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Federal Adjudication of Facts: The New Regime

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The American legal system is entering a new system of fact adjudication in federal civil practice. This new regime of management governs how courts judge the sufficiency of pleadings, how they determine facts, review factual determinations, and treat adjudicated facts in subsequent litigation. This new regime is characterized by a temporal shift toward fact adjudication at an early stage. No longer will the federal courts rely on extensive appellate review; rather, there is a shift toward deference to district court findings. In addition, the courts are shifting from notice pleading with facts ascertained by discovery to a close look at the factual bases of pleadings. Other scholars have written on this phenomenon of a shifting of judicial emphasis.[1] No one, however, has looked specifically at the various changes in procedure such as new versions or new interpretations of the Federal Rules of Civil Procedure 9(b), 11, 52, 56 and the doctrine of issue preclusion, as a whole. Such an examination reveals that the legal system is entering a new era of procedure created by the judiciary. The new procedure radically changes the fo-

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1. Two such notable scholars are Professors Richard Marcus and Judith Resnik. Professor Marcus has described the phenomenon in his article, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) [hereinafter Marcus]. Professor Resnik, in her exhaustive study, *Tiers*, 57 S. CAL. L. REV. 837 (1984) [hereinafter Resnik], described a concentration of power in the first tier of decision making, a decision to prefer "a single judge issuing a final, authoritative decision." *Id.* at 884.

cus of the rules, which formerly was to lead the case up to trial, to one that seeks pretrial adjudication.

Upon analyzing the system of fact adjudication in the United States as a whole, Professor Judith Resnik concluded that the courts have made a choice in favor of "closure, economy and power concentration."[2] The value of judicial closure is that cases are subject to limited appellate review. The effect of economy is that the superficially most expedient procedure is preferred, and the result of power concentration is that decision-making authority concerning fact adjudication is concentrated in the trial court judge. Since Professor Resnik's analysis in 1984, a review of recent developments reveals that the trend toward preferring these values of closure, economy and power concentration has become even stronger. Furthermore, the procedural system has undergone a temporal shift of decision making toward the earlier stages of the procedural system. This shift toward the earlier procedural stages conflicts with the authorities that should control the procedural system—the Seventh Amendment and congressional enactments. The new regime may also constitute an inferior method of adjudicating facts.

Before proceeding into the body of the paper, the reader must consider the accuracy that is achievable in describing the present civil procedure system. For example, two major problems present themselves when one is addressing the question of whether courts are now weighing the credibility of summary judgment decisions. First, too much data exists: a Westlaw[3] check of citations to the Supreme Court's three recent summary judgment cases in June, 1988, revealed 1,200 cites.

Second, the cases are difficult to interpret. For example, is a court weighing evidence in a summary judgment decision or not? Taking a case at random, *City of Mt. Pleasant,*

2. Resnik, *supra* note 1, at 844.
3. A computerized research service.

Iowa v. Association of Electrical Co-op,[4] the court of appeals affirmed the grant of summary judgment in favor of the defendants accused of violating the Sherman Antitrust Act. The court rejected the plaintiff's arguments that the defendant electrical cooperative had abused its monopoly power. Reading the appellate opinion, the result seems obvious in that the plaintiff showed no evidence of an abuse of monopoly power.[5]

Can the opinions be trusted? Many courts seem to present their views as the only ones that are rational. Would a city go to the trouble of litigating a complex antitrust lawsuit to the point of petitioning for a rehearing en banc with no evidence? In order to characterize accurately what the courts are doing with the facts of a case, one would have to investigate the record. With more than 1,200 reported cases as of June, 1988, a complete investigation of even ten percent of the summary judgment cases would overtax any scholar.[6]

This discussion must, logically, move to the trends, tendencies and characterizations of what the courts are doing. Not every court is adopting a "new regime" of fact adjudication. The judiciary has developed a new mind-set, however, of how to adjudicate facts. A characteristic of the new regime is looser control of trial courts, and as a result the treatment of facts in any one case is becoming more and more dependent on the predilections of the particular trial judge.

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4. 838 F.2d 268 (8th Cir. 1988).

5. *Id.* at 281 (The plaintiffs accused the defendants, a group of related rural electric companies, of price squeezing and conspiring to monopolize the wholesale electricity market in violation of 15 U.S.C. §§ 1-2, § 13(a) (1982)).

6. As stated by Professor Louis, "Reported federal summary judgment decisions now fill almost an entire volume of the United States Code Annotated. Amidst such a profusion, one can find support for virtually any approach to summary judgment, especially because so many of the decisions concentrate on the facts, repeat cliches, and use sketchy analyses." Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 722, n.83 (1984).

I. Fact Adjudication under the *Ancien Régime*

A. Notice Pleading

The *ancien régime*, or old system, of fact adjudication was characterized by notice pleading, extensive discovery, and full review. *Conley v. Gibson*[7] gave the standard rule concerning pleading under the *ancien régime*: "[A] complaint should not be dismissed for failure to state a claim 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."[8] Simply stated, the *Conley* rule was that pleadings required no detail and that one could discover the facts after filing a claim.[9] Courts, under the *ancien régime*, disfavored motions to dismiss on formal grounds, such as the failure to state a claim.[10] Professor Arthur Miller made this observation about dismissal for the failure to state a claim: "It is a wonderful tool on paper but have you ever looked at the batting average of rule 12(b)(6) motions? I think it was last effectively used during the McKinley administration."[11]

Ancien régime pleading, therefore, was to start the ball rolling, but it did little to determine the facts at issue. Because one could rely on discovery for determining facts, an attorney could plead only on the basis of suspicion.[12] Discovery was to determine the validity of the plaintiff's case.[13]

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7. 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).
8. 355 U.S. at 45-46.
9. Marcus, *supra* note 1, at 434.
10. FED. R. CIV. P. 12(b)(6).
11. A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 7-8 (1984) [hereinafter MILLER].
12. Popofsky & Goodwin, *The "Hard-Boiled" Rule of Reason Revisited*, 56 ANTITRUST L.J. 195 (1987) [hereinafter Popofsky].
13. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806 (1981).

B. Summary Judgment

Courts of the *ancien régime* preferred trial over summary judgment. The Second Circuit adopted a "slightest doubt" standard in denying summary judgment motions.[14] The Supreme Court severely limited the use of summary judgment in *Adickes v. S.H. Kress & Co.*[15] Commentators and courts have interpreted *Adickes* in various ways, but regardless of its interpretation the *Adickes* decision did make granting summary judgment difficult. One commentator stated that the movant had to show the impossibility of there being any evidence that would create a genuine issue of fact.[16]

Therefore, under the *ancien régime* the use of summary judgment was slighted in favor of trial. The *ancien régime* concluded that the trial process, with its ability to impeach witnesses, was the proper place for fact adjudication. The United States Supreme Court in *Poller v. Columbia Broadcasting System*[17] voiced its belief that "even handed justice" required that a trial should be employed rather than the granting of a summary judgment motion, at least in the area of antitrust litigation. The *Poller* Court stated:

> We believe that summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by

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14. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *see also* Marcus, *supra* note 1, n.8 at 434.

15. 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

16. Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1111 (1986). Note also that, prior to *Adickes*, the court had summarily reversed the granting of a summary judgment in *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 89 S. Ct. 1391, 22 L. Ed. 2d 658 (1969).

17. 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962).

> jury which so long has been the hallmark of 'even-handed justice.'[18]

C. Directed Verdict and J.N.O.V.

Furthermore, under the *ancien régime* the jury, not the judge, was to decide the facts. The Supreme Court had severely limited the scope of directed verdicts and J.N.O.V. motions in several cases.[19] Although disagreement exists as to whether these opinions apply only to FELA and Jones Act litigation,[20] there is no doubt that cases such as *Lavender v. Kurn*[21] and *Adickes v. S.H. Kress & Co*[22] encouraged the trial courts to use the jury instead of dismissal or summary judgment.

D. Appellate Review

Once decided, facts under the *ancien régime* were subjected to a more complicated and wider appellate review than under the present doctrine of the new regime. A classic case regarding the standard of review, *Orvis v. Higgins*,[23] set forth a wide scope of appellate review in non-jury cases:

> [W]e may make approximate gradations as follows: We must sustain a general or a special jury verdict when there is some evidence which the jury might have believed, and when a reasonable inference from that evidence will support the verdict, regardless of whether that evidence is oral or by deposition. In the case of findings by an administrative agency, the usual rule is substantially the same as that in the case of a jury, the findings being treated like a special verdict. Where a

18. 368 U.S. at 473 (citations omitted).
19. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 642-43 (4th ed. 1983).
20. *Id.*
21. 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946).
22. 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).
23. 180 F.2d 537 (2d Cir. 1950).

> trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.[24]

The *ancien régime* also allowed for a relitigation of issues, because of a narrow application of res judicata and collateral estoppel. For example, the requirement of mutuality limited the application of collateral estoppel.[25] Under the *ancien régime*, therefore, adjudication of facts focused on discovery to ascertain the facts and trials to determine them. After the trial, the appellate courts had an extensive scope of review, and could relitigate some factual conclusions. It is this system that now seems like life before the Revolution, too leisurely and inefficient for our modern world.

II. The New Regime

A. Dismissals of the Complaint

Despite Arthur Miller's statement that the last successful use of 12(b)(6) was during the McKinley administration, several commentators have described a movement away

24. *Id.* at 539-40 (citations omitted).
25. *Cf.* Park Lane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

from notice pleading and toward requirements of factually specific allegations. Professor Richard Marcus, for example, notes that "plaintiffs have an incentive to plead vaguely in hopes that discovery will turn up material on which to base a more specific charge" and that "plaintiffs with weak claims have good reason . . . to stave off dismissal in hopes of a settlement."[26] Acting against "pro-plaintiff biases" and "the impulse toward vagueness," courts have become more strict in requiring specificity. For example, in *Warth v. Seldin*[27] the Supreme Court required allegations concerning the standing of parties to be supported by "particularized allegations of fact."[28] Lower courts have frequently required fact pleading in three main areas: securities fraud, civil rights cases, and conspiracy.[29] In addition, the Ninth Circuit has adopted a requirement for specific allegations involving protected conduct under the First Amendment.[30]

Fact specificity has also spread to other areas. *The Manual for Complex Litigation*[31] calls for the use of pleadings to define and structure issues.[32] One authority notes that the *Manual* "encourages judges to insist upon some definition and structuring of issues" and criticizes notice pleading, because "real issues . . . may be clouded by imprecise or broad allegations tolerated by notice pleading."[33] In antitrust suits, courts are requiring specificity:

> The Supreme Court has yet to establish a general norm requiring fact-specific anti-trust pleading, but there is every indication of evolution toward such a norm. Pru-

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26. Marcus, *supra* note 1, at 445-46.
27. 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).
28. Marcus, *supra* note 1, at 446-47.
29. *Id.* at 447-50.
30. Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076, 1083 (9th Cir. 1976).
31. MANUAL FOR COMPLEX LITIGATION, § 21, 31-33 (5th ed. 1982).
32. *Id.* at § 21, 31-33.
33. Brunet & Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015, 1067 (1986).

> dent counsel for anti-trust plaintiffs should plead facts showing anti-trust injury and supporting a hoped for pro-se categorization with real specificity. Failure to do so may leave the plaintiff's claims vulnerable to the defendant's motion to dismiss or motion for summary judgment.[34]

Courts also impose stringent pleading requirements on plaintiffs who bring RICO[35] actions.[36] Even after the Supreme Court's decision in *Sedima v. Imrex Co., Inc.*,[37] almost thirteen percent of RICO cases were dismissed for lack of particularity and more than twenty percent were dismissed for insufficient allegations of predicate offenses.[38]

The requirement of specificity protects defendants from the expense of unnecessary discovery at the risk of slighting antitrust enforcement. In the past, pleading based only on parallel behavior would be sufficient to allow a plaintiff to proceed with discovery. Today, however,

> the litigation 'ambience' has changed and courts frequently determine that the costs to society of subjecting defendants to 'fishing expeditions' are too great to tolerate. . . . Thus, to survive a motion to dismiss, the plaintiff often must uncover prior to filing the complaint and then plead with particularity the underlying facts to support a valid conspiracy claim or the assumption that the defendant has the requisite market power to injure competition.[39]

There is, thus, a movement to reinstitute fact pleading in

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34. *Id.* at 1074.

35. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1982).

36. See the collection of cases in Blakely & Cessar, *Equitable Relief under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White Collar Crime?*, 62 NOTRE DAME L. REV. 526, 590, n.239 (1987) [hereinafter Blakely].

37. 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

38. Blakely, *supra* note 36, at 619-20.

39. Popofsky, *supra* note 12, at 211.

several types of federal complaints.

B. Rule 11—"Well-Founded in Fact"

The requirement of more specific pleading combines with the recently amended Federal Rule of Civil Procedure 11 in a synergistic fashion. In fact, it requires the plaintiff's attorney to do more factual investigation prior to filing and to reinstitute the complaint as the first barrier in the procedural system. The Federal District Court of Delaware in *In re Ramada Inns Securities Litigation*,[40] noted this change: "The combined effect of rules 9(b) and 11 is that an attorney before commencing any action involving fraud or mistake must have more specific information reasonably believed to be trustworthy than would be required if she were commencing any other kind of action."[41]

Rule 11, in fact, was changed specifically to deal with perceived shortcomings in the notice pleading system. One commentator describes the new Rule 11 as requiring the lawyer to know the facts and the law, more so than under the old Rule 11. Under the revised Rule 11 a somewhat objective standard of "reasonable inquiry"[42] is created. Profes-

40. 550 F. Supp. 1127 (D. Del. 1982).
41. *Id.* at 1132.
42. MILLER, *supra* note 11, at 15-16. Professor Miller stated:

> "To the best of his knowledge, information, and belief" (again, that is as close as you can come to describing some sort of mental state)—but here are the four critical words—"formed after reasonable inquiry." In many ways those four words are the key to rules 7 and 11. As the advisory committee note puts it, "formed after reasonable inquiry" is a stop-and-think obligation. There is now a mandated obligation on the part of an attorney to stop and think about his behavior, whether it is pleadings, motions, discovery or what have you—to the best of his knowledge, information and belief formed after reasonable inquiry. Now we have changed the nature of the standard. The combined effect of these words is that the lawyer must stop and think on the basis of the facts and the law. That is a fairly objective approach. It has got some subjective elements to it, but it is an attempt to become more objective. It is an attempt to say to an attorney: "You have to know your facts and your law before you start shooting paper arrows in the air."

sors Frank James and Geoffrey Hazard see the amended Rule 11 as a return to code pleading. They argue that the return to code pleadings is indirect, but that the phraseology of the amended Rule 11 leaves few alternatives.[43] Rule 11, therefore, has the capacity to overturn the *Conley v. Gibson*[44] system of "notice pleading."

Frantz v. U.S. Powerlifting Federation[45] discusses the interaction of Federal Rules of Civil Procedure 8 and 11. In *Frantz*, the court held that "a claim may be sufficient in form but sanctionable because, for example, counsel failed to conduct a reasonable investigation before filing."[46] The court insisted, however, that counsel have sufficient knowledge before filing the complaint:

> The complaint should contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Rule 8(a)(2). It is not only unnecessary but also undesirable to plead facts beyond limning the nature of the claim (with exceptions, see Rule 9, that do not concern us). Bloated, argumentative pleadings are a bane of modern practice. *American Nurses' Association v. Illinois*, 783 F.2d 716 (7th Cir. 1986). Rule 11 requires

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Id.

43. F. JAMES & G. HAZARD, CIVIL PROCEDURE 154-55 (3d ed. 1985) [hereinafter JAMES & HAZARD]. James & Hazard state:

> The incidence of the strike suit has led to proposals for tightening the pleading rules. There has not been much support for returning to code pleading, and probably interests associated with plaintiffs' causes are strong enough to block such a change. However, something approximating that result may be in progress indirectly. Rule 11 of the federal rules was amended in 1983 to require that all motions and pleadings be based on the subscribing attorney's "belief formed after reasonable inquiry [that] it is well grounded in fact. . . ." As some decisions suggest, this language could be administered to require the pleading to show that it is "well grounded in fact." It is difficult to see how such a requirement could be complied with except by alleging the factual grounds of the claim. This is a move in the direction of code pleading.

Id.

44. 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

45. 836 F.2d 1063 (7th Cir. 1987).

46. *Id.* at 1067.

> not that the counsel *plead* facts but that the counsel *know* facts after conducting a reasonable investigation and then only enough to make it reasonable to press litigation to the point of seeking discovery. Rule 11 neither modifies the "notice pleading" approach of the federal rules nor requires counsel to prove the case in advance of discovery. See also *Szabo*, 823 F.2d 1083 (Rule 11 requires only an "outline of a case" before filing the complaint, though it does require enough investigation to discover that outline).[47]

Even though the Seventh Circuit does not require *formal* fact pleading, it does require *functional* fact pleading. Plaintiffs must know enough facts prior to filing to avoid sanctions. The court recognizes that a fine line exists between form and functional pleading. The court has also noted that the requirements of Rule 11 should not prevent people who have at least a minimally meritorious complaint, but need discovery to help their case, from having their case heard. This need for discovery "does not excuse the filing of a vacuous complaint."[48] Crossing the line, however, subjects the attorney to censure and fines, a risk that can only have a chilling effect on litigation.

C. Summary Judgment

1. The Summary Judgment Trio

Summary judgment practice has been spurred, if not revolutionized, by three fairly recent Supreme Court cases: *Matsushita Electric Industries v. Zenith Radio Corp.*,[49] *Anderson v. Liberty Lobby*,[50] and *Celotex Corp. v. Catrett*.[51] Commentators agree that these three cases will in-

47. *Id.* at 1068.
48. *Id.*
49. 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).
50. 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).
51. 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

crease summary judgment use.[52] As stated by Professor Jeffrey Stempel, "[t]he majority opinions read like an ode to the wonders of summary judgment."[53]

Besides making summary judgment more feasible, these cases authorize a greater involvement of the judge in the fact-finding process and necessarily decrease the role of the jury. They also work to lessen the role of the trial hearing as the central fact-finding procedure and substitute the summary judgment for the trial as a principal determiner of fact.[54]

The exact meaning of the Court's pronouncements in the summary judgment trilogy is unclear.[55] *Celotex* held that it is sufficient for a movant to file a motion for summary judgment without attaching evidentiary material. What is a plaintiff required to include in the response? Professor John Kennedy gives six possible interpretations of *Celotex* as to the sufficiency of the response to the defendant's motion.[56] He concludes that "[t]he specific meaning of *Celotex* is

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52. *E.g.*, Comment, *No More Litigation Gambles*, 28 B.C.L. REV. 747 (1987); Kennedy, *Federal Summary Judgment*, 6 REV. LIT. 227, 230 (1987); Childress, *A New Era for Summary Judgments*, 6 REV. LIT. 263 (1987); Stewart, *Rulings Make Summary Judgment Possible in Complex Litigation*, 196 NAT'L L.J. 22 (1986).

53. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 106 (1988) [hereinafter Stempel].

54. Childress, *A New Era for Summary Judgments*, 6 REV. LIT. 263, 265 (1987) [hereinafter Childress]. Addressing the decrease in the role of the trial, Childress states:

> Summary judgment proceeding can now become less like pretrial dismissal motions and more like mini-trials—bench trials on paper. This doctrinal development gives the green light to grants where appropriate, increases the situations in which a grant would be appropriate and shifts the look of the motion from one of 'glorified 12(b)(6)' to preliminary directed verdict.'

Id.

55. *See, e.g.*, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491 (1988) (arguing that the cases concern the use of indirect evidence in conflict with goals of the substantive law).

56. Kennedy, *Federal Summary Judgment*, 6 REV. LIT. 227, 245 (1987).

somewhat inscrutable."[57] These cases clearly have a widespread effect. For example, a Westlaw search of citations of the cases interpreting the *Celotex* decision in June, 1988, produced over 1,000 cites.

The Court's opinions in these three cases will have several effects. One effect of *Celotex* is that it promotes the widespread use of the summary judgment motion because a defendant may move for summary judgment without supporting materials, such as affidavits, that negate the elements of the plaintiff's case.[58] The defendant can move for summary judgment merely by stating that discovery has revealed insufficient evidence to support plaintiff's claim. *Celotex* has increased the number of situations in which a defendant can use summary judgment because it requires so little to initiate the motion. In addition, *Celotex* has also shifted the time of decision about the sufficiency of the plaintiff's case forward from trial to the pretrial litigation stage. The result is that the plaintiff must come up with supporting evidence by the close of discovery. Thus the plaintiff can no longer hope that evidence will appear at the trial. Also, shifting the decision about the sufficiency of the plaintiff's case from trial to pretrial, *Celotex* necessarily decreases the authority of the jury because judges can screen cases before they are presented to the jury.

2. Evaluating the Burden of Proof

Even more damaging to the jury's role, however, is *Anderson v. Liberty Lobby*[59] and *Matsushita Electric Industries v. Zenith Radio Corp.*,[60] which empower the judge to adjudicate factual issues. *Anderson* involved a libel suit against Jack Anderson by a right-wing publisher and his or-

57. *Id.* at 245. On remand, the court of appeals decided that there was enough evidence to defeat the motion. Judge Bork dissented.
58. 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).
59. 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).
60. 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

ganization, Liberty Lobby. In *Anderson*, the court held that the standard of proof, in the *Anderson* case clear-and-convincing, must be considered in deciding a summary judgment motion.[61] In order to determine whether a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times v. Sullivan.*[62] The *Anderson* court held: "[T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence."[63] Thus, in ruling on a motion for summary judgment, the judge must review the evidence under the substantive evidentiary burden. The trial judge, however, is not to determine credibility.[64] Exactly what the majority's decision on allocation of fact determination between the judge and jury will mean in practice is unclear. In his dissenting opinion, Chief Justice Rehnquist wrote:

> The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never

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61. *Anderson*, 477 U.S. at 242.
62. 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).
63. *Anderson*, 477 U.S. at 251.
64. *Id.* at 255. The Court stated:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgement motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations on the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

Id.

cooked before and has no intention of starting now.[65]

Despite the majority's statement, *Anderson* does take some decision-making authority away from the jury. There can be two versions of how the "clear-and-convincing rule" affects factual adjudication. Either the *Anderson* rule empowers the judge to dismiss the case if the evidence is not "clear-and-convincing," or the rule is a standard the jury is to apply. The *Anderson* Court chose to give the decision to the judge. In doing so, it gives the judge fact-finding powers. Justice Brennan points out in his dissent the perceived damage that the majority decision holds for existing procedure:

> In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a prima facie case and a defendant's motion for summary judgement must fail regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.[66]

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65. *Id.* at 269.

66. *Id.* at 268. A proviso should be made in any statement about *Anderson.* Appellate judges are given authority to review facts in First Amendment cases more closely than in other cases. Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). Thus, *Anderson* could be limited to the First Amendment area. The Court, however, gives no indication of doing so.

3. Judicial Evaluation of Facts

Matsushita Electric Industries v. Zenith Radio Corp.,[67] encourages judicial evaluation of facts even more strongly than does *Anderson*. *Matsushita* involved an antitrust suit by American television manufacturers against Japanese manufacturers. The plaintiffs' theory was that the defendants had conspired to raise prices in Japan and to sell at low prices in the United States in order to drive out American producers.[68] The United States Supreme Court reversed the appellate court and ruled that the trial court had erred in granting the defendants' motion for summary judgment.[69] The Court described the non-moving party's burden:

> In the language of the rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue for trial*. . . ." Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."[70]

Matsushita does more, however, by authorizing the trial

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67. 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).
68. 475 U.S. at 574.
69. *Id.* at 598.
70. *Id.* at 587 (citations omitted). Steven Childress writes that this language makes the directed verdict test of the sufficiency of the evidence the standard for deciding summary judgment:

> With this language, the Court clearly signaled that summary judgment motions should be treated in parallel fashion to the trial motion for directed verdict, allowing a grant if the nonmovant plaintiff fails on substantive proof, even before trial. This suggests that the summary judgment procedure allows weak factual claims to be weeded out, not just factual claims that have no legal import; "genuine" allows some quantitative determination of sufficiency of evidence. Of course, a court still cannot resolve factual disputes that could go to a jury at trial. Also, it must be assumed from the later language in *Celotex Corp. v. Catrett*, discussed below in part II, subpart B, that this review assumes adequate discovery, so that the record is complete enough to define issues. However, *Matsushita* emphasizes that a court need no longer leave every sufficiency issue for trial or for a later directed verdict motion.

Childress, *supra* note 54, at 267-68.

judge to evaluate the plausibility of the evidence. The *Matsushita* Court defined implausibility as a claim "that makes no economic sense."[71] The Court held that if the trial judge determined that a respondent's claim was implausible under the Court's definition, the respondents would then be required to present "more persuasive evidence to support their claim than would otherwise be necessary."[72]

The *Matsushita* opinion demonstrates the Court's willingness to view evidence according to its understanding of economic reality. Professor Eugene Crew writes that the validity of the Court's economic assumptions is debatable because the Court seems to be saying that because it is irrational to speed, people do not speed.[73] The Court's basic factual assumption is that the actors are economically rational, or wealth maximizers, and therefore irrational conduct is unlikely.[74]

Whether or not corporate firms seek to maximize sales is an open question. Moreover, other societies may follow different goals:

> That which 'motivates' the 'rational' alumnus of the Chicago School of Law does not motivate everybody

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71. 475 U.S. at 575.

72. *Id.* Childress, writing to this issue, states:

> Two aspects of this approach seem new: (1) apparently "persuasiveness" can be considered by a judge before trial, and (2) "plausibility" can be judged, with a sliding scale of proof required of a plaintiff whose claim's plausibility varies. This means that inferences can be weighed, at least for their absolute reasonableness or persuasiveness.

Childress, *supra* note 54, at 268.

73. Crew, *Matsushita v. Zenith: The Chicago School Teaches the Supreme Court a Dubious Lesson*, 1 ANTITRUST 12 (1986) [hereinafter Crew].

74. *Matsushita*, 475 U.S. at 588-89. Specifically, the Court stated:

> Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profit may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of monopoly profits, more than the loss suffered.

Id.

> else and, particularly, the average Japanese businessman. For example, respected authorities have uniformly acknowledged that Japanese businessmen have a strong penchant for consensus and a strong motivation to collaborate with each other if necessary *to* prevail against foreign competitors.[75]

Assuming rational behavior, debate still exists over the rationality of underpricing items in order to damage the competition, which is sometimes referred to as predatory pricing.[76] The Court cites writings of the Chicago school of law and economics by Robert Bork[77] and Frank Easterbrook[78] as authority, while the plaintiff's expert is dismissed. Bork and Easterbrook write: "Accordingly, in our view the expert opinion evidence of below cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational."[79] The Court, therefore, allows the trial judge to decide the motion to dismiss in light of his view of the probability of what happened.

The *Matsushita* Court concludes by directing the court of appeals to consider other evidence: "The evidence must 'ten[d] to exclude the possibility' that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy."[80] The Court's holding represents a reversal of *Adickes v. S.H. Kress & Co.*,[81] in which the movants for summary judgment had to negate the reality of the respondent's theory of the

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75. Crew, *supra* note 73.

76. *See* McCall, *Predatory Pricing*, 33 ANTI. BULL. 1 (1987); Shepherd, *Assessing "Predatory" Actions by Market Shares and Selectivity*, 31 ANTI. BULL. 1 (1986).

77. *Matsushita*, 475 U.S. at 589 (citing R. BORK, THE ANTITRUST PARADOX (1978)).

78. *Id.* (citing Easterbrook, *Predatory Strategies and Counterstrategies*, 48 CHI. L. REV. 263 (1981)).

79. *Matsushita*, 475 U.S. at 594 n.19.

80. *Id.* at 597-598.

81. 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

case. *Matsushita* also rejected, without discussion, the prior holding of *Poller v. Columbia Broadcasting Systems*,[82] which held that a trial was the correct procedure to determine the existence of a conspiracy.[83]

Perhaps applying the *Matsushita* decision in other fact situations is an over-extension. There are several easily distinguishable points in *Matsushita*. The plaintiffs attacked a practice that at first glance seems to be what the antitrust law encourages: low cost pricing. As a result, a victory for the plaintiffs could be against substantive antitrust policy.[84] Yet, *Matsushita* is not limited to antitrust cases, and its authority gives support to judges evaluating the likelihood of the evidence in comparison with their own perception of reality. The case rests on the unstated assumption that a judge knows what is likely and what motivates a party's behavior, even a party from another culture. The *Matsushita* court also assumes that the judge is the proper person to make such an evaluation, not the jury. Therefore, the new regime has made the summary judgment motion easier to initiate[85] and has allowed the judge to evaluate facts in relation to both the burden of proof[86] and the court's view of reality.[87]

4. The Summary Judgment as Mini-Trial

The court has, in all practicality, turned the summary

82. 368 U.S. 464, 82 S. Ct. 485, 7 L. Ed. 2d 458 (1967).

83. *Matsushita* also rejected *Poller*'s teaching as to the use of summary judgment procedures in antitrust litigation. 368 U.S. at 473.

84. One commentator indicates that the application of *Matsushita* may be limited, stating: "The context of this caution makes it clear that it is not to be applied unthinkingly to every antitrust case. *Matsushita* urged courts to scrutinize predatory pricing rigorously, because antitrust law is intended to encourage price competition and because predatory pricing is likely to fail." Calkins, *Equilibrating Tendencies*, 74 GEO. L.J. 1065, 1126-27 (1986).

85. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

86. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

87. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

judgment motion into a mini-trial. In both the summary judgment and directed verdict motions the trial judge must insert the standard-of-proof question into any Federal Rule of Civil Procedure 56 decision. In addition, the judge must determine the probability of a party's allegations. Professor Linda Mullenix states:

> For if it is true, as the Court now suggests, that the question on each motion is the same (to wit, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"), then trial-like burdens and substantive evidentiary standards are clearly required. By reading backwards from the directed verdict the Court transformed summary procedure into a full trial-before-trial. With the Rule 12(b)(6) motion already in extreme disfavor, the Court has effectively deadened the pretrial utility of summary judgment—an ironic outcome for a Supreme Court urgently concerned with congested federal dockets and increased frivolous litigation.[88]

Not every court has required such a full presentation of all the respondent's evidence. For example, the *Celotex*[89] case on remand denied the summary judgment on the strength of plaintiff's transcript of her late husband's testimony concerning two letters.[90] A wise attorney, however, would do well to present as much evidence as possible at the summary judgment stage in order to be sure that the evidence presented meets the required standard of proof.[91] Rule 56 proceedings, therefore, have the potential to be transformed into pretrial documentary mini-trials.

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88. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 468 (1987) [hereinafter Mullenix].

89. Catrett v. Johns-Maville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985), *rev'd sub nom*, Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

90. Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 35 (D.C. Cir. 1987).

91. In *Catrett*, the decision was 2-1, with Judge Bork dissenting.

5. The "Out-of-the-Box" Motion

Another development of summary judgment procedure is the use of the motion in the initial pleading by filing a summary judgment motion in lieu of an answer. Such a motion, called an "out-of-the-box" summary judgment motion, can put the plaintiff in a difficult position and force him to disclose his evidence at the earliest possible procedural stage. Such motions are already appearing in malpractice and antitrust litigation.[92] Rule 56(f), however, does allow attorneys to gain more time to do discovery under certain circumstances.

6. When Affidavits are Unavailable

Should it appear from the affidavits of the opposing party that the party cannot present facts essential to justify its opposition, the court may do one of two things. First, it may refuse the application for summary judgment or, second, it may order a continuance to permit discovery to continue. Some defense counsel argue, however, that Rule 11 limits Rule 56(f). One commentator, Laurence Popofsky, contends that an "out-of-the-box" summary judgment motion in conjunction with Rule 11 can put the plaintiff's attorney in a bind.[93]

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92. Popofsky, *supra* note 12, at 212; Bower, *Defending Motions for Summary Judgment in Malpractice*, 17 TRIAL LAW. Q. 30, 32 (1985).

93. Specifically, Mr. Popofsky states:

> The plaintiff therefore no longer can plead a generalized allegation of a conspiracy or injury to competition, in the hope of uncovering facts in discovery to support such allegations. In other words, if the plaintiff has satisfied its Rule 11, obligation to conduct an investigation prior to filing the complaint and the "Rule 9(6)(b)" requirement to plead such facts with particularly the plaintiff should be able to defeat an "out-of-the-box" summary judgment motion merely by reference to the facts of which it is already aware. Thus, in some cases, plaintiff's request for further discovery under Rule 56(f) prior to a hearing or a summary judgment motion could constitute an admission that the complaint does not conform to Rule 11 and the district court therefore would not abuse its discretion by denying the Rule 56(f) request. The defendant

According to Popofsky, an "out-of-the-box" motion forces the plaintiff's counsel to develop facts that support his case at the initial pleading stage. Popofsky's position, taken literally, would read Rule 56(f) and the Federal Rules of Civil Procedure relating to discovery, Rules 26-37, entirely out of the Federal Rules of Civil Procedure. A Seventh Circuit case, *Frantz v. U.S. Powerlifting Federation*,[94] indicates that Rule 11 cannot be taken that far. Counsel must investigate thoroughly enough to have an "outline of the case," demonstrating that it is reasonable to proceed with discovery. Exactly where the court should draw the line is difficult to ascertain. Aggressive defense counsel can utilize the "out-of-the-box" summary judgment motion and Rule 11 to put immediate pressure on the plaintiff and to cut off further discovery.

Some courts, moreover, are refusing to allow more discovery time under Rule 56(f). Such refusal may be practically unreviewable because discovery control is generally viewed as a matter of district court discretion. For example, in *Wisniewski v. Johns-Manville Corp.*,[95] the court of appeals af-

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> should be entitled to proceed with the motion if the plaintiff is to avoid the imposition of Rule 11 sanctions.

Popofsky, *supra* note 12, at 212 *citing In re* Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Counsel, 817 F.2d 1391 (9th Cir. 1987).

94. 836 F.2d 1063 (7th Cir. 1987).

95. 812 F.2d 81 (3d Cir. 1987). Refusing additional time, the court stated:

> Appellants contend that the district court improperly granted summary judgment without ruling on their motion to permit additional discovery [under Rule 56(f)]. . . . The conduct of discovery is a matter for the discretion of the district court and its decisions will be disturbed only upon a showing for abuse of this discretion. . . . Appellants must demonstrate that the district court's action "made it impossible to obtain crucial evidence. . . ." *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 818 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156, 103 S. Ct. 801, 74 L.Ed.2d 1003 (1983). . . . [O]r otherwise constituted a "'gross abuse of discretion resulting in fundamental unfairness. . . .'"

Id. at 90 (citations omitted). *See* Kennedy, *supra* note 56, at 248-5; Marcus, *supra* note 1. Accord, Barona Group of the Captain Grande Band of Mission Indians v.

firmed the denial of a 56(f) continuance.

Other courts have allowed more discovery, declining to follow the *Wisniewski* decision. The Ninth Circuit Court in *WSB-TV v. Lee*[96] reversed the dismissal of a civil rights suit on summary judgment where the plaintiffs had not conducted discovery. In *Martin v. D.C. Metropolitan Police Department*,[97] the court of appeals affirmed the district court's allowance of limited discovery to test the qualified immunity of police officers. The dissent argued, however, that non-conclusory allegations of an unconstitutional motive are required *before* a court should permit further discovery.[98] The Ninth Circuit in *Barona Group of the Captain Grande Band of Mission Indians v. American Management & Amusement, Inc.*[99] held that respondents "must make clear what information is sought and how it would preclude summary judgment."[100]

Thus "inference and credibility" powers of the district court combine with discovery discretion under the summary judgment procedure to increase the power of the district court. As a result, the judge now has the power to weigh the amount of proof and make credibility determinations on the evidence and to control that evidence.[101]

D. Directed Verdict and J.N.O.V.

Although the Supreme Court has not recently ruled on standards for directed verdict and J.N.O.V. motions, the summary judgment decisions are directly applicable. If evaluations of evidence are permitted at the summary judgment

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American Mgmt. & Amusement, Inc., 824 F.2d 710 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 7 (1988).

96. 842 F.2d 1266, 1270 (11th Cir. 1988).

97. 812 F.2d 1425, 1438 (D.C. Cir. 1987).

98. *Id.* at 1440.

99. 824 F.2d 710 (9th Cir. 1987).

100. *Id.* at 716 *citing* Garret v. City and County of San Francisco, 818 F.2d 1515, 1525 (9th Cir. 1987).

101. *See, e.g., id.*

stage, they are permissible in deciding these jury-controlling motions. The Court in *Celotex* alluded to the applicability of summary judgment standards to directed verdict and J.N.O.V. motions: "[The] standard [for granting summary judgment] mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50 (a). . . ."[102]

The Supreme Court's earlier pronouncements on controlling the jury gave little power to the trial judge. Now the judge is given a role in evaluating the evidence. Moreover, *Matsushita Electric Industries v. Zenith Radio Corp.*[103] can be seen as resolving a controversy as to what evidence a court can consider in deciding directed verdict or J.N.O.V. motions. Under *Matsushita*, a trial judge may consider all of the evidence, including the evidence favorable to the non-movant plus uncontradicted and undisputed evidence, or only the evidence favorable to the non-movant. Professor Charles Wright states that the Supreme Court had arguably adopted a rule of allowing the trial judge to consider only the evidence supporting the respondent in a directed verdict or a J.N.O.V. motion.[104] *Matsushita* considers all of the evidence, both for the plaintiff and for the defendant, thus silently overruling earlier precedent. The Court, therefore, has greatly expanded the power of the trial judge vis-à-vis the jury.

1. The Clearly Erroneous Rule

In addition, the new regime also has narrowed the power of the appellate courts to review the facts found at the trial level. It has done so by broadening the scope of the clearly

102. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265, 274 (1986) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)).

103. 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

104. C. WRIGHT, THE LAW OF FEDERAL COURTS 642 (4th ed. 1983); *see also* Stephens, *Controlling the Civil Jury: Toward a Functional Model of Justification*, 76 KY. L.J. 81, 115 (1987-88).

erroneous rule and by classifying issues as factual rather than legal.

The Supreme Court in both *Anderson v. Bessemer City, North Carolina*[105] and *Pullman-Standard v. Swint*[106] held that findings of discrimination were factual rather than legal. As such, findings of discrimination are subject to Federal Rule of Civil Procedure 52's "clearly erroneous" standard of appellate review.[107] *Pullman-Standard* and the amended Rule 52 also apply the clearly erroneous rule to "paper cases," or those cases based on documentary evidence. Earlier cases frequently held that appellate courts could review *de novo* cases based on documentary evidence because no issues of credibility were involved.[108]

By decreasing the scope of appellate review, the Court has placed more power in the hands of the trial judge.[109] Comparing *Pullman-Standard* with *Anderson* and *Matsushita* reveals the new regime Court's temporal shift toward earlier stages of procedure. *Pullman-Standard* limits the review of a trial judge's fact-findings by classifying the question of racial discrimination as one of fact.[110] This fact and law classification neatly limits appellate review by mandating the clearly erroneous standard instead of the *de novo* one for matters of law. Yet, in choosing between the judge and the jury in *Matsushita* and *Anderson*, the Court chose the judge, even though the issues involved concerned intent and plausibility determinations. Under these decisions, the boundaries of fact and law shift, depending on whether the choice of decision-maker is between the trial judge and the

105. 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).
106. 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1981).
107. See discussion in Resnik, *supra* note 1, at 990-1005.
108. Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950).
109. Addressing this issue, Professor Resnik states: "In *Pullman-Standard*, as in the many other cases reviewed in this paper, the Supreme Court allocated power to the first tier and diminished, if not abolished, opportunities for revision." Resnik, *supra* note 1, at 1004.
110. 456 U.S. at 287-90.

appellate court or between the trial judge and the jury. The Supreme Court illogically but consistently puts the power in the trial judge.[111]

The decoupling of the question of appellate review from that of judge and jury allocation is a significant change from prior law. Professor Martin Louis wrote, before the *Matsushita*, *Anderson* and *Celotex* decisions, that the law and fact classification necessarily determined the scope of review.[112] This law and fact distinction no longer exists. Today the judge can weigh the evidence in view of both the standard of proof,[113] and the inherent plausibility of a party's theory of the case.[114] As a result, the judge may, at the summary judgment stage, make determinations regarding the factual issues. The judge's findings, however, are sheltered from appellate review by the clearly erroneous rule.[115]

The *Pullman-Standard* decision that ultimate facts are subject to the clearly erroneous rule also changes the prior law that appellate courts are to review ultimate facts *de novo*. The Court, however, holds that the ultimate fact-findings of trial judges are subject to the "clearly erroneous" test of Federal Rules of Civil Procedure 52(a). In *Bose Corporation v. Consumer's Union of the United States, Inc.*,[116] the court held that "[r]ule 52(a) applies to findings of fact,

111. An exception to the limited role of the appellate courts occurs in the First Amendment area, in which the courts of appeal are to conduct an independent review of the record is *Bose Corp. v. Consumer's Union of the United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). In *Bose*, the Court rejects a reliance on initial triers of fact.

112. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question and Procedural Discretion*, 64 N.C.L. REV. 993, 996 (1986) [hereinafter Louis].

113. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

114. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

115. Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1981).

116. 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 502 (1984).

including those described as 'ultimate facts' because they may determine the outcome of the litigation."[117]

2. Procedural Facts

Recently, the Court has also reclassified another group of factual circumstances so as to limit review. Courts frequently treat "procedural and evidentiary" questions as subject to a looser standard of review than that required for substantive questions:

> The percentage of procedural/evidentiary determinations that are freely reviewed is apparently much higher than the very small percentage of equivalent determinations going to the merits. Indeed, . . . for those procedural determinations that affect outcome and do not involve subjective considerations, the percentage subject to free review is so high as to amount almost to a presumption in favor of free review.[118]

The clearly erroneous rule, however, is now being applied to such procedural determinations. In *Amadeo v. Zant*,[119] the United States Supreme Court held that a district court's determination on a *habeas corpus* petition, based on the grounds that the petitioner's attorneys had not waived a challenge to the racial makeup of the jury, was a factual determination subject to Rule 52. The district court had based its conclusion on two factors. First, the plaintiff had difficulty in discovering a memorandum from the district attorney's office that showed an intentional design to underrepresent blacks.[120] Second, there was conflicting testimony as to the deliberateness of the defense counsel's not challenging the makeup of the jury.[121] The Court applied the

117. *Bose*, 466 U.S. at 501.
118. Louis, *supra* note 112, at 1038 n.334.
119. 486 U.S. ___, ___, 108 S. Ct. 1771, 1777, 100 L. Ed. 2d 249, 261 (1988).
120. 108 S. Ct. at 1777.
121. *Id.*

clearly erroneous test to this procedural issue, stating:

> Hence, the Court of Appeals offered factual rather than legal grounds for its reversal of the District Court's order, concluding that neither of the two factual predicates for the District Court's legal conclusion was adequately supported by the record. The Court of Appeals never identified the standard of review that it applied to the District Court's factual findings. It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are "clearly erroneous," and that it must give "due regard . . . to the opportunity of the trial court to judge of the *credibility of the witnesses.*"[122]

Since Professor Louis' article in 1986, the Court has subjected an entire category of factual issues, the "procedural" issues, to the limited review of the clearly erroneous standard for appellate review.

E. Collateral Estoppel and Res Judicata

The Court has also broadened the application of collateral estoppel and res judicata. It has rejected mutuality,[123] given collateral estoppel effect to state court determinations of Constitutional issues,[124] given res judicata effect to state court proceedings in Title VII cases,[125] and given collateral estoppel effect to state administrative findings.[126] These cases are prime examples of the "temporal shift." Under these cases, the new regime has shifted the decision-making moment to a prior proceeding. Prior findings are not to be

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122. *Id.* (quoting FED. R. CIV. P. 52(a) (emphasis added)).

123. Park Lane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979).

124. Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

125. Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

126. University of Tenn. v. Elliott, 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1988).

reviewed in a second hearing, although the 'fairness' of preclusion is to be reviewed.[127]

Professor Judith Resnik states, "The message is clear: finality and the preservation of resources are paramount, and the techniques by which to achieve these goals is endorsement of first tier decision making."[128] Through these decisions the court not only chooses first-tier decision-making, but it also chooses a process of decision-making that may evade the authority of the jury. For example, if the prior decision involved injunctive relief[129] or an administrative agency,[130] parties may not receive a jury determination of the facts. In *Park Lane Hosiery v. Shore*,[131] the court did not even see the lack of a jury as a procedural hindrance comparable to defending in an inconvenient forum.[132] In giving collateral estoppel effect to a prior decision by a judge, the Court not only deprives a party of a jury determination on that issue but also downgrades the *Beacon Theatres, Inc. v. Westover*[133] decision. *Beacon* held that a court had to schedule the determination of legal issues prior to equitable ones in order to preserve the party's jury right. The *Beacon* ruling upheld a party's right to a trial by jury, pointing out that "[t]his court has long emphasized the importance of the jury trial."[134] The *Beacon* court reasoned:

> This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination

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127. Park Lane Hosiery Co. v. Shore, 439 U.S. 322, 333, 99 S. Ct. 645, 647, 58 L. Ed. 2d 552, 554 (1979).
128. Resnik, *supra* note 1, at 974.
129. *Park Lane*, 439 U.S. 322.
130. *University of Tenn.*, 478 U.S. at 788.
131. *Park Lane*, 439 U.S. 322.
132. *Park Lane*, 439 U.S. at 331, n.19.
133. 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959).
134. 359 U.S. at 510, n.18.

> of equitable claims. . . . As we have shown, this is far from being such a case.[135]

In *Park Lane*, however, the Court trivializes *Beacon*'s protection of the right to a jury as "no more than a general prudential rule."[136] Therefore, *Park Lane* merely mirrors the summary judgment cases in choosing an efficient, early-stage procedure over the right to a jury.

III. Problems of the New Regime

Although championed as efficient, the new regime presents several problems. First, it conflicts with certain Rules of Civil Procedure and the Seventh Amendment. Second, it works against the institution of the private attorney general. Third, and most troubling, it deprives certain parties of their rights to relief.

Most, if not all, of these problems stem from the fact that the new regime is a creation of the judiciary, with some help from the Advisory Committee on the Rules of Civil Procedure. The new Federal Rule of Civil Procedure 11 and the new interpretations given the old rules have been inserted into a procedural system based on a different premise. Rule 11's precept of "well-founded in fact," for example, has been interjected into a system where the burden is on the defendant to show "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."[137] As a result, there is, necessarily, a conflict between the new rules and the old ones.

Besides the conflict with the Rules, the new regime also conflicts with substantive law and the Constitution, authorities that should govern procedure. Furthermore, the new regime works to defeat Congress' creation of causes of action

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135. *Id.* (citations omitted).
136. *Park Lane*, 439 U.S. at 334.
137. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1951).

under the securities laws and RICO, both of which assume that it is possible to have hidden frauds that the private bar is to ferret out.

Finally, it may be that the new regime's "temporal shift" places the decision-making at the wrong stage. The decisions never discuss what is the optimum way to decide facts, although that is the question that the courts should be asking.

A. Conflicts with the Rules

The Court amended Rule 11 in the context of criticisms of the Federal Rules of Civil Procedure governing pretrial practice. In Professor Arthur Miller's opinion, the result is that Federal Rule of Civil Procedure 8(a)(2)'s requirement of "a short and plain statement of the claim," is an inadequate access barrier.[138] The problem is that the Court amended Rule 11 without formally changing Rules 8, 12 and 56, and, more importantly, without addressing the policy reasons for their present forms. This leads to one of the new regime's most blatant contradictions in that any stringent pleading requirement conflicts with Rule 8's requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief."[139] Thus Rule 11 and the stricter interpretations of Rule 9 represent a quasi-return to Code pleading.[140]

Some interpretations of Rule 11's requirement that "the pleading . . . [be] well grounded in fact,"[141] together with the more stringent fact pleading rules, create a conflict with the policies that the discovery rules embody. All the facts are not known at the outset, and a significant portion of the factual basis of many lawsuits has to be developed after the

138. MILLER, *supra* note 11, at 7-8 ("toothless tigers").
139. FED. R. CIV. P. 8(a)(2).
140. JAMES & HAZARD, *supra* note 43, at 154.
141. FED. R. CIV. P. 11.

start of the case. In *Hickman v. Taylor*,[142] the Court recognized that

> [t]he pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[143]

Mr. Popofsky interpreted Rules 11 and 56 to mean that a plaintiff's attorney had to know the facts before filing the lawsuit.[144] The correctness of Mr. Popofsky's interpretation is doubtful because Rule 11 has to be read in conjunction

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142. 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).
143. 329 U.S. at 500-501 (citations omitted).
144. Mr. Popofsky specifically stated:

> Thus, in some cases, a plaintiff's request for further discovery under Rule 56(f) prior to a hearing on summary judgment motion could constitute an admission that the complaint does not conform to Rule 11, and the district court therefore would not abuse its discretion by denying the Rule 56(f) request.

Popofsky, *supra* note 12, at 212.

with the other rules, such as the discovery rules. The three summary judgment cases[145] all gave ample opportunity to develop discovery. *Matsushita*, for example, dragged through years of extensive discovery.[146]

Yet, the mere fact that a coherent argument can be made that a Rule 56(f) request is a violation of Rule 11 shows the dangers of Rule 11. As stated above, Rule 11 conflicts with the *Conley*[147] rule, which placed the burden on the defendant to prove any summary judgment motion. Rule 11 also conflicts with the discovery rules, which are based on the premise that the facts are not known at the pleading stage but have to be found out through a lawyer's investigation. The summary judgment cases also conflict with the general structure of the rules by conflating the tests for directed verdict and the summary judgment, thus making the summary judgment procedure into a "full trial-before-trial."[148] Such a procedure radically changes the focus of the rules, which was to lead the case up to trial. The United States Supreme Court has decided to initiate this "temporal shift" on its own, without going through the Enabling Act procedure.[149] The judiciary created many of the rules of the new regime *sua sponte* without attorney comment or congressional oversight, thus giving the Federal Rules a patchwork quality.[150]

B. Conflicts with the Seventh Amendment

The new rules may conflict with the Seventh Amendment because the emphasis on stricter pleadings prevents many parties from receiving a trial by jury. The Court's temporal shift toward allowing the trial judge to adjudicate factual issues poses a severe threat to the American jury system.

145. *See* cases cited *supra* notes 49-51.
146. Sherman, *The Matsushita Case*, 8 CARDOZO L. REV. 1121, 1127 (1987).
147. Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1951).
148. Mullenix, *supra* note 88, at 468.
149. 28 U.S.C. § 2072 (1984).
150. Stempel, *supra* note 53, at 181-87.

The central issue under the new regime is how much of the evidence may the trial court adjudicate?[151]

In *Anderson v. Liberty Lobby*[152] the Court ruled that the judge must consider the standard of proof, but the type of credibility determinations made by the judge in making this determination must invade the province of the jury.[153] Justice Brennan, in his dissenting opinion, stated that weighing the evidence's "caliber or quality," its "one-sided" nature, and the reasonableness of finding for the plaintiff must involve the judge in evidentiary determinations that have traditionally been the province of the jury.[154]

Matsushita's rejection of the plaintiff's expert also invades the factfinder's province.[155] Professor Jeffrey Stempel states that *Matsushita* takes fact adjudication away from the Jury where the Court's ideology is involved. Specifically,

> *Matsushita* is disturbing as well in that it implicitly suggests that the economic or social theories accepted by the Court majority, even if not based on facts of record in the proceeding, can justify a court ruling for a summary judgment movant as a matter of law when the dispute between the parties is one of fact rather than

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151. Calkins states: "Some evaluation is an inevitable part of deciding motions for summary judgment and directed verdict. The genuine dispute between the majority and minority concerns the appropriate breadth of the jury's discretion and the persuasiveness of the plaintiff's case." S. Calkins, *supra* note 16, at 1126, n.464.

152. 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 202 (1986).

153. *Anderson*, 477 U.S. 242.

154. 477 U.S. at 267-68 (Brennan, J., dissenting); *see* Stempel, *supra* note 53, at 115-16. Commenting on *Anderson*, Professor Stempel stated that

> the Court removed from the jury one of its traditional roles in litigation—to interpret conduct and decide whether it was "reasonable," "negligent," "reckless," "intentional," "indifferent," "fraudulent," "knowingly false," and the myriad of other fact rulings that have traditionally been reserved to the jury pursuant to the Seventh Amendment and traditional federal court practices.

Stempel, *supra* note 53, at 115.

155. 475 U.S. 564, 601-06, 106 S. Ct. 1348, 1362-67, 89 L. Ed. 2d 538, 560-65 (1986) (White, J., dissenting).

law.[156]

Whether or not one agrees with Chief Justice Rehnquist's dissent in *Anderson*, there is no question that the jury's role has been downgraded. "A new era has come and . . . the Supreme Court has not continued its vigilant watch over encroachments upon the Seventh Amendment by the courts of appeal or state supreme courts."[157] By allowing this encroachment, the rules of the new regime in effect take cases away from the jury. Such an encroachment may have a substantive effect:

> Judges are disproportionately drawn from upper-middle class backgrounds, and also disproportionately white, male and Protestant. In a recent survey, they described themselves as more conservative than liberal. This demographic aspect of the bench also carries political impact. By comparison, the juries in most jurisdictions are more representative of working class, minority, female and liberal components of American society. To the extent that judges have more opportunity to influence results since *Liberty Lobby*, it is not unreasonable to expect over time that the results will please the upper-middle class men, whites, Protestants and conservatives more than they did prior to *Liberty Lobby*.[158]

C. Conflict with Substantive Goals

1. Appellate Review

Professor Resnik suggests that the Court's emphasis on first tier decision making may reflect a substantive bias against prisoners, criminal defendants, and civil rights plain-

156. Stempel, *supra* note 53, at 112.
157. Baron, *Hello Eighth Circuit, Goodbye Seventh Amendment: Christine Craft v. Metromedia*, 55 UMKC L. REV. 33, 42 (1988).
158. Stempel, *supra* note 53, at 187.

tiffs.[159] There is not a good reason, however, why these litigants could not win below or not want extensive review. This was the case in *Christine Craft v. Metromedia, Inc.*,[160] where the appellate court reversed a trial court decision for the plaintiff. The result is that civil rights plaintiffs and criminal defendants are apt to get a better deal at the district court level than at the appellate. In *Davenport v. DeRobertis*[161] for example, Judge Richard Posner reversed a district court injunction ordering three showers a week for certain prisoners. Judge Posner found that showers are "cultural rather than hygienic" while indulging in fact-gathering about foreign folks' bathing habits.[162]

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159. Resnik, *supra* note 1, at 1013-15.
160. 572 F. Supp. 868 (W.D. Mo. 1983).
161. 844 F.2d 1310 (7th Cir. 1988).
162. *Id.* at 1316. Judge Posner stated:

> In contrast, we do not think that the provision of the injunction requiring the defendants to allow the inmates to take three showers a week has adequate support in the record or in constitutional doctrine. No doubt Americans take the most showers per capita of any people in the history of the world, but many millions of Americans take fewer than three showers (or baths) a week without endangering their physical or mental health, and abroad people as civilized and healthy as Americans take many fewer showers on average, as every tourist knows. Any inmate of Stateville's segregation unit who wants to keep as clean as a free person can wash himself daily, or if he wants hourly, in the sink in his cell—a point ignored by Dr. Shansky, the medical expert for the plaintiff class on the issue of showers. There is evidence that inmates of the segregation unit consume on average more medical services than nonsegregated inmates, but there is no evidence connecting this datum to the number of showers for each group. The importance of the daily shower to the average American is cultural rather than hygienic; as Dr. Shuman, the defendant's expert, testified, "I know of nothing that says that a shower is necessary more than one day a week. I believe in this culture it is done that way but I don't know of any medical need for it." The judge was not obliged to believe the defendant's witness, but Dr. Shansky made the same point as Shuman when he said that being able to take only one shower a week makes inmates feel "less than human." While there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant), see, e.g., Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450 (1983), we have not found any corresponding literature on the effects of limiting the number of showers that prisoners may take. The deprivation merely of cultural amenities is not cruel and unusual punishment.

No general bias against the civil rights litigant is necessarily implied in first tier decision making. One can, however, find a bias against plaintiffs where discovery is necessary to produce evidence that is in the hands of the defendant.

2. Insufficient Discovery

The early dismissal of civil rights cases does contradict a Congressional policy of awarding attorney fees to those who bring these cases and thus function as private attorney generals.[163] There is a need to permit private litigants to investigate these cases.[164] The early closure of civil rights lawsuits, due to rigid pleading requirements, under Rule 11, can foreclose this type of aggressive litigation the fee-awarding statutes are designed to promote.[165]

A statute such as RICO[166] assumes that there are hidden frauds and enterprises, which cause damage, and that private litigants are in a position to sue and to collect damages and attorney's fees.[167] RICO is based on the paranoid assumption that racketeering activity is already taking place,

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Id.

163. *See* Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

164. Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?* 104 F.R.D. 143, 164 (1985).

165. Although civil rights cases constitute less than 8% of case filing in federal court, they amounted to more than 22% of *reported* Rule 11 cases between 1983 and 1985. Unreported cases would increase those numbers, as would certain public interest litigation (i.e., welfare or housing rights) that is not classified as "civil rights." If the categories are broadened to include civil rights, employment discrimination, and other relevant categories, these categories account for 29.9% of Rule 11 motions, with sanctions being granted 68% of the time. Another 25.1% of the *reported* Rule 11 cases involved antitrust, RICO, and securities claims. Such cases have in common congressionally enacted authority, often accompanied by attorney's fees statutes. They are also uniquely targeted by Rule 11 because their facts cannot be adequately developed until after suit, and because their theories are often on the forefront of developing law.
LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331, 353 (1988).

166. 18 U.S.C. § 1964 (1984 & Supp.).

167. 18 U.S.C. § 1964 (1984 & Supp.).

such as embezzlement, obstruction of law enforcement, and securities, bankruptcy, wire and mail fraud. Under the RICO statute private litigants can sue and get treble damages plus attorney's fees.[168] The Attorney General may investigate racketeering activities prior to suit pursuant to a "civil investigative demand."[169] Thus Congress is legislating on the basis that hidden fraud occurs while, on the other hand, the judiciary is making it more difficult to litigate against these activities. As a result, many commentators believe that "[i]f RICO should be rewritten, . . . it should be rewritten by another branch of government."[170]

Furthermore, in such areas as antitrust, employment discrimination, and securities fraud, the proof needed by the plaintiff is in the hands of the defendants. The plaintiff may only have a suspicion that his losses are due to illegal acts. In fact, in *Poller v. Columbia Broadcasting Systems*[171] the Supreme Court denied the defendant's summary judgment motion because the evidence needed by the plaintiff in such a case is in the hands of the conspirators.[172] Many cases are

168. 18 U.S.C. § 1964(c) (1984 & Supp.).
169. 18 U.S.C. § 1968 (1984 & Supp.).
170. Blakely, *supra* note 36, at 593.
171. 368 U.S. 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962).
172. *See* Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213 (1987). One student writer stated:

> [T]he inflexible application of the particularity requirement in contemporary securities fraud cases inevitably results in the dismissal of some meritorious claims . . . denying the plaintiff even minimal discovery before deciding a 9(b) motion under a rigid particularity standard has significant social costs.

Common fraud was face-to-face while:

> plaintiffs in contemporary securities fraud cases characteristically have had contact with the defendants only indirectly, through impersonal market channels. [I]n deciding whether to apply rule 9(b) . . . few courts have explicitly considered either the legislative purposes of the investor-protection statutes or the practical difficulties plaintiffs encounter in piercing the shroud of secrecy that surrounds most current capital-market transactions. Indeed, the recent rash of dismissals based on rigid application of rule 9(b) appears to have been sparked not by fresh insight into the legal issues, but simply by a desire to reduce the number of claims before the courts.

such that important facts may only emerge after extensive discovery. In the Dalkon Shield cases,[173] for example, the plaintiffs were only successful after searching discovery unearthed information of the products' dangerous characteristics.[174]

3. Bias Against the Civil Rights Attorney

One may also find a bias against the general practitioner, the small firm, and those without the resources necessary to conduct the discovery necessary to survive summary judgment.[175] Arthur LaFrance points out that civil rights cases, RICO cases, antitrust and securities cases account for a disproportionate share of Rule 11 litigation, which targets a particular class of practitioners. LaFrance writes:

> It is not only certain classes of *cases* which are being discriminated against but also certain classes of *attorneys*. Those whose clients do not have the resources or access of great corporations or governmental agencies are uniquely disadvantaged. Such attorneys are likely to be small firm practitioners or are likely to be employed by public interest groups or legal services programs. Thus, Rule 11 targets both public interest litigation and public interest litigators.[176]

Consequently, the new regime generally favors defendants over plaintiffs because it makes summary judgment easier to obtain. As a result, the Court implicitly bestows a political favor, and greater judicial power, on the litigants who can make the most use of the summary judgment motion, the

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Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1435-39 (1984).

173. *In re Dalkon Shield*, 526 F. Supp. 887 (N.D. Cal. 1981), *remanded*, 693 F.2d 847 (9th Cir. 1983).

174. Stempel, *supra* note 53, at 172-173.

175. Resnik, *supra* note 1, at 1015.

176. LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U.L. REV. 331, 353 (1988).

defendant. "Defendants use the motion more than plaintiffs. Defendants are disproportionately comprised of society's 'haves': banks, insurance companies, railroads, business organizations, governments, and government agencies. Plaintiffs are disproportionately comprised of society's 'have-nots': individuals, business sole proprietorships, and smaller entities."[177]

Thus, the combination of Rule 11, the stricter use of fact pleading, and the expanded use of summary judgment works against congressional policy that seeks to give civil relief for violations of civil rights and the securities and antitrust laws.

IV. How Facts Should Be Adjudicated

Most law review articles and court decisions fail to address the issue of how facts should be adjudicated. The Supreme Court once favored trials and jury adjudication.[178] Other authorities argue that fact adjudication should be reached through power diffusion and differentiation in decision making.[179] The present United States Supreme Court

177. Stempel, *supra* note 53, at 161.

178. *See, e.g.*, Poller v. Columbia Broadcasting Systems, 368 U.S. 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962).

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even-handed justice.'

Poller, 368 U.S. at 473.

179. Professor Resnik, for example, argues:

> There are no simple, inexpensive answers or any solutions that come problem free. The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms. Any set of decisions made will produce unforeseen results that, in turn, will need to be addressed. However, the current "solution" of finality, achieved by deeming first tier decisions legitimate and by precluding review, is premised upon the fiction that first tier evaluations of dis-

prefers the trial judge to conduct fact adjudication rather than the jury and the appellate court. The Court gives few reasons, however, acting as if its choices were foreclosed by the Federal Rules of Civil Procedure, a truly circular process because the court is the body that approves the rules. Actually, the new regime is not a product of a technical analysis of the Federal Rules, but an outcome of a "failing faith" in adjudication.[180]

One may ask whether the old regime's adjudicatory process has advantages that are being discarded. The discussion should not, however, center on a technical analysis of the Rules and precedents, rather on determining what process is the best. There are some points, however, that should be recognized. First, the Seventh Amendment to the Constitution has already made a policy choice in favor of jury determination, a determination that the trial judge should not have total decision-making power. The Court should give the Seventh Amendment more respect than it does at present. The Court has refused to abide by the Seventh Amendment's policy choice that the right to a jury is to be

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> putes are sufficient to fulfill all the purposes of procedure. Those close to the courts know that, while there are many first tier successes, there are also many failures. To maintain that the system is generally functioning as it should is to undermine the special ability of courts to inquire into claims of individual errors, misdeeds and lack of concern. If we really want speedy, inexpensive decisions, we should shift to coin-flipping. If, however, we are committed to features of court procedure other than power concentration, finality and economy, we must permit opportunities for revision. We must construct procedural models that diffuse power and provide differentiation among the various types of disputes to be resolved.

Resnik, *supra* note 1, at 1030.

180. Professor Resnik writes:

> Whether the cry is for more therapeutic methods of dispute resolution or for "managerial judges" to control wayward attorneys and to stabilize a malfunctioning process, the requests are often the same: limit opportunities for adjudication by judges and for trial by jury and offer different mechanisms for the disposition of disputes.

Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 497-98 (1986).

given more weight than the right to take discovery.[181]

The older rules of the *ancien regime* were based on the premise that trials produced better results: "The rules they crafted were to enable attorneys facing off within the tradition of adversarial encounters, to provide information to judges who would, in turn, produce acceptable, indeed perhaps good outcomes."[182] It is difficult to determine if a trial based on documentary evidence or one based on testimony is more accurate. There are obvious differences in the two types of proceedings. In a summary judgment proceeding, the court only sees "cold" documents. These documents are often ambiguous and need explanation to be understood. At trial, however, "the documents are ordinarily introduced through live witnesses who not only authenticate the document but also explain its contents and significance, pointing out specific passages, illustrating and elaborating as the document is discussed."[183] A trial, therefore, gives the finder of fact the opportunity to appreciate the context of the evidence.

A trial also serves to work against any pre-determination. Persons considering documents tend to fill in gaps based on their own expectations.[184] A trial, with its explanations given by witnesses, can counter these projections. Would a fact-finder have the same concept of business practices as the Supreme Court's if *Matsushita* had been tried with live witnesses?

Another advantage of trial is the "Perry Mason," event, in which a witness may admit the truth under cross-examination in front of a black-robed judge and a jury. It is relatively easy to fudge on an affidavit, but not so easy in the

181. *See, e.g.*, Park Lane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 552 (1979).

182. Resnik, *Railing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 505 (1986).

183. Stempel, *supra* note 53, at 178.

184. *See* Bergman, *Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About*, 75 KY. L.J. 841, 861-63 (1987).

ritual of the court room.[185] The trial should not be discarded as an expensive relic of a slower, more prosperous era.

Before returning to Code pleading, which Professor Geoffrey Hazard believes is reoccurring,[186] it is important to remember the problems Code pleading generated. Rule 8 was promulgated to end the sterile debates about how many facts should be pled. Professor Jeffrey Stempel describes how much delay and confusion Rule 9(b) litigation has generated:

> The uncertainty engendered by the different standards for applying Rule 9(b) has several costs. First, it probably yields an increase in litigation under Rule 9(b). A plaintiff who cannot tell if its complaint satisfies the rule will probably file the complaint. A defendant who hopes to avoid the burden of litigating a case and cannot ascertain whether the complaint is satisfactory may move to dismiss for failure to particularize the claim adequately. Second, forum-shopping occurs when different courts apply different rules to similar situations. Third, the application of the same rule in different ways in different jurisdictions promotes in inequitable administration of the law, and makes more difficult the equal protection of the law.
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> In short, if a Rule 9(b) motion is used to gather information, it is inefficient. If, on the other hand, it is used in an attempt to dismiss a case, it is not only unlikely to be successful, but in the instances in which such motions are effective the motion may prematurely terminate a case. The chief products of Rule9(b) are motions are delay and confusion.[187]

The solution the new regime offers to present problems is to restore the Nineteenth Century solution of fact pleading. Robert Blakely addresses this question of solutions and

185. Stempel, *supra* note 53, at 179.
186. JAMES & HAZARD, *supra* note 43, at 154.
187. Stempel, *supra* note 53, at 164.

writes:

> The history of legal institutions and laws in the 20th century has been the adaptation of the nation's 19th century institutions and laws to 20th century problems. If those who would reform our basic laws truly believed that those adaptations are misguided—and they are not merely Bourbons, forgetting nothing and learning nothing, who long for the restorations of lost privileges—they should be asked what is their new design for our basic institutions and laws that will deal with 20th century problems. Is your only solution to restore 19th century institutions and laws?[188]

Another problem with the limited review of factual issues is the supposed greater expertise of appellate courts. In the federal courts system, there may not be much difference in expertise between the appellate and trial courts. Allowing for freer review may not result in many more correct decisions.[189] Importing a strict "clearly erroneous" rule into some state systems, however, could be disastrous because there often is a great spread in competence between the trial and the appellate bench. In some courts, even the integrity of many lower court judges is lacking.[190]

The judiciary, however, seems to be uninterested in close appellate review. A principle of bureaucratic theory is that multi-channels of review and observation must exist for effective control of subordinate organizations. This bureaucratic theory is the reason for separate reporting channels in many organizations, including the party official in Nazi Germany as well as the Soviet Union and the General Accounting Office in the United States federal government.[191]

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188. Blakely, *supra* note 36, at 593.

189. Resnik, *supra* note 1, at 1012-123.

190. *See, e.g.*, *After Greylord*, NAT. C.J., Oct. 10, 1988, at 3 (reports more than seventy convictions of Cook County judges, lawyers and court personnel).

191. A. DOWNS, INSIDE BUREAUCRACY 148 (1967).

Conclusion

The Supreme Court of the new regime now indicates that it does not want strict direct review of facts or collateral review. In addition, the Court does not want to know about the proceedings in subordinate courts and does not want much control over them. This can only lead to greater independence and diversity of results in the lower courts. Accordingly the outcome of a case will depend more on the particular judge an attorney draws rather than on a uniformly applied body of substantive law.[192]

The judiciary is going through a revolution in procedure. For the attorney the lessons are simple. Under the new regime an attorney must do his homework, research the law and investigate the facts before filing. He must also plead facts and conduct thorough discovery in order to survive the summary judgment motion, and try to win the case at trial, because the chances of reversal may be slim. The hard-pressed attorney may echo a saying attributed to Prince Charles Maurice de Talleyrand-Perigord, "Only those who lived before the revolution knew how sweet life could be."[193]

192. For a general discussion of the problems of maintaining control in a bureaucracy, see A. DOWNS, INSIDE BUREAUCRACY (1967).

193. N.Y. Times, Sept. 25, 1964 at 32.