

# POLITICS AND CIVIL PROCEDURE RULEMAKING

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I was surprised in 1985 to get a call from Chief Justice Burger offering me an appointment as Reporter to the Advisory Committee on the Civil Rules. I probably owed that call to the influence of Maurice Rosenberg, my sometime co-conspirator in law reform and sometime co-author.<sup>1</sup> Professor Rosenberg had a tendency to overrate my modest skill as a politician. He was at the time an academic member of the Civil Rules Advisory Committee and was surely consulted by the Chief Justice in the selection of a new Reporter. The Chief was probably looking for political talent to help address the rising political stress on procedural rulemaking that had become a serious concern beginning in the 1970s.<sup>2</sup> That stress would continue through my tenure and beyond, to become the crisis that rulemaking now faces in 2010.

## ANTECEDENT EVENTS

One cause for rising political concern radiating through the federal judiciary in 1985 was the very substantial increase in the

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<sup>1</sup> Professor Rosenberg was the chair of the Advisory Council on Appellate Justice, 1970-75 (funded by the Federal Judicial Center and Law Enforcement Assistance Administration) of which I was a member. My salute to his memory is *Maurice Rosenberg*, 95 COLUM. L. REV. 1901 (1995).

<sup>2</sup> See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

federal caseload over the preceding two decades.<sup>3</sup> There were numerous causes of that increase.<sup>4</sup> Most consequential was the growth of the criminal docket resulting from numerous extensions of federal criminal law,<sup>5</sup> especially in the then newly proclaimed War on Drugs,<sup>6</sup> and from the enhancement of the procedural rights of the accused, most notably the advent of the right to counsel.<sup>7</sup> The increases in the criminal docket were transformative,<sup>8</sup> but in addition there were very substantial increases in the number of civil actions filed by citizens seeking enforcement of civil rights or civil liberties, especially by prisoners attacking their convictions or invoking newly established rights of citizens in prison.<sup>9</sup> There were notable increases in employment discrimination cases,<sup>10</sup> and in assertions of new rights by consumers, and by those seeking to enforce complex

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<sup>3</sup> The number of civil cases pending in district courts in 1965 was 74, 395. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 88 (1965). The comparable number in 1985 was 254, 114. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 276 (1985).

<sup>4</sup> For contemporaneous accounts of the many sources of the caseload increase, see RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM 59-95* (1985); Wolf Heydebrand & Carroll Seron, *The Rising Demand for Court Services: A Structural Explanation on the Caseload of United States District Courts*, 11 JUST. SYS. J. 303 (1986).

<sup>5</sup> There were 31,569 criminal cases pending in 1965. 1965 Report, note 3, at 88.. There were 38,245 pending criminal cases in 1985. 1985 Report, note 3, at 336.

<sup>6</sup> The literature on this war is abundant. Attentive to its impact on the courts is JAMES P. GREY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT* (2001). An account of the domestic politics is ANDREW B. WHITFORD, *PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS* (2009).

<sup>7</sup> See *THE RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* (Sheldon Krantz ed., 1976).

<sup>8</sup> I have elsewhere mourned the loss of the right to transparency and procedural rights in criminal proceedings. See Paul D. Carrington, *Criminal Appeals: A Twentieth Century Perspective*, 93 MARQUETTE L. REV. \*\* (forthcoming 2010).

<sup>9</sup> See DAVID RUDOVSKY, *THE RIGHTS OF PRISONERS: THE BASIC ACLU GUIDE TO A PRISONER'S RIGHTS* (1983).

<sup>10</sup> See MACK A. PLAYER, *FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL* (2009).

environmental laws.<sup>11</sup> Extensions by highest state courts of their states' tort law to deter needless risk-taking by manufacturers and other business firms<sup>12</sup> may also have contributed additional tort claims brought to federal courts by parties invoking the diversity jurisdiction. And there were perhaps more contract disputes between business firms engaged in interstate or international commerce.

The caseloads in state and federal courts may also have been magnified somewhat by the Supreme Court's 1978 decision establishing the right of lawyers to advertise their services to encourage citizens to invoke their rights at the democratic courthouse.<sup>13</sup> And the relative cost of discovery in some big commercial cases was perhaps being elevated in the 1980s by the advent of electronic information storage.<sup>14</sup>

Most of these docket developments were visibly linked to political developments labeled by President Lyndon Johnson as the search for the Great Society,<sup>15</sup> a search that might have been better and more moderately labeled a search for a Middle Class Society. Great Society politics was a continuation of the politics of the Progressives of the early 20<sup>th</sup> century and of the Roosevelt New Deal that had long aimed to increase and enforce the rights of citizens by

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<sup>11</sup> See ENVIRONMENTAL LITIGATION: LAW AND STRATEGY (Cary R. Perlman ed., 2009).

<sup>12</sup> Instrumental in extensions of tort law were WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, first published in 1941 and published opinions of the California Chief Justice Roger Traynor. BEN FIELD, ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR (2003).

<sup>13</sup> Geoffrey Hazard, *Advertising and Intermediaries in Provision of Legal Services: Bates in Retrospect and Prospect*, 37 ARIZ. ST. L. J. 307 (2005). See generally RODNEY A. SMOLLA, LAW OF LAWYER ADVERTISING (2006).

<sup>14</sup> Martin h. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L. J. 561 (2001).

<sup>15</sup> See THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM (Sidney M. Milkes & Jerome N. Mileur eds., 2005).

providing equal protection to all.<sup>16</sup> Such politics were at least in part a continuing reaction against the anarchism and Marxism that evolved from the industrial development of the late 19<sup>th</sup> century to flourish on the domestic scene during the economic crisis of the 1930s.<sup>17</sup> And they generally had the support of a vibrant labor movement.

The relation of this “Great Society” politics to the civil caseload of federal courts was not entirely coincidental to the vision of civil procedure embodied in the 1934 Rules Enabling Act.<sup>18</sup> The shared aim of that reform, first vigorously advanced in the United States at the federal level by the Progressives of the early years of the 20<sup>th</sup> century, was to enforce all the legal rights of citizens, whether derived from legislation or state or federal constitutions.<sup>19</sup> The Progressives, in turn, drew their ideas from thoughts being expressed throughout the 19<sup>th</sup> century.<sup>20</sup> In the 20<sup>th</sup> century, their ambitions gained the vigorous support of the newly well-organized legal profession.

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<sup>16</sup> See WILL MORRISEY, *THE DILEMMA OF PROGRESSIVISM: HOW ROOSEVELT, TAFT, AND WILSON RESHAPED THE AMERICAN REGIME OF SELF-GOVERNMENT* (2009); MAUREEN A. FLANAGAN, *AMERICA REFORMED: PROGRESSIVES AND PROGRESSIVISMS, 1890-1920* (2007); MAXWELL BLOOMFIELD, *PEACEFUL REVOLUTION: CONSTITUTIONAL CHANGE AND AMERICAN CULTURE FROM PROGRESIVISM TO THE NEW DEAL* (2000).

<sup>17</sup> See PAUL AVRICH, *ANARCHIST VOICES: AN ORAL HISTORY OF ANARCHISM IN AMERICA* (1996); *COMMUNISM IN AMERICA: A HISTORY IN DOCUMENTS* (Albert Fried ed. 1997); ALONZO VAN DEUSEN, *RATIONAL COMMUNISM: THE PRESENT AND FUTURE REPUBLIC OF NORTH AMERICA* (1885).

<sup>18</sup> Act of June 19, 1934, 42 Stat. 1064, 28 U.S.C. §2072.

<sup>19</sup> To trace the evolution of the politics of 20<sup>th</sup> century law reform, see generally JUSTICE: A READER (Michael; J. Sandel ed., 2007); PATRICK HAYDEN, *THE PHILOSOPHY OF HUMAN RIGHTS* (2001); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994); RICHARD MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* (1952). On the relation to the Rules Enabling Act, See Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: I The Background*, 44 YALE L. J. 387 (1935); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL PROCESS AND THE POLITICS OF THE FEDERAL COURTS IN THE TWENTIETH CENTURY 28-33* (2000).

<sup>20</sup> See J. Newton Fiero, *Report of the Committee on Uniformity of Procedure and Comparative Law*, 19 REP. A.B.A. 411, 436-438 (1896).

The American idea of engaging judges in the crafting of “transsubstantive” procedural law had a 19<sup>th</sup> century English origin.<sup>21</sup> In the 20<sup>th</sup> century, it became a major cause for the American Bar Association and it secured the Rules Enabling Act of 1934.<sup>22</sup> The aims of those who wrote the 1934 statute creating such an advisory body<sup>23</sup> and the members of the Advisory Committee served by Charles Clark that wrote the 1938 Federal Rules of Civil Procedure,<sup>24</sup> were expressed in Rule 1: “to secure the just, speedy, and inexpensive determination of every action,”<sup>25</sup>. They were, at last, to facilitate the assertion of civil claims and assure that meritorious claims based on discoverable facts are promptly recognized and enforced.

The 1938 Rules were the product of a committee of eminent lawyers led by an Attorney General of the United States and served by Charles Clark of the Yale Law School. Their product was the outcome of group work aided by public comment enabling the group to see the diverse ramifications of proposed texts. The virtues of this political process were several: transparency, disinterest, access to advice and empirical data, and a measure of accountability to all three branches of government.<sup>26</sup> These merits have been twice in recent

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<sup>21</sup> See generally SAMUEL ROSENBAUM, *THE RULEMAKING AUTHORITY OF THE ENGLISH SUPREME COURT* (1917).

<sup>22</sup> See Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 Mich. L. Rev. 6 (1959). Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987).

<sup>23</sup> Act of June 19, 1934, ch. 651, 48 Stat. 1064.

<sup>24</sup> A brief but illuminating account of the beginnings is CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 426-432 (5<sup>th</sup> ed. 1994).

<sup>25</sup> F.R.Civ. P. 1.

<sup>26</sup> See Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process*, 49 OHIO ST. L. J. 95, 187-188 (1988).

times explicitly acknowledged by the Supreme Court,<sup>27</sup> but seem, at least at times,<sup>28</sup> to have been overlooked by the present Justices.

To the extent that the aims of the Progressive reformers were achieved, private citizens were enabled to enforce many diverse laws enacted or proclaimed to protect public interests as well as their own. In recognition of that reality, the United States was by the 1960s moving away from the New Deal reliance on administrative agencies to protect the public interest from harms caused by risky business practices.<sup>29</sup> Related to this evolution was growing awareness that agencies of governments assigned to protect the public from harms caused by the indifference or greed of business interests have a tendency, over time, to be captured by the very interests they were organized to regulate.<sup>30</sup> Citizens represented by their own private lawyers are generally less vulnerable to such capture than are public officials. It is also a feature of this sometimes costly scheme of business regulation that it is imposed *ex post*. Business decision makers without administrative oversight are freer to take risks in search of profits but are more exposed to adverse consequences than if they are regulated *ex ante* by public officers. In a nation that eschews government, this form of business regulation may be indispensable.

For these reasons and perhaps others,<sup>31</sup> civil litigation conducted pursuant to the Civil Rules as envisioned in the 1930s was

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<sup>27</sup> See, e.g. *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 507 U.S. 163, 168 (1993); *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998).

<sup>28</sup> See text *infra* at notes 184-217.

<sup>29</sup> A definitive essay is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). I have made this point more elaborately in Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929, 933-44 (1996).

<sup>30</sup> See JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT, S. REP. NO. 26, 86TH CONG., 2D SESS. (1960). Cf. *Swierkowitz v. Sorema N.A.*, 534 U.S. 506 (2002)

<sup>31</sup> Others may attribute the development to the influence of “rent-seeking” lawyers, issue group interests, budget constraints, or party politics. See Sean Farhang,

embraced by states as well as the federal government,<sup>32</sup> and had by the 1960s become an often-preferred form of regulating business in the public interest. This sense of public purpose led the Judicial Conference to propose and secure the creation of the Federal Judicial Center in 1967<sup>33</sup> in the hope that the data it might gather would inform rulemakers and thus improve procedural rules to make them more efficient instruments for the enforcement of public laws as well as citizens' legal rights, and thus to achieve "behavior modification" making our social order more just.<sup>34</sup>

A countervailing political force inevitably arose to resist this form of privatized business regulation. That force is sometimes led by lawyers whose careers are invested in representing business interests.<sup>35</sup> Champions of that cause would acquire substantial control of the federal government in the election of 1980.<sup>36</sup> "Deregulation" became a battle cry frequently heard from "business interests" such as those represented by the United States Chamber of Commerce.<sup>37</sup> One

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*Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 826-828 (2008).

<sup>32</sup> See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems in Civil Procedure*, 61 WASH. L. REV. 1367 (1986); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts* 3 NEV. L. J. 354 (2003).

<sup>33</sup> 28 U.S.C. §§620-629. A history of the Center is provided by Denise L. Arial, *History of the Federal Judiciary: The Federal Judicial Center*. <http://air.fjc.gov/history>.

<sup>34</sup> Kenneth Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 837 (1975); Owen Fiss, *The Social and Political Foundations of Adjudication*, 6 J. LAW & HUMAN BEHAV. 121 (1982). Max Weber celebrated this American impulse to rationalize legal institutions as the essence of Western culture. TERRENCE HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 288-291 (1987).

<sup>35</sup> See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

<sup>36</sup> See ANDREW BUSCH, *REAGAN'S VICTORY: THE PRESIDENTIAL ELECTION OF 1980 AND THE RISE OF THE RIGHT* (2005).

<sup>37</sup> See M.E. BEESLEY, *PRIVATIZATION, REGULATION, AND DEREGULATION* (1997); WILLIS EMMONS, *THE EVOLVING BARGAIN: STRATEGIC IMPLICATIONS OF DEREGULATION AND PRIVATIZATION* (2000); ALAN SHIPMAN, *THE MARKET*

form of deregulation politics in the American legal environment was to challenge the procedural reforms enabling private citizens to enforce their claims, and coincidentally to enforce diverse public laws. It was said that the costs of litigation were disabling American businesses from competing in the global economy that our nation aspired to enlarge.<sup>38</sup> Complaints were heard about delay and the excessive number of cases being filed. The latter protest was substantially dispelled by the available data on the growth in the civil dockets of the federal courts; there was remarkable growth in the number of cases but much of the growth was in prisoner complaints and other *pro se* cases.<sup>39</sup> As Judge Jack Weinstein assessed the stated concerns of Business about case overload, they were a “weapon of perception, not substance.”<sup>40</sup>

Nevertheless sensitive to the complaints, Chief Justice Burger in 1976 called for a national conference to be held in his hometown of St. Paul to honor Roscoe Pound, a law reformer in his time, whose address to the American Bar Association at that place in 1906<sup>41</sup> had

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REVOLUTION AND ITS LIMITS: A PRICE FOR EVERYTHING (1999); DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE IN REMAKING THE MODERN WORLD (1998); see also IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); DEREGULATION OR REREGULATION? REGULATORY REFORM IN EUROPE AND THE UNITED STATES (Giandomenico Majone ed., 1990).

<sup>38</sup> A contemporaneous assessment is STEPHEN CARROLL, ASSESSING THE EFFECTS OF TORT REFORM (1987); see also GUSTAVE H. SHUBERT, SOME OBSERVATIONS ON THE THE NEED FOR TORT REFORM (1986); HUMPHREY TAYLOR, PUBLIC ATTITUDES TOWARD THE CIVIL JUSTICE SYSTEM AND TORT LAW REFORM (1987).

<sup>39</sup> See Marc Galanter, *The Day After the Litigation Explosion*. 46 MD. L. REV. 3 (1986); and see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion”, “Liability Crisis”, and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitment*, 78 N.Y.U.L.REV. 982 (2003).

<sup>40</sup> 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. 1909 (1989).

<sup>41</sup> *Causes of Popular Dissatisfaction with the Administration of Justice*, <http://www.answers.com/topic/the-causes-of-dissatisfaction-with-administration-of-justice>.

invigorated the efforts of the Association that had resulted in the 1934 Rules Enabling Act.<sup>42</sup> While the primary consequence was a stimulation of the alternative dispute resolution (ADR) movement,<sup>43</sup> there was a shared sense that 1979 was a time to consider more reform.

And in the era following the 1980 election, business interests seeking deregulation secured appointment of a controlling majority of Supreme Court Justices and federal judges.<sup>44</sup> Especially since the appointment of Chief Justice Roberts and Justice Alito by President George W. Bush, a “pro-business shift” in the work of the Court has become manifest and seems to have magnified the Court’s inclination to weaken private enforcement of public laws regulating business.<sup>45</sup>

Cost is, of course, an ancient grievance against law.<sup>46</sup> But business interest complaints were often directed specifically at the costs associated with the discovery process that was the central, distinguishing feature of civil procedure under the 1938 Rules.<sup>47</sup> It

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See Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and A Look Ahead)*, 82 IND. L. J. 1193 (2007).

<sup>42</sup> THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A Leo Levin & Russell R. Wheeler eds. 1979).

<sup>43</sup> In 2008, Frank Sander was awarded a medal by the International Academy of Mediators for his efforts beginning at that conference. And see Michael L. Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 NEGOTIATION JOURNAL 437 (2006).

<sup>44</sup> See CASS SUNSTEIN ET AL, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

<sup>45</sup> Robert J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1531-1532 (2008).

<sup>46</sup> “In the third millenium before Christ, men were complaining about the inefficiency of legal procedure, and I fancy that if any of you are inclined in the year 7000 AD to revisit ... you will be obliged to report ... that mankind still exhibits the same discontent with its methods of adjusting human differences.” Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 A.B.C.N.Y. LECTURES ON LEGAL TOPICS 87, 88 (1926).

<sup>47</sup> F. R. Civ. P. 26-37. See Stephen Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 BOSTON COLLEGE L.

was these discovery rules that had enabled many citizens and firms to conduct private investigations of business practices threatening harm to themselves and other consumers, passengers, tenants, workers, patients, or franchisees. As Judge Weinstein observed, the motives of many of those seeking reform of discovery practice were primarily substantive rather than procedural: they sought economic advancement, perhaps especially their own, if at the cost of less civil justice.<sup>48</sup> At least in some minds it appeared that Business was concerned more with the reality that its defendants were losing cases because facts were exposed by partisan discovery than with the costs of discovery in the cases that its defendants were winning. Perhaps most unwelcome to Business was the cost of complying with laws that were being enforced by private plaintiffs.

It bears notice that the alleged costly overuse of discovery might also have been related to the entrenchment in the third quarter of the 20<sup>th</sup> century of the practice of business litigators of billing for their services by the hour, because this created a strong incentive in big stakes cases for lawyers to leave no discovery stone unturned.<sup>49</sup> By 1980, the available data indicated that the problem of excessive use of discovery was sometimes severe but largely a feature of big commercial cases, i.e., those in which lawyers were billing heavily for their time; and abuse was less likely in cases of lesser financial consequences, such as civil rights litigation.<sup>50</sup> Also an item was the

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REV 691 (1998); compare GEORGE RAGLAND, *DISCOVERY BEFORE TRIAL* (1932). On the development of practice under these rules, see WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* (1968).

<sup>48</sup> *Procedural Reform as A Surrogate for Substantive Law Reform*, 59 *BROOK. L. REV.* 827 (1993).

<sup>49</sup> See generally WILLIAM G. ROSS, *THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS* (1996).

<sup>50</sup> See generally Wayne Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *VAND. L. REV.* 1295 (1978); David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 *MINN. L. REV.* 1055 (1979); JOSEPH L. EBERSOLE & BARLOW BURKE, FEDERAL JUDICIAL CENTER, *DISCOVERY PROBLEMS IN CIVIL CASES* 18-29 (1980); Wayne D. Brazil, *Civil Discovery: Lawyers Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 *AM. BAR FOUND.*

increasing use of expert testimony having the secondary effect of engaging more of lawyers' time.<sup>51</sup>

In 1983 numerous revisions of the Rules were promulgated by the Court on the advice of the Judicial Conference, its committee and the Reporter, Professor Arthur Miller, and with the assent of Congress. Some of the 1983 amendments were specifically responsive to the expressed concerns of business interests by providing judges with "a blueprint for management" of big cases<sup>52</sup> to constrain abuses of discovery<sup>53</sup>. It also promulgated an amendment to Rule 11 to authorize judges to punish lawyers for advancing meritless contentions wasting the courts' attention and their adversaries' money.<sup>54</sup>

Managerial judging, as envisioned by these 1983 amendments, was an idea that had emerged in the early seventies at training seminars for rookie federal judges, a program that first evolved at a time when the federal criminal and prisoner petition caseloads were growing dramatically.<sup>55</sup> The idea of case management entailed

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RES. J. 787; Wayne D. Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM.B.FOUND.RES.J. 873; David A. Trubek, Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72 (1983).

<sup>51</sup> Whether this profligate use of opinion testimony has enhanced the quality of decisions has seldom been examined. See Peter Huber, *Medical Experts and the Ghost of Galileo*, 54-3 LAW & CONTEMP. PROB. 171 (1991); Deborah Hensler, *Science in the Court: Is There a Role for Alternative Dispute Resolution*, 54-3 LAW & CONTEMP. PROB. 171 (1991).

<sup>52</sup> Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* 20 (Federal Judicial Center 1984).

<sup>53</sup> See 1983 amendments to Rule 26, 97 F. R. D. 171.

<sup>54</sup> See 1983 amendments to Rule 11, 97 F. R. D. 167.

<sup>55</sup> Judith Resnik, *Changing Parties, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 ALA. L. REV. 133, 176-177 (1997).

increased engagement of judges in the conduct of pretrial proceedings for the purpose of preventing wasteful discovery.<sup>56</sup> Guidance in the methods available was provided to the judges by the Federal Judicial Center.<sup>57</sup> Contrary to occasional protests, managerial practices seemed to have worked reasonably well in the big cases for which they were designed. And the Supreme Court did not express misgivings about the adequacy of the practice to control the excessive infliction of costs on adversaries until 2007.<sup>58</sup>

The complaints of Business regarding the cost of pretrial litigation seem now to have been substantially overblown. A 2009 study by the Federal Judicial Center confirms that, with the exception of a very few outlying cases, the cost of discovery and related pretrial proceedings is minor in relation to the stakes in the cases, ranging from 1.6% to 3.3% of the amounts in dispute.<sup>59</sup>

But the scheme of case management was not without critics.<sup>60</sup> The managerial tasks, perhaps because they were sometimes deemed unworthy of the valued attention of judges appointed for life, or because Congress was not providing adequate resources to deal with the caseloads,<sup>61</sup> were increasingly delegated to the growing staffs of magistrates and clerks.<sup>62</sup> And increasing pressure was placed on

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<sup>56</sup> See WILLIAM SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* (1982); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985).

<sup>57</sup> See *MANUAL FOR COMPLEX LITIGATION* (2d ed. 1985).

<sup>58</sup> Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 899 (2009).

<sup>59</sup> Emery G. Lee & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey, Preliminary Report* (2009).

<sup>60</sup> E.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

<sup>61</sup> Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2006).

<sup>62</sup> See Patrick Higginbotham, *A Few Thoughts on Judicial Supremacy: A Response to Professors Carrington and Cramton*, 94 CORNELL L. REV. 648 (2009).

parties to settle or arbitrate, perhaps contributing to the present state of affairs from which the public trial has largely vanished.<sup>63</sup> Law is presumably still being enforced in civil cases in federal courts, but it is harder for us to see it happening in our vacant federal courtrooms.

These 1983 responses by the Rule makers facilitating judicial management were not sufficient to calm the unrest in those who saw themselves as present or prospective defendants in civil cases. Specifically, there was continuing agitation for a revision of Rule 68 to deter parties from refusing offers of judgment by exposing them to liability for attorneys' fees; this device would enable defendants to elevate the pressure on plaintiffs to accept low early offers. The proposal was perceived as a device to weaken recently enacted civil rights law.<sup>64</sup> Congressman Robert Kastenmeier of Wisconsin, the chair of the Congressional committee, was among its critics.<sup>65</sup> At the first public meeting of the Advisory Committee in 1986, this proposed revision of Rule 68 was "permanently tabled."<sup>66</sup>

It was in this political arena that I was privileged to serve the Civil Rules Committee as its Reporter. I worked for seven years with four chairs of the Committee, each of whom I admired as just the sort

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<sup>63</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* 1 J. EMPIRICAL LEGAL STUD. 1 (2004); the extent to which the expanded role of Rule 56 contributed to the phenomenon is questionable. Compare Martin Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005) with Stephen Burbank, *Vanishing Trial and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah?* 1 J. EMPIRICAL LEGAL STUD. 591 (2004).

<sup>64</sup> See, e.g., Civil Rights Attorney's Fees Award Act of 1976, 90 Stat. 2641, 42 U.S.C. §1988. For recent comment on Rule 68, see Robert G. Bone, *To Encourage Settlement: Rule 68, Offers of Judgment and the History of the Federal Rules of Civil Procedure*, 102 NW. L. REV 1561 (2008).

<sup>65</sup> See 130 Cong. Rec. 114104 (daily ed. Oct. 1, 1984). See also Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828,835 (1985).

<sup>66</sup> Minutes, Advisory Committee on the Civil Rules, Judicial Conference of the United States (on file with author). See generally Steven Burbank, *Proposals to Amend Rule 68: Time to Abandon Ship*, 19 U. MICH.J. L. REF. 425 (1986).

of judge one would seek when one's life or business or assets were at stake in a courtroom. They were Frank Johnson, Joe Weis, Frank Grady, and Sam Pointer. All were strongly committed to the aims expressed in Rule 1: enforcing all legal rights as fully, as efficiently, and as quickly as circumstances might permit. But our shared efforts were nevertheless measured by the great Charles Alan Wright as a "malaise."<sup>67</sup>

Two packages of proposed amendments to the Rules that I had a hand in drafting for the committee were sent up the chain of command to the Standing Committee, one in 1990 and another in 1992. Most, but less than all, of our 1990 proposals became law in 1991<sup>68</sup> and of our 1992 proposals in 1993.<sup>69</sup> As the second package reached the Judicial Conference, Judge Pointer and I concluded that it was time to bring my service as Reporter to an end.

My departure signaled a reform in the Committee's operations to enlarge the office of Reporter. Professor Cooper has done admirable work as my successor and has also had the very able assistance of Professor Marcus. Perhaps this reform of the office of Reporter was a result of the detection by the Administrative Office that the job previously performed by Professor Miller and then myself had become more complex and demanding than it had been during the first four decades following the promulgation of the Rules in 1938.<sup>70</sup> It seems fair to say that even Professors Cooper and Marcus have not entirely calmed the waters roiled by the partisan disputes in which I became involved.

## CONGRESS AND THE RULES ENABLING ACT

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<sup>67</sup> *Foreword: The Malaise of Federeal Rulemaking*, 14 REV. LITIG 1. (1994).

<sup>68</sup> 134 F. R. D. 525.

<sup>69</sup> 146 F. R. D. 201.

<sup>70</sup> Indeed, there had been a brief time in 1956-1958 when there was no advisory committee and hence no reporter. See Act of July 11, 1958, 72 Stat. 356 and the discussion of that legislation in *Symposium*, 21 F. R. D. 117.

One of the items percolating at the time of my arrival as Reporter in 1985 was the Advisory Committee's concern over pending proposals to amend the Rules Enabling Act itself. The proponent of the amendments was Congressman Kastenmeier, who was the only member of Congress in my time as Reporter to take a serious interest in issues of judicial administration. He represented his second district of Wisconsin for fifteen terms, only to be defeated in 1990.<sup>71</sup> I hope that it was not his willingness to invest time and effort in the study and reform of judicial administration that led to his defeat.<sup>72</sup> He impressed me as one who had a clear sense of what he was doing and a commitment to the public good.<sup>73</sup>

Kastenmeier's 1985 proposed amendments to the Rules Enabling Act were responsive, at least in part, to the scholarship of Stephen Burbank, who had been temperately critical of the 1934 establishment of a rulemaking process that lacked full transparency and sensitivity to potential substantive consequences.<sup>74</sup> If there was a partisan connection between this proposed reform of the Act and the contest between the Great Society advocates and the advocates of the deregulation of business, I was not aware of the connection.

But the two provisions of the Kastenmeier proposal were intended to elevate the sensitivity of the rulemaking process to

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<sup>71</sup> Kastenmeier, Robert William (1924-20--)  
<http://bioguide.congress.gov/scripts/biodisplay.pl?index=000020>.

<sup>72</sup> On the problems with Congressional engagement in issues of judicial administration, see Larry Kramer, "*The One-Eyed Are Kings*": *Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 L. & CONTEMP. PROB. 73 (Summer 1991); but see Avern Cohn, *A Judge's View of Congressional Action Affecting the Court.*, 54 L & CONTEMP. PROB. 59 (Summer 1991).

<sup>73</sup> The federal courthouse in Madison bears his name, as does a lecture series at the University of Wisconsin Law School. In 1985, Kastenmeier received the Warren E. Burger Award, presented by the institute for Court Management, and the Service Award of the National Center for State Courts. In 1988, he was honored by the American Judicature Society with its Justice Award for his contributions to improving the administration of justice. <http://www.law.wisc.edu/alumni/kastenmeier.html>.

<sup>74</sup> *The Rules Enabling Act of 1934*, 130 U.P.A.L.REV. 1015 (1982).

political preferences and consequences. The first idea was to open our proceedings to allow observers and lobbyists into our meeting rooms.<sup>75</sup> Judge Johnson and others were not happy with that proposal, fearing that it would introduce interest group politics into the rulemaking process. There had been from the beginning a practice of publishing proposed rules for public comment. But some perceived that the 1934 vision of procedural rulemaking as expressed in the structure of the first advisory committee and the abstract trans-substantive promise of Rule 1 aimed to avoid interest group politics and concentrate on effective enforcement of the law. Lobbyists in our committee meetings, it was feared, might deprive the rulemaking process of its disinterest, and thus of its integrity and entitlement to public acceptance.

It was recalled, as an example of disinterested rulemaking, that the celebrated 1966 enlargement of the class action had been approved by a unanimous committee sitting in the private conference room of a major business firm of which one of the committee members was the senior partner.<sup>76</sup> Could such reforms motivated by an innocent desire of rulemakers to serve the public good with more effective law enforcement be achieved if interest groups were invited to participate in their deliberations? It was also recalled that the admirably succinct New York Code of 1848 advanced by David Dudley Field<sup>77</sup> had been wrecked by special interest amendments ultimately embodied in the lengthy and uncelebrated Throop Code assembled in 1880 to record what the state legislature had done to Field's Code in response to

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<sup>75</sup> Enacted on November 19, 1988, 102 Stat. 4642, 28 U.S.C. §2073(c).

<sup>76</sup> The conference room of Covington & Burling, Washington, D.C., as a guest of committee member Dean Acheson. It was not seen at the time as a major political reform. Benjamin Kaplan, *Continuing Work of the Civil Rules Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 386-87 (1967).

<sup>77</sup> On Field's role, see CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 18-19 (1928); DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* (1986).

lobbying by the self-interested.<sup>78</sup> The structure of the rulemaking process was clearly designed to encourage the making of “trans-substantive” rules; if we need special rules for a substantive category of cases, such legislation would seem to be a task for Congress. Or so we thought.

But after assessing the situation on the ground, it seemed to the Advisory Committee unlikely that its resistance to open meetings would succeed. It was undeniable that procedure rules have substantive consequences, and it seemed that those to be affected by a change in the rules should be heard. It was possibly for that reason that Judge Johnson subsided from the Chair, so that it was Judge Weis who presided over the Advisory Committee’s first public meetings. Such occasions required wide distribution of the Reporter’s preliminary drafts to be considered at the meetings. A few interest groups did show up at meetings in my time, and they were sometimes helpful but they were unable to muster material influence on a Committee controlled by independent judges serving for “good behavior.”<sup>79</sup> Unlike Congressional lobbyists, they had no ability to diminish the careers of the “life tenure” judges whom they lobbied.

Meanwhile, before the advent of public meetings, I was directed by Judge Johnson as Chair to enlist resistance to the second provision of Congressman Kastenmeier’s proposed revision of the Rules Enabling Act to which the Advisory Committee objected. This was the proposed repeal of the supersession clause<sup>80</sup> declaring that existing statutes in conflict with new rules are to “be of no further force or effect.” The Committee’s concern was that the clause served to constrain conflicting and confusing interpretations of the Rules

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<sup>78</sup> ANNOTATED CODE OF CIVIL PROCEDURE (Montgomery H. Throop ed.); see Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2046 (1989); MILLAR, note 19, at 55-56.

<sup>79</sup> My contemporaneous account is *The New Order in Judicial Rulemaking*, 73 JUDICATURE 131 (1991).

<sup>80</sup> H. R. Rep. No. 422, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess 13, 22-23 (1985).

based on inferences drawn from previous substantive enactments of Congress.<sup>81</sup> The repeal of the supersession clause was approved by the House of Representatives.<sup>82</sup>

I succeeded in enlisting the aid of the American Bar Association Section on Litigation, the American College of Trial Lawyers, and the Association of the Bar of the City of New York, who induced the Senate Judiciary Committee to hold a hearing at which Ben Civiletti, the former Attorney General who was then chair of the ABA Section, offered testimony in favor of supersession. Others who submitted statements were Professor Edward Cooper, Mary Kay Kane, and Charles Alan Wright. Contrary statements were submitted by Professors Stephen Burbank and Judith Resnik, who was representing the ACLU.<sup>83</sup> We won in the Senate, and the supersession clause was retained in the law as enacted in 1988.<sup>84</sup> I note, however, that the problem with supersession abides; there is now a circuit split on the application of the clause to the divergence between Section 3731 of Title 18 and the Rule 4(b) of the Rules of Appellate Procedure.<sup>85</sup> Whether this recent conflict reflects the possibility that our victorious lobbying was misguided I leave to wiser heads better informed by 25 years of additional experience.

The Advisory Committee thereafter devoted our attention to the texts of the Rules, their interpretation or misinterpretation by courts, and to any available data supplied by the Administrative Office that might inform us as to how best to achieve the aims stated in Rule 1, to reduce needless cost, delay and confusion. In that spirit, we amended Rule 1 to urge pursuit of those aims in the managerial practices that

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<sup>81</sup> The uses of the clause are elaborated in Paul D. Carrington, “*Substance*” and “*Procedure*” in the *Rules Enabling Act*, 1989 DUKE L. J. 281 322-327.

<sup>82</sup> N. 80 supra.

<sup>83</sup> Hearing on Supersession Before Subcommittee on Courts and Administrative Practice of Senate Committee on the Judiciary, May 28, 1989.

<sup>84</sup> See Judicial Improvements and Access to Justice Act, 102 STAT. 4642 (1988).

<sup>85</sup> See Anthony Vitarelli, *A Blueprint for Applying the Rules Enabling Act’s Supersession Clause*, 117 YALE L. J. 1225 (2008).

had begun to replace the traditional forms of litigation, often by substituting magistrates, special masters, mediators, or arbitrators for the Article III judge.

A homely example of our committee work was Rule 15(c) pertaining to the relation between pleading amendments and statutes of limitations. The Committee's attention was drawn to the 1986 decision of the Supreme Court in *Schiavone v. Fortune*.<sup>86</sup> Plaintiffs had alleged that they were defamed in *Fortune* magazine. They sued the offending magazine. Belatedly, they were informed that there was no such corporate entity as *Fortune*. They then served the summons and complaint on the corporate publisher, Time, Inc. It was held by the Supreme Court that the statute of limitations had run and their claims were barred. Given that Time was in fact fully informed of the filing of the claim long before the limitation period had run, this seemed inconsistent with the purpose of Rule 15(c) allowing amendments to "relate back" for the purposes of the statute, and also seemed at odds with the aims expressed in Rule 1.<sup>87</sup>

The Advisory Committee invested a lot of time in the task of revising Rule 15(c), partly as a result of my shortcomings in drafting a text that fully solved the problem. In the effort to clarify the rule, we were striving to achieve simplicity; to that end, we tried to adhere to "the Rosenberg Rule" cautioning us to keep the text simple by removing a word to make room for any word we proposed to add. In due course we did recommend an amendment that was in due course

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<sup>86</sup> 477 U.S. 21 (1986).

<sup>87</sup> Note the similarity of the *Schiavone* case to the Court's more recent holdings that some rules imposing time limits that it deems to be jurisdictional cannot be waived by a defendant even one who is fully informed and in no way prejudiced by a plaintiff's mistaken non-compliance. E.g., *Bowles v. Russell*, 549 U.S. 1263 (2007). In that recent case, the Court enforced the limit on the time for filing an appeal from a denial of habeas corpus. The petitioner missed by one day, but filed on the day that the defense and the trial court had agreed was the last day. I question whether any member of Congress who voted for the law would have approved that result. But see Scott Dodson, *Mandatory Rules*, 61 STAN. L. REV. 1(2008). I regard the issue as one ripe for consideration by the Advisory Committee on Appellate Rules.

promulgated in 1991. Alas, our amendment was not so clear that it resolved the recurring issues in later cases. There are scores of reported decisions based on interpretations of our rule. Some of them may be wrong.<sup>88</sup>

But the lawmaking process employed in the revision of Rule 15 should command a measure of public respect. As Benjamin Spencer has lately reminded us, the rule amendment process is preferable to law made in judicial opinions because it is a more democratic, transparent, and accountable method of law reform.<sup>89</sup>

### THE RIGHT TO TRIAL BY JURY

But the Supreme Court has on several occasions chosen to disregard the text of the Rules and the rulemaking process to make the law what a majority of the Justices wanted it to be.<sup>90</sup> At the time of my arrival as Reporter, there was ferment over what the Supreme Court and the district judges had done to the institution of the civil jury. The Advisory Committee was obliged at least to reconsider the text of Rule 48, which had become misleading in light of then recent developments.

I was myself among the many who disapproved the decision of the Supreme Court confirming the discretion of district judges to impanel juries of less than twelve.<sup>91</sup> That decision validated local rules that were not consistent with the text of Rule 48. Those local rules were not connected to the politics of Rule 1 or to Business resistance to private enforcement of public law, but did reflect a

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<sup>88</sup> Cf. *Goodman v. Praxair Inc.*, 494 F. 3d 458 (4<sup>th</sup> cir. En banc 2007).

<sup>89</sup> *Plausibility Pleading*, 49 BOSTON COLL. L. REV. 431, 454 (2008). The same point was also made in reporting the *Twombly* decision in *The Supreme Court 2006 Term, Leading Cases, Pleading Standards*, 121 HARV. L. REV. 305, 313 (2007)

<sup>90</sup> A major influence in moving the Court to think in this way was Justice William Brennan, who saw his office as one that would “shape a way of life for the American people” DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN. JR., THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* 161–62 (1997).

<sup>91</sup> *Colgrove v. Battin*, 413 U.S. 149 (1973).

different divide of constitutional import over the measure of discretion to be vested in federal judges. It seemed that the Judicial Conference generally favored judicial discretion. Others favored firm rules to guide judges and lawyers and assure that the law is evenhandedly enforced.

In the early 1970s at a Fourth Circuit Judicial Conference, I had heard Chief Justice Burger in an informal discussion with perhaps twenty lawyers propose that the civil jury be eliminated to allow district judges to decide cases more efficiently.<sup>92</sup> The decision to allow judges to reduce the civil jury to six was for the Chief a halfway measure, but it conformed to a recommendation of an American Bar committee.<sup>93</sup> The idea of a six-person jury had been presented to Congress in 1971 and again in 1973 and 1977 but with no positive action being taken.<sup>94</sup>

Given its disregard of the tradition and text of the Seventh Amendment, and failure to gain the acceptance of Congress, the decision also implied that district judges were pretty much free to exercise judicial power in the manner of English Chancellors<sup>95</sup> and to disregard the text of Rule 48 allowing a jury of fewer than twelve by stipulation of the parties. That disregard of the text was a source of concern to the Advisory Committee.

After perhaps improvidently expressing my own disapproval of the Court's decision at a conference at the University of Chicago convened to discuss the topic,<sup>96</sup> I put the issue of Rule 48 on the

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<sup>92</sup> Also see Warren E. Burger, *The State of the Federal Judiciary – 1971*, 57 A.B.A.J. 855, 858 (1971).

<sup>93</sup> *Report Number 1 of the Special Committee on Coordination of Judicial Improvements*, 99 ABA ANNUAL REPORT 182, 305 (1978).

<sup>94</sup> For an account of the efforts, see Resnik, note 50, at 141-143.

<sup>95</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

<sup>96</sup> Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. L. F. 33, 51.

Committee's agenda. It was clear that the committee in 1990 would not reconsider the six-person jury, but it did agree to make the text of the rule correspond to reality, and that is what we tried to do and succeeded in doing. A few years later, after my time, the committee would support a return to the 12-person jury, but it was unable to gain the support of the Judicial Conference.<sup>97</sup>

### THE DISCOVERY RULES: MANDATORY DISCLOSURE

But while we attended to such technical matters, the political pot continued to boil and the committee was feeling its heat. As noted, Congress again joined (or intruded) in our enterprise in 1988 by quietly enacting as Section 7047 of its mammoth Anti-Drug Abuse Act a revision of Rule 35 to authorize mental examinations of parties by psychologists as well as psychiatrists.<sup>98</sup> The Committee had no objection to this amendment and followed the lead of Congress to propose the amendment to Rule 35 in 1991 to enable parties to secure examinations by other "suitably qualified" professionals such as dentists. There was some regret that Congress had not referred the issue to the Judicial Conference for its consideration.

In the same 1988 law, Congress also expressed concern over the localization of federal law by the promulgation of diverse local rules of procedure.<sup>99</sup> The most common kind of local rule invalidated by Congress was a standard restriction on the number of interrogatories a party could serve except by leave of court;<sup>100</sup> almost every district had such a rule, and after 1988, all of them were invalid.

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<sup>97</sup> Leading the effort was Richard S. Arnold. See *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1 (1993).

<sup>98</sup> Act of November 19, 1988, 102 Stat. 4401. Section 7046 of extended the role of psychologists in enforcing the drug laws; while they were at it, Congress also amended the Federal Rules of Evidence and Rule 35 to accommodate the role of psychologists.

<sup>99</sup> *Id.*

<sup>100</sup> DANIEL R. COQUILLETTE, ET AL, REPORT OF THE LOCAL RULES PROJECT 95-99 (1988).

But the center of much of the political discourse then, as now, was the cost and effectiveness of the discovery rules. No one doubted that many lawyers were very thorough and sometimes abusive in conducting discovery. An example brought to my attention was an extended three-day deposition of a university president by a lawyer advancing a claim for medical malpractice against the hospital maintained by the deponent's university. It seemed obvious by the second day of the deposition if not long before that the presidential deponent had no relevant information, but the deposition continued. The apparent aim of the extended deposition was to induce the president to agree to a settlement in order to terminate his endless questioning, a device to be likened to those employed by officers in pursuit of terrorists. Such abuses were equally obvious to many observers in big commercial cases litigated by lawyers paid by the hour to conduct depositions as a team of three or more questioners.

In 1987, in response to the political ferment over such costs, the Brookings Institution, at the suggestion and with the support of then-Senator Joseph Biden, appointed a Task Force of Civil Justice Reform.<sup>101</sup> Senator Biden was at the time the chair of the Judiciary Committee. Some or all of the thirty-five members of the study group may have been suggested by him. They met several times at Brookings to debate the issues, received the results of a Lou Harris poll<sup>102</sup> and in 1989 published a report entitled *Justice for All: Reducing Cost and Delay in Civil Litigation*.<sup>103</sup> This title suggested fidelity to the 1938 aims of the Rules, and the antecedent politics favoring effective private law enforcement. It favored ideas then

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<sup>101</sup> It appears that the funds for the study came from a The Foundation for Change; its president was Mark Gitenstein, who was also director of Senator Biden's staff.

<sup>102</sup> Louis Harris and Associates Inc., *Procedural Reform of the Civil Justice System: A Study Conducted For the Foundation for Change Inc.* (March 1989).

<sup>103</sup> Charles Alan Wright generously describes the report as "particularly influential." *LAW OF FEDERAL COURTS* 436 (5th ed. 1994). Its influence was however preordained; causation went from the Senate to Brookings, not from Brookings to the Senate.

currently circulating among the federal judiciary: differential case management, earlier judicial engagement, encouragement of voluntary exchange of information, early resolution of discovery disputes before the filing of motions, and referring appropriate cases to alternative dispute resolution programs. *Justice for All* also advocated empirical studies by an independent source in addition to those provided by the Federal Judicial Center.<sup>104</sup>

There was at the time of this publication a manifest shortage of data to resolve conflicting observations of reality bearing on the feasibility of its proposals. Yet *Justice for All* provided the basis for Senator Biden's proposed legislation enacted as the Civil Justice Reform Act of 1990.<sup>105</sup> It had the support of the Business Round Table<sup>106</sup> and the American Institute of Certified Public Accounting,<sup>107</sup> but the vigorous opposition of many federal judges who regarded such action by the Senate as an affront to judicial independence, procedure rules being in their view solely the business of the Judicial Conference.<sup>108</sup> The Senate Committee Report, in the tradition reflected in the 1938 Rules, explained that the Act was "to promote for all citizens, rich or poor, individual or corporation, plaintiff or defendant, the just, speedy and inexpensive resolution of civil disputes

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<sup>104</sup> Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (Summer 1988).

<sup>105</sup> Enacted December 1, 1990 as Title I of the Judicial Improvements Act of 1990, 104 STAT. 5089. See generally Senate Committee on the Judiciary, *The Civil Justice Reform Act of 1990* (1990).

<sup>106</sup> Importance of Civil Justice Reform Act of 1990 stressed by the Business Roundtable, <http://www.highbeam.com/doc/1G1-8077598.html>. See Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROB. 105 (1991).

<sup>107</sup> *AICPA endorses Civil Justice Reform Act*, 169 J. OF ACCOUNTANCY 27 (April 1, 1990).

<sup>108</sup> See Hearings before the Senate Judiciary Committee, 101<sup>st</sup> Cong. 2d session on S. 2027 and S. 2648; and see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 71 MINN. L. REV. 375, 407-435 (1992); Lauren Robel, *Fracture Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

in our Nation's federal courts."<sup>109</sup> It empowered district courts to experiment with diverse forms of case management responsive to the not-very-original ideas set forth in *Justice for All*.<sup>110</sup> The experimenting district courts were required to appoint and consult local advisory committees of suitable diversity.<sup>111</sup> The statute called for an independent study of the results over a seven-year period.<sup>112</sup>

The Civil Rules Committee was not resistant to the ideas of local experimentation or independent empirical evaluation. But there was concern over the empowerment of the district courts to enact local rules departing from the national rules.<sup>113</sup> Delocalization had been a *raison d'être* of the 1938 Rules and an object of attention in the recent 1988 Congressional enactment. Localization was seen to be a significant problem in its introduction of additional elements of complexity and uncertainty into the national law governing proceedings in the federal courts.<sup>114</sup> There were already in place in some districts elaborate local rules that threatened disharmony as well with the secondary aim of the 1934 Act to enable counsel to be mobile in representing clients in diverse federal courts without need to study

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<sup>109</sup> S. Rep. No. 101-416, 101 Cong., 2d Sess., at 1 [Aug. 3, 1990].

<sup>110</sup> 104 STAT 5089.

<sup>111</sup> The act ordered each U.S. district court to implement a Civil Justice Expense and Delay Reduction Plan under the direction of an advisory group comprising "those who must live with the civil justice system on a regular basis" (S. Rep. No. 101-416, at 414 [quoting statement of chairman Biden, *Cong. Rec.* S416 (Jan. 25, 1990)].

<sup>112</sup> There were criticisms of the Act. See A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877 (1993); Among the problems presented was a difficulty in measuring its expiration. See Carl Tobias, *The Expiration of the Civil Justice Reform Act*, 59 WASH & LEE L. REV 571 (2002);

<sup>113</sup> Best stated by Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U.PITT.L.REV. 853 (1989).

<sup>114</sup> Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN L REV.1447 (1994); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L REV. 1589 (1994). Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 55-58 (1997).

local practices. Unleashing local rulemakers was seen as a threat of chaos.<sup>115</sup>

As it happened, I had in 1989, at the direction of the Committee, drafted for its consideration a possible amendment to Rule 26 requiring parties to make voluntary disclosures of relevant and discoverable information. My draft was a radical proposal requiring disclosure of just about everything an advocate might have or might think that the other side might want to know about a newly filed case. The basic idea of mutual disclosure had been suggested by then-Magistrate Wayne Brazil in 1978 and advanced by *Justice for All*. Our draft went the full distance with the idea.<sup>116</sup>

Consistent with traditional practice as well as with Congressman Kastenmeier's policy of transparency in rulemaking, we circulated this preliminary draft to seek comment from diverse interested scholars, judges, and lawyers. It was obvious to the committee when it met to consider my draft and the comments received that our proposal needed work. Among its worrisome features was a requirement that all expert reports be disclosed. It was the sense of the Committee that this went too far; such material might be discoverable in due course, but the parties could not properly be required to commit themselves to a line of expert testimony before the issues of fact, if any, were clearly defined. But for want of a better idea, some of the experimental districts promulgated our draft as a local rule to be tested empirically.

The Advisory Committee was moved to seek to contain such rampant localization of discovery practice. So, after further consideration, we circulated a draft of the rule that would authorize local districts to enact disclosure rules more prudently limited than the rule I had improvidently circulated earlier. Two full pages of text

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<sup>115</sup> See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929 (1996).

<sup>116</sup> *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1348. And see William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

were proposed to be added to Rule 26(a) prescribing what the Committee deemed to be an appropriate duty of disclosure and its limits; we stopped short in that draft of requiring counsel to anticipate the allegations of the adversary. On receipt of this draft, some districts promulgated it as their local rule, and some drew criticism for doing so.<sup>117</sup> But as a result there were three and possibly more versions of Rule 26 that were in play in different local districts.

Meanwhile, as the local district advisory committees were doing their work pursuant to the Civil Justice Reform Act, the political premises of that law were being contested by a Republican administration seeking re-election in 1992 as a team faithful to business interests beleaguered not only by the high cost of litigation, but by substantive concerns over the application of tort law to deter disapproved business practices. Vice President Dan Quayle was appointed to lead a Council on Competitiveness staffed largely if not entirely by loyal Republicans committed to protecting the ability of American business to compete profitably in global markets.<sup>118</sup> “Deregulation” was their often stated aim.

In the same vein and contemporaneous with the publication of *Justice for All* and the appointment of the Council on Competitiveness was the protest of scholar-Circuit Judge Frank Easterbrook that American business interests were threatened because trial judges were helpless to control parties who were abusing the discovery process, the case management powers conferred on district judges being, in

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<sup>117</sup> See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 813-21 (1991).

<sup>118</sup> See DAVID S. BRODER, *THE MAN WHO WOULD BE PRESIDENT: DAN QUAYLE* 125-128 (1992); Warren T. Brookes, *The President's Council on Competitiveness*, NATION'S BUSINESS, May 1989 at 1. The House of Representatives denied funding to the Council. Kenneth J. Cooper, *Divided House Bars Funds for Quayle Competitiveness Council*, WASHINGTON POST, July 2, 1992; Jonathan H. Adler, *Quayle's Hush-Hush Council*, NATIONAL REVIEW, November 2, 1992 at 1.

Judge Easterbrook's view, inadequate to the task.<sup>119</sup> This assessment was no more rooted in data than was *Justice for All*, but Judge Easterbrook expressed no need for information about the facts on the ground.

The Quayle Council on Competitiveness conducted hearings and in 1990 I was summoned to a conference room in the Department of Justice to explain the ongoing consideration of the discovery rules and the reasons if any for not repealing Rules 26-37. It is fair to say that my words were without effect. In 1991, the Council published its Agenda for Civil Justice Reform, recommending many changes in the civil justice system, including even a reversal of the longstanding "American Rule"<sup>120</sup> to introduce the principle that the loser must pay the full costs of the winner of a lawsuit.

Vice President Quayle was an outspoken champion of the Council's Agenda,<sup>121</sup> and he was not alone in voicing that view,<sup>122</sup> but his explanatory remarks to a meeting of the American Bar Association

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<sup>119</sup> *Discovery as Abuse*, 69 B. U. L. REV. 635, 638-639 (1989). Contrast the speculative view of Judge William W. Schwarzer, *The Federal Rules, the Adversary Process and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

<sup>120</sup> The American Rule was expressed in the Fees Act of 1853, Act of Feb. 26, 1853, 10 Stat. 161. The Act expressed the holding of the Court in *Arcambel v. Wiseman*, 3 Dall. 306 (1796). See John Leubsdorf, *Toward A History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROB. 9 (1984); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993); see also William W. Schwarzer, *Fee-Shifting Offers of Judgment -- An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 148 (1992);

<sup>121</sup> See Remarks of Vice President Quayle at the American Business Conference, Oct. 1, 1991, FED. NEWS. SERV.; Dan Quayle, *Too Much Litigation; True Last Year, True Now*, NATIONAL LAW JOURNAL, August 10, 1992 at 17.

<sup>122</sup> See, e.g. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 4 (1988); President Bush, remarks at Labor Day Picnic, Waukesha, WI, Sept. 7, 1992, Fed. News Serv.; Jack Anderson, *U.S. Has Become Nation of Lawsuits*, WASHINGTON POST, Jan. 25, 1985 at B-8; Robert F. Dee, "Blood Bath," 10 ENTERPRISE 2 (March/April 1986).

were not well received.<sup>123</sup> Indeed, in a blistering denunciation by Talbot D'Alemberte, the President of the ABA, Vice President Quayle was accused of using discredited statistics to advance ill-founded views.<sup>124</sup> As Learned Hand had observed long before, rhetoric such as the Vice President's forecasting such doom has been heard since the time of Hammurabi.<sup>125</sup> Marc Galanter soon offered persuasive empirical evidence that the "litigation explosion" to which the Council on Competitiveness purported to respond did not exist.<sup>126</sup>

In due course, the Council on Competitiveness would make some recommendations that resembled those advanced by the Brookings group.<sup>127</sup> One notable recommendation that may have deserved more attention than it received was one aiming to constrain

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<sup>123</sup> David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, NEW YORK TIMES, August 14, 1991 at A1. For his account of his presentation, see DAN QUAYLE, *STANDING FIRM* 282-290 (New York 1994).

<sup>124</sup> <http://www.faqs.org/abstracts/Law/Discipline-on-the-ABAs-agenda-Quayle-spices-up-ABA-meeting-discipline-finances-also-are-on-the-agend.html#ixzz0Wy9061MM>. Among the studies that the Vice President did not consult were JOSEPH EBERSOLE AND BARLOW BURKE, *DISCOVERY PROBLEMS IN CIVIL CASES* (1980); PAUL R. CONNALLY ET AL, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY* (1978); see also DANIEL SEGAL, *SURVEY OF THE LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT* (1978); COLUMBIA UNIVERSITY PROJECT FOR EFFECTIVE JUSTICE, *FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY, REPORT TO THE ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE* (1968); MAURICE ROSENBERG, *CHANGES AHEAD IN FEDERAL PRETRIAL DISCOVERY*, 45 F. R. D. 479 (1969); see also MAURICE ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* (1964)..

<sup>125</sup> See op. cit. n. 46.

<sup>126</sup> Marc S. Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993).

<sup>127</sup> COUNCIL ON COMPETITIVENESS WORKING GROUP ON CIVIL JUSTICE REFORM, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* (Washington 1991). Its recommendations were embodied in S. 2180, 102nd Cong., 2d sess. (1992). See also Executive Order 12778, reprinted in 56 Fed. Reg. 55 (1991) and Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559 (1992). For an account, see Carl Tobias, *Civil Justice Reform Roadmap*, 142 F. R. D. 507 (1992); Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AMER. U. L. REV. 1521 (1993).

overuse of expert testimony.<sup>128</sup> Deborah R. Hensler assessed the Council's broader proposals as going well beyond procedural reform; "[they] seek to change the current balance between individual plaintiffs and corporate defendants, in favor of the latter. The agenda is a political one, and it ought to be debated and decided on the floors of Congress and state legislatures."<sup>129</sup> No one contended otherwise, but few debates were held.

While the Council on Competitiveness was having its day,<sup>130</sup> the Civil Rules Advisory Committee was receiving early reports of the ongoing empirical studies envisioned by the Brookings group that were being conducted by Rand<sup>131</sup> and the Federal Judicial Center.<sup>132</sup> The early data indicated that the disclosure requirements established in some district courts were achieving modest savings in the cost of the litigation. Although the seven-year period of experimentation specified by the 1990 Act had five years yet to run, the Committee decided in 1992 to recommend the promulgation of our improved draft of Rule 26 lending support to the local rules requiring limited disclosures to adversaries before any requests. While it was thus

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<sup>128</sup> *Id.*, Recommendations 12-14.

<sup>129</sup> *Taking Aim at The American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (1992). See also Jack R. Weinstein, *Procedural Reform as A Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827 (1993); Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV. 857 (1993).

<sup>130</sup> A non-governmental organization of "CEOs, university presidents and labor leaders" took the same name in 2002. <http://www.compete.org/about-us/>. For a scorching assessment of the Quayle Council's handiwork, see OMB Watch, *Undoing Quayle Council Damage*, July 3, 2002, <http://www.ombwatch.org/note/740>.

<sup>131</sup> James Kakalik et al. *Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17 (1997); a study of this report is Bryant Garth, *Observations of an Uncomfortable Relationship: Civil Procedure an Empirical Research*, 49 ALA. L. REV. 103 (1997).

<sup>132</sup> DONNA STIENSTRA, MOLLY JOHNSON & PATRICIA LOMBARD, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997).

reconsidering Rule 26, the Committee also agreed to limit the number and length of depositions<sup>133</sup> and the number of written interrogatories<sup>134</sup> that a party might impose on an adversary without leave of court. Revisions of Rules 30 and 33 were proposed for those purposes, and revisions of other discovery rules<sup>135</sup> were also proposed to fit them to the 1992 package. And we proposed to amend Rule 16 to permit and encourage greater use of pretrial meetings to plan discovery and trial. These amendments were expected modestly to serve the stated aims of both the competing Quayle and Biden groups, and the empirical evidence is that they did.<sup>136</sup>

These modest reforms would not resolve all the disarray, but at least some of us thought that they might help to calm the storm of the Council on Competitiveness. And they would ease the concern about the proliferation of localization threatening the national uniformity that had been the first object of the 1934 law, and the reason that many states had signed on to the Federal Rules *in haec verba*.<sup>137</sup> The Standing Committee approved. The Judicial Conference approved. And the Supreme Court promulgated our proposed amendments.<sup>138</sup>

But that was not quite the end of the story on mandatory disclosures in my time as Reporter. Several months after the Court promulgated our proposed rule, the leadership of the American Bar Association suddenly “went ballistic” at the idea of mandatory disclosure. The very idea was said to be an offense against the sacred adversary tradition. To make any voluntary disclosure to an adversary was seen as a betrayal of the client. On the testimony of the President

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<sup>133</sup> F. R. Civ. P. 30(a)(2).

<sup>134</sup> F. R. Civ. P. 33(a).

<sup>135</sup> F. R. Civ. P. 37.

<sup>136</sup> Kakalik et al, note 130.

<sup>137</sup> John B. Oakley & William Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

<sup>138</sup> Amendments to the Federal Rules of Civil Procedure (Apr. 22, 1993), reprinted in 146 F. R. D. 401 (1993).

of the Association, the House Judiciary Committee recommended that the amendment to Rule 26 be vetoed by Congress as provided by the 1934 Rules Enabling Act.<sup>139</sup> And the House of Representatives did just that; it disapproved our rule as promulgated by the Court, by a vote of 385 to 0.<sup>140</sup>

But under the Rules Enabling Act, the veto required majority votes of disapproval in both houses. The proposed reform therefore went to the Senate, where it was clearly doomed by the ABA lobbyists. But the disapproval had first to go through the Senate Judiciary Committee at a time when it was on a calendar requiring short meetings with limited debate and unanimity for a committee to send a proposal up to the full Senate. A brief hearing was conducted by the Subcommittee on Courts and Administrative Practice. Judge Pointer was allowed five minutes at that hearing.<sup>141</sup> Unanimity was denied when Senator Howard Metzenbaum of Ohio raised his hand to insist on a full hearing in the Judiciary Committee on the issues presented.<sup>142</sup> There could be no hearing within the time allowed by the Rules Enabling Act for the Congressional veto. So the rule I had the pleasure of drafting became the law of the United States notwithstanding its unanimous disapproval by the House of Representatives and the almost certain disapproval of the Senate. I do not expect that anyone will ever equal my achievement in writing a law that a unanimous House of Congress could not prevent from becoming the law of the United States.

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<sup>139</sup> 28 U.S.C. §2074.

<sup>140</sup> 149 Cong. Rec 27271-4 (1993).

<sup>141</sup> See Hearing before the Subcommittee on Courts and Administration, 103d Congress, Second Session, <http://www.wbooksread.com/authors-eng-united-states-cong-proposed-amendments-to-the-federal-rules-of-civil-procedure--hearing-before-the-tin.shtml>.

<sup>142</sup> Shipa Shah, Note: *An Application of Federal Rule of Civil Procedure 26(a)(1) to Section 1983 Actions: Does Rule 26(a)(1) Violate the Rules Enabling Act?*, 43 CLEVE. ST. L. REV. 115, 120 (1995). (citing Randall Seaborn, *New Discovery Rules Take Effect*, NATIONAL L. J., Dec. 6, 1003 at 3)..

However that might be, it may now be concluded that the adversary tradition has for the moment survived and that the disclosures required by Rule 26 may have reduced costs in some cases, but have been no magic bullet,<sup>143</sup> and have drawn some criticism of their own.<sup>144</sup> And the “Deregulation” or “tort reform” movement formerly led by Vice President Quayle abides in the expressions of politicians and other leaders who share his lack of interest in real data of the sort assembled by Rand or the Federal Judicial Center.<sup>145</sup> So, agitation for reform of the discovery rules continued.<sup>146</sup> Reforms of discovery imposed since enactment of the Civil Justice Reform Act have done little to abate that political movement to reduce the legal expenses of business firms and the effectiveness of private enforcement of laws that they would prefer not to obey. With their objective in mind, it was suggested that the fee-shifting scheme advocated by the Quayle Commission be adopted but applied only to discovery motions, where it might serve to deter needless squabbling over the limits of the right to conduct private

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<sup>143</sup> WILLIAM SCHWARZER ET AL, CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE (1994); Edward D. Cavanaugh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565 (1997). JAMES S. KAKALIK ET AL, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1997). TERENCE DUNWORTH & JAMES KAKALIK, EVALUATING THE CIVIL JUSTICE REFORM ACT (2007) Elizabeth Plapinger, *Rand Study of Civil Justice Reform Act sparks Debate*, NATIONAL LAW JOURNAL, March 24, 1997 at B18; Steven Flanders, *The Unanswered Question: The Impact of the Civil Justice Reform Act of 1990*. 82 JUDICATURE.55 (1995).

<sup>144</sup> Griffin B. Bell et al., *Automatic Disclosure in Discovery-The Rush to Reform*, 27 GA. L. REV. 1, 17-18 (1992); Robert D. Cooter & Daniel L. Rubinfeld, *Reforming The New Discovery Rules*, 84 GEO. L. J. 61 (1995).

<sup>145</sup> For an apt account, see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*, 78 N. Y. U. L. REV. 982 (2003).

<sup>146</sup> Paul V. Niemeyer, *Here We Go Again: Are The Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 521 (1998); Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery “Reform,”* 64 LAW & CONTEMP. PROBS. 197 (Spring/Summer 2001).

investigations of claims and defenses.<sup>147</sup> That proposal has not been adopted, nor, so far as I am able to tell, has it been advanced by any business interests.

#### RULE 4 AND SERVICE OF PROCESS ABROAD

In another gesture that served to remind us who is and should ultimately be in charge of making our national law, Congress had tinkered with Rule 4 in 1983.<sup>148</sup> Those legislated amendments aimed to facilitate service of the summons by eliminating the traditional need for the employment of a United States marshal, and by adopting a provision shifting the costs of service to a defendant who refused to waive needless and costly formality in personal service. Both schemes had been earlier adopted in state courts and seemed to be useful methods of reducing legal costs.<sup>149</sup>

In its enactment, Congress had seemingly neglected to provide that the device of requested waiver of formal service of process could be employed when the defendant to be served was outside the state in which the court was sitting.<sup>150</sup> There was also a perceived need to amend Rule 4 to reduce a hazard imposed on parties suing the United States or its officers. That hazard arose when a court of appeals held that a party serving a summons on fewer than all of many necessary parties to such an action within the time allowed for the completion of service of process could not be given additional time to correct such an oversight.<sup>151</sup> This was a needless trap to be closed. Maybe, we then thought, one summons served on the United States should suffice. I recall suggesting that each post office should have a “P.O. Box A: Sue the US” located next to P.O. Box 1 in every federal post

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<sup>147</sup> See Paul D. Carrington, *Renovating Discovery*, 49 ALA L. REV. 51 (1997).

<sup>148</sup> Act of January 12, 1983, 96 Stat. 2527.

<sup>149</sup> 1 ROBERT. CASAD, JURISDICTION IN CIVIL ACTIONS 5-29 (2d cir. 1991).

<sup>150</sup> Robert Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1 (1988).

<sup>151</sup> *Whale v. United States*, 792 F. 2d 951 (9<sup>th</sup> cir. 1986).

office, where a summons might be served. But we were assured by Attorney General Thornburgh that the government absolutely required multiple notices of any suit filed against it or its officer. We did nevertheless manage some simplification of suits against the government or its officers.

A greater challenge to the Committee's work on Rule 4 was posed by the Hague Convention on the Service of Judicial and Extrajudicial Document in Civil or Commercial Matters. It had been signed in 1965<sup>152</sup> and by 1985 had been widely ratified.<sup>153</sup> Rule 4 needed to be amended to accommodate the aim of that Convention to facilitate transnational litigation, and to address the issues presented by service of process outside the United States. Among its complexities, the Hague Convention obligated signatory nations to establish a "Central Authority" that would assume responsibility for delivery of the requisite documents to the defendants, a role not unlike that of which United States marshals had in 1983 been relieved by an act of Congress. (And bearing some resemblance to the idea of P.O.Box A: Sue U.S.!) )

As the Committee considered transnational service of process, there also arose attention to the fact that the long arm of the federal courts in claims arising under federal law against defendants who were to be served outside the United States was not as long as recent due process decisions of the Supreme Court<sup>154</sup> suggested that it might be. Indeed, the Court had explicitly invited rulemakers to consider whether the federal arm should be extended to secure less expensive and more effective enforcement of our national law on foreign firms

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<sup>152</sup> On the role of the United States in its drafting and promotion, see Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A. B.A.J. 650 (1965); Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters*, 2 CORNELL INT'L L. J. 125 (1969).

<sup>153</sup> See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §472, Reporter's Comment (1986).

<sup>154</sup> E.g., *Arrowsmith v. United Press Int'l*, 320 F. 2d 219 (2d. cir. 1963).

whose practices risked harms to our citizens.<sup>155</sup> The Advisory Committee resolved that a federal plaintiff should be allowed to invoke personal jurisdiction over a defendant having “minimum contacts” with the United States even though those contacts with any particular state might be too modest to reach the minimum standard and sustain personal jurisdiction in any state court. So, with these numerous thoughts, reconsideration of Rule 4 proceeded.<sup>156</sup>

On consideration of the Hague Convention and the cost saving device introduced by Congress, the Advisory Committee was attracted to the prospect that the costly intricacies of compliance with the Convention might be avoided by asking the defendant to waive the Central Authority procedure established by the Convention in a case in which that procedure was not needed to provide the requisite information to the defendant. The cost saving could be much more significant in international than in domestic cases, given that service of process through a Central Authority requires that the complaint and summons be translated into the language of its officers, even if the foreign defendant to be served is entirely fluent in English, and was also likely to result in substantial delay sometimes intentionally imposed by governments protective of their defendants. Of course, many international firms doing business in the United States have no practical need for the formalities of the Convention requiring the participation of a Central Authority.<sup>157</sup> Toyota does not need to see a complaint against it in Japanese. The matter was discussed with officers of the Department of Justice, perhaps through Justice with the Department of State, and with informal academic gatherings in Europe. No reasonable objection could be seen by the Committee for

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<sup>155</sup> *Omni Capital International v. Rudolph Wolff & Co.*, 484 U.S. 97 (1987).; see J. Dickson Phillips & Paul D. Carrington, *Reflections on the Interface of Treaties and Rules of Procedure: Time for Federal Long-Arm Legislation*, 57-3 LAW & CONTEMP. PROB.153 (1994).

<sup>156</sup> See Joseph Weis, *The Federal Rules and the Hague Convention: Concerns of Conformity and Comity*, 50 U.PITT.L. REV. 903 (1989).

<sup>157</sup> E.g., *Bankston v. Toyota Motor Corp.*, 889 F. 2d 172 (8<sup>th</sup> cir. 1989).

not applying the requested waiver-of-service provision to defendants outside the United States, especially when a costly, dilatory, and unnecessary translation would be needed.

To address all these purposes, Rule 4 was reorganized to accommodate the needed amendments. Our draft was published for comment and no objections were heard. The proposal was unanimously approved by the Standing Committee and by the Judicial Conference.

But it was quietly revised at the behest of the Supreme Court to insert language making the cost-shifting waiver-of-service provision inapplicable to a defendant to be served outside the United States.<sup>158</sup> That revision was made at the direction of Chief Justice Rehnquist and the Judicial Conference in response to the protest of the British Embassy. The Embassy, presumably at the request of officials of the European Union, had retained Erwin Griswold, a former Solicitor General of the United States, to inform the Court and the State Department that our proposal was offensive to signatories to the Hague Convention. No public consideration of this issue was ever conducted. So much for the new practice of transparency required by the revised Rules Enabling Act! It seemed to me at the time that the international political question raised by the British Embassy was one best resolved by Congress on the advice of the Executive.

. Just as the House of Representatives had responded to the lobbying of the American Bar Association on Rule 26 without serious consideration of the political issue it addressed, so did the Court and the Judicial Conference under the leadership of Chief Justice Rehnquist respond to lobbying by the British Embassy on Rule 4 without public deliberation or consideration of the merits of the issue presented. I continue to believe that the cost-shifting provision should be applied to a foreign defendant who needlessly requires an American plaintiff to hire a translation of a summons and complaint

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<sup>158</sup> See Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57-3 LAW & CONTEMP. PROB. 103, 143-148 (1994)

when the defendant is fully fluent in English and engaged in activities in the United States that give rise to the complaint. I see no conflict with the Hague Service Convention, whose aims are essentially those of Rule 1. I urge the Advisory Committee to try once more to get it right.<sup>159</sup>

### THE HAGUE EVIDENCE CONVENTION

Rule 4 was not the only rule that posed an issue regarding the impact of international relations on American civil procedure. In addition to the Hague Service Convention, there was the Hague Evidence Convention bearing on the taking of evidence abroad.<sup>160</sup> The relation of that treaty to Rule 26 emerged as a problem in 1987 in the 5-4 division of the Supreme Court in *Societe Nationale Industrielle Aerospatiale v. United States District Court*.<sup>161</sup> In that case, the French manufacturers of an allegedly defective airplane resisted a Rule 34 request for documents bearing on the airplane's design by insisting on the plaintiffs' use of the formalities provided by the Convention. The Convention does impose on the signing nations an obligation to cooperate with "Letters of Request" addressed not to the party from whom evidence is sought, but to his government that may in due course secure and transmit it. The Court unanimously rejected the defendants' contention that the plaintiffs seeking documents located in France were required to pursue them by means of the Letter of Request procedure. The majority opinion of the Court cautioned district courts to "exercise special vigilance to protect foreign litigants from unduly burdensome discovery,"<sup>162</sup> but

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<sup>159</sup> See Joseph F. Weis, Jr., *Service by Mail – Is the Stamp of Approval from the Hague Convention Always Enough?* 57-3 LAW & CONTEMP. PROB. 165 (1994); but see Doug Rendleman, *Comment on Judge Joseph F. Weis Jr, Service by Mail – Is the Stamp of Approval from the Hague Convention Always Enough?*, 57-3 LAW & CONTEMP. PROB. 179 (1994).

<sup>160</sup> Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, opened for signature March 18, 1970 and entering into force on October 25, 1980. See generally Lawrence Collins, *The Hague Evidence Convention and Discovery: A Serious Understanding?*, 35 INT'L & COMP. L. J. 765 (1986)..

<sup>161</sup> 482 U.S. 522 (1987).

<sup>162</sup> 482 U.S. at \*\*\*.

concluded that the Convention merely supplied an alternate optional means of pursuing information or evidence.

Four Justices dissented from the “Court’s view of this country’s national and international obligations.”<sup>163</sup> They urged that some deference be shown to foreign sovereignty and the international agreement, and that the Letter of Request procedure should therefore be used as a first resort when it is available and adequate to the specific task.

The issue presented by the two opinions seemed to the Advisory Committee to be worthy of broader public consideration. We published a draft of an amendment that would require a first resort to the Letter of Request procedure if available and suited to the task at hand.<sup>164</sup> After considering the reactions to that tentative draft, the Committee decided that the majority decision should be expressed in the text of the rule, which should include a reference to the Letter of Request procedure as an option. The Committee’s purpose was, as with the Rule 38 proposal, to assure if possible that the Rules as published accurately express the governing law.

After this proposal was sent to the Court, an objection was voiced by the United Kingdom and the Court remanded the matter to the Committee. When the Committee, upon reconsideration, again resolved that the rule should be amended to conform to rule expressed by the Court, the Department of State joined in expressing disapproval, so the Judicial Conference laid the matter to rest.<sup>165</sup> The majority opinion remains the law, and there is still no reference to the Hague Evidence Convention in the Rules.<sup>166</sup> It seems unlikely that many American litigants have been constrained from discoveries by

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<sup>163</sup> . 482 U.S. at \*\*\*

<sup>164</sup> 127 F.R.D. 318.

<sup>165</sup> 146 F.R.D. 515, n.1.

<sup>166</sup> A contemporaneous assessment of the results is Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure*, 57-3 LAW & CONTEMP. PROB. 77 (1994).

courts concerned about the need to exhibit respect for foreign governments.<sup>167</sup>

## RULE 11 SANCTIONS

The first substantial response made by the Advisory Committee to the rising complaints of business interests over their suffering with frivolous claims and excessive discovery had come in Professor Miller's time. As previously noted, the committee he served rewrote Rule 11 to permit and encourage monetary sanctions to be imposed on lawyers responsible for the assertion of meritless motions, claims and defenses.<sup>168</sup> The revision was well drafted and won much approval at the time of its promulgation, but not without controversy. Among many others, I thought they had it was about right. It did apparently have the effect of causing some lawyers to do a bit more homework before filing a claim or motion in federal court.<sup>169</sup>

Yet, while many lawyers told the American Judicature Society that they had counseled a client not to file suit in light of Rule 11, the impact on actual filings was not evident.<sup>170</sup> And the increasingly frequent resort to Rule 11 begot a substantial and adverse reaction from members of the bar. The issues Rule 11 presented remained at the top of the committee's agenda for at least four years. Among the complaints were that the newly revised rule (1) gave rise to a new industry of Rule 11 motion practice adding to cost and delay; (2)

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<sup>167</sup> See HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 198-204 (2008).

<sup>168</sup> Amendment effective April 28, 1983 (effective August 1, 1983), 97 F.R.D. 165. 167-68 (1983).

<sup>169</sup> NEW YORK STATE BAR COMMITTEE ON FEDERAL COURTS, *SANCTIONS AND ATTORNEYS' FEES* (1987); THOMAS WILLGING et al, *THE RULE 11 SANCTIONING PROCESS* (1989); AMERICAN JUDICATURE SOCIETY 3D CIRCUIT TASK FORCE, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 68-72 (Stephen R. Burbank ed., 1989); E. WIGGINS et al, *REPORT ON RULE 11* (1989).

<sup>170</sup> ELIZABETH WIGGINS, THOMAS WILLGING, & DONNA STIENSTRA, *FJC REPORT ON RULE 11* (1991).

stimulated incivility between lawyers; (3) was usually aimed at plaintiff's counsel, leaving defense counsel unrestrained in the assertion of unfounded denials; and (4) encouraged judges to indulge their occasional personal animus toward individual lawyers, sometimes by belated *sua sponte* rulings coming after a dispute seemed to have been resolved.<sup>171</sup> Another complaint heard was that the rule was deterring private enforcement of public law, at least in the field of antitrust law.<sup>172</sup>

The New York State Bar and a Third Circuit Task Force organized by the American Judicature Society and served by Professor Stephen Burbank both voiced many of these concerns.<sup>173</sup> Perhaps in part because of the recent revisions of the Rules Enabling Act, the Committee was moved to seek public comments on the efficacy of the rule, with ten specific questions posed for response.<sup>174</sup> The Committee also, perhaps for the first time, specifically requested that the Administrative Office gather data on the effects of the rule. No fewer than three books were published by eminent authors reporting the emerging case law to the lawyers caught in the toils of the new law.<sup>175</sup> Numerous hearings in diverse locations were conducted to hear the views of lawyers and judges who had used the

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<sup>171</sup> See William Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); Gerald Solovy & Laura A. Kaster, *Rule 11: Framework for Debate*, 81 MISS. L. REV. 1 (1991). Herbert Kritzer, Lawrence Marshall & Frances K. Zemans, *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 259 (1992).

<sup>172</sup> Daniel E. Lazaroff, *Rule 11 and Federal Antitrust Litigation*, 67 TULANE L. REV. 1034 (1993).

<sup>173</sup> See Stephen R. Burbank *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV. 511 (1989); Stephen R. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989).

<sup>174</sup> 131 F. R. D. 335 (1990).

<sup>175</sup> JEROLD S. SOLOVY & CHARLES M. SHAFFER JR., *RULE 11 AND OTHER SANCTIONS: NEW ISSUES IN FEDERAL LITIGATION* (1987); GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (2D ED. 1994); GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* (2d ed. 1992).

rule. Their responses were not reassuring. Not only were hostility levels elevated, but many judges were being routinely asked to consider sanctions to punish many, and perhaps most, lawyers whose motions they had denied.<sup>176</sup> Rule 11 motions to sanction Rule 11 motions were being made.

One thought was to restore fully the discretion of the trial judge being asked to impose sanctions on an adversary. It was also suggested that the hostility might be reduced by a “safe harbor” provision that would require that sanctions motions be made promptly in direct response to the challenged action of counsel, and that a modest time would be allowed for the withdrawal of the challenged motion or allegation when the moving party detected that the sanctions motion might have merit. A draft to that effect was circulated, and more comments were received. Hearings were held. Revisions were made in response to the comments. A draft was recommended to the Standing Committee with the safe harbor provision and with a modest constraint on judicial discretion in the administration of the rule. The Standing Committee debated the draft at length and made further revisions, including the restoration of judicial discretion.<sup>177</sup> The draft as revised was promulgated and became law in 1993 over the dissent of Justices Scalia and Thomas, who vigorously protested that the revision was premature, and that more lawyers needed to be punished.<sup>178</sup> The factual basis of their opinion was not disclosed; it clearly disregarded the data gathered by the Administrative Office.

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<sup>176</sup> See Melissa L. Nelken, *Sanctions Under Amended Rule 11 -- Some “Chilling Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L. J. 1313 (1986).

<sup>177</sup> For a review of all the changes see Georgene Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39 (1994).

<sup>178</sup> 146 F.R.D. 507- 509 (1993).

Whether our 1993 revision of Rule 11 was benign I leave to others to say.<sup>179</sup> It did for at least a time quell the concern for the civility of the federal legal process. For better or worse, the rule apparently continued to impede the assertion of civil rights claims of employees by contingent fee lawyers reluctant to risk sanctions.<sup>180</sup> It did not succeed in settling the law on sanctions. For example, questions remained on whether the need for a separate motion on sanctions was indispensable, and whether the safe harbor provision was to be strictly enforced.<sup>181</sup>

And it did not calm the Justices who had in 1991 chosen to disregard the constraining text of Rule 11 to hold, over the dissent of Justice Scalia and others, that federal district judges have *inherent* power to punish lawyers and their clients for persisting in the presentation of a frivolous, indeed fraudulent, defense sometimes in the face of orders of the court.<sup>182</sup> It was observed that the conduct to be punished in the case presented did include much adversary conduct that was not reached by Rule 11 because it was not reflected in pleadings or motions, nor was it entirely within reach of the contempt power. The Court concluded that neither Rule 11 nor the statute forbidding lawyers to engage in vexatious behavior<sup>183</sup> was applicable to much of the misconduct, but that this lack of explicit authority should not preclude a court from doing whatever it takes to prevent

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<sup>179</sup> More tinkering would be needed. See Maureen N. Armour, *Practice Makes Perfect.: Judicial Discretion and the 1995 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677 (1996). A later assessment is Margaret L. Sanner & Carl Tobias, *Rule 11 and Rule Revision*, 37 LOYOLA OF L. A. REVIEW 571 (2004).

<sup>180</sup> For thoughtful consideration of the issue, see Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155 (1999).

<sup>181</sup> See Danielle Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1 (2002).

<sup>182</sup> *Chambers v. NASCO*, 501 U. S. 32 (1991). Over the dissents of Justices Kennedy, Rehnquist, Scalia, and Souter.

<sup>183</sup> 28 U.S.C. §1927.

abuse. The Court urged judges to use Rule 11 when applicable, but not to be constrained by its limitation in circumstances in which lawyers needed to be punished. In so holding, the Court relied in part on its earlier decision<sup>184</sup> upholding the power of the district court to dismiss a civil claim for failure to prosecute even though the defendant had made no motion to dismiss, notwithstanding the explicit language of Rule 41(b) requiring such a motion as a precondition to dismissal. Implicit in the Court's holding was the suggestion that Rule 11 might perhaps be deleted as an unnecessary impediment to judges seeking to do the right thing.

#### THE SUPREME COURT'S ROLE AS PROCEDURAL LAWMAKER: RULES 56 AND 8

The relation of the rule makers to the Court was of greatest concern in the Advisory Committee's consideration of Rule 56. The concern was aroused by the "trilogy" of cases handed down by the Supreme Court in 1986.<sup>185</sup> Those decisions were seen by the Committee to revise the Rule to permit district judges to render summary judgments more freely than its previous decisions seemed to allow. And, in many minds,<sup>186</sup> including mine, more freely than the text of the rule could reasonably be said to intend. The trilogy proved

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<sup>184</sup> *Link v. Wabash R. R.* 370 U. S. 626 (1962).

<sup>185</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zebith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>186</sup> See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment* 100, *YALE L. J.* 73 (1990); Jack Friedenthal, *Cases on Summary Judgment: Has There Been A Meterial Change?* 63 *NOTRE DAME L REV.* 770 (1988); Melissa Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 *HASTINGS L.J.* 53 (1988); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment* 54 *BROOKLYN L REV* 35 (1988); Steven A. Childress, *A New ERA for Summary Judgments*, 116 *F.R.D.* 183 (1987).

to be a foretaste of another, even more radical, revision of the Rules that would be fashioned by the Court in 2007<sup>187</sup> and 2009.<sup>188</sup>

Rule 56 had been promulgated in its original form in 1938 as an adoption of a procedure used in England for a half century, and in numerous states.<sup>189</sup> The aim was to enable the trial judge to spare the court and the parties the cost of a trial when its outcome was foreseen with certainty. In a classic early 1940 interpretation it was said that “its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer at trial.”<sup>190</sup> The aim was to inquire before trial, but after discovery, whether such evidence exists. The moving party assumed the burden “to show that there is no genuine issue as to any material issue of fact.”<sup>191</sup>

We are told that the 1986 opinions of the Court re-writing Rule 56 have been more frequently cited “than any decisions in the history of American jurisprudence.”<sup>192</sup> They were seen by respected scholars to have the effect of reviving the fact pleading standards that were the primary feature of the 19<sup>th</sup> century codes that had often led to decisions based on perceived flaws in the texts of complaints and answers.<sup>193</sup>

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<sup>187</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544. (2007); for a prompt comment, see Edward J. Cavanaugh, *Twombly*, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN L. REV. 877 (2008).

<sup>188</sup> *Ashcroft v. Iqbal* 556 U.S. \*\* (2009).

<sup>189</sup> See Charles Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L. J. 423 (1929); John Bauman, *Evolution of the Summary Judgment Procedure*, 31 IND. L. J. 329 (1956).

<sup>190</sup> *Whitaker v. Coleman*, 115 F. 2d 305, 307 (5th cir 1940) (per Hutcheson, J.).

<sup>191</sup> F.R.Civ. P. 56c).

<sup>192</sup> Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 143 (2006).

<sup>193</sup> Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L.REV. 433 (1986); Arthur R. Miller, *The Pretrial Rush of*

Among other effects, the trilogy was seen by the Advisory Committee to render Rule 56 misleading. It was questioned whether lawyers could retain faith in the text crafted through the rulemaking process established by Congress. In taking it upon itself to depart from the text of the Rule, the Court seemed to many to have manifested a measure of disrespect for the rulemaking process that had been designed to assure the well-informed disinterest of those responsible for the texts of trans-substantive procedure rules, and for their revision. Although the alignments of Justices lend no support to the observation, the three decisions together could also be seen to reflect a substantive political agenda to assist the contemporaneous deregulation movement soon to be led by Vice President Quayle.<sup>194</sup>

Among the tasks I was assigned in my first years as a Reporter was consideration of re-writing the pertinent language of Rule 56 to make it consistent with the three Supreme Court decisions. The Advisory Committee was moved to accept the Court's dictation, and I tried to draft a rule more consistent with the Court's opinions. I recall that one of the meetings of the Committee was held at a conference room at the Supreme Court. Chief Justice Rehnquist happened by and expressed interest in our agenda. He warmly approved of the idea of re-writing Rule 56. But he did not stay to help with the task.

The Committee did, after an extended period of study and reflection, approve a draft of Rule 56. In fairness, none of us were sure we had it right. We sought to reconcile the text of the rule to the 1986 trilogy and also to clarify the use of the rule to resolve specific claims or issues even when the whole case could not be summarily resolved.<sup>195</sup>

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*Judgment: Are the "Litigation Exploaion," "Liability Crisis", and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L.REV. 982 (2002).

<sup>194</sup> Risinger, note 186.

<sup>195</sup> Minutes of Civil Rules Committee Meeting of April 13-15, 1992. (on file with author).

We also tinkered with Rule 50 for the purpose of linking it to our proposed text of Rule 56.<sup>196</sup> Our proposal for Rule 50 became law, but not our proposal for Rule 56. While other questions were discussed, the argument that seemed to prevail in the Standing Committee against the revision of Rule 56 was that it would be inappropriate for our committees to be trespassing on a lawmaking role that the high Court had appropriated for itself. I was not the only person present who was resistant to a notion that seemed to be misplaced modesty and deference by those to whom Congress had assigned the role of disinterested drafting of procedural law for its non-partisan approval.

The premise of the Rules Enabling Act of 1934 that still governs the Judicial Conference is that courts of first instance should be bound to adhere to pre-existing rules crafted by the Conference and its committees but subject to Supreme Court approval and Congressional acquiescence, just as they are bound to respect and enforce Congressional legislation. The Supreme Court seemed to have departed from that premise in the 1986 trilogy; it was seen by many to have re-written Rule 56 in a moment of “judicial activism.”

If there was doubt that the Court was re-writing the Rules to conform to the political preferences of a majority of the Justices, the doubt was resolved in 2007 and 2009. Its 2007 decision in *Bell Atlantic v. Twombly*<sup>197</sup> was made to rest in part on the fact that the claim was one arising under the federal antitrust law. The majority of the Court expressed skepticism about the virtue of antitrust plaintiffs as a group sufficient to justify a more rigorous application of Rules 8 and 12 to their suspect claims by greater readiness to render judgments on the pleadings. This approach would foreclose wasteful discovery by plaintiffs who are deemed by the judge to be unlikely to

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<sup>196</sup> See Paul D. Carrington, *Exorcising the Bogy of Non-Transsubstantive Rules and Making Rules to Dispose of Manifestly Unfounded Assertions*, 137 U.P.A.L.REV 2067 (1989).

<sup>197</sup> *Bell Atlantic v. Twombly*, note 186; See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules”*, 2009 WIS. L. REV. 535 (2009).

be able to find the requisite evidence of conspiratorial misconduct even by free use of the means of discovery.

The Court took no notice of the efforts to reform discovery practice in which the Advisory Committee has been engaged since the “judicial case management” reforms of 1983, but relied on Judge Easterbrook’s 1989 declaration that the Civil Rules are not working.<sup>198</sup> No notice was taken by the Court of the 1993 amendments to the discovery rules with which we had addressed the issues raised by Judge Easterbrook.<sup>199</sup>

The opinion of the Court in *Twombly* showed surprising disregard for the character of antitrust law that had led to a contrary position in 1962, when the Court cautioned that “summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.”<sup>200</sup> That 1962 caution is no less apt in 2010.<sup>201</sup> But where the Court in 1962 had seen a duty to interpret the Rules to favor antitrust law enforcement in the setting of a motion to avoid trial, the Court in 2007 saw itself as having a contrary duty to protect business firms from the expense even of enduring the discovery process in an antitrust claim if in a court’s intuitive judgment the claim seemed unlikely to be a winner. Never mind that withholding access to discovery will inevitably prevent some meritorious claims from being heard.

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<sup>198</sup> Op. cit. n. 119.

<sup>199</sup> Supra text at notes 117-173. This oversight was promptly noted by Edward Cavanaugh, supra n. 186, but not by the Court.

<sup>200</sup> *Poller v. Columbia Broadcasting System Inc.*, 368 U.S. 464. 473: (1962) (per Clark J.)

<sup>201</sup> See Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond* (draft on file with author). Hovenkamp distinguishes geographic market division from parallel pricing; “methods of indirect proof that might work in a case alleging unlawful price fixing are unlikely to work in one alleging unlawful market division.”

The opinion of the Court manifested a disregard of the text of Rules 8 even more obvious and drastic than the disregard of Rule 56 that had been manifested in 1986.<sup>202</sup> Rule 8 is the “keystone” of civil procedure under the 1938 Federal Rules scheme.<sup>203</sup> The Court did not observe the dictum of the late Chief Justice Rehnquist that access to discovery could not be restricted without an amendment of Rules 8 and 9.<sup>204</sup> As recently as 2002 the Court had unanimously confirmed that the only means available for foreclosing discovery was a summary judgment under Rule 56.<sup>205</sup> Nor did it acknowledge that stare decisis has long been said to have special value when judges are interpreting legislation,<sup>206</sup> a principle perhaps having special application to legal texts promulgated by the Court itself, with the assent of Congress, on the advice of disinterested and well-informed experts.

Nor did the Court in 2007 observe that its assessment of the “plausibility” of a plaintiff’s allegations cast the Justices as well as the trial judge into the fact-finding role of the civil jury. That oversight was also observed in an unrelated case in which the Justices viewed the films of an automobile accident to decide for themselves whether there was fault.<sup>207</sup>

The Court also disregarded the text of Rule 9. That Rule has always modified the basic principle of Rule 8 by setting a heightened

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<sup>202</sup> See cases cited in note 185 supra.

<sup>203</sup> CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 470 (6<sup>th</sup> ed. 2002).

<sup>204</sup> *Leatherman*, note 26, at 168-169 (1993).

<sup>205</sup> *Swierkowitz v. Sorema N.A.*, supra n. 30.

<sup>206</sup> See *Neal v. United States*, 516 U.S. 284, 295 (1996). And see Justice Scalia in *Hohn v. United States* 524 U.S. 236 (1998)(stare decisis applicable to procedure rules) at 259.

<sup>207</sup> *Scott v. Harris* 550 U.S. 372 (2007); See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L REV. 837 (2009).

standard of pleading for fraud. But not for antitrust claims.<sup>208</sup> Benjamin Spencer has rightly questioned how there can be yet another specially heightened standard that is not expressed in Rule 9.<sup>209</sup>

The Court's non-Rule-based heightened pleading standard requires the antitrust plaintiff to know what the defendant alone may know. Scott Dodson has aptly described the relationship between the parties as an "information asymmetry,"<sup>210</sup> which is just what the discovery rules were promulgated to correct.

And one is left to wonder what the Court proposes to do to a plaintiff who presents as his or her complaint one of the forms appended to the Federal Rules as models of what is expected of pleaders. Form 11, for example, merely alleges that the defendant negligently drove a motor vehicle into the plaintiff. This pleading does not seem to meet the Court's standard.

One who shared the politics of the generations of procedural lawmakers such as Bentham, Field, Pound and Clark could hope that *Twombly* was just an antitrust case to be understood as an expression of the Court's desire to protect business interests from claims brought under a federal law that the Justices no longer approved. But the 2009 opinion of the Court in *Ashcroft v. Iqbal*<sup>211</sup> dissolved that hope. Iqbal's allegations that the defendants were among the public officials responsible for his harsh treatment when there was no evidence

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<sup>208</sup> See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002).

<sup>209</sup> *Plausibility Pleading*, 49 BOSTON COLL. L. REV. 431, 473-477 (2008). Also to be noted is the special standard applicable to habeas corpus proceedings under Habeas Rule 2(c). *Id.* 477-478.

<sup>210</sup> *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 121 (2007); Benjamin Spencer added the observation that "When such information is unknown or unknowable from the plaintiff's perspective at the pleading stage, the doctrine is too unforgiving and unaccommodating, leaving plaintiffs with potentially valid claims with no access to the system." *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 36 (2009).

<sup>211</sup> 129 S. Ct. 1937 (2009).

legitimizing his arrest as a terrorist in violation of federal law, were in the Court's view allegations simply unworthy of belief and therefore unworthy of investigation through the use of the discovery rules. The defendants' qualified immunity as public officials ostensibly doing their duty became in the Court's opinion an absolute immunity depriving Iqbal of access to the evidence he would have needed to prove his allegations. This was done despite the concession of the defendants that they would be liable if they had knowledge of the mistreatment of Iqbal and had been deliberately indifferent to his mistreatment. Because a majority of the Justices found Iqbal's allegations implausible, it directed the district court to terminate the case against them prior to factual investigation. This action was inconsistent with the text of Rule 8 that expressly entitles Iqbal to proceed to prove the facts alleged if they would entitle him to relief.<sup>212</sup> The Court's decisions disregarding the text of Rule 8 as interpreted by generations of federal judges make its earlier 1986 seeming disregard of the law of summary judgment seem restrained in comparison.

Advocates of "deregulation" are surely celebrating the opinion in *Iqbal* as a major step in the dismantling of the system of private enforcement of public law established in 1938. It is a happy day for Vice President Quayle's Council on Competitiveness that sought in 1990 to enhance business profits by disabling citizen plaintiffs from enforcing laws made to protect them from the consequences of risky profit-seeking. We are even told, in a gesture of remarkable incivility, that the Court's activism is a response to the need to fight the War on Terror.<sup>213</sup> Those who respect Rule 8 favor terrorism!

The Court seems, not in these cases alone, to have lost the self-discipline required to show appropriate respect for the procedural lawmaking system established by Congress in 1934, or to observe the principle of self-restraint in respecting the work of the Judicial

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<sup>212</sup> F. R. Ci.v P. 8(a).

<sup>213</sup> William McGurn, *Terror by Trial Lawyer*, WALL STREET JOURNAL, December 7, 2009 at A17.

Conference that it had voiced as recently as 1999.<sup>214</sup> That principle is now one of convenience to the Justices.<sup>215</sup> A majority seem oblivious of their duty to obey and enforce that law. As Judge Scirica has recently observed, the 1934 Act was

a brilliant solution to the making of procedural law. Described as a treaty between the legislative and judicial branches, it provides a dispassionate, neutral forum that allows procedural law to be written in a deliberate and thoughtful manner. Key members of the Executive Branch (such as the Deputy Attorney General and the Solicitor General) have seats on the Rules Committee. The openness mandated by Congress invites public comment, and new rules are enacted only after approval by the Judicial Conference, adoption by the Supreme Court, and after a six-month interval while Congress considers whether to permit the rules to become law. All of this ensures the rigorous scrutiny and public review essential to establish the credibility and legitimacy of the rulemaking process.<sup>216</sup>

The Court visibly lacks sufficient respect for the other branches of the national government or for the Judicial Conference of the United States to heed such a treaty. Perhaps the absence of trial experience and legislative experience enables the present Justices to make an inflated assessment of their own wisdom manifested by their academic credentials. Other recent instances indicate diminished regard for subordinate judges and jurors thought to be responsible for

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<sup>214</sup> In *Ortiz v. Fibreboard Corp.* 527 U.S. 815, \*\*\* (1999), the Court had declared:

The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.

<sup>215</sup> The Court in *Mohawk Industries Inc v. Carpenter*, 175 L. Ed. 458 (2009), expressed deference to the statutory rulemaking process to consider fashioning a new rule governing the appealability of discovery orders. This was rightly characterized by Scott Dodson as ironic. Melinda Harris, *Order to Disclose Privileged Material Is Not Subject to Interlocutory Review*, 78 U.S. LAW WEEK, December 15, 2009, at 1346.

<sup>216</sup> THE THIRD BRANCH 1, 11 (December 2009).

assessing the credibility of evidence.<sup>217</sup> Still others confirm the Court's lack of regard for Congress.<sup>218</sup>

### COMPARE THE FEDERAL ARBITRATION ACT OF 1925

The decisions of the Supreme Court in re-writing the Federal Rules of Civil Procedure in disregard of the role of other branches of government in order to protect business interests from the costs associated with effective private enforcement of public law should not be seen only in isolation. While the Court was re-writing Rule 56 and then Rule 8 (texts that it had promulgated in 1938) to ease the concerns of Business, it was pursuing the same political objective in its re-writing of the Federal Arbitration Act of 1925.<sup>219</sup>

The 1925 Act had been adopted to foster arbitration of contract disputes arising between business firms engaged in interstate commerce by reversing a body of *federal common law* (i.e., the law overruled and dissolved in 1938 in *Erie R.R. v. Tompkins*)<sup>220</sup> that had denied enforcement in federal courts of arbitration agreements made prior to the existence of the dispute to be arbitrated, often in disregard of the applicable state law of contracts.<sup>221</sup> As federal and state laws enacted to serve public regulatory purposes became more numerous, business interests were attracted to arbitration as a means of blunting the force of such laws. Arbitration is not an absolute bar to law

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<sup>217</sup> For example, in *Scott v. Harris*, 550 U.S. 372 (2007), the Justices themselves watched the film presented to the jury and made their own assessment of what happened. Taking over role of jury. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

<sup>218</sup> See Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009).

<sup>219</sup> The point is made in more detail in Paul D. Carrington, *Self-Deregulation, A "National Policy" of the Supreme Court*, 3 NEVADA L. J. 259 (2002).

<sup>220</sup> 304 U.S. 64 (1938).

<sup>221</sup> See IAN R. MACNEIL. AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 122-133 (1992).

enforcement, but the citizen plaintiff must share the cost of the arbitrator. And any factual investigation is entirely in the hands of the arbitrator.<sup>222</sup> And the arbitrator is not accountable for his or her fidelity to the law.<sup>223</sup> So it became attractive for firms to arbitrate private claims arising under state or federal regulatory laws. With increasing frequency, firms wrote arbitration clauses into standard form contracts required to be signed by workers, consumers, investors, patients, or franchisees.

In 1953, the Court held that an arbitration clause in a brokerage agreement is not binding on a plaintiff seeking recovery under the Securities Act of 1933.<sup>224</sup> That decision was widely approved and taken to apply to claims advanced to enforce other laws enacted by Congress.<sup>225</sup> In 1984, the Supreme Court for the first time held that the 1925 federal law could be invoked to bar California state courts from enforcing their state's law by invalidating an arbitration clause in a standard form franchise agreement in order to assure judicial enforcement of California's Franchise Investment Act.<sup>226</sup> And in

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<sup>222</sup> E.g., 9 U. S. C. §7. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ARBITRATION ACT §7.

<sup>223</sup> Until 2008, it was widely held that an award might be set aside if it exhibited a "manifest disregard of law." And it was assumed that a contract could provide for judicial review of fidelity to law. That assumption was laid to rest in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). And see *Citigroup Global Mkts., Inc v. Bacon*, 562 F. 3d 349 (5<sup>th</sup> cir. 2009). For an evaluation of *Hall Street*, see Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review is Not Always Pro-Arbitration*, 77 U. CHI. L. REV. \*\*\* (2010).

<sup>224</sup> *Wilko v. Swan*, 346 U.S. 427. The Court relied on the language of the Securities Act declaring void any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any [of its] provision[s]." In reaching this conclusion, it followed the position taken by the Securities and Exchange Commission in its amicus brief. And see *Boyd v. Grand Trunk Western R.R.*, 338 U. S. 263 (1949); *Donohue v. Susquehanna Collieries Co.* 138 F2d 3 (3d cir 1943); *American Safety Equipment Corp. v. J. P. Maguire & Co., Inc.*, 391 F2d 821 (2d cir 1968).

<sup>225</sup> See e.g., *In the Matter of AAACON Auto Transport, Inc.*, 537 F2d 648 (2d cir 1976); *American Safety Equipment Corp. v. J. P. Maguire & Co., Inc.*, 391 F2d 821 (2d cir 1968).

<sup>226</sup> *Southland Corp. v. Keating*, 465 U.S. 1. The state law in question was CAL. CORP. CODE §31000 et seq. In 1995, the Supreme Court extended its application of the

1989, the Court explicitly overruled its own 1953 decision to hold that the 1925 Act empowered brokers to compel their investors to arbitrate claims arising under federal securities laws<sup>227</sup> The Court went on to apply the principle to other federal laws.<sup>228</sup>

Maybe an arbitrator might investigate facts in dispute when a citizen seeks to enforce the law enacted for his or her protection, and maybe the arbitrator might elect to enforce the law, but an arbitrator is not accountable to anyone for a failure to investigate facts or adhere to the controlling state or national law.<sup>229</sup> It is said reassuringly by those providing arbitration services that private citizens required thus to arbitrate win a higher percentage of their cases than in litigation.<sup>230</sup> If so, a likely explanation is that the upfront charge for the cost of arbitration and the absence of the right to discovery of needed evidence serve to deter the filing of any but the most assured claims. Indeed, if it were true that plaintiffs win more readily in arbitration, one can be assured that few businesses would be writing arbitration clauses into their standard form contracts.

Also, arbitration is a private proceeding. One of its attractions to predatory or risk-taking business is that it diminishes the likelihood that the success of one claim by a consumer or employee or investor will encourage others like it. Evidence revealed to an arbitrator remains private. Whereas a public enforcement proceeding serves to alert the general public to the need for regulation and enables them to

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Federal Act to preempt Alabama law protecting consumers of services from mandatory arbitration clauses in standard form contracts. *Allied Bruce Terminix Companies v. Dobson*, 513 U.S. 265.

<sup>227</sup> *Rodriguez de Quijas v. Shearson/American Express*, 490 US 477; the overruling was foretold in *McMahon v. Shearson/American Express Inc.*, 482 U. S. 220; see Carrington, op. cit. n. 208 at p. 603.

<sup>228</sup> See op. cit. n. 219.

<sup>229</sup> *Hall Street Associates, L.L.C. v. Mattel, Inc.*, note 223.

<sup>230</sup> E.g., National Arbitration Forum, <http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&nayID=6&news=31>.

measure the usefulness of their legal institutions, Secret proceedings or suppressed discovery material conceal from the public not only the risk of the harm at issue, but also an awareness that they are being served by the law enforcement efforts of their fellow citizens.<sup>231</sup>

This history of federal arbitration law since the mid-1980s tends to confirm that the Supreme Court's revisions of the Federal Rules of Civil Procedure have a clearly visible political aim. It is to protect business firms from unwelcome private law enforcement, never mind contrary legal texts whether enacted directly by Congress or promulgated by the Court itself on the advice of the Judicial Conference and with the tacit approval of Congress, or even if enacted by state legislatures to assure the effective enforcement of state law.

Congress, under the leadership of Senator Hatch, has intervened to protect the rights of automobile dealers to enforce the Automobile Dealers Day in Court Act.<sup>232</sup> And under the leadership of Senator Grassley, to assure the rights of farmers to opt out of arbitration clauses written into their printed contracts with firms that buy their produce.<sup>233</sup> But much state and federal law is less vigorously enforced as a result of the Court's decisions.

Meanwhile the Court has also re-written the Federal Rules of Evidence to weaken and perhaps nullify federal laws dependent for their enforcement on the use of expert opinion. District judges are to exclude expert testimony that, on the basis of their personal scientific expertise, they deem unreliable.<sup>234</sup> Rule 702 of the Federal Rules of Evidence was amended in 2000 in an attempt to codify the Court's

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<sup>231</sup> Adrian Lanni, Note, *Public Rights in Private Arbitration*, 107 YALE L. J. 1157 (1999).

<sup>232</sup> 21<sup>st</sup> Century Department of Justice Appropriations Act, November 2, 2002, 70 STAT. 1125, 15 U. S. C. §§1221 et seq

<sup>233</sup> Food Conservation and Energy Sct of 2008, Pub. L. 110-246, §1105, 122 Stat. 1651, 2119 (amending 7 U.S.C., §197c.

<sup>234</sup> *Daubert v. Merrill Dow Pharms, Inc.*, 509 U.S. 579 (1995); *General Electric Co. v. Joiner*; 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

utterances.<sup>235</sup> The admission of expert testimony under that Rule is highly discretionary and dependent on the judge's scientific competence.<sup>236</sup> Review of such rulings in the courts of appeals is, to say the least, problematic.<sup>237</sup> And this empowerment has contributed measurably to the rise in summary judgments dismissing plaintiffs' cases.<sup>238</sup> One effect of this reform is to magnify the political consequences of the Court's efforts to diminish access to discovery.<sup>239</sup>

For example, the enforcement of some federal laws regulating business may depend on expert economic opinion that can be secured only from experts fully informed of the defendant's case. The Bank Merger Act,<sup>240</sup> a law connecting banking and antitrust law, is a timely example of a federal law that may have been nullified by the Court's re-writing of the law of evidence to require unavailable expertise. Whether less constrained enforcement of the Act might have diminished the impact of the 2008 economic crisis is a question that may be worthy of consideration.

Perhaps it is not an overstatement to say that the Supreme Court in reinterpreting the Federal Arbitration Act, as in rewriting the Federal Rules of Civil Procedure, appears to have been captured by Business, much as many of the public regulatory agencies were captured to make us increasingly dependent on the system of private enforcement that emerged from the 1934 Act and its political

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<sup>235</sup> As amended Apr 17, 2000, eff. Dec. 1, 2000.

<sup>236</sup> See Sheilah Jasanoff, *Law's Knowledge: Science for Justices in Legal Settings*, 95 AM. J PUBLIC HEALTH S49 (2005).

<sup>237</sup> See, e.g. *Huss v. Gayden*, 2009 WL 3278698 (5<sup>th</sup> cir. en banc).

<sup>238</sup> SEE LLOYD DIXON & BRIAN GILL, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION, RAND Institute of Civil Justice (2002).

<sup>239</sup> DAUBERT: THE MOST INFLUENTIAL SUPREME COURT RULING YOU'VE NEVER HEARD OF, Project on Scientific Knowledge and Public Policy (2003).

<sup>240</sup> Act of May 13, 1960, Pub. L. 86-463, 74 Stat. 129 (1960), amended by Act of February 21, 1966, Pub. L. 89-356, 64 Stat. 892 (1966).

premises.<sup>241</sup> It is certainly not an overstatement to say that the Court has in these decisions manifested “judicial activism” of just the sort that conservative politicians have so vigorously decried.

### PRESCRIPTIONS

Arthur Miller has thoughtfully prescribed diverse actions for the Advisory Committee to consider as possible revivals of the Federal Rules.<sup>242</sup> The Institute for the Advancement of the American Legal System, a think tank established in 2006, has also chimed in with a proposal of Civil Caseflow Management Guidelines<sup>243</sup> and a set of proposed Pilot Project Rules to which the name of the American College of Trial Lawyers is also attached.<sup>244</sup> These Institute proposals are presented as “radical.” Skepticism has been expressed by veteran litigators J. Douglas Richards and John Vail who make the not groundless claim that the facts on the ground do not justify reforms on the scale proposed by the Institute.<sup>245</sup>

I am inclined to agree with the latter that the case has not been made for radical departure from the scheme established in 1938. To be sure, times have changed. But the American College proposals, like the decisions of the Court in *Twombly* and *Iqbal*, seem to be derived not from observable reality but from a political ideology that is resistant to private enforcement of public law and therefore favored by the Chamber of Commerce. Indeed, there was nothing in the

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<sup>241</sup> Capture was further confirmed by *Citizens United v. FEC*, 139 S.Ct. 876 (2010) holding that corporations have a First Amendment right to fund political campaigns.

<sup>242</sup> Pleading and Pretrial Motions—What Would Judge Clark Do? Essay Prepared for 2010 Litigation Review Conference (2009) (on file with author).

<sup>243</sup> INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASEFLOW MANAGEMENT GUIDELINES (2009).

<sup>244</sup> INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM AND AMERICAN COLLEGE OF TRIAL LAWYERS, PILOT PROJECT RULES (2009).

<sup>245</sup> *A Misguided Mission to Revamp the Rules*, TRIAL, November 2009 at 52-55 (2009).

rulings made in either case that had not been considered and rejected repeatedly by the Civil Rules Committee, among others.<sup>246</sup>

The present rulemaking system cannot proceed alone to correct what the Supreme Court has done to impair the effective enforcement of the substantive laws made by the Congress of the United States or the states. Given the role of the Court in the rulemaking legislative process as established by the 1934 Act, there is simply not much that the Advisory Committee or the Judicial Conference can reasonably be expected to do. To restate the law of pleading as expressed in *Twombly* and *Iqbal* would require a repudiation of the premises of the Rules Enabling Act of 1934 and the antecedent thoughts on law reform dating from Jeremy Bentham, David Dudley Field, and Roscoe Pound.

It is therefore past time for Congress to address the issues presented to the Advisory Committee in 1985 and now elevated to urgency by the Court's holding in *Iqbal*. I therefore offer my unqualified endorsement to the Notice Pleading Restoration Act of 2009<sup>247</sup> as proposed by Senator Specter and others. Or, better, to

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<sup>246</sup> Steven Burbank observed :

Nor do I think it was fortuitous that the Court proceeded by judicial decision rather than by remitting the issues to the Enabling Act process. As the head of the latter the Chief Justice was well aware that the Civil Rules Committee had raised and abandoned the possibility of amending the pleading rules a number of times, including in the recent past. Moreover, one of the reasons for the committee's serial inaction – that any amendment tightening pleading would be politically controversial and thus likely to arouse strong opposition in Congress -- can only have encouraged the Court to proceed as it did, particularly with a Democratic Congress.

It is precisely because these decisions represent an attempted power grab by the Court in direct contravention of the process prescribed by Congress that I have advocated legislation that would return federal pleading law to the status quo ante until such time as amendments to the Federal Rules are proposed through the Enabling Act process, subject to review by Congress.

Remarks to The Constitution Society, February 24, 2010 (on file with author).

<sup>247</sup> S. 1504, 111<sup>th</sup> Cong., 1st session (2009).

Stephen Burbank's proposal.<sup>248</sup> Or possibly Martin Redish's more radical proposal to have the Judicial Conference report directly to Congress, with such advice as the Court might wish to contribute.<sup>249</sup> Surely Redish is correct that if the responsibility for making non-trans-substantive law is constitutionally vested in Congress, not the Court. If, for example, there is to be a different standard for summary judgment or motions for judgment on the pleadings applicable to antitrust cases, the institution to promulgate such a law is Congress, and not the Court.

One is moved to be cautious in engaging Congress. In another of its "activist" ventures as the champion of business interests, the Court has assured the right of those with money to dominate the election of legislators at all levels of government.<sup>250</sup> I do not suppose that Congressman Kastenmeier was a victim of generous business contributions to the campaign of his adversary, but it would be no surprise to learn that some Congressmen in 2010 would take that risk into account before considering rules of civil procedure that might enhance the ability of citizens to enforce laws regulating Business.

Perhaps the Advisory Committee might be summoned to serve Congress as a consultant in a search for an enactment that might bring the Court back to the mission of enforcing the rights of citizens as expressed by generations of law reformers and embodied in the Rules Enabling Act of 1934. Might Congress, for example, empower the Court to certify to the Judicial Conference questions about procedure rules and their possible need for reconsideration or revision in a transparent and representative process? Would such an empowerment, by providing the Court with a self-effacing method of

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<sup>248</sup> Has the Supreme Court Limited Americans' Access to Courts? Hearing before the Senate Judiciary Committee, 111<sup>th</sup> Cong. (2009) (testimony of Stephen Burbank) available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf>

<sup>249</sup> WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 18, 62-85 (2009).

<sup>250</sup> See, *Citizens United v. FEC*, note 241.

addressing the politics of civil procedure, help the Court to find its way back home to an appropriate role in the constitutional scheme? It might be worth a try.