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REFORM THROUGH RULEMAKING?

RICHARD L. MARCUS*

During what has been called the “Golden Age of Rulemaking,”¹ giants trod the soil of rulemaking. Drawing from the legacy of Jeremy Bentham, David Dudley Field, and Roscoe Pound, a small band of drafters created the Federal Rules of Civil Procedure in the late 1930s and changed the American procedural landscape. Their reforms included completing Field’s effort to bury technical pleading requirements² and adopting a revolutionary set of discovery provisions.³ More recently, the federal rulemakers’ 1966 revision of the class action rule has had at least revolutionary consequences, sometimes in the teeth of what the rulemakers said they wanted it to do.⁴

Altogether, these giants are seen to have accomplished “a major triumph of law reform”⁵ that “transformed civil litigation [and] . . . reshaped civil procedure.”⁶ Beyond that, “they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of

* Horace O. Coil (‘57) Chair in Litigation, University of California, Hastings College of the Law. This Article was presented at the Litigation in a Free Society Conference in Hollywood, Fla., on March 16, 2002. I am indebted to Vince Moyer of the Hastings Law Library for locating a number of hard-to-find sources.

1. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 (1999) (section entitled “The Golden Age of Rulemaking”); see also Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989) (referring to the “golden age of federal civil procedure”). A different image is suggested by Paul Carrington—that into the 1960s the rulemaking power was still in its “honeymoon stage.” See Paul Carrington & Derek Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 AZ. L. REV. 461, 490 (1997).

2. See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) (evaluating the continuing efforts of the federal courts to develop an appropriate attitude toward scrutinizing pleadings under the 1938 pleading reforms); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439-51 (1986) (tracing the evolution of pleading rules).

3. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 736 (1998) (referring to “the discovery revolution”).

4. See Richard L. Marcus, *Benign Neglect Reconsidered*, 148 U. PA. L. REV. 2009 (2000) (discussing possible amendments to Rule 23 to deal with uses to which class actions had been put under the 1966 revision of the rule); Richard L. Marcus, *They Can’t Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995) (discussing the ramifications of aggressive use of Rule 23 in mass tort litigation).

5. Geoffrey C. Hazard, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989).

6. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 233 (1998). See also *id.* at 248, reporting that the Civil Rules were “surely the single most substantial procedural reform in U.S. history.”

judicial procedure.”⁷ We are even told that they “became a means of transforming the modes of judging.”⁸ It is thus not surprising that these revolutionary changes have become the heart of the modern civil procedure course in law schools, so that most American law students start learning about how lawsuits are handled by studying them. After they graduate, they continue to labor in the shadow of these reforms. Most states have adopted procedural rule provisions that mirror the Federal Rules,⁹ and even in states that have persisted in alternative procedural provisions, the pleading, discovery, and class action innovations of the Federal Rules have made their mark.

Although one can question whether there really was a causal relationship between rule changes and the transformation of litigation,¹⁰ given this experience, it is understandable that one familiar with the broad consensus that rulemaking worked such a change in the past would look now to

7. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989).

8. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934 (2000).

9. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (examining the widespread copying of the Federal Rules in state court systems).

10. Judge Patrick Higginbotham, one of the commentators on this paper during the Litigation in a Free Society Conference, raised legitimate questions about justifications for the widespread consensus that rule changes had propelled a litigation metamorphosis. He made at least two fundamental points that should be noted.

First, Judge Higginbotham pointed out that some central elements of the Federal Rules of Civil Procedure reforms had important antecedents in the Field Code of the mid-nineteenth century. So in terms of effecting “revolutionary” changes in procedure, one can at least debate whether the changes were actually so large, or merely carried through what Field had attempted more than 80 years earlier. It is surely true that these reforms did not all spring from nowhere into the rulemakers’ minds. *But see* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Context*, 135 U. PA. L. REV. 909, 932 (1987) (asserting that the Field Code was “not, contrary to its usual portrayal, a parent of the Federal Rules”). In any event, it does seem that at least some of the changes constituted a clear break with the Field Code. *See* Subrin, *supra* note 3 (describing the Civil Rules’ discovery provisions as “revolutionary”).

Second, and more importantly, Judge Higginbotham suggested reasons for questioning the widespread assumption that the rules themselves propelled litigation changes. Certainly the relaxation of previous procedural tethers contributed to what followed, but it may well not have been a primary cause. Forces beyond the rulemakers’ control, such as the growing importance of public law litigation, actually were central to several distinctive features of contemporary American civil litigation. Hence, the experience with the Civil Rules may not provide a ground for thinking that rule changes can cause such a transformation because the midcentury metamorphosis could represent only the coincidence of rulemaking and changes that were brought about by extraneous factors.

It is fascinating to try to unravel cause and effect in this area, and this Article does not attempt to do so concerning the midcentury transformation. Instead, it proceeds from the starting point of the popular version of what the rulemakers did then and considers what the rulemakers can do now. If Judge Higginbotham is right, the rulemakers of the past may have been no more capable of sparking fundamental reform than the rulemakers of today.

rulemaking as the method for further reforms to address the challenges of 21st century litigation. However, as the diffidence in the title of this Article suggests, it is not at all clear that such reform can come from this source.

Perhaps the pervasive and longstanding effect of the original Rules resulted from the intellectual capacity and fortitude of the federal rulemakers themselves. Charles Clark, at least, implied that self-confidence was central to the drafting effort he led as Reporter to the committee that produced the original Federal Rules when he urged that “reformers must follow their dream and leave compromises to others.”¹¹ It is difficult to find similar confidence welling in the hearts of contemporary rulemakers.¹² It is particularly difficult to find any enthusiasm for any undertaking that might be deemed “revolutionary,” or perhaps even aggressive.

To the contrary, what one hears about rulemaking is that it is caught in a period of crisis. Reflecting on recent reform efforts, this paper therefore evaluates the prospects for future reform from this quarter. It begins by invoking three perspectives that might inform that inquiry and then elaborates on various themes of crisis that have been heard over the past twenty years. Against that background, it examines some features and episodes of recent rulemaking, partly from the perspective of an insider.¹³ Despite the pervasive and valid concerns about a crisis in rulemaking, it concludes that some modest reform is possible, and that rulemaking’s inability to deliver revolutionary change may not be a bad thing. Indeed, it may be that the latitude accorded the giants of rulemaking was something of an anomaly in American legal history.

I. THREE PERSPECTIVES

As is so often true in academia, it seems useful to begin with three perspectives to frame our inquiry. The first perspective examines the initial clarion call to respond to the rulemaking crisis, Professor Friedenthal’s 1975 article announcing that the congressional interception and revision of the Federal Rules of Evidence showed that a “contemporary crisis” had arisen

11. Charles E. Clark, *The Federal Rules of Civil Procedure: 1938-1958, Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 448 (1958).

12. Cf. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (arguing that procedural innovations of 1970s and 1980s represented loss of faith in adjudication and consequent enthusiasm for other means of resolving cases, such as alternative dispute resolution).

13. Since 1996, I have had the privilege of serving as Special Reporter to the Advisory Committee on Civil Rules and worked on its review of discovery and class action rules. In this Article, I speak only for myself and in no way for the Committee.

concerning the Supreme Court's rulemaking power.¹⁴

Professor Friedenthal began by endorsing rulemaking as "a means of obtaining meaningful and necessary reform of antiquated procedural rules that can otherwise be altered only through legislation."¹⁵ Until rather recently, the results of this rulemaking had been "spectacular," in part because similar improvement could not have been obtained by legislation "in the face of opposition from trial attorneys."¹⁶ Judges, who are freer from political pressures than members of Congress, are thus able to make the needed reforms in their role as rulemakers.

But the remarkable success of reform via rulemaking had been thrown into jeopardy, Friedenthal warned, by the flaws of the proposed Evidence Rules. At the root of the problem, he thought, was the increased distance between the Supreme Court and the rulemakers, as the drafts of proposed changes were filtered through various committees and the Judicial Conference before they reached the Court. Until 1956, the Court had reviewed the rulemakers' work rather directly. But in that year, Chief Justice Warren discharged the committee, which had been in relatively continuous existence since 1936, and the rule revision process ground to a temporary halt. Under what has been called the "Queen Mary Compromise,"¹⁷ the solution that emerged was that Congress should direct by statute that rulemaking be presided over by the Judicial Conference.

Due to this new arrangement, Friedenthal thought, the Court simply was not supervising the rulemaking process closely enough. More particularly, the failings of the Evidence Rules, and to a lesser extent the 1970 amendments to the discovery provisions of the Civil Rules, resulted from both the incompleteness of the Advisory Committee's consideration of the amendments and its tendency to insert new provisions after the public comment period had closed.¹⁸ In the case of the Evidence Rules, "the Court's utter reliance on the discretion of a drafting committee ended in disaster."¹⁹

14. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

15. *Id.*

16. *Id.* at 674.

17. See Self-Study of Federal Judicial Rulemaking, A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States, 168 F.R.D. 679, 685-86 (1995) (describing discussions of Chief Justice Warren, Justice Tom Clark, and Chief Judge John J. Parker of the Fourth Circuit Court of Appeals during their trip on the Queen Mary to the 1957 American Bar Association (ABA) Convention as the source of the 1958 legislation that created the current statutory apparatus). See 28 U.S.C. § 331 (2000). See also 28 U.S.C. § 2073(b) (2002) (directing the Judicial Conference to establish a Standing Committee on Rules of Practice and Procedure).

18. See Friedenthal, *supra* note 14, at 677.

19. *Id.* at 685.

What was needed, he felt, was to “restore to the Court the full rulemaking powers it previously enjoyed.”²⁰ If the Court continued to be a “mere conduit” for the work of others,²¹ the era of effective reform was over.

Friedenthal’s goal, then, was to ensure that giants would continue to manage and direct the rulemaking process so that the legacy of reform from the era of Charles Clark could be preserved. Both as a matter of content and as a matter of form, he felt that substantive involvement by Supreme Court Justices was key to achieving these goals and that Congress would become more active unless that occurred. Should Congress become more active in reviewing or initiating procedural change, rulemaking would no longer offer the promise of reform.

Quite a different perspective on procedural reform has recently been suggested by Professor Leubsdorf, who reflects on what he calls “the myth of civil procedure reform.”²² This myth, he explains, has been conceived and purveyed by civil procedure teachers in this country, including him, who have indoctrinated their students, the American bar of today.²³ The problem is that there is no solid evidence that reform has actually made any difference, prompting Leubsdorf to “propose a counter-myth”: “[T]he great reforms had little or no impact on the speed or cost of the average civil action.”²⁴

This perspective calls into question the whole thrust of the notion that rulemaking giants have in the past transformed American civil procedure. In part, that misgiving is due to unresolved disagreements about the goal sought to be achieved—reducing cost, speeding disposition, improving accuracy, or fostering litigant satisfaction, for example²⁵—and, in part, it is due to the difficulty in measuring the effectiveness of procedures in achieving some of these goals. For example, “it is virtually impossible to assess accuracy.”²⁶ On some points, there is some evidence that weakens the claim that procedural change has achieved the goals it sought to accomplish. The duration of cases, for example, decreased in the federal courts from 1900 until about 1942, when it averaged less than one year, and then it rose slowly until 1980, when

20. *Id.* at 675.

21. *Id.* at 685.

22. John Leubsdorf, *The Myth of Civil Procedure Reform*, in *CIVIL JUSTICE IN CRISIS* 53 (A.A.S. Zuckerman ed., 1999).

23. *See id.* Professor Leubsdorf acknowledges that his own book on civil procedure, coauthored with Professors James and Hazard, is one of the props of the myth. *See id.* at 53 n.1.

24. *Id.* at 63.

25. *See id.* at 54-56.

26. *Id.* at 55.

it hovered around one year.²⁷ That statistic hardly shows that the adoption of the Civil Rules in 1938 produced a strong positive effect in terms of speedy justice.

Despite his counter-myth, Professor Leubsdorf eventually assures us that “many procedural changes do make many differences some good and some bad.”²⁸ But that is not an entirely cheerful affirmation, as “it is hard to tell what change will make what difference,”²⁹ and many will “find it hard to believe that all changes labelled ‘reform’ necessarily move in a desirable direction.”³⁰ So both the efficacy and desirability of reform are debatable.

The third perspective invokes a peculiarly American phenomenon of “adversarial legalism,” as explored by Professor Kagan, who is both a lawyer and a political scientist.³¹ Adversarial legalism describes the tendency of Americans to resolve political and social issues in a rights-based, dispute-oriented format. Professor Kagan’s focus is much broader than the rulemaking process, for it employs “a sociolegal, comparative, and political perspective” to examine adversarial legalism.³² His starting point is to appreciate that, “compared to other economically advanced democracies, American civil life is more deeply penetrated by legal conflict and by controversy about legal processes.”³³ This orientation is reflected in our methods of dealing with an array of problems such as combatting crime, compensating injured people, regulating securities markets, and addressing environmental concerns. In most other countries, that sort of activity is principally controlled by government through a system of social insurance or by “corporatist” enforcement bureaucracies. “By viewing these different legal spheres holistically,” Kagan reasons, “it becomes clear that the different streams of the American legal process share a common set of characteristics.”³⁴

The critical distinction is that this country is peculiarly resistant to centralized power even though it expects a great deal of government:

American adversarial legalism, therefore, can be viewed as arising from a fundamental tension between two powerful elements: first, a *political culture* (or set of popular attitudes) that expects and demands

27. *See id.* at 63-64.

28. *Id.* at 65.

29. *Id.* at 66.

30. *Id.*

31. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

32. *See id.* at 5.

33. *Id.* at 3.

34. *Id.* at 5.

comprehensive governmental protections from serious harm, injustice, and environmental dangers—and hence a powerful, activist government—and, second, a set of *governmental structures* that reflect mistrust of a concentrated power and hence that limit and fragment political and governmental authority.³⁵

The branch of government that provides aggressive protection but diffused authority is the court system, which Kagan characterizes as “the most politically and socially responsive court system in the world.”³⁶ Although many denounce American “litigiousness,” therefore, it is actually a consequence of “deeply entrenched political roots.”³⁷ The court system, which operates on a “coordinate model,” diffuses authority and allows individual judicial officers great latitude.³⁸ In part because they are politically selected, American judges feel more independent, and act more pragmatically in dealing with established legal rules, finding it easier to develop new legal responses than judges in other contemporary democracies.³⁹ Similarly, broad concepts of standing afford many access to the judicial machinery to assert their rights.

In this light, the American tendency to litigate about topics that are handled without litigation in other societies is not pathological, but rather a logical consequence of the American method of providing activist government without a centralized bureaucracy. On the positive side, it can provide remarkable protections on the initiative of a few, including the dispossessed; those who champion the remedial potential of adversary legalism are right. But it also has negative potential since it gives broad opportunities for self-interested actors to go to court and prevent promising governmental activity or reform.⁴⁰ Moreover, the uncertainty and cost of adversarial legalism may often frustrate the assertion of rights. Thus, there are two faces of adversarial legalism, but those who address reform in American litigation tend to speak only about the favorable or unfavorable features. Indeed, some who challenge the overbroad assertions of critics of American adversary legalism seem unwilling to acknowledge the system’s drawbacks, perhaps for fear of lending support to political action that would

35. *Id.* at 15.

36. *Id.* at 16.

37. *Id.* at 6.

38. *See id.* at 99 (citing MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986)).

39. *Id.* at 112-13.

40. *See id.* at 25-33, illustrating the “pathologies of adversary legalism” with the tale of the necessary dredging of the Port of Oakland, California, which was frustrated by long delays and greatly enhanced costs due to litigation by disparate opponents.

overreact to these problems.⁴¹

For our purposes, the key point is that it would not seem likely that the process of litigation in this country would be regulated by “bureaucratic legalism,” which emphasizes “uniform implementation of centrally devised rules.”⁴² Instead, the process of making process might be expected to be pervaded by the techniques of adversarial legalism. This tendency, in turn, might have been expected to intensify in recent decades because “the adversarial legalism that has pervaded the United States in the last few decades is both more extensive and more intense than that of the nineteenth century and the first half of the twentieth.”⁴³

Thus, the three perspectives, sketched with too much generality and a tendency to force them into a mold suitable to this Article’s focus, can be taken to suggest different reactions to the prospects of rulemaking to achieve effective reform. Professor Friedenthal focuses on the great value of expertise and centralization, which he feared was being lost, and the resulting inability of the rulemakers of the future to achieve the signal gains accomplished by their forbearers. Professor Leubsdorf, on the other hand, questions the assumption that great strides really had been made, at least for most cases, and suggests that further reform might therefore be viewed with skepticism. Professor Kagan’s more general view of the American governmental arrangement, on the other hand, would seem to predict increased controversy, contentiousness about any reform efforts, and increasing centrifugal forces.

II. THE CURRENT RULEMAKING “CRISIS”

With those perspectives in mind, we may turn our attention briefly to the widely-reported crisis in rulemaking. Professor Friedenthal may have been one of the first to ring the tocsin, but he was surely not the last to announce that a crisis had descended on the rulemaking enterprise. Within six years, Professor Friedenthal was denouncing proposals for further rule changes as

41. *See id.* at 5.

Many lawyers and sociolegal scholars view complaints about law and litigation in the United States as exaggerated or, more pointedly, as the laments of conservatives who resent legal changes that help the disadvantaged. But the sociolegal scholars’ defense of the American legal system, I suspect, also reflects a political concern: to acknowledge the system’s defects, they fear, may encourage politicians to enact reforms that would throw out the baby of justice along with the bathwater of legal excess. The concern is understandable, but refusal to recognize the unique and problematic features of the American legal system may ultimately endanger the baby even more.

Id. at 5 (citation omitted).

42. *Id.* at 11.

43. *Id.* at 36.

“political.”⁴⁴ More generally, for academics (probably the only people who would spend a lot of time worrying about such things), the crisis idea seems to be the new canon so far as rulemaking is concerned. Of course, as I have noted in the past, calling something a crisis is a good way of getting attention to support a change.⁴⁵ Claimed crises of various sorts partly explain the 1934 decision to delegate rulemaking authority to the Supreme Court.

Another thing that academics are good at doing is questioning widely accepted views. So perhaps we might question this crisis mentality. At a minimum, we could raise some questions about whether the “Golden Age of Rulemaking” really was Nirvana. Professor Bone says that this period lasted from 1950 until 1970,⁴⁶ but some might raise questions about whether it really lasted until 1970. Professor Friedenthal, for example, thought that the problem started in the mid-1950s when Chief Justice Warren discharged the original Civil Rules Committee.⁴⁷ Friedenthal also thought that the work product of the later committee, reviewed by the Judicial Conference, fell short of the work of the giants. He strongly criticized aspects of the 1970 amendments to the discovery rules, which he attributed to the inattention of the Supreme Court.⁴⁸ So Friedenthal would end the period in 1955, a rather short golden age if it only started in 1950. The starting date should probably be put earlier, for it was during the 1930s that the giants of rulemaking rewrote the American procedural landscape.

If having a big effect—achieving pervasive reform—is the measure of a golden age, the claim for that period is a strong one. All of us must concede that those giants accomplished an amazing thing. They revised procedure stem to stern and set it on a different course, one that probably assisted in the later vitality of what Professor Kagan calls adversarial legalism. Indeed, some may think that the giants’ accomplishments were so momentous that there simply should not have been any more rulemaking.⁴⁹ Maybe the Queen Mary Compromise should not have been reached, and the existing rules, including the tinkering during their first decade and a half of existence,

44. See Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 813-15 (1981) (characterizing as political the argument of Justices Powell, Burger, and Rehnquist that proposed discovery amendments were insufficient to deal with discovery problems).

45. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 762-63 (1993).

46. See Bone, *supra* note 1, at 897.

47. See *supra* text accompanying note 17.

48. See Friedenthal, *supra* note 14, at 677-82 (discussing asserted deficiencies in the work-product provisions of the 1970 amendments).

49. See Marcus, *supra* note 45, at 761 (citing lawyer who rued the creation of rule committees who kept changing the rules).

should be left intact as a procedural Bible for American litigation.

But at least the uncharitable might raise questions about whether the Golden Age should be viewed as quite so golden. Giving such power to a small group made up of several law professors and a number of very prominent lawyers might not sit well as a general matter. Not even any sitting judges were included in the mix. And a fair argument can be made for the idea that judges could be expected to be less attuned to client interests than lawyers.⁵⁰ (Law professors, of course, are the purest of the pure.) We are told that these rulemakers extensively consulted with others about what they were doing,⁵¹ but one cannot resist the urge to suspect that this interaction was less intense than what is now necessary with regard to much more modest rulemaking efforts. One could also wonder at (and about) the extent to which the rulemakers of the Golden Age were seemingly willing to put aside their possible self-interests, or those of their clients—the broadening of discovery and the 1966 expansion of the class action rule seem to be cases in point.

So as we survey the changed circumstances of rulemaking in the present, we should not forget the sorts of questions that might have been raised about what happened during the Golden Age. Notwithstanding those questions, there is wide agreement that rulemaking has fallen onto seriously hard times, and that reform would therefore be much harder to accomplish via rulemaking. Charles Alan Wright thus reported in 1994 that he was “gloomier about the status of the rulemaking process than I had ever been.”⁵² Professor Subrin has described “a procedural regime that is in question and in decline, if not in its death throes.”⁵³ Professor Bone says that “today the court

50. Whether judges should simply be viewed as another interest group in the rulemaking process can be debated. Compare Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (exploring thesis that, as rulemakers, judges could be expected to pursue their own self interests) with Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994) (questioning Macey's thesis).

51. Thus, as the rules were being introduced at public events sponsored by the ABA in 1938, Arthur T. Vanderbilt, then President of the ABA, said that the members of the Advisory Committee “very wisely called on the Bar to help them,” and that the resulting rules were “the result of cooperation of a large number of lawyers.” See American Bar Association, *Proceedings of the Institute on Federal Rules*, Cleveland, Ohio, 178 (1938). William D. Mitchell, the Chairman of the Advisory Committee, emphasized that they were “not the work of a star chamber commission.” *Id.* at 189. See also Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1658 (1995) (asserting that the original Advisory Committee “widely circulated proposed drafts to the bench and bar for comment”).

52. Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 9 (1994) (focusing largely on the inclusion of opt-out rights in the 1993 amendments, permitting districts to secede from certain federal rules).

53. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 311 (1988).

rulemaking model is under siege.”⁵⁴ Professor Mullenix foresees that the Advisory Committee might go “the way of the French Aristocracy.”⁵⁵ Professor Walker sees “the most serious challenge to the procedural status quo since the adoption of the original Federal Rules in 1938.”⁵⁶ Professor Friedenthal’s tocsin thus has now been rung by a lot of others, as well.

But there is less agreement on what the crisis is. Professor Geyh, who worked with the House Judiciary Committee during part of this period, says that there has been “a startling transformation of the judiciary’s role” due to the more active role of Congress since the presentation of the Evidence Rules.⁵⁷ Professor Burbank describes this development as the loss of the judiciary’s monopoly power over procedure.⁵⁸ Professor Yeazell sees the problem as isolation of the rulemakers, who are now mostly judges, from the consumers of court services, the lawyers.⁵⁹ These difficulties are compounded, he urges, by “procedure’s very own twelve-step program,”⁶⁰ the elaborate ritual required to adopt a change to the rules, and he laments that “[i]t requires more steps to amend a Federal Rule of Civil Procedure than it does to amend the U.S. Constitution.”⁶¹ Professor Walker argues that the true explanation is the end of the New Deal, with its reliance on technocratic expertise and centralization.⁶²

There is also room for debate about whether the crisis arose because of factors internal to rulemaking. Professor Friedenthal saw the problem as largely structural, resulting from the end of the Supreme Court’s direct supervisory role.⁶³ Professor Walker, on the other hand, attributes the current situation to a “[m]ajor change in political structure and practice” in the last quarter of the 20th century as the New Deal consensus evaporated.⁶⁴ Professor Geyh attributes it to the “Watergate mentality” of the last thirty

54. Bone, *supra* note 1, at 888.

55. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

56. Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997).

57. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996).

58. Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 226 (1997).

59. Yeazell, *supra* note 6, at 231. He adds that “[o]ver the last fifty years, the Rules have removed more and more of day-to-day procedure from judicial sight,” meaning that judges lack information about how the rules work. *Id.* at 241.

60. *Id.* at 236.

61. *Id.* at 235.

62. See Walker, *supra* note 56.

63. See *supra* text accompanying notes 17-21.

64. See Walker, *supra* note 56, at 1286.

years,⁶⁵ and Professor Bone more specifically attributes it to “the rise of procedural skepticism during the 1970s.”⁶⁶ Professor Burbank places more emphasis on what the rulemakers themselves have done, including perhaps shooting themselves in the foot on occasion. Certainly, the drafters of the Evidence Rules might have done just that by including privilege provisions in their package of proposed rules, although they might be excused for failing to foresee that Watergate would cast such a harsh light on the provisions for executive privilege. More recently, as Professor Burbank notes, the 1983 amendments, particularly the expansion of Rule 11, seem to have created a “poisonous environment” for rulemaking, and, at the same time, there has been some seeming “judicial overreaching” in connection with rulemaking.⁶⁷ More generally yet, Professor Resnik sees a pervasive loss of faith in the whole project of adjudication.⁶⁸

So also is there some diversity of views on the solution to the problems of contemporary rulemaking. Professor Geyh urges creation of an Interbranch Commission on Law Reform and the Judiciary.⁶⁹ Professor Burbank agrees, hoping that such an effort would establish new ground rules for spheres of authority.⁷⁰ Professor Bone, on the other hand, urges that what we need is a new theory of procedural rulemaking to counter the impulse toward populism.⁷¹ Professor Walker contends for “fundamental review,” arguing that welfare reform, with its regime of enhanced local control and system of waivers of national requirements, along with mandatory research and use of incentives, could be an analogy for a useful reform package.⁷² Professor Yeazell, on the other hand, thinks that the solution lies in modifying the structure of rulemaking. He suggests that final rulemaking authority should be relocated to the Standing Committee on Rules of Practice and Procedure, and that the advisory committees should be purged of judicial members (although judges would be allowed to serve on the Standing Committee).⁷³

In sum, although there is no agreement about what action should be taken, there is broad agreement that dramatic action must be taken if rulemaking is again to serve its purpose of providing desirable reform.

65. Geyh, *supra* note 57, at 1167.

66. Bone, *supra* note 1, at 891.

67. Burbank, *supra* note 58, at 227-28.

68. *See* Resnik, *supra* note 12.

69. *See* Geyh, *supra* note 57, at 1169.

70. *See* Burbank, *supra* note 58, at 246-50.

71. *See* Bone, *supra* note 1, at 918-47.

72. *See* Walker, *supra* note 56, at 1287-91.

73. *See* Yeazell, *supra* note 6, at 238-52.

III. ASPECTS OF CONTEMPORARY RULEMAKING

To date, no such dramatic action has been taken. No commissions have been appointed, and the apparatus of rulemaking continues to function as it has for decades, tweaked by the 1988 amendments of the Rules Enabling Act.⁷⁴ Meanwhile, some moderately controversial topics have been addressed. The Civil Rules on discovery have been revised, and another effort is under way to reform the class action rule. Both of these rulemaking efforts have generated a lot of attention, and less celebrated undertakings, such as a comprehensive revision of Rule 53, have also proceeded.

This recent experience, which I have seen somewhat from the inside, suggests that contemporary rulemaking has a number of aspects that may not have been equally true of rulemaking during the Golden Age. Given the dire diagnoses of crisis and the aggressive prescriptions of some who seek to resolve that crisis, it seems useful to reflect on whether those aspects of current rulemaking show that things are worsening. In the process, we may be able to develop some insights on whether rulemaking can function as an engine of legal reform. Additionally, this canvas of current activities permits us to reflect on which of the introductory images seems best to correspond to what is going on.

1. Top Down Versus Bottom Up

Professor Friedenthal's model of rulemaking was very much a top down version, and his concern was that the top level of the process—the Supreme Court—was not sufficiently engaged. One surmises that he thought this lack of top level engagement had adverse effects on both the content and the salability of the resulting rules. Certainly, the original rules represented a top down effort. However much the rulemakers interacted with others, they ultimately devised a new procedural system themselves. The Rules Enabling Act itself had not sanctioned any particular system,⁷⁵ and it does not appear

74. Judicial Improvements and Access to Justice Act, Tit. ix, Pub. L. No. 100-702, 102 Stat. 4642, 4648-52 (1988).

75. Although this is a fundamental point, it is somewhat difficult to support with a citation, perhaps because it is so pervasively accepted. True, the thrust of the Act was to create a uniform federal procedure. But the Act itself did not say what the uniform system would be. Thus, Professor Subrin devotes a lengthy article to chronicling the “revolutionary character of the decision inherent in the Federal Rules to make equity procedure available for all cases” and shows that this was a decision made by the rulemakers. *See* Subrin, *supra* note 10, at 913. And in his epic study of the Act, Professor Burbank points out that even after the Act was adopted, some of those who ultimately wrote the rules argued for continued conformity to state procedure. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1135-36 (1982) (describing articles by Professor Edson Sunderland,

that the rulemakers received other outside direction on what they should produce. In Professor Walker's view, "[t]he original Rules are a strong example of centralization at the federal level."⁷⁶

The top down method did not immediately sweep the day. Although the new pleading regime was meant to make a distinct break with the past, for years a number of district judges who favored more stringent pleading standards waged what has been called a "guerrilla attack" on the relaxed provisions of the Civil Rules.⁷⁷ This insurrection was quelled finally only by a 1957 decision of the Supreme Court.⁷⁸ On other topics, the procedural breakthrough of the rulemakers met with less resistance. Professor Subrin seemed surprised by the revolutionary nature of the discovery rules in his 1998 reflection on the emergence of those rules,⁷⁹ but that breakthrough seems to have achieved widespread support in short order.⁸⁰

The top down orientation seems out of place in the American arrangement described by Professor Kagan, which emphasizes the diffuse and localized nature of power in our polity. That may be particularly true of our courts; as Professor Damaska noted fifteen years ago, the U.S. court system relies on locally independent courts because it operates in a dispute resolution "reactive mode."⁸¹ One might doubt that such tendencies toward local independence would disappear.

They did not. Within a few years, local rules had blossomed, and a 1940 study showed that they were quite numerous.⁸² Since that time, there have been recurrent efforts to contain local rulemaking. By the 1980s, Congress had become concerned, and, as a result, the Standing Committee on Rules of Practice and Procedure launched a Local Rules Project to respond to the problem. In an action "radically at odds with one of the basic premises of

who was ultimately a member of the Advisory Committee and chief drafter of the discovery rules).

76. Walker, *supra* note 56, at 1276.

77. RICHARD FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 524 (7th ed. 1997).

78. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (stating that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief").

79. See Subrin, *supra* note 3.

80. By 1945, for example, the Third Circuit had recognized regarding discovery that "[t]he Rules probably go further than any State practice, but . . . [w]e must start any discussion of the use of discovery in a particular case from the premise that the Rules are intended to go far in making information known by one party available to the other." Hickman v. Taylor, 153 F.2d 212, 217 (3d Cir. 1945), *aff'd*, 329 U.S. 495 (1947).

81. See, e.g., Damaska, *supra* note 38, at 73-80 (describing the characteristics of "the reactive state").

82. See Report on Local District Court Rules, 4 Fed. R. Serv. 969 (1940).

modern federal procedure,”⁸³ Congress meanwhile prompted more vigorous local activity by passing the Civil Justice Reform Act (CJRA) in 1990. The bottom up view of procedural revision seems irrepressible.⁸⁴

The recent reality, therefore, has been that the national rulemakers could not assume national compliance with their rules. One former Reporter of the Advisory Committee has likened the situation to a new Confederacy.⁸⁵ The CJRA and the opt-out provisions inserted in 1993 reflect and somewhat reinforce this impulse. Perhaps partly because of the CJRA experience, the 2000 amendments encountered heated opposition among many judges, and elicited during the public comment period some “love letters” from exasperated district judges. Perhaps some vehement examples, all from district judges, are worth quoting:

Judicial districts do not need solutions imposed from Washington. Judges in the field know best what works in their District.⁸⁶

I recognize this as just the latest attempt to make us all alike, in my strongly held view very unwisely. . . . Fayetteville, Harrison, Fort Smith, Hot Springs, Texarkana and El Dorado, Arkansas, just aren’t like Detroit, Chicago, Philadelphia, Pittsburgh, Boston, New York City, etc.⁸⁷

[A]t a time when the federal government is promoting decentralization, this change from local option to a national standard in the federal courts appears to be an anachronism.⁸⁸

[T]he entire tenor of the Advisory Committee’s report on this amendment reminds one of a parent’s rebuke of a wayward child. It is insulting to the district courts and was put forth in support of a change that has no justification except to serve the end of uniformity in and for itself.⁸⁹

83. Burbank, *supra* note 58, at 230.

84. A chief aid to Senator Biden, chief sponsor of the CJRA, so described the goal of the legislation. See Jeffrey J. Peck, “Users United”: *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 109-10 (1991).

85. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996).

86. Comment 98-CV-130. I see no need to identify the judges quoted. These comments are on file with the Administrative Office of the United States Courts.

87. Comment 98-CV-123.

88. Comment 98-CV-128.

89. Comment 98-CV-110.

In part, that emphasis on local initiative reflects the genuine creativity of some local judicial innovations. The entire case management movement, for example, was a bottom-up development originating in a number of metropolitan districts in the 1960s and 1970s. Only with the 1983 amendment to Rule 16 did this activity find its way into the national rules; in that instance the national rules were in a sense used as a way of exporting the innovation of these metropolitan districts nationwide. Even then, districts were permitted to exempt certain categories of cases from the requirements of Rule 16(b).

The Rule 16 experience is hardly the only one of this sort. Most recently, Rule 5(d)'s requirements for filing of discovery were amended in 2000 because most districts had local rules that did not require the filing of discovery. Before that, a variety of other discovery features, including numerical limitations on discovery events and the required conference before a motion to compel, were added to the national rules based on experience at the local level.⁹⁰ Even features of the initial disclosure regime adopted in 1993 were based on local practice.⁹¹

It is hard to say whether the original Advisory Committee operated entirely without concern about local innovations in practice. We are told that it circulated its proposals widely among the bench and bar,⁹² and it seems likely that local practices would have been among the things those who were consulted would mention. It is clear that local experience now has some role to play in fashioning the national rules. Some are even adapted to avoid interfering with local practice. Thus, in 2000, the timing requirements of Rule 26(f) were tempered to avoid disrupting those districts that moved so rapidly that the national minimum time limits might actually slow things down.⁹³ At the same time, however, the initial disclosure and related requirements were made nationally binding by removal of the authority to opt out by local rule.⁹⁴ Unlike the 1983 treatment of Rule 16(b), the 2000 amendments do not authorize districts to exclude categories of cases from

90. See generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 783 (1998) (detailing some of these provisions).

91. The early meeting of counsel included in Rule 26(f) was prompted by the model adopted in three districts that had earlier adopted a disclosure system by local rule. See Marcus, *supra* note 45, at 809.

92. See *supra* note 51 and accompanying text.

93. See FED. R. CIV. P. 26(f), which allows a district to accelerate events by local rule if "necessary to comply with its expedited schedule for Rule 16(b) conferences."

94. See, e.g., FED. R. CIV. P. 26(a)(1) (initial disclosure); 26(d) (moratorium on discovery); 26(f) (required early conference of counsel to develop discovery plan).

these requirements. Instead, the rules themselves prescribe eight categories of excluded cases.⁹⁵

2. *The Current Consultative Mode for Developing Amendment Proposals*

The need for attending to local practice suggests one element of recent experience in rulemaking. As noted above, the assurances that the original Advisory Committee fully vetted the new rules ring a little hollow to contemporary ears. We have been told that there was a period during the Golden Age of Rulemaking when early revelation of possible rule changes was not the mode.⁹⁶ On the Advisory Committee's own initiative,⁹⁷ formal hearings on proposed rule changes were first held regarding the discovery rule proposals in 1978. A decade later, Congress mandated such openness by statute.⁹⁸ Others continue to urge that such efforts be embraced.⁹⁹

There is much to be said for going beyond these ideas. Even the most open-minded of rulemakers might be tempted toward pride of authorship by the time formal proposals have been put before the nation. Floating formal proposals as a way of testing the water also seems unwarranted. More than a decade ago, Reporters of the committee began informal circulation of amendment ideas among people whose comments might be informative.¹⁰⁰ For the last decade or so, the Civil Rules Advisory Committee has taken these concepts to heart. Judge Higginbotham may have originated the idea of doing so in a formal manner during his tenure as Chair of the Advisory Committee; at his behest a broad-ranging two-day conference in Dallas in early 1995 explored a variety of areas that might be the focus of future rulemaking.¹⁰¹

95. See Fed. R. Civ. P. 26(a)(1)(E) (listing eight categories of cases excluded from initial disclosure, the discovery planning conference, and the moratorium on formal discovery).

96. See Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991) (reporting that the Advisory Committee Reporter during the 1960s "was instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation").

97. See Marcus, *supra* note 90, at 758 n.58 (reporting that this was the first time the Advisory Committee held public hearings on proposed amendments).

98. See 28 U.S.C. § 2073 (2002) (requiring that rulemaking committees hold public meetings, with minutes, and provide a report with each rule change proposal).

99. See Yeazell, *supra* note 6, at 247-48 (urging "requiring the Advisory Committee to formulate, for each set of proposed Rules, a plan that would actively involve a cross-section of the bar, specifically identifying those whose views might be adverse to the proposed rules").

100. I recall that Paul Carrington was doing this sort of thing as early as 1986 or 1987. Ed Cooper has continued the practice since then. In September 2002, I wrote to lawyers nationwide soliciting their views on potential rule changes to address challenges of electronic discovery.

101. See Geoffrey C. Hazard, Jr., Reporter, Conference on the Federal Rules of Civil Procedure (1995) (reporting on proceedings of March 30-31, 1995, conference convened by the Advisory Committee in Dallas, Texas).

This trend has accelerated during the six years I have been associated with the Advisory Committee. The Committee has, during that time, organized at least five formal conferences: two on discovery generally, two on electronic discovery, and one on class actions.¹⁰² Each of these events included invited participants thought to reflect a range of viewpoints. Two have overtly drawn on bar groups to provide broader input as well. All have provided valuable insights to the Advisory Committee, including an opportunity for less formal interaction in addition to the formal conference sessions.

In part, these interactions serve as an early warning system about potential difficulties with rule reform ideas. But they do more. Often nowadays, a critical consideration is how a given change will “work” with the practicing bar. Even a committee composed entirely of practicing lawyers might hesitate to make a confident judgment about that impact without some additional outside input. A committee composed substantially of judges can benefit even more.

But this sort of interaction goes beyond providing early warnings about ideas the committee is considering because it can direct attention to topics the committee has not identified as important. Electronic discovery is an excellent case in point. Even though the Advisory Committee’s Discovery Project was conceived in 1996 as including consideration of all aspects of discovery, the committee itself did not identify electronic discovery as a topic for consideration. Rather, lawyers invited to comment on the problems of discovery during the 1997 sessions brought it up as an omission from the committee’s array of concerns, and then other lawyers mentioned these problems during the hearings on the actual proposals made in 1998. There was not time to learn enough about these issues to include provisions for them in the 1998 package of proposals, but the conference method was well suited to examining these questions and was used for the purpose on two

102. These were as follows:

January 16, 1997: Discovery miniconference in San Francisco to explore possible areas for amendment of the discovery rules with a number of lawyers and judges.

September 4-5, 1997: Discovery conference at Boston College to consider areas for possible amendments to the discovery rules.

March 21, 2000: Miniconference on electronic discovery in San Francisco to identify problems unique to discovery of computer-based materials with lawyers, judges, and technical experts

October 21, 2000: Miniconference on electronic discovery in Brooklyn, New York, to pursue questions about possible rule amendments to respond to concerns about discovery of computer-based materials with representatives of bar groups, lawyers, and judges.

October 21-22, 2001: Conference in Chicago with experienced lawyers and judges to consider current proposals for amending Rule 23 and other possible proposals for amending it to deal with the challenges of contemporary class actions.

occasions in 2000.¹⁰³

It is not always easy to arrange broad dialogue. For example, if one is interested in considering forfeiture issues, which are sometimes handled in proceedings governed by the Supplemental Rules originally added to deal with admiralty and maritime claims, how does one identify people who can speak for the interests of claimants in forfeiture proceedings? Despite those difficulties, it seems likely that the consultative mode will continue to be pursued.

The Advisory Committee has recognized the value of this activity. Repeatedly, committee chairs have commented that they form an important ingredient in the “new model” of rulemaking that has emerged in the last decade. Whether this should be regarded as top down or bottom up, it is surely interactive at a point when proposals for amendment are in a formative stage, and the question whether rule amendment is advisable remains open. It is unclear whether committees focused on other sets of rules have often employed similar interactive methods,¹⁰⁴ but advance consultation has assumed considerable importance in relation to the Civil Rules.

3. *Adding an Empirical Dimension*

Among other things it offers, the consultative mode can provide some quasi-empirical insights. But much of that information is necessarily anecdotal, and more disciplined information-gathering is often possible. In the past, it has sometimes seemed that there was insufficient interest in gathering such information,¹⁰⁵ and in 1993 Professor Burbank even called for a moratorium on further rule changes until empirical information was added

103. See *supra* note 102.

104. In January 2002, I participated in panel discussion of class action issues for the Judicial Conference Committee on Federal-State Jurisdiction that served a somewhat similar educational function, but that committee is not involved in rule amendment.

In a somewhat similar vein, the Working Group on Mass Torts appointed by the Chief Justice in early 1998 to study statutory and rule-based responses to the issues presented by mass tort litigation proceeded by convening conferences with a broad range of judges, lawyers, and academics to evaluate and develop possible legal changes to cope with mass tort litigation. For a comprehensive compilation of these efforts, see the appendices to REPORT ON MASS TORT LITIGATION (Feb. 15, 1999).

105. See Mullenix, *supra* note 55. In this article, Professor Mullenix reviews the emergence of the proposal to mandate initial disclosure, which was eventually embodied in FED. R. CIV. P. 26(a)(1), as adopted in 1993. She notes that “there is virtually no empirical study of the current practice of such informal discovery,” *id.* at 810, and describes her tentative efforts to gather some information regarding the experience in three districts that had adopted some form of early disclosure by local rule. See *id.* at 811-21. But when she relayed these results to the Advisory Committee at its November, 1989, meeting, the committee declined to undertake any further study. See *id.* at 816 n.114. She recognizes as well that requests for empirical study “also serve to postpone solving the problem.” *Id.* at 829.

to the mix.¹⁰⁶

Considerable efforts have been made in this regard; in 1997 Professor Burbank noted that the judiciary “has come to recognize the value of seeking empirical data before formulating new or amended Federal Rules.”¹⁰⁷ At least in connection with the review of the discovery rules, there was considerable effort to gather hard data. The Federal Judicial Center (FJC) did a survey of the lawyers in 1,000 recently closed cases after consultation with the Advisory Committee in an effort to generate information about existing discovery problems and possible rulemaking reactions to them.¹⁰⁸ In addition, at the request of the Advisory Committee, the RAND Corporation performed further analysis of the data it had developed in its assessment of the CJRA experience to determine whether insights about discovery practice could be gleaned from that data.¹⁰⁹

Together, these studies (and the prior RAND study of the operation of the CJRA) afforded some insights. It was apparent, for example, that those who had actual experience with initial disclosure found that experience positive. Although unable to demonstrate that early disclosure efforts had reduced costs or shortened litigation, the RAND Corporation study of CJRA programs showed considerable support in opinion surveys. About 60% of surveyed lawyers¹¹⁰ and over 78% of judges favored early disclosure.¹¹¹ The Federal Judicial Center’s study of cases closed in 1996 found that, of those attorneys who reported an effect from initial disclosure, the effect was most often of the sort that disclosure was intended to foster. Thus, the percentage who found that disclosure caused the duration of litigation and cost of discovery to decline was more than four times as large as those who felt it had caused an increase in these factors.¹¹² More than four times as many

106. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call For a Moratorium*, 59 BROOK. L. REV. 841 (1993).

107. Burbank, *supra* note 58, at 242. In the same vein, Federal Judicial Center researchers gathering data on discovery practices to assist the Advisory Committee in its 1996-1999 review of discovery began their report by noting that “the Committee requested this research *before* drafting proposals for change.” Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 526 (1998) (emphasis in original).

108. The survey produced the report published as Willging, *supra* note 107.

109. See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998).

110. See JAMES S. KAKALIK, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 274 (1997) (reporting that in 1991 58% of responding lawyers said that early disclosure would be “generally desirable,” and that in 1993 65% so responded).

111. *Id.* at 261 (reporting that 78.2% of surveyed judges viewed early disclosure as “generally desirable”).

112. Willging, *supra* note 107, at 563.

lawyers reported that disclosure improved the procedural fairness of the cases than found the reverse, and six times as many attorneys thought that disclosure increased the prospects for settlement as thought that it lowered those prospects.¹¹³ Perhaps these attitudes explain another FJC finding—that initial disclosure was much more widespread than had been expected due to reports on how many districts had opted out of it.¹¹⁴

At the same time, although recent experience may not have fully exploited the possibilities of empirical work,¹¹⁵ there are definite limits to the insights that can be gleaned for rulemaking purposes from empirical work of this sort. For example, there can be methodological disputes about different techniques for eliciting conclusions.¹¹⁶ Thus, even though social scientists may treat opinions as unreliable, rulemakers could find them useful in determining whether and how to amend the rules.¹¹⁷ Similarly, rulemakers may decide that conclusions that do not satisfy customary social science requirements are nonetheless important in determining whether rule changes would be desirable.¹¹⁸ As I have said in the past, rule changes might be justified on a showing that is less scientifically compelling than that required for the Food and Drug Administration to approve a new drug.¹¹⁹

113. *Id.*

114. *See id.* at 534 (reporting on “the unexpectedly high incidence of initial disclosure,” and that “more than a third of the attorneys in our sample who had engaged in initial disclosure had litigated their case in a district classified as having opted out”).

115. *See* Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 112 (2002) (exploring ways in which different empirical research techniques can develop information useful to the rulemaking process).

116. For example, RAND found no relationship between early disclosure and reduced time to disposition, but the FJC did. Similarly, RAND found a reduction in time to disposition due to the use of early discovery cutoffs, but the FJC did not. *See* Willging, *supra* note 107, at 557-58. These differences may be due to the fact that RAND was looking at only twenty districts and was comparing district-wide medians, while the FJC was focusing on individual closed cases drawn from almost all districts. *See id.* at 558. But the divergent conclusions also underscore the difficulty of using these empirical techniques.

117. I have been told by at least one social scientist, for example, that surveys of lawyer opinion are not a legitimate basis for policy decisions because lawyers’ opinions about what techniques that reduce costs are not reliable. Instead, in this view, only gathering data on actual hours worked under different rule regimes and comparing those data can support confident conclusions. But at least a considerable number of social scientists would treat survey results as significant and “empirical.” Consider, for example, the 1997 FJC study of discovery, which largely relied on survey questions. *See* Willging, *supra* note 107. So there seems to be debate on this point in the social scientist community.

118. For example, the RAND study of the CJRA determined to a probability of 0.06 that a strong form of disclosure correlated to litigation savings, but the standard used for significant correlations was 0.05. *See* KAKALIK, *supra* note 110, at 201-02. The closeness of the results might be significant to rulemakers even though they are not significant to social scientists.

119. *See* Marcus, *supra* note 45, at 770 (asserting that “if procedural reform could only be adopted after being proved effective and safe in a manner similar to the way that the FDA determines whether a new drug can be sold, it seems unlikely that there would be any formal procedural reform”).

Two further points deserve note. First, empirical data may show that in most cases certain problems are not appearing. Opponents of rule changes may then argue that changes are not justified because they are not targeted at cases in which the problems arise. The empirical review of discovery in 1997, for example, suggested that in most cases there were not serious problems with discovery. That conclusion does not lead necessarily to the further conclusion that rule changes should be limited to “problem” cases. Often it is impossible to define in a rule which cases are problems.¹²⁰ If so, it may well be sensible to adopt rule changes designed to address the problem cases and apply them in all cases unless they will clearly cause new problems in the cases that were not formerly problems.

The second point is more general: Much as empirical data are a desirable basis for rule changes, rulemakers cannot be blind to the reality that many of the current rules were adopted without much empirical foundation of the “hard data” sort described above. The framers working in the 1930s, though they may have been products of the Realist movement, did not have much solid empirical data on which to justify their conclusion that very substantial changes were needed to improve civil litigation, much less that their particular changes would accomplish good results. Indeed, it seems dubious that anything resembling the conference-style information gathering that is now in vogue attended that drafting process. As we have seen, their results were widely regarded as highly successful, suggesting that empirical foundations are not always an essential prerequisite to successful rulemaking. But it is also true that rules that were themselves not founded on empirical research might legitimately be displaced by later efforts only partly validated by such information.

4. Rule Evolution through Judicial Interpretation

Litigation itself can adapt, and to some extent reform, the application of procedural rules. It also can be viewed as a method for highlighting the need for changes in the rules. Quite a lot of time has passed since the rules were originally adopted in 1938, and many critical developments have occurred that revealed problems or affected the continued effectiveness of the rules. Because the rules were relatively open-textured by design, judicial interpretation has provided one method for adapting them. Sometimes it has seemed to be an alternative to formal amendment. While *Hickman v.*

120. See Marcus, *supra* note 90, at 777-78 (noting the difficulty of defining problem cases in a rule).

*Taylor*¹²¹ was pending before the Supreme Court, for example, the Court also had before it a proposal to amend the discovery rules to address the question of work product materials. The Court decided the case and did not adopt the amendment, and the rules did not overtly address work product for another twenty-three years.¹²² Sometimes rule reform can, in effect, occur without formal action by the rulemakers.

However elastic some rule provisions and aggressive some courts, there are limits to this sort of activity. Around the time the Supreme Court was deciding *Hickman v. Taylor*, Charles Clark, by then a judge on the Second Circuit, reacted as follows to the majority's ruling that Clark thought unduly constricted Rule 56 on summary judgment: "That is a novel method of amending rules of procedure. It subverts the plans and hopes of the profession for careful, informed study leading up to the adoption and to the amendment of simple rules which shall be uniform throughout the country."¹²³

Whatever the reasons for the Supreme Court's decision not to adopt rule revisions in 1947 to deal with work product,¹²⁴ it has lately expressed misgivings with aggressive revision of rules by judicial interpretation.¹²⁵ Thus, when lower courts again began overtly developing more demanding pleading requirements for certain types of cases even though they did not fit within the heightened specificity requirements of Rule 9(b), the Court held that this could not be done even though it might be a good idea: "that is a result which must be obtained by the process of amending the Federal rules, and not by judicial interpretation."¹²⁶

121. 329 U.S. 495 (1947).

122. For a description of these events, see 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE & PROCEDURE* §§ 2021-22 (2d ed. 1994).

123. *Arnstein v. Porter*, 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J., dissenting).

124. See *supra* note 122 and accompanying text.

125. Some question the Court's seeming rigidity in sticking to the "plain language" of the rules rather than relying on the context and purposes they seek to serve. With rules, as opposed to statutes, the Court itself is the promulgator, and accusations of disregarding the policy choices of another branch due to relaxed emphasis on the strict wording of the rules ring rather hollow even though Congress does have a role in the rule-making process. Judge (then Professor) Moore therefore urged the Supreme Court to "do what it can do best—develop federal common law interpreting Federal Rules in light of their underlying policy and purpose on a case by case basis." Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1108 (1993). Although it is hard to disagree with Judge Moore's point that this flexibility is better than more frequent rule changes, see *id.* at 1109, it may be harder to see it as a proper role for the lower courts, which must interpret the rules much more frequently than the Supreme Court, and which are not formally included in the promulgation of the rules.

126. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (asserting that imposing more stringent pleading requirements on claims against municipalities, though possibly desirable, "is a result which must be obtained by the process of

Clark's objection has at least two components. First, judicial interpretation may respond to objectives that deviate from, or are even antithetical to, those sought by the rulemakers. The early rebellion against the relaxed pleading standards¹²⁷ is an example of that phenomenon. The idea of rules is, in part, that they confine the latitude of judges.¹²⁸ Perhaps the most pertinent recent example of that sort of thing is the rather emphatic disapproval that the rulemakers had in 1966 for use of Rule 23(b)(3) in even single accident mass tort class actions. Repeated judicial activism severely undermined that effort at restraint, and the Supreme Court seems to have buried it in 1997.¹²⁹

A second point is that judicial interpretation is likely to vary in different courts, thereby undermining the national uniformity that the rules were intended to achieve. Of course, it is inevitable that disagreements about interpretation of some rule language can result in differences in application by different judges, and therefore some regional disuniformity if different circuits reach different results. But that is magnified considerably if we invite judges to act as mini rule committees and shade their interpretations of the rules' actual language to take account of the sorts of policy judgments a rules committee might conclude justify amending a rule. That is the province of the rulemakers, not of judges enforcing the rules.

A third point that Clark probably had in mind is that individual judicial interpretation may be wrong more often than advisory committee action. Smart and wise as they are, judges can rely only on their own intelligence and wisdom and the arguments made for them by the parties. Rules committees draw on wider sources of information. This sort of problem is peculiarly resistant to solution through case law. Thus, rule committee action

amending the Federal Rules, and not by judicial interpretation"); *cf.* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (1999) (Rehnquist, C.J., concurring) (agreeing with dissent that it would be desirable to uphold the proposed class action settlement in the case, but joining Court's opinion overturning the settlement because Rule 23 does not justify that outcome as presently written, and "we are not free to devise an ideal system of adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states existing law.").

127. *See supra* text accompanying note 77.

128. There remains, of course, the ongoing debate on the extent to which rules should make confining judicial discretion their goal. For discussion, see Shapiro, *supra* note 7, at 1991-98. My point is only that rules that are designed to accomplish that result should not be interpreted to allow broad discretion. For discussion of "discretion to dismiss" as a view of the pleading rules, see Marcus, *supra* note 2, at 480-84. The question of whether it is desirable to write rules that confer discretion over certain matters raises different issues.

129. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (acknowledging the Advisory Committee note, but adding that "the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970's, have been certifying such cases in increasing number").

will continue to be needed when judicial decision goes in the wrong direction. Recent concern about restrictive interpretation of Rule 15(c)(3) might fit this description.¹³⁰

On the other hand, rule evolution through judicial decision might have the advantage of being incremental by nature. “Real” reforms often go beyond incremental change. It is difficult to imagine, for example, that individual judicial decisionmaking could produce such innovations as the initial disclosure obligation first inserted into the rules in 1993.¹³¹

In sum, whether or not judicial decisions themselves propel rule amendments, they are not a substitute for them.

5. Rule Revision to Enact “Best Judicial Practices”

A related consideration is whether rules should be amended to implement practices that judges have developed, whether by decisionmaking or simply as a matter of management of cases. Professor Leubsdorf, in his reflection on whether procedural change is a myth, somewhat disparaged such efforts: “Often . . . procedural reform simply puts the seal of legislation on changes that many judges are already implementing.”¹³²

As a starting point, it must be admitted that judicial activity “without benefit of rule” can and does occur, sometimes under claimed sanction of rule. Sometimes that sort of activity can go on for a long time. Decades of experience using special masters in ways not contemplated by Rule 53, for example, created a body of experience that ultimately caught the Advisory Committee’s attention.¹³³ At least in that circumstance, recognition in the rule of what is happening in the nation seems hard to criticize, particularly if it can include specific directives on matters that may not always have been handled in the best way. Thus, there is now pending for action a proposed rewrite of Rule 53 that tries to do those things.¹³⁴

There may at least be a debate about whether it is desirable to write

130. See *Singletary v. Pa. Dep’t of Corrs.*, 266 F.3d 186, 200-03 & n.5 (3d Cir. 2001) (urging consideration of amendment to Rule 15(c)(3) to respond to judicial interpretation of the rule).

131. Bottom up judicial innovation on the local rulemaking front can produce just this sort of innovation. At least some districts had some initial disclosure requirements in local rules at the time the Advisory Committee started looking at the question. See Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115, 126 (1993) (reporting that some twenty districts had adopted initial disclosure).

132. Leubsdorf, *supra* note 22, at 63.

133. For discussion, see Edward H. Cooper, *Civil Rule 53: An Enabling Act Challenge*, 76 TEX. L. REV. 1607 (1998).

134. See Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Civil and Criminal Procedure and Rules of Evidence, 201 F.R.D. 560, 670-718 (2001).

judicially developed practice into rules frequently. Perhaps a good example is provided by the 2000 amendment to Federal Rule of Evidence 702, which implements and explains the proper handling of the judge's "gatekeeper" function in connection with expert testimony. The Supreme Court stepped into the area in its 1993 *Daubert* decision,¹³⁵ and there have been quite a few decisions since then, including two more by the Supreme Court. The rule amendment attempted to make concrete the criteria that should be employed, and also to provide a Committee Note that gave some direction about how these criteria should be applied (including, perhaps, indications about which lower court cases should and should not be followed).

This is a ticklish enterprise. Particularly with standards like these, which emerge from judicial decision, there may be concern about supplanting judicial development of that which judicial decision created. Thus, the Committee Note to Rule 702 emphasizes at the outset that "[n]o attempt has been made to 'codify' these specific factors."¹³⁶ There follows, however, a rather lengthy discussion of a variety of issues that might arise, illustrated with citations to decisions already interpreting or applying these factors.

Should the rules process thus intervene into the decisional one? Clearly it can; rule changes can be made to "correct" mistaken judicial decisions¹³⁷ (or simply to change legal rules). But it is not clear whether that was the purpose of the amendment to Evidence Rule 702, and some might contend that it is difficult to determine what is meant by a discursive "scholarly" Committee Note. On the other hand, the direction provided by a Note may be nearly as valuable to judges and lawyers as the rule itself. And the rulemaking and decisionmaking processes are not hermetically sealed. Indeed, in a 1999 decision the Supreme Court itself cited the pending proposal to amend Rule 702.¹³⁸

Unless rulemakers limit themselves to "breakthrough" reforms, the question whether there should be amendments to implement what at least some judges have already determined to be wise under existing, open-ended rules will recur. Some may object that this sort of change is not needed because experienced judges and lawyers are already doing what the amendment says should be done. Others can object that any change in the rule implies that there should be a change in practice, creating a risk that the

135. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

136. See Committee Note to 2000 Amendment to Fed. R. Evid. 702.

137. For example, the Committee Note accompanying the 1991 amendment to Rule 15(c)(3) said that the rule "has been revised to change the result in *Schiavone v. Fortune*," 477 U.S. 21 (1986).

138. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 156-57 (1999) (citing and quoting pending proposal).

very practices the rule seeks to encourage might be undermined.

Yet, if the rulemakers can only tread where no judge has gone before, rulemaking will be a risky enterprise. And if they are to act on what they learn through interaction with practitioners, it may be that they can only do so by following the lead of some judges. One can readily see that the direction provided by a rule based on those insights, particularly if supported by a Note amplifying the points, could be of use to many judges and lawyers, even if not to those most knowledgeable in a given area.

6. *Rule Versus Note*

Here we descend to the truly prosaic. We have already mentioned the unhappy fate of the 1966 Advisory Committee Note on mass tort class actions.¹³⁹ An ongoing question with regard to statutory interpretation is whether legislative history should matter. With procedural rules, that debate has a particular focus as applied to the Committee Note. Some courts certainly give considerable weight to the Note. The Third Circuit, for example, recently began its interpretation of a recent rule change by observing that “[t]he Committee Note is always a good starting point.”¹⁴⁰

Whatever the likelihood that the members of Congress who vote on legislation actually know what is in the legislative history, there is no question that in recent years many of those who vote on rule changes are aware of what is in the Note that accompanies the rule. Both the Advisory Committee and the Standing Committee spend quite a lot of energy on the Note.¹⁴¹ Lawyers do, too. Those who comment or testify about proposed rule changes often address themselves largely to the Note. Indeed, in recent years the Advisory Committee has often heard from lawyers who want the current committee to amend a Note that accompanied a rule amendment of the past without changing the rule itself. At least that contingency has been addressed; a Note can only be issued in conjunction with a rule amendment.¹⁴² But the overall practice has reached a point to prompt

139. See *supra* note 129.

140. *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 529 F.3d 154, 163 (3d Cir. 2001). Candor requires that I note that the author of this opinion was Judge Anthony Scirica, who has for several years served as Chair of the Standing Committee on Rules of Practice and Procedure.

141. See Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 29 (2001) (“In my experience as a member of the Advisory Committee on Civil Rules, the members and Reporters—as well as members of the public commenting on possible changes—devoted considerable attention to the explanatory notes as well as to the text of proposed rules.”).

142. This is a rule that is not necessarily written down even though it is adhered to. During the January 2002 meeting of the Committee on Rules of Practice and Procedure, for example, there was a

Professor Struve to argue that a Committee Note should be given “authoritative effect.”¹⁴³

Perhaps partly in recognition of the importance of Note material, there has also recently emerged a debate about how far a Note should go. Some might even invert the limitation on changing a Note without a concomitant rule change to suggest that a rule change might be used as a vehicle for a Note that actually contains more substance than the rule itself. At least when rules implement judicial “best practices,” it may seem that the detailed explanation about what makes these practices best (along with illustrations) may be as important as the actual provisions of the rule. Should rulemakers be required to put their substantive preferences into the rule or leave them out altogether? As attention on rulemaking builds, that sort of question may be asked more often.

7. *Rules Versus Legislation*

A key element in the current concern about a rulemaking crisis is the increased willingness of Congress to take action on matters that are, or might appropriately be, the subject of rulemaking. At some level, this concern is likely to be important for the rulemakers. A decision to make rule changes might be said to open the door to legislative intervention because the occasion for that is an ingredient of the amendment process.¹⁴⁴ A decision not to consider rule changes on a given topic despite legislative interest might prompt unilateral legislative action where the legislature would await, and

discussion of the “internal committee rule” that “[a] note may not be changed unless a corresponding change is also made in the text of the corresponding rule.” Draft Minutes, Committee on Rules of Practice & Procedure, Jan. 10-11, 2002, Tucson, Az., at 21. Part of the explanation for this rule is that, as a form of legislative history, a Note reflects the intentions of the drafters at the time it is adopted. Another reason is that any change would be subject to the full Enabling Act process, else changes in the notes could effect a substantial revision of the rules without the scrutiny required in that process.

143. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002). She reasons that the Rules Enabling Act commands that the Committee Note must accompany proposed rule changes throughout the rule amendment process and that, “seen in the light of their creation—the Notes in some ways resemble the text more than legislative history.” *Id.* at 1158. Unlike the materials that constitute “legislative history,” she urges that “the active examination, and, at times, amendment of the Notes by the Advisory Committee and the Standing Committee, as well as the likelihood that the Notes receive scrutiny from at least some members of the Judicial Conference, the Supreme Court, and (occasionally) Congress, indicate that those who considered and approved the text of the rule also considered and approve the accompanying Note.” *Id.* at 1159-60.

144. See Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 261 (1999) (quoting warning to Advisory Committee by a former Senate staffer about making discovery revisions and sending them to Congress: “[I]f you tinker you always run the risk that Congress will totally ignore you and take on the reform and procedural issues itself.”).

hopefully be at least channeled by, rulemaking.

Initially, the Advisory Committee's concern might be labelled "turf protection." Professor Burbank describes the Rules Enabling Act as a "treaty" between Congress and the rulemakers about which has first rights to act on certain subjects.¹⁴⁵ At the outset, this sort of activity may provide good reason for the rulemakers to believe that they should go first on all topics that generally fall within their bailiwick. The judiciary, at least, describes the rule promulgation process as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules."¹⁴⁶ From the perspective of the rulemakers, Congress does not match up: "[I]t is extremely rare for any product of the legislative process to receive such objective consideration, public input, and expert review."¹⁴⁷

Despite that, Congress certainly has taken actions that appear to violate the treaty. The unilateral revision of Rule 35 to add examinations by psychotherapists is a frequently invoked example.¹⁴⁸ That one prompted a rule revision in 1991 that more comprehensively (and carefully) dealt with the general question. Score one for the rulemakers. And yet Congress does not necessarily keep score that way. Indeed, some in Congress seem anxious to rub the rulemakers' noses in the fact of their position of inferiority. For example, even as Rule 23(f) was headed toward implementation in 1998, bills before Congress sought to provide virtually the same thing.¹⁴⁹ And some associated with congressional activity have bridled at awaiting or paying obeisance to the rulemaking process.¹⁵⁰

On other topics, the interaction has involved issues that are more debatable. An example might be litigation confidentiality, a topic on which I admit to strong views.¹⁵¹ For a number of years, some legislatures, including Congress, have looked hard at whether judicial protective orders in civil litigation contravene public safety concerns. Although that concern is surely one that Congress could legitimately view as beyond the seeming scope of rulemaking, it can also be argued that the importance of facilitating discovery

145. See Burbank, *supra* note 58, at 231 (referring to "the treaty we call the Enabling Act").

146. Committee on Long Range Planning, Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts 54 (2d printing 1995).

147. McCabe, *supra* note 51, at 1683.

148. See National Narcotics Leadership Act of 1988, Pub. L. 100-690 § 7047(b)(2), 102 Stat. 4181, 4401 (1988) (amending Rule 35).

149. See Judicial Improvement Act of 1998, S. 2163, 105th Cong. (1998); H.R. 660, 105th Cong. (1998).

150. For example, an aide to Senator Biden spoke derisively of the "near mystical reverence of the rulemaking authority exercised by the Judicial Conference." Peck, *supra* note 84, at 117.

151. See Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (arguing against broad view of "openness" of discovery).

is a topic of great importance in practice that could be furthered by protective orders. Accordingly, for a number of years the Advisory Committee studied the possibility of amending Rule 26(c) to address this question, and one proposed amendment got as far as a vote by the Judicial Conference, which sent it back for further study.¹⁵² Eventually, in March 1998, the Committee resolved that it was not going to take further action, and so informed Congress.¹⁵³ Since then, legislative proposals have continued to be made, but legislation has not been adopted.

Perhaps there will never be a clear dividing line between the province of Congress and the province (at least initially) of the rulemakers. But those concerned with effective litigation reform must recognize that sometimes rulemaking is not enough, even if Congress takes a restrained attitude. It may be that the current concern about the problems generated by overlapping class actions illustrates this situation. Some debate whether there really is an important problem. If there is, rule changes might be devised that could address the problem.¹⁵⁴ But those rule changes might raise serious issues about whether the rulemakers have overstepped the line and tried to do something that they are not allowed to do.¹⁵⁵ And it might be that the most effective solution would be to modify the rules regarding removal of class actions from state court to federal court, perhaps involving a body like the Judicial Panel on Multidistrict Litigation in that process. That, of course, the rulemakers could never do under the current treaty.

So collaboration rather than tension may be the best way to solve problems. Certainly there is much to be said for Judge Weinstein's advice that pushing too hard on the divide between the legislative and rulemaking spheres threatens the entire enterprise.¹⁵⁶ This potential tension will always be there, and the rulemakers may make things worse by blinding themselves to it. To some extent, they can probably avoid action that prompts Congress to press on the other side of the divide. But at some point it would undermine the rulemaking process to take action that appears unwise, or fail to take

152. See Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, Criminal Procedure and Evidence, 163 F.R.D. 91, 124 (1995) (reporting that the Judicial Conference returned the proposed amendment of Rule 26(c) for further consideration).

153. See Draft Minutes, Civil Rules Advisory Comm., March 16-17, 1998, at 38-39.

154. Ed Cooper, the Reporter of the Advisory Committee, has circulated a summary of possible changes to the rules to address these concerns that has received a good deal of commentary. See Reporter's Call for Informal Comment: Overlapping Class Actions (Sept. 2001).

155. During the class action conference in Chicago in October 2001, procedure scholars disagreed about these questions.

156. See JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 78 (1977) ("It is the good sense to avoid intolerable conflicts by refusing to push the notion of independent branches of government to its logical conclusion that has made it possible for our government to survive.").

action that is warranted, simply because of a feared congressional reaction. Controversy alone should not define the limits of rulemaking, an insight learned early on.¹⁵⁷ Properly crediting the commentary on proposed amendments against that background is therefore one of the challenges of modern rulemaking.

8. *Reacting to Public Comment*

Whether or not the rulemakers of the past had sufficient outside input to guide them before they acted, modern rulemakers surely get a lot. Besides the fruits of the consultative mode,¹⁵⁸ there are hearings and written comments to be absorbed and evaluated. It may be that the Committee's handling of this material provides a counterpoint to congressional reaction to somewhat similar input.

In this era of emphasis on the influence of special interests, many view Congress as focusing almost entirely on who is doing the talking rather than on the arguments being made. That must be an oversimplification, but Congress is supposed to be politically responsive. Although the 1988 legislation opened up the rulemaking process to more input, it did not direct that the rulemakers be responsive in the same way. Thus, although some arguments seem to be couched in terms of the interest of the commenter,¹⁵⁹ it is comforting to be able to say that such arguments are rare but unlikely to have much effect.¹⁶⁰ Yet it is probably true that some organizational

157. Thus Edgar Tolman, a member of the original Advisory Committee, offered the following caution about the breadth of the committee's authority to make procedural rules but not change substantive law:

I think the greatest fallacy of all, the one that has manifested itself most clearly in the discussions of the question, is that when a provision of procedural law becomes important it thereby becomes substantive law because of its importance.

Am. Bar Assoc., Proceedings of the Institute at Washington, D.C. 31 (1938).

158. See *supra* text accompanying notes 96-104.

159. For example, the FBI submitted comments on a number of proposed amendments to the discovery rules including the change in scope of discovery under Rule 26(b)(1). On that topic, its entire statement was as follows:

The proposal to narrow the overall scope of discovery would seem to be favorable to the FBI. In the majority of cases brought against it, the FBI would seek little if any affirmative discovery from its opponent. In contrast, the FBI is very often the recipient of overly broad and unnecessarily intrusive discovery requests which go far beyond the issues which should be dispositive of the case.

Comment 98-CV-214, at 4. The foregoing may be a good reason for the FBI to favor the rule change, and since it is a public law-enforcement body, that may be sufficient. But it is harder to see this sort of statement in general as a good argument to the Advisory Committee about adopting the scope change.

160. Carrington, *supra* note 96, at 165 (asserting that the committee will turn a deaf ear to genuinely selfish arguments).

commentators—perhaps “mainstream” bar groups would be an example—are likely to be given special attention when they comment. Often the views of these organizations represent the cumulative wisdom of many lawyers, and often the organizations themselves have a track record of offering thoughtful and thorough comments. Beyond that, however, assessing public commentary is usually not a matter of counting noses.

Public hearings are not trials, but many who appear bring their trial lawyer habits to the hearing setting. For one who has been away from the courtroom, this serves as a reminder of the amount of overstatement that often occurs in trials. Whether or not bluster is an effective technique in trials, it probably is not usually effective in rulemaking hearings, which more closely resemble appellate arguments.

But one side’s overstatement can be telling when embraced by the other side. Consider the question whether the discovery scope defined in Rule 26(b)(1) should be changed so that discovery regarding the “subject matter” involved in the litigation (as opposed to discovery relevant to the claims and defenses) could be obtained only for good cause. Many from the defense side asserted that the “subject matter” standard was no limit at all. We were told, for instance, that in automobile product liability cases judges would accept the argument that the subject matter of the suit was “how defendant builds cars.” That might be taken as overstatement from the defense side, but when the same position is adopted by the plaintiff side it could provide a reason for embracing change. Thus, it is interesting that one academic critic of the narrowing of scope quoted a plaintiff antitrust lawyer who urged the committee not to make the change as follows:

In an antitrust context, if we were going about monopolizing oranges and we wanted to ask a question about grapefruits, it would not relate to the claim or defense, but it could relate to *the subject matter of how do you conduct your business*, what kind of contracts, agreements and restrictive practices do you engage in.¹⁶¹

This sort of argument from the plaintiff side can lend credence to the case for change by overstating the status quo or implicitly supporting the conclusion that the current standard actually provides no limit on discovery.

Another benefit of the hearing process is that it provides an advance sampler of the sorts of arguments lawyers are likely to make in court about what the rule changes mean that demonstrates that clarifications are

161. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 564 (2001).

necessary to make clear that the change is not intended to have that effect. Again invoking the discovery experience, a good illustration is provided by repeated statements about an asserted connection between the judicial authority to expand discovery to the “subject matter” limit and the proposed explicit authority to condition discovery on payment of costs in instances where the discovery exceeds the proportionality limitations of Rule 26(b)(2). Many lawyers, from both the defense and plaintiff sides, said that these changes were to work in tandem, and that judges who expanded discovery should routinely shift the costs of the expanded discovery to the party seeking it. But the two amendments were not thought to be linked; indeed, the good cause needed to justify broader discovery would seem in most instances to negate any objection on proportionality grounds. As a consequence, Committee Note language was drafted to negate this interpretation.¹⁶²

Public comment can also provide highly useful insight into experience under regimes like those proposed by the amendments. For example, another change included in the discovery amendments proposed in 1998 was limiting the duration of depositions to “one day of seven hours.” The Committee’s third hearing was in Chicago, and Illinois state courts have for some years had a three-hour limitation for depositions. It was striking that many lawyers who had lived under this rule were satisfied with it. Even some who had openly opposed the rule when it was proposed told the Committee that it worked.¹⁶³

Despite considerable, sometimes voluble, opposition during public hearings, controversial rule changes have recently gone forward and been adopted. Thus, although cringing before the threat to “take it to Congress” might show that the crisis in rulemaking has come home to roost, the recent reality of public comment has not had that flavor. Neither has it resembled a graduate seminar. But it has probably come a good deal closer to a seminar than many hearings in Congress, and adds an important dimension to responsible rulemaking.

162. See Agenda Item III-A, Meeting of Advisory Committee on Civil Rules, April 19-20, 1999, at 38-40. Ultimately, the Judicial Conference did not recommend adoption of the cost-bearing provision, so this Note language was dropped because the rule change was dropped.

163. See, e.g., testimony of Daniel Fermeiler, Trans. of Jan. 19, 1999, public hearing at 188-93 (reporting that he was president of the defense bar when the Illinois rule was proposed, and that he spoke against the change at that time, but now that he has lived under the rule, he can report that it works).

9. *Third Branch Grass-Roots Reaction*

A specialized aspect of commentary on rule changes is grass-roots judicial reaction. Like other interested parties, some judges may have strong views on issues considered in rulemaking. Unlike others, they are in a particularly effective position to be heard because approval by the Judicial Conference is one step in the rule amendment process. District judges constitute nearly half the members of that body.¹⁶⁴

Judges understandably care deeply about rule changes that directly affect their daily activities. At times, they vehemently assert their right to do things their own way.¹⁶⁵ There is some reason for concern about the impact of judicial resistance to rule change. Consider Judge Higginbotham's description of the effort to increase the size of juries:

Our Rules Committee tried desperately to get back to the 12-person juries, the Advisory Committee adopted it, the Standing Committee adopted it, but the Judicial Conference opposed it, because the district judges didn't want to lose the authority to themselves decide whether it would be six or 12.¹⁶⁶

Experiences like this understandably prompt caution among rulemakers, and may justify Professor Yeazell's reaction that "[t]his is not the way to make procedural rules."¹⁶⁷ But widespread opposition among district judges does not necessarily spell doom for proposed changes. Consider the abolition of opt-outs regarding initial disclosure. According to comments, a significant proportion of all district judges went on record opposing the change, but it was nonetheless adopted.

IV. IS REFORM POSSIBLE THROUGH CONTEMPORARY RULEMAKING?

Perhaps the foregoing catalogue of issues raised in current rulemaking will persuade some that it is a toothless remnant of the vital rulemaking

164. 28 U.S.C. § 331 (2002) provides that the chief judge of each circuit is a member of the Judicial Conference, as is the Chief Judge of the Court of International Trade, and that a district judge from each circuit shall be a member of the Judicial Conference, also. Because the Chief Judge of the Court of International Trade is a member of the Judicial Conference, district judges constitute a minority of that body. The Chief Justice presides at the meetings of the Judicial Conference and could by voting on matters pending before the Conference further dilute the voting power of the district judge members if they all agree about a matter before the Conference.

165. See *supra* text accompanying notes 86-89 (comments on abolition of opt-outs for initial disclosure).

166. Am. Law Inst., Remarks and Addresses, 78th Annual Meeting 29 (2001).

167. Yeazell, *supra* note 6, at 234 (discussing the fate of the twelve-person jury).

process that existed during the Golden Age. An important starting point in making such a determination is to decide what really matters. A recurrent feature of the public hearing process is the bombastic prediction that a change will have cataclysmic significance. A member of the Standing Committee, for example, asserted that the Rule 26(b)(1) change in the scope of discovery was “the most radical change in the civil rules in 60 years,”¹⁶⁸ and an academic commentator predicted that the scope change was “likely to be an inefficient disaster.”¹⁶⁹ Similar assertions abounded in the public commentary process.

Frankly, the scope change was a modest one, and the new scope of discovery is extremely broad by the measure of any other country.¹⁷⁰ Indeed, one might even argue that the change was not a good idea because it was so modest. Of course, it is difficult to determine what effect such a change has on activity that is quite difficult to monitor. But it is interesting to report the early returns found by Professor Rowe, who as a member of the Advisory Committee was one of the strongest opponents of the rule change. Investigating the actual effect of the amendment in reported cases, he found that in almost all of the cases the outcomes were the same under either version.¹⁷¹ Based on these early returns, he concluded that “it does not appear that the sky has fallen or that it will probably do so,” and that this amendment did not create a “growth industry” as did the amendment of Rule 11 in 1983.¹⁷² Already, some courts under the new rule are saying that “[t]he scope of discovery under the Federal Rules of Civil procedure is well-established.”¹⁷³ So this change illustrates the phenomenon of overstatement and not the power of rule change.

In my opinion, the truly important change to the rules in 2000 was the abolition of the opt-out provisions because it took a substantial step toward restoring the national uniformity of procedure under the rules. Admittedly, that was a kind of a negative accomplishment because it removed the authorization to deviate that was introduced in the 1993 amendments, something of a self-inflicted wound that is explained by the peculiar

168. These comments are quoted in Marcus, *infra* note 170, at 183 n.168.

169. Stempel, *supra* note 161, at 531.

170. See generally Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153 (1999) (arguing that the pending discovery changes in the United States would not significantly move it toward the attitude of the rest of the world on the proper scope and intensity of discovery, and that American discovery would still seem anathema to the rest of the world).

171. See Rowe, *supra* note 141.

172. *Id.* at 22, 33.

173. *Lovato v. Burlington N. & Santa Fe Ry. Co.*, 200 F.R.D. 448, 449 (D. Colo. 2001).

circumstances of the 1991-1993 period.

In 1993, of course, the major trauma in rulemaking was about initial disclosure. Like the 2000 scope change, it was an idea that some asserted was revolutionary: a replacement for discovery and a rejection of a major plank of the revolution of 1938.¹⁷⁴ Perhaps it was favored by some with remarkably zealous views about drawbacks of adversary discovery, but it was ultimately a rather modest change that most lawyers and judges who used it came to favor fairly quickly.¹⁷⁵ The big change that year, in my view, was the addition of Rule 26(a)(2) with its comprehensive requirements for disclosures about testifying experts. This change was significant in part due to case law developments fortifying the judge's role as gatekeeper of expert testimony.¹⁷⁶ It should not be surprising that it has generated a large number of decisions about the adequacy of disclosures and the consequences of failure to make adequate disclosure.¹⁷⁷ And yet it slipped through with hardly a mention during the tumult about initial disclosure.

The level of commotion about a rule change is therefore a poor barometer of the actual importance of the change. Indeed, essentially the same change can produce a moderate firestorm one time and no reaction another. In 1978, for example, a proposed amendment to Rule 5(d) was published that would have eliminated filing of certain discovery materials.¹⁷⁸ This proposal provoked opposition,¹⁷⁹ and eventually a more modest amendment was substituted, authorizing orders relieving parties from filing discovery materials in specific cases. Even this limited change prompted adverse comment. The *New York Times* denounced it in an editorial,¹⁸⁰ and prominent members of Congress wrote expressing their uneasiness about it.¹⁸¹

174. Consider the views of one district judge (perhaps sympathetic to the idea) as the controversy was swirling: "Some observers of civil litigation believe that discovery rights will be taken from lawyers within the next decade or two, to be replaced by a system of standard disclosures." *Wauchop v. Domino's Pizza, Inc.*, 143 F.R.D. 199, 200 (N.D. Ind. 1992).

175. See *supra* note 110-14 and accompanying text.

176. See *supra* notes 135-38 and accompanying text.

177. See 8 Fed. Prac. & Pro. § 2031.1 (Supp. 2002) for descriptions of many of these cases.

178. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622 (1978) (directing that discovery materials not be filed until used in the proceeding).

179. *E.g.*, Report of the Ad Hoc Committee to Study the High Cost of Litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit, 86 F.R.D. 267, 284-85 (1979) (opposing elimination of the requirement that discovery materials be filed).

180. See *Paper Justice*, N.Y. TIMES, July 22, 1980, at A18 (asserting that the amendment would give judges "the power to prevent public access to a huge number of documents that now belong in the record").

181. Senator Edward Kennedy, Chairman of the Senate Judiciary Committee, wrote to the Director of the Administrative Office of the U.S. Courts expressing the Committee's concern "about the possible harm which could result to interested parties and the general public from improper

In 2000, Rule 5(d) was amended to do exactly what the initial 1978 proposal sought to do, and there was essentially no reaction at all. In part, this silence in 1999-2000 may have been due to the reality that most district courts had already adopted such provisions by local rule, but the contrast is nonetheless rather striking, the more so in comparison to the controversy that swirled around a 1995 proposal to amend Rule 26(c) regarding protective orders. Already, courts are citing the 2000 change to Rule 5(d) as weakening arguments for nonparty access to discovery materials.¹⁸²

How then to assess the potential and effect of rulemaking as a source of real reform? Perhaps a helpful start comes from returning to the three perspectives suggested at the outset. Considering first Professor Friedenthal's hope that the Golden Age could be restored by renewed involvement of the Supreme Court, it seems clear that has not occurred. Whether it could ever have restored the top-down apparatus that seemed to explain the great success of rulemaking as a device for reform during the Golden Age, the Court has kept its distance, most remarkably in 1993.¹⁸³

Indeed, it may be that the ability of rulemakers to dictate aggressive reform during the Golden Age was a consequence of unusual features of the time, perhaps features linked to the New Deal.¹⁸⁴ The model of a group of experts, largely insulated from external and "political" pressures, has not been the norm for American policymaking across a variety of topics. Perhaps it draws more closely on the political experience of other nations. Compare the recent reforms of procedure in England, which were produced somewhat

implementation of amended Rule 5(d)," and asking for a report back after a year on the actual experience. See Letter from Sen. Edward Kennedy to William Foley, Director, Administrative Office of the U.S. Courts, July 29, 1980 (on file with author). Mr. Foley responded, reassuring Senator Kennedy that nonfiling orders should be entered "only when the court has determined that it is unlikely that the proceeding will be of interest to the general public." Letter from William Foley to Sen. Edward Kennedy, Aug. 26, 1980 (on file with author).

Representative Robert Drinan, Chairman of the Subcommittee on Criminal Justice of the House Judiciary Committee, wrote to the Deputy Director of the Administrative Office to convey his concerns about the amendment to Rule 5(d). See Letter from Rep. Robert Drinan to Joseph Spaniol, Deputy Director, Administrative Office of the U.S. Courts, June 24, 1980 (on file with author).

182. Thus, the Second Circuit rejected arguments based on one of its earlier cases because that earlier case "relied upon Federal Rule of Civil Procedure 5(d) to find a statutory right of access to discovery materials, [and] the recent amendment to this rule provides no presumption . . . let alone public access to them. Indeed, the rule now *prohibits* the filing of certain discovery materials unless they are used in the proceeding or the court orders filing." *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 233 n.11 (2d Cir. 2001) (emphasis in original).

183. Thus, Chief Justice Rehnquist was notably standoffish when he transmitted the 1993 change: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." Letter of Transmittal, William H. Rehnquist to Speaker of the House of Representatives, April 22, 1993, 146 F.R.D. 403 (1993).

184. Cf. Walker, *supra* note 56.

singlehandedly as a result of the careful study of Lord Woolf,¹⁸⁵ who seems to aspire to the sort of breakthrough said to have typified our Golden Age of Rulemaking.¹⁸⁶ Although cross-cultural comparisons and generalizations about other legal systems are hazardous, there does seem to be some reason to think that procedural reform on the Continent is the preserve of somewhat more sheltered academics even though it ends up in legislation. Perhaps this flows from a different orientation toward the legal system on the Continent, which we are told is more dominated by law professors.¹⁸⁷ In any event, in contrast to the profusion of writing in this country on the process of rulemaking, there is little—at least in English—on the comparative effort in the Continent, so that further examination of this comparison must await further work.

Turning to Professor Leubsdorf's ruminations about the myth of procedural reform, one could find some confirmation of this thesis. Certainly, the significance of the recent procedural changes is far eclipsed by the ballyhoo accompanying them and often contradicts the loud forebodings. Initial disclosure did not supplant formal discovery, cause a revolution, or undermine the adversary system. The CJRA did not produce a "revolutionary redistribution of the procedural rulemaking power,"¹⁸⁸ although it contributed to fortifying trends toward local autonomy that have been somewhat countermanded by the 2000 amendments. The modest recalibration of the scope of discovery in 2000 has not produced major effects and is not likely to do so.

The changes that are significant are hardly earth-shaking. Expert disclosure is an important feature of lawyers' lives, but substantial discovery regarding experts was generally done before 1993. The initial conference of counsel introduced in Rule 26(f) in 1993 and made nationally required in

185. See ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996).

186. Thus, Professor Jolowicz reports that Lord Woolf said in a speech that the former procedure of the English courts would be of "historic interest" only once the new one was up and running, and that old precedents would "mislead rather than inform on the new position." J.A. JOLOWICZ, ON CIVIL PROCEDURE ix (2000). Professor Jolowicz doubts, however, that Lord Woolf was serious, noting that "[e]ven the French Revolution could not produce a truly radical civil code." *Id.*

187. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 65 (1969) ("In civil law jurisdictions, the way legal scholars look at the law is the way everyone looks at it."). This orientation may result in part from a less pragmatic system of legal education, which focuses more on legal abstractions. See Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 264 (1992) (suggesting that American class actions are incomprehensible to Continental lawyers because Continental lawyers "focus [on] what exists in the codes and not the problems which exist in society").

188. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992).

2000 is reportedly often a useful organizing device but not an earth-shaking addition to the judicial management activities that flowed in the wake of the 1983 amendments to Rule 16(b), which were themselves building on judicial activity that occurred without the prodding of a national rule.

So by and large Professor Leubsdorf's myth seems to be borne out. Perhaps the contrast of the Private Securities Litigation Reform Act (PSLRA)¹⁸⁹ experience underscores the point and suggests that if "real" reform is sought today, it must come from Congress. This is not the place, and I am not the person, to provide a judgment on whether that statute produced real reform.¹⁹⁰ Certainly, the amount of attention that legislation has received indicates that it has had important effects. Whether it produced the effects desired is less clear. *The Economist* recently published a chart, for example, indicating that the number of securities fraud class actions quadrupled during the period from 1996 through 2000.¹⁹¹ Congress itself seemed to recognize that the original legislation did not achieve its full effects when it passed further legislation in 1998.

In a significant respect, this development casts an ironic light on some recent scholarship endorsing substance-specific procedure.¹⁹² It seems that the notion underlying this argument for departing from the transsubstantive ideal was partly that judicial interference through procedure had hobbled the enforcement of substantive law adopted by Congress. Perhaps the 1991 Civil Rights Act was an example of legislative efforts that serve this sort of purpose; revision of procedural means could be included in the mix even if that involves undercutting the rulemakers.¹⁹³ The PSLRA, ironically, seems

189. Private Securities Litigation Reform Act of 1995, Pub. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.).

190. Others have tried to assess the impact of the Act. *See, e.g.*, Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. (forthcoming) (surveying effectiveness of Act based on database of 1449 class actions filed between 1996 and 2001, and concluding that the legislation did not work as intended because the rate of filing of class actions continued as before, although there is evidence that overall case quality has improved); Joseph Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity I Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002) (examining the ambiguities of the PSLRA rules on pleading in view of lower court interpretations).

191. *See Face Value: In a Class of His Own*, THE ECONOMIST, Jan. 17, 2002, at 56. The cause for this increase in filings seems to be external to the litigation system. Thus, Jonathan D. Glater, *Recomputing Earnings With Lawbook and Eraser*, N.Y. TIMES, July 2, 2002, at C8, also offers a chart showing considerable growth in securities class actions filings but explains that this increase corresponds with a big increase in restatement of corporate earnings.

192. *See, e.g.*, Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801, 813 (1992) ("Congress should amend certain federal rules of civil procedure, making the rules more responsive to the needs of civil rights plaintiffs.").

193. But it is worth noting that aspects of the Civil Rights Act of 1991 may have backfired. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (holding that changes in discrimination

to represent an effort by Congress to change procedure to restrict enforcement activity that had developed in the courts. It surely shows that Congress may tinker with procedural rules otherwise governed by the rulemakers in order to have the desired effect on substantive enforcement. But it also demonstrates that Professor Carrington was right to emphasize the dangers of substance-specific procedure, for that sharpens the involvement of those able to influence the political branches to obtain the desired procedures for “their” cases.¹⁹⁴

Yet the PSLRA surely has, for good or ill, had some considerable effects. As one court recently noted, its lead counsel provisions created “significant federal rights that previously did not exist.”¹⁹⁵ Whether or not those are the sort of rights that the rulemaking process can properly create,¹⁹⁶ it is hard to cite a similar breakthrough due to rulemaking in recent decades. Perhaps Rule 11 would come closest,¹⁹⁷ and the Rule 11 experience is not necessarily one that the rulemakers will want to repeat soon.

But as Leubsdorf himself notes, procedural breakthroughs are rare events and meaningful reform need not depend on changes of that magnitude. Because rulemaking has produced some noteworthy changes recently, it seems capable of further changes of that dimension, albeit not of the dimensions accomplished during the Golden Age. Those breakthroughs, indeed, may be off limits because they have been absorbed into the American litigation psyche. As Professor Hazard has recently argued, broad party-controlled discovery has achieved almost constitutional stature in this

law effected by the Act precluded certification of a plaintiff class in an employment discrimination action); Lesley Frieden Wolf, Note, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1849 (2000) (describing challenges to class certification under new Act, and noting that “[u]nintentionally, Congress may have created an insurmountable barrier for plaintiffs seeking class certification for discrimination claims”).

194. See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989) (cautioning about likely effects of confining procedural change to specific substantive areas because that would prompt efforts by those affected to influence content of revised procedures).

195. *In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001) (upholding injunction against state court proceedings in order to give effect to this right).

196. *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 402 (1980), says that, for purposes of the personal stake requirement to avoid mootness, a “procedural claim, such as the right to represent a class,” remains even after the substantive claim has expired. One might liken this to the lead plaintiff rights created by the PSLRA.

197. Justice Kennedy argued in *Bus. Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991) that the rule “creates a new tort of ‘negligent prosecution’ or ‘accidental abuse of process.’” *Id.* at 567 (Kennedy, J. dissenting). The majority, however, found the rule within the rulemaking power because it was reasonably necessary to the integrity of the federal court system so that any “incidental” effect on substantive rights did not matter to its validity.

country.¹⁹⁸ As a consequence, modifications of the discovery regime do not question the fundamental commitment to providing the parties latitude in evidence development that has no parallel in the rest of the world.¹⁹⁹ Perhaps similarly, it has been suggested that the 1966 adoption of expanded class action provisions so altered American litigation that it cannot now be taken back by rulemaking.²⁰⁰

On balance, then, it may be that Professor Kagan's more general analysis is most pertinent to assessing the ongoing capacity of the rulemakers to accomplish reform. That analysis emphasizes the diffusion of authority that traditionally has characterized governmental activity, and the tendency of American adversarial legalism, to rely on rights-based presentations by contending interests. In addition, it emphasizes the diffusion of governmental power, particularly to local courts.

Together, these forces have produced the sorts of impediments to action that seem to characterize difficulties with using rulemaking to accomplish aggressive reform. Consider Kagan's description of the distinctive American approach to developing regulatory regimes:

Many governments seek to manage the political struggle over regulatory standards by entrusting regulatory decisions to technocratic bureaucracies, largely shielded from political and legal interference. . . . The United States, in contrast, strives to subject the political struggle over regulatory policy to the constraints of legal rationality, which gives both regulated businesses and proregulation advocacy groups yet another set of weapons to foil regulatory decisions that they may dislike.

The U.S. administrative process for making regulatory policy, accordingly, is distinctive in its legal formality, its openness to interest group participation, its adversarial quality, and its subjection to judicial review. American statutes and court decisions insist on publication of draft regulations, followed by open hearings in which

198. See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1694 (1998) ("Broad discovery is thus not a mere procedural rule. Rather it has become, at least for our era, a procedural institution perhaps of virtually constitutional foundation.").

199. See generally Marcus, *supra* note 170.

200. See Mullinex, *supra* note 55, at 836 n.210 (reporting that Paul Carrington, then Reporter of the Civil Rules Advisory Committee, "suggested that the 1966 amendments to rule 23 now would probably be impossible to revise through the Advisory Committee processes because of the perceived political implications of such a rule revision").

advocacy groups, business organizations, and other interests may present their critiques and demands.²⁰¹

Surely the Golden Age of procedural rulemaking did not look that way, while in the current era rulemaking has such features. That may be the “crisis” of rulemaking. But the current era has also seen a major upsurge in American adversarial legalism.²⁰² It would perhaps be odd were procedural rulemaking spared from the pervasive American orientation toward this sort of activity. From this perspective, one might say that the Golden Age of rulemaking was really out of step with general American legal traditions, and that its eclipse in recent decades is entirely in keeping with the more general upsurge of adversarial legalism during that period. Certainly many features of contemporary rulemaking resemble the aspects of American government that Professor Kagan describes, such as the recurrent paralysis of attempts to achieve change, the receptivity of the governmental structure to bombastic challenge, the ability of local actors to defy the central authority, and the overall resistance to granting power to, or perhaps even reposing trust in, experts who are entirely free of political influence.

If that analysis is correct, the current trends and future prospects for rulemaking seem to be in keeping with much broader currents in American society. One might even say that the mid-century freedom of the giants who framed the original Civil Rules to impose a new order on American procedure was the exception that needs explanation, not the return to more familiar circumstances of politically contested stasis.

CONCLUSION

There is much to be said in favor of a regime that confers procedural rulemaking authority on a band of experts who can carry out dramatic reform when that is warranted.²⁰³ Perhaps that is what those who want to convene a

201. Kagan, *supra* note 31, at 188.

202. See *supra* text accompanying note 43.

203. Indeed, a recent article urges that the rulemaking model is so good that it should be employed to develop a comprehensive set of canons of statutory interpretation:

Statutory interpretation is, in many ways, a field like civil procedure, or criminal procedure, or evidence. Like evidence and procedure, statutory interpretation was an area of judicial expertise. And like evidence and procedure, statutory interpretation was long assumed the exclusive province of the judiciary. On the other hand, all three fields demand, above all, internally coherent and consistent codes. These are notoriously hard for judges to develop case by case, and after years of effort, the results have been unsatisfactory.

In the fields of evidence and procedure, an innovative solution has been discovered: the federal rulemaking process. This process combines the expertise of the courts with the democratic legitimacy of Congress. It has harnessed the strengths of both branches and led, through

commission to hammer out a new consensus²⁰⁴ hope would emerge. But in the American tradition, that new consensus, even if concocted, is not likely to last. So those who thought that the midcentury success of top-down reform would persist were likely to be disappointed.²⁰⁵ Even science, we are told, confronts the risk of succumbing to a process of politicization. Because science is frequently invoked in political debates—often about the environment—the impartiality of scientific research may be threatened. At least one leading scientist has recently warned that “[p]oliticization of science has always been, and always will be, integral to political advocacy.”²⁰⁶ “Science is becoming yet another playing field for power politics, complete with the trappings of media spin and a win-at-all-costs attitude. . . . There is little sense in yearning for a bygone era when science was construed as ‘value-free.’”²⁰⁷

In this climate, some surely have aspirations for rulemaking that outstrip its capacity to deliver. One professor, for example, believes the Golden Age produced “the open courts and access to justice that was Twentieth Century law’s greatest achievement.”²⁰⁸ Anyone who expects rulemaking to produce breakthroughs of this magnitude in the new century is going to be disappointed unless a dramatic change occurs. Whether this constitutes a crisis can at least be debated. At the same time, the forecasts of doom seem too dire. Rulemaking no longer operates with the elan that prevailed during the Golden Age. I share Judge Winter’s frustration that “even amendments best characterized as trivial or incremental may encounter enormous resistance.”²⁰⁹ But rulemaking has not been entirely hobbled. And the difficulties that now attend even modest changes do not necessarily show that

collaboration, to the creation of coherent, unified codes: Federal Rules of Evidence and Procedure. These successes should be replicated, in Federal Rules of Statutory Interpretation.

Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088-89 (2002).

204. See *supra* text accompanying notes 69-70.

205. As Professor Subrin has noted, the 1930s experience is unlikely to be repeated:

I believe it was Professor Hazard who pointed out to me many years ago that the legal profession has become so decentralized and diverse that it is unlikely in the extreme that a relatively small group of lawyers, many of whom knew each other in advance, could sit in a room and create an entirely new procedure for the entire country as was the case in the 1930s.

Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 84 (1997).

206. Roger A. Pielke, Jr., *Policy, Politics and Perspective: The Scientific Community Must Distinguish Analysis from Advocacy*, 416 NATURE 367, 367 (2002).

207. *Id.* at 368.

208. Stempel, *supra* note 161, at 637.

209. Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 263 (1992).

there is a crisis so much as that the conditions of American adversarial legalism that pervade legal institutions in our society affect the rulemakers as well. Maybe rulemakers *should* largely be preoccupied with the sorts of concerns that are enumerated above.²¹⁰ In any event, it seems likely that, in the future, they *will* focus largely on such concerns, and that major breakthroughs are accordingly unlikely to result from rulemaking. Nonetheless, the Republic—and the courts—will probably survive.

210. See Part III.