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YE SHALL KNOW THE TRUTH”: TRUTH-SEEKING, JUDICIAL ECONOMICS, AND THE
TRANSFORMATION OF CIVIL PROCEDURE

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___ MICH. L. REV. ___ (forthcoming 2027)

Federal civil procedure has undergone two major revolutions over the last century. The first occurred with the promulgation of the Federal Rules of Civil Procedure (FRCP) in 1938. The second occurred over the last forty years, with the emergence of what scholars call our “new era” of civil procedure.

This Article argues that both the original FRCP and our new era of civil procedure are defined by their vision of how litigation should accomplish one of its most ancient and challenging tasks: seeking the truth. When promulgated, the FRCP established a fact-intensive “ex post” approach to truth-seeking. Under this approach, disputes about the truth were resolved only after the facts of a case had been fully developed. This mode of truth-seeking was motivated by the FRCP drafters’ commitment to empiricism and legal realism.

In contrast, the current era of civil procedure is characterized by an “ex ante” approach to finding the truth, which empowers judges to make determinations about the truth of cases even before any evidence has been produced. This approach to truth-seeking was pioneered by judges who used economic analysis to guide their procedural decisions in antitrust conspiracy cases, a development I call “judicial economics.” Initially, judicial economics was used only after discovery and trial. Over time, however, growing judicial confidence in economic reasoning led judges to use it earlier in litigation—first at summary judgment and later at the pleading stage—in ways inconsistent with the FRCP’s ex post commitments. This shift was bolstered by a segment of the burgeoning law and economics movement dedicated to making legal doctrine conform to the purported lessons of microeconomics.

Once judicial confidence in the power of economics to reveal the truth displaced the counter-veiling commitment to fact-intensive decision-making in antitrust conspiracy cases, the Supreme Court in *Matsushita* and *Iqbal* empowered judges to dispose of cases they deemed “implausible” before trial across all areas of litigation. Today, such determinations need not rest on any formal theory but instead can be made by applying “judicial experience and common sense.” This is an epochal shift in legal epistemology: through the rise of judicial economics, federal procedure has moved from a system that relied on case-specific facts to determine the truth, to one that allows judges to use their general sense of the world to dismiss cases before any evidence has been produced. Coming to terms with this helps us understand how contemporary procedure emerged, how it functions, and how it might be reformed—in ways that take procedure’s implications for truth-seeking seriously.