing that "as a matter of law, the individual defendants cannot conspire with their own organizational defendant").

²⁸⁰ *Id.* at 847. The court focused on the fact that the factual allegations of the complaint concerning the individual defendants seemed to refer only to acts by the individuals in their capacity as agents for the institutional defendants. *Id.* The court seemed to ignore the fact that MSL had alleged that all defendants conspired to fix salaries, restrict output, and raise tuitions. See *supra* note 274 and accompanying text.

²⁸¹ *Massachusetts School of Law*, 853 F. Supp. at 848; see also *Eisenach v. Miller-Dwan Medical Ctr.*, 162 F.R.D. 346, 349 (D. Minn. 1995) (noting that "to abdicate competent pleading [under Rule 8(a)(2)] in deference to amplified discovery does a distinct injustice to our responsibility, under Rule 1").

denied the motion for reconsideration by finding that the plaintiff had not proven with reasonable particularity that the individual defendants had sufficient contacts with the state of Pennsylvania to sustain jurisdiction. Instead, the court went out of its way to use the Rule 1 trinity to craft a more demanding reading of a pleading rule.

Recent uses of Rule 1 also demonstrate that some courts view the trinity as a limit on federal court discretion and as permitting only those acts described by the particular language of the Rules.²⁸² The logic of the district court in *Jackson v. Nicoletti*²⁸³ provides an example of equating attention to the literal language of the Rules with observance of the trinity. In that case, a prisoner filed suit claiming that the circumstances of his arrest violated 28 U.S.C. § 1983.²⁸⁴ The defendant police officers filed a motion to dismiss pursuant to Rule 12(b)(6) on grounds that the applicable two-year statute of limitations had run.²⁸⁵ The district court first concluded that, under the "plain language" of Rules 3 and 5(e), the plaintiff had not "commenced" his action within the limitations period.²⁸⁶ The district court also noted, however, that prisoners acting *pro se*, such as the plaintiff, often "receive[d] the benefit of substantive and procedural protection not available to represented plaintiffs."²⁸⁷ In particular, the district court referred to the decision of the Supreme Court in *Houston v. Lack*²⁸⁸ in which the Supreme Court held that a prisoner's notice of appeal of a habeas corpus petition is "filed" when the prisoner delivers the notice to prison authorities rather than when the clerk receives it.²⁸⁹ The district court also acknowledged that other courts had recently extended the approach of *Houston* to situations closely analogous to those at issue in the case.²⁹⁰ However, the court in *Jackson* ultimately refused to extend *Houston* to the filing of § 1983 complaints under Rule 3 and granted

²⁸² For a discussion of similar treatment of the trinity in early district court cases, see *supra* notes 90-105 and accompanying text. For a discussion of similar treatment of the trinity in the opinions of the United States Supreme Court, see *supra* notes 169-76, 182-202 and accompanying text.

²⁸³ 875 F. Supp. 1107 (E.D. Pa. 1994).

²⁸⁴ *Id.*

²⁸⁵ *Id.* The arrest occurred on June 11, 1992, and the clerk of the court stamped plaintiff's complaint as "filed" on July 11, 1994. *Id.* at 1107-08.

²⁸⁶ *Id.* at 1109. Under Rule 3 "[a] civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3. Rule 5(e) provides that "[t]he filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court." FED. R. CIV. P. 5(e).

²⁸⁷ *Jackson*, 875 F. Supp. at 1109.

²⁸⁸ 487 U.S. 266 (1988).

²⁸⁹ *Jackson*, 875 F. Supp. at 1109-10 (citing *Houston*, 487 U.S. at 275-77).

²⁹⁰ *Id.* at 1110-11 (citing *Dory v. Ryan*, 999 F.2d 679, 682 (2d. Cir. 1993); *Garvey v. Vaughn*, 993 F.2d 776, 780, 781 n.13 (11th Cir. 1993); *Lewis v. Richmond City Police Dep't*, 947 F.2d 733, 736 (4th Cir. 1991); and *Higgenbottom v. McManus*, 840 F. Supp. 454, 455-56 (W.D. Ky. 1994)).

the motion to dismiss.²⁹¹

The court in *Jackson* devoted a considerable amount of the opinion to its reasons for not applying the rule of *Houston* to alter "the clear language" of Rules 3 and 5(e).²⁹² In particular, the court concluded that ignoring the plain language of the Rules would "unquestionably deviate" from the Rule 1 trinity.²⁹³ The district court believed that if it extended *Houston* to the facts in *Jackson*, a collateral issue would arise in any "close case" when a prisoner hands a complaint to a prison official. The collateral issue of timeliness would create an "excessive administrative burden" and permit defendants in such cases to enforce the statute of limitations only through extended discovery and motion practice.²⁹⁴ The district court also noted that by applying the rule in *Houston*, the court would be altering unambiguous language in the Rules without first finding an underlying constitutional violation arising from the Rules.²⁹⁵ In the district court's view, such "selective enforcement" of procedural rules was "unwise."²⁹⁶ Moreover, the court opined that an expansive application of *Houston* effectively would exempt *pro se* prisoners from all deadlines imposed by the Federal Rules of Civil Procedure "as well as add an elasticity to the statute of limitations unique to them."²⁹⁷ Accordingly, the Rule 1 trinity counseled adhering to the plain language of Rules 3 and 5(e).²⁹⁸

²⁹¹ *Jackson*, 875 F. Supp. at 1114.

²⁹² *Id.* at 1111-14.

²⁹³ *Id.* at 1112-13.

²⁹⁴ *Id.* at 1112.

²⁹⁵ *Id.* at 1111-12 ("In the absence of a constitutional violation, however, courts have a duty to apply plain and unambiguous language enacted pursuant to Congressionally prescribed practices.").

²⁹⁶ *Id.* at 1112 & n.8.

²⁹⁷ *Id.* at 1114. The district court observed that the *Houston* rule was a "natural response" to the relatively short period of time in which a *pro se* prisoner must file a notice of appeal, *i.e.*, thirty days. *Id.* at 1113. The court concluded that "policies of finality and repose counsel strict application of statutes of limitations." *Id.*

²⁹⁸ For additional cases in which district courts equated observance of the trinity with strict adherence to the language of other Federal Rules of Civil Procedure, see *Campbell v. Illinois Dep't of Correction*, 907 F. Supp. 1173, 1177 (N.D. Ill. 1995) (noting that the restrictions on the period for service under Rule 4(m) harmonize an "open door policy" with the mandate of the trinity); *Oliphant v. Perkins Restaurants Operating Co.*, 885 F. Supp. 1486, 1495 (D. Kan. 1995) (invoking the trinity in refusing to interpret Rule 51 in a way that would stand its language "on its head"); *In re Lotus Dev. Corp. Sec. Litig.*, 875 F. Supp. 48, 51-52 (D. Mass. 1995) (suggesting that stay of automatic disclosure requirements under Rule 26(a)(1) pending resolution of defendant's motion to dismiss would be inappropriate absent express provision in the Rules and noting that courts should apply the Rules in light of Rule 1); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1995 U.S. Dist. LEXIS 10138, at *20 (E.D. Pa. July 17, 1995) (applying Rule 20 and Rules generally "as written" to achieve long terms goals of the Rules as expressed in the trinity); *Murray v. Sevier*, 156 F.R.D.

The language currently used by district courts in referring to the Rule 1 trinity remains consistent with viewing the trinity as more than a rule of construction.²⁹⁹ In citing to Rule 1, courts repeatedly refer to the trinity as embodying the "purposes,"³⁰⁰ "objectives,"³⁰¹ "goals,"³⁰² and even the

235, 241 (D. Kan. 1994) (requiring plaintiff to plead a class action under Rule 23.2 rather than Rule 23 because "[t]his court will not allow plaintiffs to proceed as if Rule 23.2 [did] not exist . . . and [because] the court is bound by the admonition" of the trinity); *Kenny Enterprises, Inc. v. Balfour Beatty de Venezuela*, No. 93-1630, 1994 U.S. Dist. LEXIS 3124, at *1, *4 (E.D. La. Mar. 10, 1994) (restricting discovery to "relevant" information as provided by the language of Rule 26, despite presumption in favor of granting discovery requests); *West End Assocs. v. Sea Green Equities*, No. 93-3515, 94-836, 1994 U.S. Dist. LEXIS 10655, at *11 (D.N.J. July 30, 1994) (equating Rule 11 misconduct and the trinity); *McFadden v. Grand Union*, 154 F.R.D. 61, 64 (S.D.N.Y. 1994) (equating the trinity and Rule 19); *Rojac Co., Inc. v. United States Fid. & Guar. Co.*, 93 Civ. 2654, 1994 U.S. Dist. LEXIS 5827, at *4 (S.D.N.Y. May 31, 1994) (equating permissive counterclaims under 13(b) and the trinity); *Interdigital Tech. Corp. v. Oki America, Inc.*, No. 93-2004, 1994 U.S. Dist. LEXIS 4129, at *2 (E.D. Pa. Mar. 31, 1994) (equating language of Rule 26(c) and the trinity); *Mines v. City of Philadelphia*, No. 93-3052, 1994 U.S. Dist. LEXIS 9776, at *7 (E.D. Pa. July 13, 1994) (equating the trinity with Rule 16(b) language requiring a party to demonstrate "good cause" before a court may amend a scheduling order); *Seidman v. American Mobile Sys., Inc.*, 157 F.R.D. 354, 366 (E.D. Pa. 1994) (equating availability of class actions with the trinity); *see also* *Mareno v. Jet Aviation of Am., Inc.*, 155 F.R.D. 74, 76 (S.D.N.Y. 1994) (noting that the amended mandate of Rule 1 emphasizes means other than Rule 11 to deter abusive litigation); *Agostino Ferrari, S.p.A. v. Antonacci*, 858 F. Supp. 478, 481 n.1 (E.D. Pa. 1994) (tying the Rule 1 trinity to "firm, early deadlines for discovery and trial"); *United States v. Neaman Bros. & Assocs.*, No. 89-07-00444, 1994 Ct. Int'l Trade LEXIS 30, at *9 (Feb. 7, 1994) (suggesting that a defendant may not ignore rules designed to secure the trinity).

²⁹⁹ For similar perceptions of the trinity by the early district courts, *see supra* notes 120-26 and accompanying text.

³⁰⁰ *Roberts & Schaefer Co. v. Hardaway Co.*, No. 95-590-CIV-T-17E, 1995 U.S. Dist. LEXIS 10667, at *4 (M.D. Fla. July 25, 1995); *In re E.I. du Pont de Nemours & Co. Benlate Litig.*, No. 4:95-cv-36, 1995 U.S. Dist. LEXIS 12175, at *53 (M.D. Ga. Aug. 21, 1995); *Morsey v. Chevron U.S.A., Inc.*, No. 94-1301-WEB, 1995 U.S. Dist. LEXIS 7000, at *12 (D. Kan. Feb. 7, 1995); *Petralia v. Centennial Life Ins. Co.*, No. 93-1425-CIV-T-17c, 1994 U.S. Dist. LEXIS 4832, at *5 (M.D. Fla. Mar. 30, 1994); *Sawinski v. Bill Currie Ford, Inc.*, 866 F. Supp. 1383, 1388 (M.D. Fla. 1994); *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543, 546 (S.D.N.Y. 1994); *Fallowfield Dev. Corp. v. Strunk*, Nos. 89-8644, 90-4431, 1994 U.S. Dist. LEXIS 12758, at *22 (E.D. Pa. Sept. 2, 1994); *see also* *Kahn v. General Motors Corp.*, 865 F. Supp. 210, 214 (S.D.N.Y. 1994) (referring to "policies").

³⁰¹ *Automatic Sys. Dev., Inc. v. Sabratek Corp.*, No. 93 Civ. 7149, 1994 U.S. Dist. LEXIS 1907, at *4 (S.D.N.Y. Feb. 15, 1994); *Perry v. ICN Pharmaceuticals*, 86 Civ. 6776, 1994 U.S. Dist. LEXIS 3120, at *2 (S.D.N.Y. Mar. 14, 1994); *Reilly v. Metro-North Commuter R.R.*, 93 Civ. 7317, 1994 U.S. Dist. LEXIS 6693, at *3 (S.D.N.Y. 1994).

³⁰² *In re Lotus Dev. Corp. Sec. Litig.*, 875 F. Supp. 48, 51-52 (D. Mass. 1995); *West*

"cornerstone"³⁰³ of the Federal Rules of Civil Procedure.³⁰⁴ Some district courts use the trinity as a statement of goals to support the resolution of procedural issues not specifically addressed by the Rules³⁰⁵ and to authorize departures from requirements and conditions set forth in the Rules.³⁰⁶ Describing such uses of Rule 1 helps in understanding the extent of the power with which district courts associate the trinity. Again, some recent examples illuminate and clarify the impact of the trinity.

In *Local 715, United Rubber, Cork, Linoleum & Plastic Workers v. Michelin America Small Tire*,³⁰⁷ the court ordered the parties to negotiate

End Assocs., L.P. v. Sea Green Equities, Nos. 93-3515, 94-836, 1994 U.S. Dist. LEXIS 10655, at *11 (D.N.J. July 30, 1994); Audiotext Communications Network, Inc. v. U.S. Telecom, Inc., No. M8-85, 1994 U.S. Dist. LEXIS 185, at *4 (S.D.N.Y. Jan. 11, 1994); McFadden v. Grand Union, 154 F.R.D. 61, 62 (S.D.N.Y. 1994); Sussman v. Stern, No. 93 Civ. 4017, U.S. Dist. LEXIS 5816, at *2 (S.D.N.Y. May 5, 1994); Colony Nyro Partners v. Waterside Dev. Corp., 840 F. Supp. 15, 18 (S.D.N.Y. 1993).

³⁰³ Bayer AG & Miles, Inc. v. Barr Lab., Inc., 162 F.R.D. 456, 461 (S.D.N.Y. 1995); Mareno v. Jet Aviation of Am., Inc., 155 F.R.D. 74, 76 (S.D.N.Y. 1994).

³⁰⁴ See Tagupa v. Odo, 843 F. Supp. 630, 633 (D. Haw. 1994) (noting importance of the trinity to the operation of the civil justice system); Feliciano v. Dubois, 846 F. Supp. 1033, 1038 (D. Mass. 1994) (noting that a court's responsibility in resolving procedural, substantive, and pragmatic issues is to promote the trinity).

³⁰⁵ See *infra* notes 307-19 and accompanying text.

³⁰⁶ See *infra* notes 320-52 and accompanying text. At least one court has used the power provided by the trinity to construe and apply laws *other than* the Federal Rules of Civil Procedure. See *Adler v. Adler*, 862 F. Supp. 70, 72 (S.D.N.Y. 1994) (refusing to interpret a preliminary question concerning removal as a federal question sufficient to support removal, because such an interpretation would be "contrary to the objectives set forth in [the trinity]"); *Automatic Sys. Dev., Inc. v. Sabratek Corp.*, No. 93 Civ. 7149, 1994 U.S. Dist. LEXIS 1907, at *4 (S.D.N.Y. Feb. 15, 1994) (concluding that stay of proceedings pending interlocutory appeal would be inconsistent with the trinity); *Barbieri v. Hartsdale Post Office*, 856 F. Supp. 817, 820 (S.D.N.Y. 1994) (holding removal from state small claims court inconsistent with the trinity); *Fontaine v. Ryan*, 849 F. Supp. 242, 244 (S.D.N.Y. 1994) (observing that permitting withdrawal of counsel in ongoing suit would be "entirely inconsistent" with the trinity); *McFadden v. Grand Union*, No. 93 Civ. 4841, 1994 U.S. Dist. LEXIS 1994, at *2 (S.D.N.Y. Feb. 18, 1994) (citing trinity to justify refusal to appoint counsel in duplicative federal suit); *Morrison Law Firm v. Clarion Co.*, 158 F.R.D. 285, 287 (S.D.N.Y. 1994) (granting motion to dismiss based upon forum non conveniens supported by the trinity); *Tilcon Minerals Inc. v. Orange & Rockland Utils., Inc.*, 851 F. Supp. 529, 531 (S.D.N.Y. 1994) (noting that use of declaratory judgment as "nonfinal stepping stone" in a contract dispute does not promote the trinity); *Mancuso v. Consolidated Edison Co.*, No. 93 Civ. 0001, 1993 U.S. Dist. LEXIS 17731, at *6 (S.D.N.Y. Dec. 13, 1993) (finding use of partisan experts inconsistent with the trinity and directing parties to consider appointment of a neutral expert); *Mioduszewska v. Board of Educ.*, No. 91 Civ. 3843, 1993 U.S. Dist. LEXIS 18896, at *4 (S.D.N.Y. Dec. 13, 1993) (invoking the trinity to direct parties to attempt to agree on neutral experts).

³⁰⁷ 840 F. Supp. 595 (N.D. Ind. 1993).

issues underlying a labor dispute.³⁰⁸ The parties engaged in extensive negotiation, but the union representatives refused to submit the company's settlement offer to the union membership for a vote.³⁰⁹ Because the union membership was the only body with authority to settle the case, the negotiations could proceed no further. The district court considered how—and whether—it could break the stalemate.

The district court in *Local 715* introduced its solution to the stalemate by reciting the Rule 1 trinity.³¹⁰ The court then noted that Rule 16 permits courts to use a number of mechanisms to encourage settlement, including: (1) pretrial conferences to “discuss means for dispensing with the need for costly and unnecessary litigation;”³¹¹ (2) discussion of “settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;”³¹² (3) consideration of “such other matters as may facilitate the just, speedy, and inexpensive disposition of the action;”³¹³ and (4) “requir[ing] that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.”³¹⁴ The district court concluded that its order to discuss settlement required the presence of an individual with authority to commit the union to a particular agreement.³¹⁵ If the entire union membership could not be physically present for settlement discussions, then “they . . . must have the opportunity to pass on settlement offers which are received.”³¹⁶ The court then ordered a vote of the union members on whether they wished to vote on acceptance of the company's proposals.³¹⁷

The district court in *Local 715* did not stop at requiring the union members to consider the settlement proposals. In addition to ordering the

³⁰⁸ *Id.* at 596.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* (quoting *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 650 (7th Cir. 1989)).

³¹² *Id.* (quoting FED. R. CIV. P. 16(c)(9)).

³¹³ *Id.* (quoting FED. R. CIV. P. 16(c)(16)).

³¹⁴ *Id.* (citing FED. R. CIV. P. 16(c)). The court also recited portions of the advisory committee notes for Rule 16, in which the committee noted that the Rule's explicit language does not limit the court's inherent powers or other powers provided under the Civil Justice Reform Act of 1990, § 103(a), 104 Stat. 5091 (codified at 28 U.S.C. § 473(b) (1994)), to require parties to participate in settlement discussions. *Id.* at 596-97 (quoting FED. R. CIV. P. 16(c) advisory committee's note (1993)). The Civil Justice Reform Act provides that a court may require representatives of parties with authority to bind the parties in settlement discussions to be present or available by telephone during any settlement conference. 28 U.S.C. § 473(b).

³¹⁵ *Local 715*, 840 F. Supp. at 597.

³¹⁶ *Id.*

³¹⁷ *Id.* (noting that “[t]he results of the vote may be useful as guidance to the parties and the court”).

vote, the court ordered that appointed masters would administer the vote using a form of ballot written by the court.³¹⁸ The court utilized the Rule 1 trinity not only to require the participation of parties with authority to settle, but also to structure the internal processes by which one of the parties participated in the litigation.³¹⁹

Perhaps the most interesting use of the trinity arises when courts view it as authorization to treat lightly or even supersede applicable language in other Rules. In doing so, some district courts have recognized that the trinity can be used to subvert the purposes of other Rules.

*Dobbs v. Lamonts Apparel, Inc.*³²⁰ provides an example of how one court used the Rule 1 trinity to usurp control of matters governed by other Rules. In *Dobbs*, the plaintiffs' attorney sent a questionnaire to present and former employees of the defendant who were potential class members.³²¹ In discovery, the plaintiffs subsequently produced a blank form of the questionnaire and the names of the employees who responded to the questionnaire.³²² The defendant sought to compel production

³¹⁸ *Id.*

³¹⁹ For additional cases in which district courts have utilized the Rule 1 trinity to resolve issues not addressed specifically by the Rules, see *Castano v. American Tobacco Co.*, 889 F. Supp. 904, 907 (E.D. La. 1995) (citing to the trinity in context of the court's inherent power to structure or modify a stay of proceedings to avoid delay); *Prudential-LMI Commercial Ins. Co. v. Windmere Corp.*, No. 94-0197, 1995 U.S. Dist. LEXIS 11316, at *4 (E.D. Pa. Aug. 8, 1995) (concluding that although no rule addressed whether a third-party defendant could file a cross-claim against an original defendant who was not the third-party plaintiff, permitting such a claim would be consistent with the trinity); *Tagupa v. Odo*, 843 F. Supp. 630, 633 (D. Haw. 1994) (concluding that permitting deponent to give deposition testimony in Hawaiian language would be contrary to Rule 1); *Doe v. Herseman*, 155 F.R.D. 630, 630 (N.D. Ind. 1994) (finding service of a subpoena under Rule 45(b)(1) by certified mail rather than personal delivery consistent with Rule 1); *Kahn v. General Motors Corp.*, 865 F. Supp. 210, 214-15 (S.D.N.Y. 1994) (concluding that in light of Rule 1, a plaintiff could not make its waiver of the right to a jury trial under Rule 39 conditional upon a particular judge conducting the bench trial); *Micro Designs Software Corp. v. Saxon*, No. 93 Civ. 7091, 1994 U.S. Dist. LEXIS 767, at *5 (S.D.N.Y. Jan. 24, 1994) (directing parties to consider settlement options for 30 days pursuant to the Rule 1 trinity); *Seattle Audobon Soc'y v. Lyons*, 871 F. Supp. 1286, 1289 (W.D. Wash. 1994) (citing trinity to promote transfer of venue under 28 U.S.C. § 1404(a)); *Mioduszewska v. Board of Educ.*, No. 91 Civ. 3843, 1993 U.S. Dist. LEXIS 18896, at *4-*5 (S.D.N.Y. Dec. 13, 1993) (directing parties to consider settlement and, if unsuccessful, to attempt to agree on one or more neutral experts to examine questions pertinent to the case); see also Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 802 (1989) (identifying Rule 16 and the trinity as authorizing judges to require the use of alternative dispute resolution procedures).

³²⁰ 155 F.R.D. 650 (D. Alaska 1994).

³²¹ *Id.* at 651.

³²² *Id.*

of the "verbatim answers" to the questionnaire; plaintiffs sought to protect the responses from discovery as attorney work-product under Rule 26(b)(3).³²³

The district court treated the requested materials as "witness statements," and admitted that they fell within the traditional scope of protected attorney work-product.³²⁴ The court also noted that the defendant could obtain the factual information contained in the responses by either deposing the respondents or by submitting interrogatories to the plaintiffs.³²⁵

The court in *Dobbs* ultimately rejected the claim to work-product protection. After commencing its analysis by quoting the Rule 1 trinity,³²⁶ the district court noted that Rule 26(b)(3) did not protect the facts contained in the completed questionnaires.³²⁷ The court then appeared to abandon the work-product doctrine:

What a witness "knows" is not the work of counsel. That the witness' knowledge should be discoverable on a first-hand basis, but not in the form of answers given to opposing counsel in writing, strikes the court as an example of elevating form above substance; and, as far as the qualified work product privilege is concerned, a fiction.³²⁸

³²³ *Id.* Rule 26(b)(3) provides, in part, that:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) *only upon a showing* that the party seeking discovery has *substantial need* of the materials in the preparation of the party's case *and* that the party is *unable without undue hardship* to obtain the *substantial equivalent* of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3) (emphasis added).

³²⁴ *Dobbs*, 155 F.R.D. at 651. The district court also noted that scholars have criticized traditional protection for such "witness statements," because a witness would be entitled to a copy from the plaintiffs under the second paragraph of Rule 26(b)(3) but a party might not be so entitled. *Id.* at 651-52 (quoting 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2028 (1970 & Supp. 1993)).

³²⁵ *Id.* at 652-53.

³²⁶ *Id.* at 652. The court quoted the trinity in a separate paragraph without specifically explaining its relationship to the subsequent analysis. *Id.*

³²⁷ *Id.*

³²⁸ *Id.* The district court in *Dobbs* subsequently stated that it would make "all verbatim third-party witness statements discoverable." *Id.* at 653 ("[T]he verbatim, third-party witness statement is, by its very nature, material which must be subject to efficient discovery without being filtered by someone else."); cf. *Pache v. Wallace*, No.

Despite its apparent departure from the Rule, the court in *Dobbs* attempted to fit its decision within the language of Rule 26(b)(3). The court suggested that other means of discovery could not substitute for production of the actual questionnaire answers, because the employees *might* give different answers in response to deposition questions³²⁹ and because plaintiffs' counsel would put their own "spin" on interrogatory answers.³³⁰ The court concluded that discovery of the material contained in the questionnaire responses by means other than production of the responses "will simply not be the substantial equivalent of the earlier written statement."³³¹ Moreover, the court stated:

It is the view of this court that a verbatim witness statement, even one solicited by counsel, is *per se* necessary to the full and efficient development of a case. . . . [T]he verbatim, third-party witness statement is, by its very nature, material which must be subject to efficient discovery without being filtered by someone else.³³²

Accordingly, the court granted the defendant's motion to compel production of the questionnaire responses without requiring defendant to demonstrate "substantial need or inability to otherwise obtain the material *beyond the showing already made*."³³³

The court in *Dobbs* effectively rewrote Rule 26(b)(3) under the aegis of the trinity. Either the court completely abandoned work-product protection for third-party witness statements, or it was prepared to permit discovery of attorney work-product if other methods of discovery entailed the *possibility* of an adverse party being unable to obtain the *same* statements in an equally efficient manner. Moreover, the court in *Dobbs* never considered that Rule 26(b)(3) serves to encourage thorough preparation of a case by prohibiting one side from gaining the fruits of the other side's efforts without having to expend the time or money.³³⁴ The

93-5164, 1995 U.S. Dist. LEXIS 3511, at *4 (E.D. Pa. Mar. 20, 1995) (deciding that a motion to dismiss accompanied by attachments outside of the pleadings need not be treated as a motion for summary judgment despite the last sentence of Rule 12(b)(6) when the documents are indisputably authentic and the plaintiff bases its claims on the documents).

³²⁹ *Dobbs*, 155 F.R.D. at 652. Without citing any support for its conclusion, the court stated that "almost anyone will answer the question differently unless coached to give the same answer." *Id.*

³³⁰ *Id.* at 653.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* (emphasis added).

³³⁴ See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 386 (2d ed. 1993) (noting that work product protection emerged to encourage attorneys to prepare their own cases rather than waiting for opposing counsel to investigate); see also *id.* at 390 (commenting that "good cause will rarely exist [for disregarding work-product protection] in situations . . . involving the attempt by one party to obtain the statements of wit-

approach of the court in *Dobbs* hardly seems consistent with the "plain language" approach suggested by recent Supreme Court decisions.³³⁵

District courts also utilize the trinity to temper the effects of the language in the Rules even when the Supreme Court has suggested strongly that it is not appropriate to do so. *Feliciano v. Dubois*,³³⁶ a prisoners' civil rights case, provides one example. In *Feliciano*, the district court prefaced its opinion by characterizing the case as "one of many now pending in this court that present a common pattern of jurisdictional, substantive, procedural and pragmatic issues the court may, and perhaps must, consider in order to promote 'just, speedy and inexpensive determination.'"³³⁷ The court used the opportunity of ruling on pending motions³³⁸ to publish an "early case management" order that it "expect[ed] to apply in this case and like cases . . . in the absence of new developments in statutes, rules of procedure and precedents bearing on these matters."³³⁹ The court then conducted an "early screening" of the complaint to identify frivolous claims and to determine whether the plaintiffs should provide more facts to support their allegations.³⁴⁰

The district court in *Feliciano* put its "early screening" in context by describing a long line of precedent authorizing dismissal of § 1983 com-

nesses that had been taken by opposing counsel"). For another example in which a district court required a party to produce its work product to an opponent, see *Fountain v. L & M Botruck Rental, Inc.*, No. 93-0379-L, 1994 U.S. Dist. LEXIS 2790, at *3 (E.D. La. Mar. 3, 1994) (noting that "the pretrial production of relevant surveillance material . . . would most likely secure the just, speedy, and inexpensive determination of most actions").

³³⁵ See *supra* notes 169-76, 182-202 and accompanying text.

³³⁶ 846 F. Supp. 1033 (D. Mass. 1994). In *Feliciano*, two prisoners, proceeding *pro se* and *in forma pauperis*, filed suit against the Massachusetts Commissioner of Correction and 24 individual defendants in their individual and official capacities. *Id.* at 1038. The plaintiffs alleged that a disciplinary action and certain conditions of their imprisonment violated various provisions of the Constitution, 42 U.S.C. § 1983, and other state and federal laws. *Id.* at 1038-39.

For additional cases involving *pro se* parties in which courts have made reference to the Rule 1 trinity, see *Doe v. Morgenthau*, 871 F. Supp. 605, 607 (S.D.N.Y. 1994); *Glendora v. Dolan*, 871 F. Supp. 174, 177 (S.D.N.Y. 1994); *Kahn v. General Motors Corp.*, 865 F. Supp. 210, 214 (S.D.N.Y. 1994); *McFadden v. Grand Union*, No. 93 Civ. 4841, 1994 U.S. Dist. LEXIS 1994, at *2 (S.D.N.Y. Feb. 18, 1994); *Sadowski v. Technical Career Insts., Inc.*, No. 93 Civ. 0455, 1994 U.S. Dist. LEXIS 15590, at *16 (S.D.N.Y. Nov. 2, 1994); *Jackson v. Nicoletti*, 875 F. Supp. 1107, 1112-13 (E.D. Pa. 1994).

³³⁷ *Feliciano*, 846 F. Supp. at 1038 (citing the trinity).

³³⁸ One plaintiff had sought appointment of counsel. *Id.* at 1039. Two of the individually-named defendants, the Attorney General and Governor of Massachusetts, filed motions to dismiss the complaint. *Id.* at 1044.

³³⁹ *Id.* at 1038.

³⁴⁰ *Id.* at 1040-43. The court's screening included a review under 28 U.S.C. § 1915(d) for "frivolous" claims brought *in forma pauperis*. *Id.* at 1041.

plaints when the complaints "failed to set forth at least an outline or summary of facts that, if proved, would entitle the plaintiff to relief."³⁴¹ However, the district court also recognized the recent opinion in *Leatherman v. Tarrant County Narcotics Intelligence Unit*,³⁴² in which the Supreme Court reaffirmed the significance of the notice-pleading standard.³⁴³ Although the court in *Feliciano* was uncertain of the effect of *Leatherman* on prisoner suits under § 1983 generally, the court concluded that *Leatherman* might preclude dismissal of prisoners' complaints for lack of particularity.³⁴⁴

Even if the court in *Feliciano* could not impose "particularity-of-complaint" requirements after *Leatherman*, the district court concluded that it could impose "particularity-of-claim" requirements as part of an "early case management" order.³⁴⁵ The court believed that it could require the plaintiffs to clarify in writing "ambiguous claims so as to enable opposing parties and the court to evaluate jurisdictional and other potentially dispositive issues."³⁴⁶

Having articulated its early screening requirements, the court in *Feliciano* then reviewed the complaint for pleading deficiencies that, prior to *Leatherman*, would have led the court to dismiss claims made against two of the individually-named defendants.³⁴⁷ Based upon those deficiencies, the court entered an interlocutory order giving the plaintiffs ninety days

³⁴¹ *Id.* at 1042 (citing to relevant decisions from the First Circuit).

³⁴² 113 S. Ct. 1160 (1993). For a discussion of *Leatherman*, see *supra* note 247 and accompanying text.

³⁴³ *Feliciano*, 846 F. Supp. at 1042 (noting that "general notice pleading consistent with Rule 8(a) . . . is sufficient to state a claim against a municipality based on inadequate training" (citing *Leatherman*, 113 S. Ct. at 1161)).

³⁴⁴ *Id.* The district court in *Feliciano* noted that the present case involved civil rights claims against individual defendants but that *Leatherman* concerned civil rights claims against a municipality. *Id.* (noting that *Leatherman* did not consider whether the "qualified immunity jurisprudence [in § 1983 suits] would require a heightened pleading in cases involving individual government officials" (quoting *Leatherman*, 113 S. Ct. at 1162)).

³⁴⁵ *Id.* at 1042. The district court characterized the Supreme Court's opinion in *Leatherman* as an "interpretation and application of the Federal Rules of Civil Procedure." *Id.* The district court concluded, therefore, that "common practices of invoking particularity-of-claim requirements in ways other than dismissing a civil action under a particularity-of-complaint requirement are not undermined by *Leatherman* as long as they are otherwise permitted by applicable statutes, rules and precedents." *Id.* The district court further justified its newly created screening mechanism as consistent with "statutory directives and national and local rules encouraging early and rigorous case management to reduce costs of litigation and avoid delay." *Id.* at 1043.

³⁴⁶ *Id.* (noting that the court could require the clarification "in some form of written submission to the court (an amended complaint being only an allowable form and not a required form)").

³⁴⁷ *Id.* at 1045-47 (discussing claims against the Governor and Attorney General).

to file a "written submission . . . stating with particularity at least an outline or summary of the facts and legal grounds of each claim alleged."³⁴⁸ If the plaintiffs failed to do so, some of their claims would be "subject to dismissal forthwith."³⁴⁹

The district court in *Feliciano* invoked the Rule 1 trinity to support the conclusion that a heightened standard of pleading inconsistent with the terms of Rule 8(a) *could* be imposed post-pleading through early case management orders. Although the court did not enter its order until seven months after the plaintiffs had filed their complaint, the court did not base its order on the passage of any specific period of time.³⁵⁰ In fact, the court suggested that early "particularity-of-claim" requirements could be appropriate even without an opportunity for "extensive" discovery by a plaintiff.³⁵¹ Use of the trinity to support such "particularity-of-claim" orders is noteworthy because it results in a procedure that tends to eviscerate the purpose of notice-pleading under Rule 8.³⁵²

Finally, like their earlier counterparts, district courts continue to recognize the tension arising from attempts to pursue the ends of justice,

³⁴⁸ *Id.* at 1048-49.

³⁴⁹ *Id.* The court's order actually granted a provisional dismissal of the claims against the Governor and Attorney General that would become final unless the plaintiffs filed the written submission described in the text. *Id.*

³⁵⁰ Docket entries for the case indicate that the plaintiffs filed their complaint on July 16, 1993, and the court issued its "particularity-of-claim" order on February 10, 1994. (docket entries on file with the author).

³⁵¹ The district court described a motion for summary judgment for failure to assert a claim within the court's subject matter jurisdiction as one example of a "particularity-of-claim" requirement independent of Rule 8. *Feliciano*, 846 F. Supp. at 1042-43 ("Such a motion may be presented effectively at a very early stage of proceedings because the grounds asserted for the motion may make immaterial all of the facts that are genuinely disputed. A response by the plaintiffs seeking time for extensive discovery . . . is likely to fail under these circumstances.").

³⁵² For additional opinions in which district courts utilized the Rule 1 trinity to temper the effect of other Rules, see *Anton/Bauer, Inc. v. Energex Sys. Corp.*, No. 93 Civ. 4682, 1994 Dist. LEXIS 3195, at *4 (S.D.N.Y. Jan. 11, 1994) (citing to the trinity as justifying a refusal to delay an "otherwise proper preliminary injunction" because of the defendant's failure to request a bond or set forth the amount necessary, even though Rule 65(c) provides that no restraining order or preliminary injunction shall issue except upon the giving of security in such sum as the court deems proper); *Reilly v. Metro-North Commuter R.R.*, No. 93 Civ. 7317, 1994 U.S. Dist. LEXIS 6693, at *2-*3 (S.D.N.Y. May 20, 1994) (denying leave to amend Title VII complaint to add individual defendant because, pursuant to the objectives of the trinity, courts should not add natural persons simply because they might be subject to suit); *Jeffrey A. Singer, P.C. v. Capanna*, No. 91-2062, 1994 U.S. Dist. LEXIS 1348, at *2 (E.D. Pa. Jan. 12, 1994) (citing the trinity prior to considering defaulted defendant's claims, despite failure to file a timely answer and failure to show "excusable neglect" sufficient to merit an extension of time as required under Rule 6(b)(2)).

speed, and inexpensiveness simultaneously.³⁵³ Some courts acknowledge the misleading ease with which Rule 1 suggests a pursuit of the trinity.³⁵⁴ The need to resolve procedural issues has forced other district courts to respond to this tension by compromising one principal to foster another.

*Resolution Trust Corp. v. Fleischer*³⁵⁵ provides a recent demonstration of the difficulties involved in balancing the trinity's elements. In *Fleischer*, the court granted the defendants' request for a six-month continuance of the trial date even though the court had rejected earlier requests.³⁵⁶ The court made its decision with "a certain degree of reluctance" and despite the diligence of plaintiff's counsel in preparing for the original trial date.³⁵⁷ The court believed that the defendants' own tactical decisions had contributed to their lack of preparation.³⁵⁸ The court also noted that a continuance would probably cause additional expense to the plaintiff.³⁵⁹ Nevertheless, the court's primary concern was to allow "both sides a full and fair opportunity to explore before a jury the nature and character of the conduct for which the plaintiff seeks to hold these defendants accountable."³⁶⁰ The court did "take[] to heart the admonition" of the trinity and attempted to accommodate issues of speed and expense.³⁶¹ However, the court concluded that it would not subordinate a "just" determination to "maximizing speed and minimizing expense."³⁶²

³⁵³ See, e.g., *Barnett v. Daley*, No. 92 C 1683, 1995 U.S. Dist. LEXIS 1673, at *1 (N.D. Ill. Feb. 10, 1995) (noting that although uncovering all the material facts is "the most important foundation for a just decision," the court also must consider cost in defining the appropriate scope of discovery). For a discussion of this tension in early district court opinions, see *supra* notes 127-34 and accompanying text.

³⁵⁴ See, e.g., *Sussman v. Stern*, No. 93 Civ. 4017, 1994 U.S. Dist. LEXIS 5816, at *2 (S.D.N.Y. May 5, 1994) (noting that although courts traditionally cite justice, speed, and inexpensiveness in tandem, the concepts are not always consistent and compromises are sometimes necessary); cf. *Kampfer v. Gokey*, 159 F.R.D. 370, 373 (N.D.N.Y. 1995) (noting that the court cannot forsake justice in the name of speed).

³⁵⁵ No. 93-2062, 1994 U.S. Dist. LEXIS 7544, at *3 (D. Kan. May 27, 1994). In *Fleischer*, the Resolution Trust Corporation sought \$160 million in damages from the former shareholders, officers, and directors of Franklin Savings Association, a failed savings and loan institution.

³⁵⁶ *Id.* The court initially scheduled the trial to begin less than 17 months after the plaintiff filed suit. *Id.* at *12.

³⁵⁷ *Id.* at *4.

³⁵⁸ *Id.* at *8.

³⁵⁹ *Id.* at *11.

³⁶⁰ *Id.* at *4. The court later stated that its concern was that if plaintiff should prevail at trial it would be because "that is where the truth lies and not because the defendants were unprepared." *Id.* at *11-12.

³⁶¹ *Id.* at *12 ("Often the considerations of speed and expense have been slighted over the years and delay and cost have frequently been excessive in the litigation process.").

³⁶² *Id.* The court noted that such a continuance is rare, and that its order arose from the unusual and complex nature of the case. *Id.* The court also suggested that

Like the "early district courts," district courts currently use the Rule 1 trinity to flavor a broad variety of procedural stews. Some courts use the trinity to foster liberal interpretations requiring only substantial compliance with the Rules;³⁶³ others use the trinity to justify interpretations that tend to impede adjudication on the merits.³⁶⁴ Some courts employ the trinity to define their limits by the language of the Rules;³⁶⁵ others employ it to escape or exceed the limits sets by the Rules' language.³⁶⁶ Some courts utilize the trinity without reference to precedent;³⁶⁷ others, to avoid troubling precedent.³⁶⁸ Finally, some courts invoke the trinity without attempting to explain its meaning or effect;³⁶⁹ others cite the trinity while admitting the difficulty of explaining how its parts can be fit together.³⁷⁰ In short, rather than a simple rule of construction, the federal courts seem to have transformed the trinity into a rule of heightened discretion.

V. PRAYERS, RULES, DISCRETION, AND CONCLUSIONS

What conclusions follow from the procedural effects associated with application of the Rule 1 trinity?³⁷¹ It seems difficult—if not heretical—

appellate rulings expected during the continuance period would provide useful guidance on certain legal issues when the case came to trial. *Id.* at *10.

For additional instances in which district courts attempted to balance justice, speed, and expense, see *Gropp v. United Airlines, Inc.*, 847 F. Supp. 941, 946 (M.D. Fla. 1994) (granting leave to amend complaint over defendant's Rule 1 objection on grounds that "this court does not construe [Rule 1] as a mandate which sacrifices the just resolution of actions in order to comport with a notion of efficiency"); *Kahn v. General Motors Corp.*, 865 F. Supp. 210, 214 (S.D.N.Y. 1994) (refusing to enforce conditional waiver of jury trial in light of attendant "prejudice, delay and inefficiencies for the litigants and the court"); *Jeffrey A. Singer, P.C. v. Capanna, C.A. No. 91-2062*, 1994 U.S. Dist. LEXIS 1348, at *1 (E.D. Pa. Jan. 12, 1994) (citing the trinity to avoid "an injustice visited upon the [] defendants simply by the passage of time"); *Mines v. City of Philadelphia*, No. 93-3052, 1994 U.S. Dist LEXIS 9776, at *7 (E.D. Pa. July 13, 1994) (describing the purpose of Rule 16 as securing the trinity as soon as possible); *In re IBM Corp. Sec. Litig.*, No. 92 Civ. 9076, 1993 U.S. Dist. LEXIS 20041, at *6 (S.D.N.Y. Dec. 8, 1993) (concluding that the burden of additional discovery outweighed likely benefit).

³⁶³ See *supra* note 258.

³⁶⁴ See *supra* notes 259-81 and accompanying text.

³⁶⁵ See *supra* notes 282-98 and accompanying text.

³⁶⁶ See *supra* notes 320-35 and accompanying text.

³⁶⁷ See *supra* note 254.

³⁶⁸ See *supra* notes 336-52 and accompanying text.

³⁶⁹ See *supra* notes 255-56.

³⁷⁰ See *supra* notes 353-62 and accompanying text.

³⁷¹ I am not suggesting that the preceding discussions demonstrate cause and effect relationships. The particular decisions in the cases described above did not necessarily turn on the Rule 1 trinity. However, the opinions demonstrate both the contexts in

to contest the plea for the "just, speedy, and inexpensive determination" of civil disputes. The long tradition of articulating such hopes by itself discourages controversy.³⁷² The use of and effects linked with the trinity in the federal courts suggest, however, that we should not take the trinity lightly.

The trinity may be part "prayer" as Charles Clark stated more than fifty years ago,³⁷³ but it is also much more. The Federal Rules of Civil Procedure present the trinity in a Rule format and as the first in a series of eighty-six Rules. As such, Rule 1 most often operates in conjunction with other Rules. Moreover, the Supreme Court and some district courts have recently suggested that compliance with the trinity requires fidelity to the "plain language" of the other Rules.³⁷⁴ Thus, any assessment of the value of the trinity requires an understanding of how the Rules function.

The Rules exist to have some effect, at least part of which is to limit discretion by guiding the behavior of those who participate in federal court litigation.³⁷⁵ Although the Rules permit some discretion by design³⁷⁶ and cannot avoid discretionary application in practice,³⁷⁷ it was

which courts consider the trinity applicable and the results courts correlate with the trinity.

³⁷² See *supra* notes 1-8 and accompanying text for a discussion of the "tradition."

³⁷³ See *supra* note 47.

³⁷⁴ See *supra* notes 169-76, 182-202, 282-98 and accompanying text.

³⁷⁵ See *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) (recalling Justice Black's description of the "principal function of procedural rules to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts"); Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 501-03 (1950) [hereinafter Clark, *Special Problems*] (suggesting that rules should instruct in the use of power as well as grant it); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972 (1989) (noting that the Advisory Committee expected that "the content of the rules they were writing would have an impact on the way the federal courts conducted their business"); cf. FREDERICK SCHAUER, *PLAYING BY THE RULES* 229 (1991) (describing rule-based decision making as reflecting a belief that we lack the capacity to consider all possible alternative courses of action and their possible consequences in any context; as a result, we simplify our thought processes with rules); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1192 (1994) (describing rules that "work best" as those which dictate "the course of action to be taken in all cases that fall within its terms").

³⁷⁶ See, e.g., FED. R. CIV. P. 8(f) (providing that pleadings shall be construed "as to do substantial justice"); FED. R. CIV. P. 16(c)(f)(16) (identifying "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action" as appropriate subjects for consideration at pretrial conferences); FED. R. CIV. P. 15(a) (providing that leave to amend pleadings "shall be freely given when justice so requires"); see also Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 308 (1938) (describing the federal rules as exemplifying a trend favoring less binding and strict

never intended for any Rule to provide a source of unbounded judicial discretion.³⁷⁸

The Rules not only limit, however; they also empower.³⁷⁹ The Federal

rules of form and providing a large measure of discretion to trial judges); Subrin, *How Equity Conquered Common Law*, *supra* note 25, at 918-26, 949-93 (describing the discretion historically afforded by equity procedure and the reliance of the Federal Rules of Civil Procedure on the equity model).

³⁷⁷ Even if Congress, the Supreme Court, and the original Advisory Committee had intended to implement a system of rigid procedures preempting judicial discretion, the practical reality of the application of such procedures by individual judges suggests the impossibility of realizing such a system. See Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. PITT. L. REV. 853, 854 (1989) (noting that the sense of justice common in a community "creeps" into the application of even rigid rules and softens perceived arbitrariness that strict application might entail); Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, reprinted in 79 F.R.D. 173, 174 (1978) (finding that federal appellate courts had read discretion into at least thirty other Rules); cf. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 961-67 (1995) (noting that rules interpretation necessarily involves discretion and discussing the "continuum from rules to untrammelled discretion, with factors, guidelines, and standards falling in between").

³⁷⁸ See, e.g., Clark, *The Handmaid of Justice*, *supra* note 376, at 299 (referring to the "necessity of procedure in the sense of regularized conduct of litigation," and noting that "[r]egular procedure is necessary for equal treatment [and the appearance thereof] for all"); Shapiro, *supra* note 375, at 1972-73 (suggesting that if the Rules Committee intended to permit judges to do whatever they wished, the drafters would have "come up with a variant of the present rule 1" and not wasted the effort of drafting over eighty additional rules); see also Bone, *supra* note 25, at 22 n.48 (noting that even equity was confined by principals of natural justice); cf. Subrin, *How Equity Conquered Common Law*, *supra* note 25, at 988 (noting that if the purpose of courts was merely to resolve disputes, coin flips would suffice, and suggesting that the true purpose is to "resolve disputes through reasoned and principled deliberation, based on rules").

For discussion of the longstanding tension between discretion and rigidity in rules of procedure, see 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 251 (3d ed. 1923) (describing "due regard for the claims of substantial justice" and "a system of procedure rigid enough to be workable" as "one of the most permanent problems" a legal system must face); Clark, *The Handmaid of Justice*, *supra* note 376, at 300 (noting the "dilemma which justice faces" in choosing between "regularity of action" and "individualization of treatment"); Shapiro, *supra* note 375, at 1995 (noting the equally undesirable implications of both unbounded discretion and "hard and fast requirements"); cf. Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 469 (1993) (noting similar concern in administrative law with controlling the exercise of congressionally-delegated discretion by federal agencies).

³⁷⁹ See Clark, *Special Problems*, *supra* note 375, at 493 ("Procedural rules must be viewed as grants or creations of judicial power."); cf. SCHAUER, *PLAYING BY THE RULES*, *supra* note 375, at 232 (concluding that rules are instrumentalities not only of power but of restraint as well).

Rules of Civil Procedure provide an imprimatur for activity considered to fall within their scope. The mere recitation of a Rule—whether or not accompanied by discussion of its relevance—adds an air of legitimacy to decisions concerning procedure.³⁸⁰

Although presented as but one in a series, the trinity is a unique Rule. Apart from its capacity to empower and guide particular procedural decisions, the trinity, by its terms, applies to the construction and administration of all of the Rules.³⁸¹ This peculiar aspect of the trinity makes it troubling. As a Rule, the trinity represents an additional source of empowerment and discretion. Yet, as a Rule, the trinity also should guide the exercise of that discretion. Unfortunately, the difficulty in defining³⁸² and ordering³⁸³ terms such as “just,” “speedy,” and “inexpensive” prevents the trinity from providing principled guidance in the exercise of discretion. As Charles Clark recognized, words not only permit a reader to give them the reader’s own meaning, but the more imprecise the words are, the greater the delegation of authority to engage in interpretation.³⁸⁴ And, as Clark also suggested, adding an additional layer of discretion to rules that already permit the exercise of discretion in their application is at best unnecessary and at worst confusing and harmful.³⁸⁵ In short, the

³⁸⁰ See *supra* notes 87-88, 255 and accompanying text for a description of the district courts’ uses of the trinity as unexplained invocations and benedictions.

³⁸¹ See *supra* note 10 for the current text of Rule 1.

³⁸² See Bone, *supra* note 25, at 4 (noting that cost and delay are “relative concepts”); Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 283-85, 302 (1991) (noting that “the ambiguous Rule 1 charge fails to define justice,” describing “justice” as a “fairness-based term,” and stating that “no single concept can hope to define adjudicatory fairness,” but suggesting several concepts relevant to its definition); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 738-42 (1987) (noting that to describe efficiency as a goal does not help us to recognize the goal, and that even if we acknowledge efficiency as a measure of the relationship between benefit and cost, the task of defining the component parts of benefit and cost remain); Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 849-80 (1994) (describing the confusing tradition of using “delay” and “speed” as gauges for procedural justice).

³⁸³ For the difficulty courts have in determining the relative weights to be given to the elements of the Rule 1 trinity, see *supra* notes 127-34, 353-62 and accompanying discussion; see also Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 251 (1990) (noting that the trinity “illustrates that we want many things from the litigative process” and recognizing potential conflicts among these desires).

³⁸⁴ See Clark, *Special Problems*, *supra* note 375, at 494 (quoting Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 425 (1950)).

³⁸⁵ See *id.* at 505 (noting that in reviewing findings of fact under the “clearly erroneous” standard of Rule 52(a), some appellate courts adopted a greater power of review when evidence below was by deposition, thus co-opting “an additional measure of discretion to a rule calling for the exercise of discretion”).

trinity adds an extra layer of empowerment and discretion without providing an extra layer of guidance or control. We should not be surprised, then, to observe the wide range of approaches and effects that courts associate with the trinity.

Ultimately, we must ask ourselves whether the additional discretion courts have found in the trinity is worth the risks it poses for certain process values. For example, such broad discretion can increase the time and cost of litigation by encouraging an advocacy that challenges every rule of procedure unless the rule accommodates an individual party's concerns.³⁸⁶ The heightened discretion found in the trinity also might imply that matters of process rest solely in the control of an individual judge. Such a perception undermines the sense of dignity and control that parties value in dispute resolution processes.³⁸⁷ The perception also subverts public confidence that the federal courts provide a principled dispute resolution system.³⁸⁸

The Rule 1 trinity illustrates the dangers of unexamined traditions in civil procedure. The aspirations the trinity expresses seem to demand our consent, but the reality of the trinity's application should order our caution. Improving procedure is a laudable goal. We must remain cautious, however, that our prayers for procedure do not become mantras for mayhem accompanied by the power of rules.

³⁸⁶ Professor Subrin reminds us that courts of equity—perhaps the ultimate arena for the application of discretion in resolving disputes—were “notorious” for the duration of their proceedings. See Subrin, *How Equity Conquered Common Law*, *supra* note 25, at 920 n.58 (tying the length of equitable proceedings to the desire “to effect complete relief” and “the self-interest of Chancery officials who profited from lengthy suits”); cf. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 7 (1990) (noting that increases in the number of appellate judges leads to higher rates of appeal due to greater unpredictability of appellate decisions).

³⁸⁷ For analysis of the values of dignity, control, and satisfaction with dispute resolution processes, see E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y. REV. 953, 972-73 (1990).

³⁸⁸ See Brunet, *supra* note 382, at 307 (noting that unlimited discretion may “jeopardize the quality of, and public confidence in, our system of dispute resolution”).