

3-1-1993

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Recommended Citation

Richard L. Morris, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 Brook. L. Rev. 761 (1993).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol59/iss3/3>

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OF BABIES AND BATHWATER: THE PROSPECTS FOR PROCEDURAL PROGRESS

*Richard L. Marcus**

INTRODUCTION

For me, this Symposium's topic recalls what a prominent Manhattan lawyer remarked over lunch at an American Law Institute meeting several years ago: "The worst thing they ever did for civil litigation was to create a standing committee on the civil rules." Having a standing committee meant somebody was always tinkering with the rules; it would be better, he felt, to leave the rules alone and to trust their evolution to careful judicial interpretation. The events that prompted this Symposium show how thoroughly my friend's desire for cautious continuity has been frustrated. Nowadays a leading question is whether the Advisory Committee on the Civil Rules can control, or even strongly influence, the pace and direction of innovation. And innovation does seem to be heading in several directions at once.

This Article examines the controversy that surrounds these developments with a view toward preserving the valuable features of our existing system of civil litigation. As the pace and diversity of innovation increase, there is increasing risk that we will be throwing out the baby with the bathwater.¹ The organizers of the Symposium suggest that we try to determine who stands to win or lose due to recent or proposed changes. My reaction is that, to the extent this focuses on a narrow self-interested approach to current controver-

* Professor of Law, Hastings College of the Law, University of California. Besides the participants in the Symposium, I received very useful comments on a draft of this Article from Wayne Brazil, Paul Carrington, Mary Kay Kane and Tom Willging. I am indebted to Amy Landers, Hastings class of 1993, Anne Lackey, Hastings class of 1994 and Nick Humy, Hastings class of 1995, for research assistance. All errors that remain are my responsibility.

¹ Cf. STEPHEN B. BURBANK, RULE 11 IN TRANSITION 71 (1989) ("[t]he answer lies not in throwing the baby out with the bathwater").

sies, it points in a dangerous direction. I argue that we instead should continue to endorse the pursuit of a neutralist rulemaking process.

Part I begins with a review and brief evaluation of the simmering controversies regarding civil litigation reform. It emphasizes the difficulty that attends a neutralist reform stance, notes the temptation of offering a political critique and considers the challenge to trans-substantive rules. Part II then surveys a series of episodes of reform in order to reflect on the insights they provide about the current controversies. Finally, Part III offers some observations about the pragmatic possibilities of progress through procedural reform.

I. CURRENT CONTROVERSIES

A. *The Crisis Mentality*

As Professor Robel observes, "Crisis rhetoric is enduringly popular in discussions of the court system."² Perhaps this reflects the difficulty of attracting attention to the dry problems of court procedure in the absence of a crisis. But the pervasiveness and tenor of current crisis rhetoric seem to outstrip that of recent memory. My reason for starting with the crisis mentality is that it tends to invite radical and hasty solutions to problems—throwing out the baby with the bathwater.

This crisis talk can be separated into three related areas. The first emphasizes the "litigation boom" image, which I admit to having invoked,³ and the related notion that lawyers are the cause of many, if not most, of America's woes. On the quantitative level the emphasis has been on caseloads. Of course, there have been other episodes of caseload growth.⁴ In

² Lauren Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 115 (1991).

³ See, e.g., Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 436 (1986) [hereinafter Marcus, *Fact Pleading*]; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983) [hereinafter Marcus, *Myth and Reality*].

⁴ There was, for instance, a burst of growth in civil filings in federal courts between 1900 and 1907. David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 123 (1981). England experienced a litigation boom in the 16th and 17th centuries. See C.W. Brooks, *Litigants and Attorneys in the King's Bench and Com-*

any event, the more strident uses of recent caseload trends have been quite simplistic as scholarly analyses, particularly those of Professor Galanter, have blunted the argument from statistics.⁵ Even officials of the Bush Administration have acknowledged that the scare tactics are overblown.⁶ Although popular with past Administrations, the broader attack on lawyers has been rejected even by judges appointed by those Administrations.⁷ The academic arguments supporting the inflammatory attacks on lawyers have similarly been rebutted.⁸

As a result, the feeling that there is some pressing urgency for change, which is fueled by the litigation crisis notion, appears to have been debunked in professional, if not political, circles.⁹ Yet debunking these overblown claims has not left satisfaction, much less complacency, in its stead. To the contrary, it is hard to find anyone who is fundamentally satisfied with the course and condition of civil litigation today. Whether or not Pound was right that some such dissatisfaction is inevitable,¹⁰ this pervasive unhappiness will fuel innovation.

The second type of crisis relates to control over innovation and, more specifically, the rules for handling civil litigation.

mon Pleas, 1560-1640, in *LEGAL RECORDS AND THE HISTORIAN* 41 (J. H. Baker ed., 1978).

⁵ See, e.g., Marc Galanter, *The Life and Times of the Big Six: or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

⁶ See Stuart Gerson, *Both Sides Are Wrong on Tort Reform. So What's Right?*, CONN. L. TRIB., May 18, 1992, at 20 ("The evidence does not support the view that American society is everywhere being overwhelmed by torrents of new cases.").

⁷ See, e.g., Henry Reske, *In Defense of Lawyers*, A.B.A. J., Jan. 1993, at 33 (Judge Roger Miner, "a conservative federal judge appointed by Ronald Reagan," attacked the president's Council on Competitiveness as "scapegoating at its worst.").

⁸ See Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists*, 70 TEX. L. REV. 645 (1992).

⁹ Indeed, it is important to remember that the general public awareness of this controversy is a matter of the last decade or so, and it might be expected to recede from the public consciousness.

¹⁰ See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. OF THE A.B.A. 395, 395-97 (1906) ("Dissatisfaction with the administration of justice is as old as law [A]ll legal systems among all peoples have given rise to the same complaints It is obvious, therefore, that there must be some cause of causes inherent in all law and all legal systems in order to produce this universal and invariable effect.").

There is an intrinsic and unresolved tension about where the power to make procedural rules should rest. There is a strong argument for *some* unilateral judicial power over the process of decisionmaking to preserve an independent judiciary,¹¹ but despite occasional references to such power,¹² the Supreme Court has not explored the possible limits of the idea.¹³ Instead, it has contented itself with viewing the power to make rules for civil litigation as a delegation from Congress; the inherent power debate accordingly "really is of no practical importance with regard to federal practice" because it is assumed that Congress has that power.¹⁴

Of course, Congress did not make significant use of that power until the proposed Federal Rules of Evidence surfaced in 1974. Professor Friedenthal saw that episode as a "contemporary crisis," suggesting that it "may have spelled the end of the autonomous role held by the Supreme Court for the past 40 years."¹⁵ During the 1980s Congress sporadically reviewed the

¹¹ Consider the views of Levin and Amsterdam: "There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*." A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958); see also Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 193 (1979) (judicial supremacy extends to "rulemaking that is indispensable to the courts' functioning").

¹² See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965) (regarding "matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules") (quoting *Lumbermen's Mut. Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

¹³ See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1115-16 (1982) (Supreme Court has not adequately explored constitutional limits on court rulemaking). For an effort to develop a separation of powers defense of inherent judicial power over procedure, see Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1319-22 (1993).

¹⁴ 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1001, at 5 (1988).

¹⁵ See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675 (1975). Professor Friedenthal's proposal in 1975 was that the Supreme Court reassert control over the work product of the rules process. Even though the Court eventually voiced opposition to being removed entirely from the rules process, the most recent bout of rulemaking suggests that it has little desire to do as Professor Friedenthal urged. Thus, Chief Justice Rehnquist's letter of transmittal accompanying the 1993 amendments to

existing rulemaking arrangement and, in 1988, it eventually amended the Rules Enabling Act to require greater openness in the process, but not to require that the rule committees be "representative."¹⁶

In this "new ballgame" for rulemaking,¹⁷ there may be "large benign consequence[s],"¹⁸ but there are also widespread misgivings. For example, Professor Carrington forecasts that if Congress is receptive to special interests' importuning about rule changes, "the rule-making tradition is doomed to disintegrate,"¹⁹ and Professor Charles Alan Wright worries that the 1992 approval of a variety of controversial amendments "will jeopardize the continued existence of the court rule-making process."²⁰ Professor Mullinix suggests that, due to Congressional meddling, the Advisory Committee may "go the way of the French Aristocracy."²¹ Indeed, Professor Walker recently has predicted that more intervention from Congress will occur unless the discretion of the Advisory Committee is curtailed,²² while Professor Burbank asserts in this Symposium that the rulemakers have put their work at risk of legislative override by failing to obtain empirical evidence on the operation of current rules or proposed substitutes.²³ Added to the risk of overruling from above is Congress' expansion of local rulemaking power under the Civil Justice Reform Act of 1990 ("CJRA"), which is said to effect "a revolutionary redistribution of the procedural rulemaking power," leaving the existing rules

the Rules asserted only that "the Court is satisfied that the required procedures have been observed," but hastened to add that "this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." *Letter of Transmittal, Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 403 (1993).

¹⁶ Pub. L. No. 100-702, § 402, 102 Stat. 4649 (codified as amended at 28 U.S.C. § 2073 (1988)).

¹⁷ Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1035.

¹⁸ Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 165 (1991).

¹⁹ *Id.* at 166.

²⁰ Ann Pelham, *A Legend Worries*, LEGAL TIMES, June 29, 1992, at 6.

²¹ Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

²² Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 462-63 (1993).

²³ Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).

process "a quaint, third-branch vestigial organ."²⁴ Understandably, assurances from the Rules Committee that it avoids controversial subjects and that it is sensitive to the risk of amending the rules too quickly and too often provide cold comfort to those concerned about the fate of the rules process in the face of such dire predictions.²⁵

The third crisis might best be called a crisis of purpose. Professor Resnik has labelled it failing faith.²⁶ At mid-century, civil litigation in this country drew its attitude from what I have called the "Liberal Ethos"—that lawsuits should be resolved in court on their merits and that courts should eschew technical detail.²⁷ In large measure, this Ethos was enshrined in the Federal Rules of Civil Procedure, which "have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure."²⁸ As we absorbed the ethos, however, familiarity bred a substantial uneasiness because the unfettered liberality of the rules, combined with other developments, has created a litigation machine that often seems indifferent to the merits.²⁹

One reaction to this situation is to conclude that, if pursued to endgame, litigation produces bad results—the precise opposite of the assumption underlying the Liberal Ethos. For

²⁴ Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992).

²⁵ See Interview with Hon. Robert Keeton, Chair, Judicial Conference Committee on Rules of Practice and Procedure, *The Third Branch* (March 1993). For example, the amendment of Rule 50 in part to rename the motion for a directed verdict a "motion for judgment as a matter of law" seems difficult to defend if only essential changes are made. The Advisory Committee Notes tell us that the amendment "effects no change in the existing standard," but that the name is changed in part because the traditional name is "misleading as a description of the relationship between judge and jury." FED. R. CIV. P. 50 Advisory Committee Notes, 1991 Amend., Subdivision (a). Whatever the force of this criticism of the traditional name, it seems a weak ground for abandoning a term that has been in use for centuries.

²⁶ Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

²⁷ See Marcus, *Fact Pleading*, *supra* note 3, at 439-40.

²⁸ David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989).

²⁹ For example, Professor Alexander's recent study of settlements in securities class actions confirms the suspicion that the mere fact the litigation apparatus has been engaged may matter more to the settlement value of cases than the underlying merits of the suit. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

example, a leading federal judge told a group of newly-appointed judges in the mid-1970s that “[o]ptimal justice is usually found somewhere between the polar positions of the litigants. Trial is likely to produce a polar solution”³⁰ This message has produced enough judicial converts so that some see among federal judges “an attitude that a trial represents a judicial failure.”³¹ Whether or not this represents a “flight from law,”³² it clearly represents a profound malaise in the Liberal Ethos.

In a way, this crisis of purpose lies at the heart of the other two, for if we were comfortable that litigation is unlikely to produce dramatically skewed results, we would be less concerned about increased filing rates. Similarly, were there no reason to fear that something is horribly wrong, we would not consider jettisoning existing arrangements, and the rulemaking process would not be as strained as it is today. Simply stated, what we need is an aspiration.

B. *The Difficulty of the Task*

We are constantly reminded that judicial reform is no sport for the short-winded, but this message usually seems premised on the difficulty of changing longstanding habits of

³⁰ Philip W. Tone, *The Role of the Judge in the Settlement Process*, in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES, 1973-75, at 57, 60 (1976).

³¹ Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 50 (1987); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 987 (1987) (“Some judges now feel that they have failed if they are forced to hear a case at trial.”).

Admittedly disenchantment with polar solutions is not the only reason judges embrace settlement promotion. For some, it seems the only way to cope with mounting caseloads. But unless one were confident that settlements accurately forecast trial outcomes (as contrasted with accurately predicting later settlements), there is an implicit indifference to trial outcomes. The “clear-the-dockets” mentality appears to place only limited emphasis on the substance of the settlements that ensue. Indeed, as trial outcomes become scarcer, it is more and more difficult for anyone to evaluate judicially brokered settlements by reference to such outcomes. Although it is true that docket pressures tempt judges to compromise on “justice” in promoting settlements, that impulse receives a major push from the suspicion that trial outcomes themselves are too often skewed by excesses of the adversarial process.

³² Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and Common Law*, 63 NOTRE DAME L. REV. 693, 716 (1988).

intensely conservative institutions. Clearly we live now in an era when many of those tethers have loosened, perhaps resulting in a rule-making crisis where too many cooks spoil the soup. Yet having a freer hand for innovation does not really make the task an easy one, for designing procedures is in reality an extremely delicate matter.

These difficulties only recently have come to occupy center stage in the academy. Less than a generation ago, civil procedure scholarship was largely riveted on issues of jurisdiction and exploration of the *Erie* doctrine; once the locality, court system and governing law had been selected, the prevailing view was that designing the process for handling the merits would be a rather straightforward matter. By now we have learned from other disciplines and have reoriented ourselves toward process. With these new insights, we find that choices that the Liberal Ethos made simple now seem more ambiguous. But consider the alternatives.

Limiting ourselves to utilitarian approaches, we have at one end of the spectrum Posnerian law and economics, which posits that any procedure can be justified only if its prospects of reducing the risk of error exceed its cost of implementation.³³ Under this approach, if there existed a machine that invariably and cheaply determined the correct outcome in civil cases, it should be used in preference to other procedures for resolving disputes, despite its inhuman operation. With regard to certain civil procedure matters, this narrow economic analysis can be very useful. For example, the effect of fee-shifting, widely supposed to promote valid claims and deter the assertion of groundless defenses, on careful economic analysis proves to be much more complicated.³⁴

But for most procedural issues this approach is too narrow. Even Jeremy Bentham, the great father of utilitarian analysis of judicial procedure, acknowledged the narrowness of this view. For him the critical objective must be apparent justice—that is, justice that the public (and perhaps the parties) considers just.³⁵ Professor Dworkin similarly concludes that

³³ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.1 (3d ed. 1986).

³⁴ See, e.g., Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 *LAW & CONTEMP. PROBS.* 173 (1984).

³⁵ Jeremy Bentham, *Principles of Judicial Procedure*, in 2 *THE WORKS OF JEREMY BENTHAM* 21 (1843):

any decent utilitarian approach must take account of values beyond accuracy,³⁶ while Professor Mashaw has fully explored the failings of a due process jurisprudence limited to considerations of accuracy and cost.³⁷ Without question, something more needs to be considered.

The procedural justice school provides insight into what the additional considerations might be by exploring the reactions of parties to the process they receive. Beginning with the pathbreaking work of Professors Thibaut and Walker, which showed that litigants actually value an opportunity to be heard and to control process independently of the outcome, a literature concerning the values that process can have besides providing accurate results has developed.³⁸ Yet to a significant extent we are left to compare process apples with accuracy oranges, the greatest irony of which is the possibility that processes that actually impede accurate determinations would nevertheless be important to apparent accuracy or to serve the participants' desire simply to participate.

Compounding the problem further is empirical uncertainty. Whatever one seeks to achieve through innovations in civil litigation, one must proceed on the basis of empirical assumptions or knowledge. In the first half of this century, the realists pursued empirical data about law with sometimes stupefying persistence. Increasingly, there are sources of rigorous empirical information on various issues of procedural reform. One example is the deflation of overblown litigation boom talk

That a system of procedure be good—that it be well adapted to its proper end, it is not sufficient that the decision rendered in virtue of it be conformable to real justice; it is necessary that they should be conformable to apparent justice: to produce . . . real justice, the only true way is to produce apparent justice. In point of utility, apparent justice is everything; real justice, abstractly from apparent justice, is a useless abstraction, not worth pursuing, and supposing it contrary to apparent justice, such as ought not to be pursued.

Id.

³⁶ Ronald Dworkin, *Principle, Policy, Procedure, in A MATTER OF PRINCIPLE* 72, 102 (1985) (“[The] psychological fact that people generally mind an adverse decision more if it is taken facelessly, without their participation, . . . is the sort of harm that figures in any decent utilitarian calculation.”).

³⁷ Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 41 (1976).

³⁸ See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

through analysis of statistical and other empirical data. Other forms of empirical data similarly can bring other arguments down to earth. For example, Professor Hensler effectively critiqued Professor Trangsrud's recent defense of the right of litigants to individual trials in personal injury cases through the use of social science research about the actual powerlessness most personal injury plaintiffs feel.³⁹ Indeed, as Benjamin Kaplan suggested a quarter century ago,⁴⁰ and as Professor Walker recently urged,⁴¹ field experiments could be used to provide hard data on how proposed reforms actually would work.

Much as this information may assist rulemakers in evaluating accuracy oranges and process apples, it is unlikely to provide definitive answers in many cases. Moreover, such information can be immobilizing; if procedural reform could only be adopted after being proved effective and safe in a manner similar to the way that the FDA determines whether a new drug can be sold, it seems unlikely that there would be any formal procedural reform. The challenge, then, is to appreciate and evaluate the pertinent policy concerns and make reasonable use of empirical information. This can prove surprisingly difficult, but also yield answers.

For example, several years ago I undertook to reassess the stated common-law preference for a live, in-court trial because of developments that to me seemed to be eroding our actual commitment to that mode of decision.⁴² Surprisingly, although

³⁹ Compare Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 with Deborah Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89.

⁴⁰ See Letter from Benjamin Kaplan to Dean Acheson (March 2, 1967), reprinted in Stephen Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1966-67 (1989) ("I would insist upon experimentation with live cases to the extent this would not involve illegal discriminations among litigants.").

⁴¹ See Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988); see also Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986) (arguing that procedures should be evaluated by "accepted methods of (social) scientific hypothesis testing"). But see Mullenix, *supra* note 13, at 1297 (suggesting that a challenge to local practices implemented under the Civil Justice Reform Act ("CJRA") "is especially likely in those districts where the courts have implemented new rules by applying those rules to a random (or selected) portion of the civil docket").

⁴² See Richard L. Marcus, *Completing Equity's Conquest? Reflections on the*

the conventional justification for in-court scrutiny of witnesses is to assist the fact-finder in deciding who is telling the truth, available psychological research (admittedly in rather different contexts) suggested that making determinations of truthfulness based on face-to-face observation of testifying witnesses might be *less* accurate than other methods of decision.⁴³ Nevertheless, consideration of other factors such as public understanding of the case, acceptability of results and the value to the parties of having their day in court persuaded me that the tradition should be continued.⁴⁴ If such a venerated feature of civil litigation as the trial in open court can only be justified by extended analysis, it is apparent that the task of designing innovations is far more difficult than might have been expected initially.

C. *Winners, Losers, Neutrality and Ideology: The Political Critique*

Another way of approaching the problem is to disregard the difficulties outlined in the previous section and do as our hosts suggest—focus on winners and losers. Never mind what grand scheme might be furthered or retarded by a given innovation in the civil litigation system, what matters is whether *I* benefit or lose. This may serve to clear the head, focus everyone's attention and banish the problems presented when one tries to justify changes by the sorts of rationales outlined above.

This attitude can be labelled the political critique, although one must accord a rather broad meaning to the word "political."⁴⁵ Procedural reform, we are told, "ha[s] always had

Future of Trial under the Federal Rules of Civil Procedure, 50 U. PITT. L. REV. 725 (1989).

⁴³ *Id.* at 757-62.

⁴⁴ *Id.* at 762-70 & 774-81.

⁴⁵ Focusing on winners and losers arguably is not a political orientation. Certainly there are situations in which that is correct. For example, the campaign waged by court reporters against efforts to adopt other methods for recording court proceedings and depositions fits into no known set of political theories. Yet even that effort is reflected in the political process. See, e.g., Tom Dresslar, *Lobbyist Reveals Clout of Professional Group*, S.F. DAILY J., Aug. 3, 1993, at 1 (describing great success California Court Reporters' Association has had in killing legislation to authorize alternative means of reporting judicial proceedings). Indeed, one of the

a substantial political dimension,"⁴⁶ and we are therefore invited to "turn our attention to understanding and analyzing the political agendas of the Rules."⁴⁷ This orientation appears to be quite different from the sort of utilitarian calculus suggested above, whether that is narrowly focused on costs and error avoidance or attempts more broadly to take account of "process values." Moreover, if the positions of the players are derivative of their stakes in the outcome (rather than flowing from some general view of the proper goals or operation of a civil litigation system), those "neutral" values may be used as window dressing for quite a different agenda.

In some instances those who seek to advance their interests through civil litigation reform are overt about what they are doing, but many who seek advantage through reform proposals do not act so transparently. Thus, skepticism about hidden agendas sharpens our antennae as we scrutinize arguments phrased as neutral. This is a proper attitude to take toward much of the litigation crisis bombast that has become so common in the last ten years. Though it is phrased in general terms and purports to further neutral interests of society or the court system, in the hands of many this rhetoric seems to be narrowly gauged to serve the interests of a certain sector. And it does so by fomenting a pervasive uneasiness among the general population—specifically, that as a consequence of the 1938 triumph of the Liberal Ethos we all are losers. This skepticism properly invites us to consider the motivations of the so-

witnesses testifying before Congress against the 1993 amendments to the Federal Rules of Civil Procedure was there to address only such issues. *See also Rule 30(b)(4) of the Federal Rules of Civil Procedure Governing Depositions: Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) (statement of William K. Slate, II).

In general, in connection with civil litigation reform there seems a close connection between concerns labelled political and the question of who wins and loses. Thus, it may be urged that a given change should not be undertaken because it is designed to disadvantage certain litigants (often the disempowered) or, even if not so designed, because it will have that effect. If civil litigation reform is to be scrutinized through the lens of gains or losses for a given group, that seems to be a political orientation.

⁴⁶ Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2050 (1989).

⁴⁷ Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2226 (1989).

called innovators, whether the innovation in question is advanced by representatives of the insurance industry or by the American Trial Lawyers Association. In either instance, the real objective of the one proposing the change may be to become a winner, not to achieve whatever loftier goals are invoked to justify the change. Indeed, in a world in which proposals do emanate from interest groups and some players are focused on their private advantage, it would be foolish to disregard motivation as a hint about both the desirability and likely impact of proposals for change.

This sort of skepticism does not, however, deny the possibility that a given proposal could, regardless of its origin and its supporters, actually be justified on more neutral grounds. The political critique can be taken this extra step, however, with the suggestion that everything is political and that neutrality is impossible. Thus, we are also told that because the world is not neutral, there is no such thing as a neutral procedure.⁴⁸ If that is the case, neutral arguments and neutral concerns will not matter except to the extent they provide window dressing. All that matters is who wins and who loses.

I believe that, despite the difficulty of the choices that must sometimes be made, neutrality is at least a pursuable goal in designing procedures for civil litigation. Accepting this view requires some effort at defining neutrality, and the definition is somewhat negative. As a starting point, neutrality is a perspective that is not driven by the self-interest of the observer (or of those the observer "represents"), at least in the parochial sense that such self-interest is to be advanced at the expense of the interests of identifiable others. Certainly there may be substantial disagreements about the wisdom of choices to be made,⁴⁹ but if the choice is made on a basis of society-

⁴⁸ See Phyllis Tropper Baumann et al., *Substance and Procedure in the Shadow of Procedure: The Integration of Substance and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 218 n.26 (1992) ("Of course, virtually any procedural rule can have a disparate impact on those who can least afford lawyers or who have less relevant information at their disposal."); Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 49 (1991) ("Consolidation of lawsuits already filed is not a neutral act, at least in this non-neutral world, in which some litigants are richer than others, . . . some have more time to spend on litigation, and some lawyers have more resources than do others.").

⁴⁹ For example, relaxation of class actions may lead to overdeterrence. See Kenneth M. Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict*

wide benefits, the focus is in the right direction. Thus, at the heart of a neutralist perspective on procedure is an honest attempt to fashion rules that will fairly accommodate the concerns of accuracy, participation and efficiency.⁵⁰ Although attitudes toward these concerns may be colored by matters of "ideology," that is not somehow a trump that makes the entire exercise a charade.

Indeed, the very concerns of some who promote a political critique of procedural reform actually reinforce the desirability of a neutral aspiration in designing procedures. If the game is limited to winners and losers, the losers are likely to be those with the least power. Not surprisingly, identifying the ideological agenda behind certain reform proposals reveals that it seems to have been the powerful rather than the powerless who have recently sought advantage through self-interested promotion of change.⁵¹ Perhaps, then, the message is merely that one should fight fire with fire; if the powerful are using civil justice reform to their advantage, the powerless must fight back as best they can.⁵² Yet, almost by definition, this is a losing fight.⁵³

of Interest, 4 J. LEGAL STUD. 47, 60-61 (1975).

⁵⁰ Professor Walker, for example, has recently offered the following set of criteria for action by the Advisory Committee on Civil Rules:

- (a) Civil rulemaking shall be based on adequate information concerning the need for and consequences of proposed rules;
- (b) Civil rulemaking shall not be undertaken unless the potential benefits to society from the rule outweigh the potential costs to society;

. . .

- (d) Among alternative civil rulemaking approaches to any given objective, the alternative involving the least net cost to society shall be chosen; and

- (e) The Advisory Committee shall set rulemaking priorities with the aim of maximizing the net benefits to society.

Walker, *supra* note 22, at 481.

⁵¹ Resnik, *supra* note 47, at 2226 ("It has not been civil rights litigants who have sought open politicization of the rulemaking process. Rather, powerful repeat players have begun to speak of 'court reform.'").

⁵² *Id.* ("In short, the politicization of rule-making has already happened—caused not by the vulnerable of the society but by the powerful.").

⁵³ In terms of the widespread concern with the impact of a variety of developments on civil rights plaintiffs, there is a certain irony to the political explanation for recent innovation. The general, and persuasive, view of much litigation crisis rhetoric is that it has been fueled by prospective products liability defendants and/or their insurers. But there is limited indication that the effort has

This view also assumes that the powerful have succeeded in politicizing rulemaking, a conclusion to be examined with some specific examples in Part II. If it turns out that the rules are made by persons attempting in good faith to apply neutral principles, despite the difficulty of that task, then there may be an alternative to the losing fight. Thus, the source of the rules may be key to their neutrality in aspiration. If so, it is important that the rulesmakers take care to avoid as best they can the sorts of pitfalls that invite congressional second-guessing.⁵⁴

The critics sometimes recognize an interesting phenomenon—the main thrust of the political effort to influence procedure has been directed not at the Advisory Committee, but at the general public and at legislators.⁵⁵ Indeed, there seems to be no direct effort to refute Paul Carrington's assertion that the Advisory Committee can be expected to turn a deaf ear to genuinely selfish arguments.⁵⁶ It hardly follows that other potential rulemakers, Congress chief among them, will behave in the same way. Thus, from one perspective the political critique could be an attempt to blunt the efforts of others to politicize rulemaking, a salutary goal.

Should the effects of proposed changes—the identity of winners and losers—be entirely irrelevant to a neutral perspective? The answer must be that they should not; a sensible approach would call for consideration of the likely effects of a change, including possible gains and losses for identifiable groups. But a neutral approach also implicitly accepts the

resulted in changes that provide important benefits for defendants in such cases; certainly the level of attention hardly compares to the attention given to the reported impact on civil rights plaintiffs. It is hard to accept the proposition that civil rights plaintiffs were the target at which the powerful in the products liability arena were aiming. Recall that the U.S. Chamber of Commerce supported much of the Civil Rights Act of 1991. From the view that reforms are animated by the hidden agenda of the Business Roundtable, then, it appears rather like the powerful have fired their propaganda cannon but hit the wrong target.

⁵⁴ See *supra* notes 18-23 and accompanying text.

⁵⁵By and large . . . [the] work has been done not by letters written to the Advisory Committee on the Civil Rules, but rather by lobbying efforts directed towards legislatures and the public, by well-financed media campaigns, and by support for conferences and meetings to address and describe the "litigation crisis."

Resnik, *supra* note 47, at 2219-20.

⁵⁶ Carrington, *supra* note 18, at 165.

possibility that uneven impact will be the outcome of certain reforms, so long as it is not the principal objective. The judgment to be made, therefore, is whether some adjustment in the general procedural regime should be undertaken to ameliorate the impact on a particular group.

D. *The Trans-substantivity Tangle*

Taking account of differential impact raises the contentious problem of trans-substantivity. Modern procedure usually prescribes a single set of procedures for all cases; as Judge Weinstein put it, "one stretch sock fits all."⁵⁷ The single procedure approach, however, has recently become the subject of a heated critique. Thus, we are told that "uniformity and trans-substantivity rhetoric are a sham,"⁵⁸ and that "trans-substantivity may have become the enemy of substance."⁵⁹ Despite the vigor of this critique, in large measure it seems to be making a mountain out of a molehill.

Originally the vision of simple and uniform rules of procedure may have been embraced partly for aesthetic reasons.⁶⁰ That vision surely has been taken to extremes on occasion, perhaps largely to provoke.⁶¹ But the critics sometimes seem tempted in the opposite direction. They so vigorously emphasize the relationship between procedure and the substantive rights being asserted that one is tempted to reverse Henry Maine's famous comment⁶² and suggest that procedure should

⁵⁷ 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, 1902 (1989).

⁵⁸ Burbank, *supra* note 40, at 1940.

⁵⁹ Carl Tobias, *The Transformation of Trans-substantivity*, 49 WASH. & LEE L. REV. 1501, 1507 (1992).

⁶⁰ Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352 (1990).

⁶¹ Consider, for example, Charles Clark's proposal that the Model Rules of Evidence be limited to "one broad rule of admissibility of relevant evidence," with a few subordinate rules to qualify the main rule. See Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 433-34 (1989). It may be that Clark made this proposal as a counterweight to Wigmore's desire that the model code incorporate his ponderous and detailed code of evidence, and that Clark's actual objective was for a code along the lines drafted by Morgan, which ultimately was adopted.

⁶² "So great is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." HENRY MAINE, *EARLY LAW AND CUSTOM* 389 (1907).

be secreted in the interstices of substance. Viewed another way, the point seems to be that there is no meaningful difference between substance and procedure.

Undoubtedly procedural rules can be important to the vindication of certain rights, and different procedural rules may be more important in different areas of law.⁶³ But Justice Harlan's point remains pertinent: the basic thrust of substantive rules—controlling primary behavior in society—is primary, while procedural rules are secondary, and are invoked only in connection with litigation.⁶⁴ Thus, although there is a large “twilight zone”⁶⁵ in which rules may be classified as partly substantive and partly procedural, there is also a large area that is purely substantive, and these rules could be handled under a variety of different procedures.

More basically, the point is that uniformity is purchased at too high a price in predictability and legislative constraint on judicial power. To be neutral and uniform, procedural rules have to be written at a level of abstraction that imposes little practical restraint on individual judges' latitude to make decisions. The stretch sock stretches too far. This of course recalls a longstanding debate between rules and standards,⁶⁶ and raises serious concerns about the proper limitations on judicial latitude.⁶⁷ Although this point has force, it is not particularly new and is met by counterforce.

The latitude built into modern procedure is largely due to a functional orientation. Rather than trying to pigeon-hole cases according to the legal issues involved, the rules focus on the functional factors that influence the sensible handling of litigation. These factors often include the substantive issues

⁶³ “[A]most every procedural rule may have a substantial effect on the outcome of a case.” 19 WRIGHT & MILLER, *supra* note 14, § 4505, at 27.

⁶⁴ *Hanna v. Plumer*, 380 U.S. 460, 475-76 (1965) (Harlan, J., concurring).

⁶⁵ *Carota v. Johns Manville Corp.*, 893 F.2d 448, 450 (1st Cir. 1990).

⁶⁶ See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

⁶⁷ See Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647 (1988):

Ad hoc judicial activity is hard to square with the notion that the Federal Rules of Civil Procedure should be applied in the same manner in all cases [T]here is a troubling possibility that judges may indulge their own preferences about kinds of litigation in expanding or contracting litigation opportunities.

Id. at 678.

involved. It is therefore commonplace that questions about procedure need to take account of the substantive law involved. The "transparency" of modern procedure⁶⁸ assumes a substantial interaction and frequent synergy between the substantive and procedural elements of a case. Moreover, it contemplates that procedural learning and practices from one substantive area can be borrowed for another.

A shift away from trans-substantive procedures would erode or eliminate the positive effect of applying procedural learning from one substantive area to another. Tightening up on trial court functional directives could do a good deal more harm than good, a point the recent unhappy experience with the Sentencing Guidelines⁶⁹ emphasizes with excruciating clarity. Moreover, nobody has offered a clear explanation of how the substantive areas are to be divvied up for purposes of particularized procedures. For example, as much as critics emphasize the obstacles encountered in civil rights litigation nowadays, there are serious problems in determining what should be included in that category, if it is to be considered a category at all.⁷⁰ Indeed, the thrust of most recent efforts at differentiating among cases in choosing procedural arrangements is itself functional, not substantive. Thus, we are invited to develop refined procedural approaches for complex or simple cases,⁷¹ evidently recognizing that a given substantive category could produce both complex and simple cases, and that the category of "complex" or "simple" cases will include cases drawn from a variety of substantive categories.

Except for a blanket indictment of the "formless" nature of the trans-substantive orientation of all modern procedure, the actual impact of the trans-substantive critique is relatively modest. It does not reject the general idea of a common model of procedures for most or all cases,⁷² but only asks that special

⁶⁸ See Geoffrey C. Hazard, Jr., *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 632-33 (1988).

⁶⁹ See, e.g., Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

⁷⁰ "[C]ivil rights' is an elusive, or at least capacious, category . . ." BURBANK, *supra* note 1, at 69-70.

⁷¹ See, e.g., 28 U.S.C. § 473(a)(1) (1993) (inviting "systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity").

⁷² Thus, critics who recently excoriated a variety of developments in the Title

circumstances be noted. This is not a revolutionary concept, for we already have rules that are substance-specific.⁷³ But generalizing from these concepts comes with real risks and costs. One risk is political. As has been fully explored elsewhere,⁷⁴ separating out a specific substantive area constricts the focus on the winners and losers in such a way as to magnify the likelihood that those with greater power will be the winners. As Professor Friedenthal pointed out in the mid-1970s, making special rules for certain types of cases can have unnerving consequences.⁷⁵ Another risk is more general. By requiring differentiation according to substantive type of claim, it complicates the handling of litigation, which today often includes a variety of substantive claims in a single lawsuit. Thus, a shift away from trans-substantive procedure threatens to create losers of both the specific and general type.⁷⁶

VII area in an effort, among other things, to "explode" the myth of neutral procedure, ended up acknowledging that "[f]or many, if not most matters, the general, flexible Federal Rules of Civil Procedure may work fine." Baumann et al., *supra* note 48, at 300 n.413.

⁷³ See, e.g., FED. R. CIV. P. 9(b) (requiring particularity in pleading of fraud).

⁷⁴ See Paul Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2069-87 (1989).

⁷⁵ Friedenthal, *supra* note 15, at 673-74 (noting that political pressure led to exemption from interrogatories for personal injury and wrongful death cases in New York state court practice).

⁷⁶ In at least some quarters trans-substantive procedure retains force. In *Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 113 S. Ct. 1160, 1163 (1993), the Court unanimously held that a "heightened pleading standard" for civil rights cases alleging municipal liability, popular with a number of lower courts, was invalid because it went beyond the formal pleading requirements of Rule 8(a)(2). The Court rejected judicial efforts to engraft new provisions on the federal rules:

Rule 9(b) does impose a particularity requirement in two specific instances Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*.

Perhaps if Rules 8 and 9 were re-written today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.

Id. at 1163.

II. LEARNING FROM PAST AND FUTURE EPISODES OF INNOVATION

To examine further the above generalities it is useful to reflect upon the light shed on present controversies by various episodes of innovation. Ultimately, this necessarily brief review suggests that there are considerable reasons for fearing that radical revision today would jettison significant advantages whether or not it would solve serious problems as well.

A. *The Nineteenth Century Legacy*

Because the watershed for conscious procedural reform in Anglo-American civil litigation is the nineteenth century, starting with Bentham's utilitarian critique, we should begin with some reference to this era. Although we must be careful not to assume that seemingly similar attitudes on some issues between us and nineteenth-century reformers show that their views were identical to ours,⁷⁷ there is much to be learned on a general level from the reform experience of that era. First, the justification for reform was a popularized crisis. In England, for example, the strictures of the writ system and its attendant intricacies and delays created a "crisis" that was supposedly "viewed by the public with serious concern."⁷⁸

Second, the reform efforts provide reasons for uneasiness about absolute commitment to either judicial or legislative rulemaking. In England, after a royal commission recommended revising the pleading rules, the judges were allowed to design the replacement procedures, which were promulgated as the Rules at Hilary Term. Confronted with objections to the intricacy of the existing practice, the judges concluded that what was needed was more precision and, hence, more intricacy.

⁷⁷ See Subrin, *supra* note 31, at 932 (arguing that the Field Code was "not, contrary to its usual portrayal, a parent of the Federal Rules").

⁷⁸ See Edson Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 728-29 (1926). Sunderland, who later served as one of the professionals who drafted the Federal Rules, was persuaded that it was critical that "legal procedure was brought under public, not professional regulation Early in the struggle it became perfectly clear that delegation of the control of procedural technique to the legal profession was a policy which was socially unsound." *Id.* at 739.

cy. The rules were a complete failure, although enthusiasm for common law pleading continued among judges, and Parliament had to step in and simplify things with the Judicature Acts. In this country, by contrast, the impulse to reform came from legislative commissions, principally in New York under the guidance of David Dudley Field. That reform effort was hamstrung by judicial interpretation and also was ornamented over time with legislative additions to what came to be known as the Throop Code.⁷⁹ Thus, the risk of both legislative success by special interests and judicial sabotage emerged.

Third, the shared impulse on both sides of the Atlantic was toward simplicity and away from substance-specific procedure. Thus, as much as Field's objective may have been to confine judicial discretion, the current emphasis on tailoring procedure to the substantive rights involved appears to be an attempt to turn around a century and one-half of reform efforts.

Fourth, the political critique seems inapplicable. Certainly the framers of the reform efforts would, as a matter of position, be expected to favor entrenched interests. Field, for example, was by his own description the most successful lawyer of the day in this country, and he represented many of the largest commercial interests.⁸⁰ He undoubtedly had mastered the existing procedures, and it is hard to believe that either he or his clients would have benefitted significantly from the relaxations and simplifications that he sought to introduce. Thus, the reform movement appears to have been motivated genuinely by a neutral urge to improve the operation of the court system.

Finally, whether that effort worked is quite another matter. On this side of the Atlantic, we are told, judges effectively resisted the relaxed procedures.⁸¹ In England, perhaps because of the relaxation brought about by the Judicature Acts, matters supposedly moved quickly to an impasse that is reminiscent of much we presently hear about civil litigation in our

⁷⁹ Whether these legislative additions really complicated the original setup is debatable, but at least in Field's opinion they watered down the enterprise.

⁸⁰ Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 316 (1988).

⁸¹ See *McArthur v. Moffet*, 128 N.W. 445, 446 (Wis. 1910) (referring to "[t]he cold, not to say inhuman, treatment which the infant Code received from the New York judges").

country.⁸² Thus, we have an ominous introduction to the limitations of procedural progress.

B. *The Adoption of the Federal Rules and "The Golden Age of Federal Civil Procedure"*⁸³

The Federal Rules were also born of supposed crisis—this time the difficulties created under the Conformity Act. A proponent of the Rules Enabling Act even told a Congressional committee that "this is one of the things that is making Bolsheviks in this country,"⁸⁴ certainly a remarkable piece of inflammatory bombast. Anyone who is offended by the overstatement of today might be reassured by the degree of overstatement encountered yesterday.

Measured by contemporary standards, the drafting and adoption of the Federal Rules was a remarkable accomplishment. Today, any amendment to the rules that emerges from the customary rules process requires a three-year gestation, but the entire original package was drafted in only two years.⁸⁵ Despite some claims that the proposed rules were widely debated at the bar,⁸⁶ it seems clear that the process was not assisted or encumbered by the sort of public aspect that now attends amendments. The drafting was done by a group of elite lawyers and law professors who acted with little empirical evidence.⁸⁷

For those concerned with the process of rulemaking or with the hidden or overt agendas of the powerful, these should be extremely troubling features. But the rulemakers' work product seems to confound the expectations. The thrust of the

⁸² See Samuel Rosenbaum, *Studies in English Procedure*, 63 U. PA. L. REV. 273, 289-91 (1915) (within ten years after the Judiciary Act of 1875 had relaxed procedure, it was said that excessive litigation, particularly excessive discovery, had run up the cost of litigation so much that the reforms seemed to be defeating their own ends).

⁸³ Weinstein, *supra* note 57, at 1906.

⁸⁴ See *Procedure in the Federal Courts: Hearings on H.R. 2377 and H.R. 90 Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess. 6, 13 (1922), quoted in Subrin, *supra* note 31, at 959.

⁸⁵ Carrington, *supra* note 74, at 2119.

⁸⁶ William D. Mitchell, *The Federal Rules of Civil Procedure*, in FIELD CENTENARY ESSAYS 73, 79 (1949); 4 WRIGHT & MILLER, *supra* note 14, § 1005, at 29.

⁸⁷ See Carrington, *supra* note 18, at 163.

rules was to simplify and to provide access. Discovery, for example, was broadened and largely released from judicial control. In Professor Subrin's view, these changes had a truly "revolutionary" character.⁸⁸ They contributed to some fairly revolutionary progressive effects in litigation. Broad discovery and relaxed pleading did open the way for plaintiffs to explore and expand new frontiers of substantive liability; the resulting synergy between procedure and substance has rarely been so visible.⁸⁹ In a rather striking way, the openness of the rules also paved the way for much social action litigation.

But this is hard to jibe with the view that the powerful will favor their own interests. Indeed, it leaves Professor Resnik wondering "[w]hy were these gentlemen, often associated with interests linked today to the 'defense bar,' sounding (from our latter-day perspective) so much like 'plaintiffs' lawyers?"⁹⁰ Perhaps they failed to ask the question we are invited to address today—Who are the winners or losers if our proposals go through? In some areas, it is likely that they could not have foreseen the impact their changes actually had.⁹¹ But as to other matters they clearly did foresee the potentially epic nature of the changes they wrought.⁹²

One answer might be that these lawyers had a personal agenda. As members of elite law firms, they might have foreseen the growth of national law firms and concluded that a national procedural code stressing relaxed pleading and broad

⁸⁸ Subrin, *supra* note 31, at 925.

⁸⁹ See, e.g., Jack Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981) ("The ability of plaintiffs' attorneys to obtain a corporate defendant's records, to depose corporate employees, and to send searching interrogatories has had a substantial impact in particular areas of law, and is one important factor in the dramatic increase in cases filed.").

⁹⁰ Resnik, *supra* note 26, at 500.

⁹¹ See, e.g., Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues of the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246 (1989) ("Th[e] relationship between civil justice and social justice was not anticipated in 1938. The social wrongs whose remediation is assisted by the Federal Rules in the present era had not then appeared on the civil litigation agenda."); see also Larry Kramer, *"The One-Eyed Jacks are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS. 73, 78 (1991) ("I doubt that many people in the mid-1950's anticipated how important civil rights cases have become.").

⁹² The potential of broad discovery, in particular, unnerved some of them. Subrin, *supra* note 31, at 977-78.

discovery would assist enterprises like their own. After all, the likely growth of large law firms had been urged as a reason to reject the Rules Enabling Act.⁹³ But the argument does not wash. By the time the drafters had assembled, the idea of a national code had been fixed by the passage of the Rules Enabling Act; the choices the drafters made had to do with the *content* of that code. The choices they made, therefore, are hard to relate to their self-interest. Litigation was then the poor step-sister in most elite law firms,⁹⁴ and the prospect of a growing litigation practice as a mainstay of an elite law firm would have been unlikely to occur to these lawyers. Moreover, the emergence of national law firms in the litigation arena depended far more on other factors—improved telecommunications, jet airplanes, word processing and the like—than on the relaxed provisions of the Federal Rules.

The more plausible answer is that the framers did not pause long to identify winners and losers. True, while the Federal Rules drew their essence from equity because “people with identifiable agendas wanted it,”⁹⁵ the drafters’ desire was not the product of a plan to benefit or debilitate certain litigants or classes of litigants. It appears, rather, to have been the result of a judgment about what would best serve the interests of the litigation system and, derivatively, society. In

⁹³ Professor Subrin quotes a letter from a West Virginia lawyer objecting to uniformity:

[A] firm in a great city may represent a railroad, or an industrial company doing business in many states[;] if the procedure in the Federal Courts is uniform this city firm can, itself, conduct the main parts of the litigation and reduce the local lawyers substantially to filing clerks and advisors on jurors. Uniformity, therefore, increases the influence and importance of the great city firm, having at its head, perhaps, some business man masquerading as a lawyer Uniformity would further augment the importance of large aggregations of men and depress the individual

See Subrin, *supra* note 46, at 2009.

⁹⁴ See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 6-7, 16-17 (1991) (describing disdain of elite law firms for litigation). A variety of factors explain the relatively recent emergence of litigation as a major profit center in law firms. Dean Garth, for example, calls our attention to the “litigation explosion” in the 1970s and 1980s of corporations suing other corporations. See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and its Values*, 59 BROOK. L. REV. 931 (1993).

⁹⁵ Subrin, *supra* note 31, at 914.

fact, they were pursuing the Liberal Ethos.⁹⁶

Assuming the framers were animated by an aspiration toward neutrality rather than an agenda of favoring certain litigants, there remains the possibility that they were wrong in their judgments. Relaxed pleading and broad discovery could produce undesirable results, and there were frequent protests that the revised rules did so. Some lower courts tried to curtail relaxed pleading, at least in complex cases, but were reversed and chastised for doing so.⁹⁷ It may be, as Professor Subrin has eloquently argued, that many of our litigation ills today can be traced to the choice made in 1936-1938 to adopt equity's relaxed attitude for all civil litigation.⁹⁸ Putting aside the question of whether there really is any other way to go, the point for our purposes is that this choice fits within a neutralist view of procedure.

C. *The 1966 Amendment to Rule 23*

Few changes in the rules before the 1980s commanded as much attention as the 1966 amendment to Rule 23, governing class actions. This amendment originated with the understandable unhappiness with the original Rule 23, which called for discriminations among "true," "hybrid" and "spurious" class actions based upon questions such as whether joint or several rights were presented. As Benjamin Kaplan, the Advisory Committee's Reporter, explained in describing the amendments, the old rule was "a text burdened with a categorization of rights at a high pitch of abstraction."⁹⁹ In place of that formalism, the drafters cast class actions according to functional (and possibly overlapping) categories, a trend that may be carried further in the near future under new amendments presently being considered by the Advisory Committee. Although this reworking created a variety of new problems, it was clearly a technocratic one in many ways.

Below the technocratic surface lurked larger implications

⁹⁶ See *supra* notes 26-29 and accompanying text.

⁹⁷ See, e.g., *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-24 (2d Cir. 1957); see also Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45 (1957).

⁹⁸ See Subrin, *supra* note 31, at 982-92.

⁹⁹ Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 377 (1967).

that some see as proving the failure of trans-substantivity. Reflecting on the matter twenty years later, Kaplan said:

On its face, the amended rule appears trans-substantive. Yet one could foresee that it would apply particularly in certain substantive fields such as securities fraud; and, with no great flight of imagination, one might predict that the working of the rule must bring about changes of substance . . . [I]t did not escape attention at the time that it would open the way to assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants.¹⁰⁰

Writing in 1969, Kaplan had acknowledged the open-ended possibilities of the rule, but also "confess[ed] that I am exhilarated, not depressed, by experimentation which spies out carefully the furthest possibilities of the new Rule."¹⁰¹

Dramatic developments did occur. The number of class actions filed dramatically increased, and some judges may have been too free in allowing them to proceed as class actions.¹⁰² Partly on the strength of this enthusiasm, a new era of public law litigation emerged. As Judge Weinstein put it, "[m]uch of the environmental, consumer and securities litigation has been made possible by an expanded class action rule."¹⁰³

Were all these results foreseen, and should they have been? Arthur Miller has asserted that "the draftsmen conceived the procedure's primary function as providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies."¹⁰⁴ Indeed, at the time the rule was initially drafted in 1962, there had been only a few civil rights actions, and "it would have required the clairvoyance of a Nostradamus for the Advisory Committee to know

¹⁰⁰ Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126-27 (1989).

¹⁰¹ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INT'L & COMP. L. REV. 497, 500 (1969).

¹⁰² "Enthusiasm for the class action fed upon itself, and the procedure fell victim to overuse by its champions and misuse by some who sought to exploit it for reasons external to the merits of the case. Mistakes, in most cases honest mistakes of faith, were made." Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 678 (1979).

¹⁰³ JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 16 (1977).

¹⁰⁴ Miller, *supra* note 102, at 669.

that the class action eventually would be involved in thousands of civil rights cases."¹⁰⁵ But it is clear that the drafters did expect that there would be some impact in civil rights cases; Rule 23(b)(2) was drafted with that prospect specifically in mind.¹⁰⁶

Whether or not foreseen, the effects nevertheless provoked a reaction. Some, including some judges, screamed of "legalized blackmail."¹⁰⁷ The Supreme Court erected jurisdictional barriers to state-law, small-claim class actions¹⁰⁸ and interpreted the rule to require potentially expensive mailed notice to all identifiable class members.¹⁰⁹ In employment discrimination cases, the Court rejected the "across the board" rule adopted by some lower courts and insisted that the commonality and typicality requirements be applied with care.¹¹⁰

Perhaps partly as a result of these equilibrating effects,¹¹¹ class action filings in federal court fell off by the late

¹⁰⁵ *Id.* at 671.

¹⁰⁶ 7A WRIGHT & MILLER, *supra* note 14, § 1775, at 470 ("subdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area").

¹⁰⁷ Milton Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971); see *Eisen v. Carlisle and Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (criticizing suit as a "Frankenstein Monster posing as a class action") (Lumbard, C.J., dissenting).

¹⁰⁸ *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

¹⁰⁹ *Eisen v. Jacquelin*, 417 U.S. 156 (1974). There is almost no academic support for this rule. See, e.g., Jonathan Macey & Geoffrey Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27 (1991) ("There is little to recommend the *Eisen* rule from the standpoint of economic analysis."); see also *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) ("No (sane) person would pay the entire costs of a securities class action in exchange for a maximum benefit of \$1,135.").

¹¹⁰ *General Tel. Co. v. Falcon*, 457 U.S. 147 (1982). For an argument that greater care was needed in the handling of Title VII class actions, see George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1980).

¹¹¹ Lest it be thought that all Supreme Court rulings curtailed use of the class action device, it should be noted that there were others that were helpful to plaintiffs. See, e.g., *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985) (due process does not require "opt in" procedure to protect personal jurisdiction interests and make judgment binding on nonresident class members); *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) (res judicata effect of unsuccessful employment discrimination class action limited to claims of class-wide discrimination); *Crown, Cork & Seal v. Parker*, 462 U.S. 345 (1983) (tolling of limitations period applies to claims of unnamed members of class in employment discrimination action where certification denied on ground that named plaintiffs were not adequate and that their claims

1980s.¹¹² Meanwhile, however, innovation had spread in a direction not intended in 1966—mass torts. The framers had foreseen this possible use of the Rule 23(b)(3) class action and expressed disfavor with it in a famous Advisory Committee Note.¹¹³ But they had not foreseen the growth in mass torts, and innovative judges began to experiment with class actions in that area. Many of the experimental uses of class actions in personal injury cases were undertaken pursuant to Rule 23(b)(1), not the subdivision that prompted the restrictive Advisory Committee Note. Some of those responsible for the restrictive note nevertheless concluded that it should no longer be honored in light of developments since 1966.¹¹⁴ Thus class actions have recently been used in some instances of mass repetitive injuries.¹¹⁵ Used in this way, class actions could be seen as advantaging defendants, particularly if the cases are handled as are mandatory class actions, and imposing undesirable fetters on plaintiffs. Hence the criticism of class actions comes from a “political” source that urges their expansive use in other situations such as employment discrimination.

What does this tale tell us? First, the rules process can produce changes that appear to benefit the downtrodden, a result that seems hard to square with certain versions of the political critique. As the Reporter recognized, “establishment defendants” might blanch at some of these developments, but a

were not typical); *United Airlines v. MacDonald*, 432 U.S. 385 (1977) (unnamed class members could intervene to appeal denial of class certification); *American Pipe & Const. v. Utah*, 414 U.S. 538 (1974) (filing of class action tolls running of statute of limitations for all putative members of class who opt in).

¹¹² See, e.g., Douglas Martin, *The Rise and Fall of the Class Action Lawsuit*, N.Y. TIMES, Jan. 8, 1988, at B7.

¹¹³ A “mass accident,” resulting in injuries to numerous persons, is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but also of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

FED. R. CIV. P. 23(b)(3) (Advisory Committee Notes).

¹¹⁴ See RICHARD MARCUS & EDWARD SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 384 (2d ed. 1992) (quoting Professor Charles Alan Wright and Judge Jack Weinstein).

¹¹⁵ See *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986) (Rule 23(b)(3) class action). There have also been efforts to adapt Rule 23(b)(1)(B) to permit a “limited fund” class action in some mass exposure situations. See, e.g., *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 856 (1986).

drafting group of elite membership, operating in relative secrecy, went ahead anyway.

A second insight is that substantial changes are likely to produce periods of heady uncertainty followed by more moderate mastery of new procedures. The restraining interpretations of later years may be seen as reflecting a hidden agenda,¹¹⁶ but they also fit the hypothesis that there is a pendulum that gradually imposes constraints on new procedures. As experience with the device develops, appellate courts are likely to impose increasing constraints on trial court latitude.¹¹⁷ Thus, the fact that the more aggressive uses of class actions in the early years were reined in later does not necessarily imply a hidden agenda.

A third insight is to recognize the difficulty of predicting who belongs in the "winner" or "loser" category. 1960s enthusiasm for using the class action as a method of banding claimants together has given way to 1980s and 1990s uneasiness that use of the device will trammel the rights of plaintiffs and permit defendants to steal a march on plaintiffs' individual control of their litigation destinies.¹¹⁸ Although the 1966 perspective might have been that a number of "establishment defendants" would blanch at the increased availability of class actions, the perspective a quarter century later is not so one-sided. Some defendants may view class actions as an important tool to deal with widespread liability.

Accordingly, we are left with a textured view of the trans-substantivity debate. Doubtless the revision of Rule 23 had a practical impact on a number of litigants, creating winners and losers. Doubtless it also had an effect on the substantive law, which was shaped by the dynamics of the procedure.¹¹⁹ But

¹¹⁶ Robert Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2188 (1989) (referring to "the attack on the class action device" as part of "the same agenda" that challenges the implementation of *Brown v. Board of Education*).

¹¹⁷ See Henry Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 771-73 (1982). Courts sometimes recognize this process: "[A]buse of discretion can be found more readily on appeals from the denial of class status than in other areas, for the courts have built a body of case law with respect to class action status." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993).

¹¹⁸ See generally Resnik, *supra* note 48.

¹¹⁹ See *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (approving "fraud-on-the-market" theory of causation which allows class-wide handling of causation issue in

in a real sense this effect occurred because the device was available on a trans-substantive basis. Whatever the rulemakers could foresee, the framers could not foresee all uses to which the device could be put. Instead, lawyers and judges innovated from one substantive field to another. Although the most useful guides of interpretation on issues such as the common question requirement might be other class actions involving the same substantive claim, courts could use their Rule 23 learning in one substantive area to branch into others. Indeed, those who object to the use of class actions in personal injury situations essentially recognize that the device is trans-substantive and wish that it was not.

D. *Managerial Judging*

If the 1966 amendment to Rule 23 represents the high water mark of expansive procedure, managerial judging is a symptom of judicial retreat from that open-handedness. For some, it is "a sign of and a reaction to a procedural regime that is in question and in decline, if not in its death throes."¹²⁰ We are told that "[a]t base, the advocates of managerial judging claim that the Federal Rules of Civil Procedure do not work."¹²¹ In some forms, the shift toward case management is strong evidence of the crisis of confidence: "To the extent that advocates of case management . . . give up on law application, they are giving up on the essence of adjudication."¹²² As suggested by these apocalyptic portents, the emergence of managerial judging says much about the new innovation in federal procedure, but it provides limited support for the political or trans-substantive critique, and suggests no intrinsic winners or losers, unless lawyers themselves are a category of concern.

Managerial judging evidently grew from the innovative actions of a number of judges in metropolitan districts across the nation. Although related to efforts to handle "protracted" litigation during the 1940s and 1950s,¹²³ the broader manageri-

securities fraud action by adopting a rebuttable presumption of reliance).

¹²⁰ Subrin, *supra* note 80, at 311.

¹²¹ E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 310 (1986).

¹²² Subrin, *supra* note 31, at 989.

¹²³ See, e.g., Leon R. Yankwich, "Short Cuts" in *Long Cases: A Commentary on*

al impulse probably depended upon adoption of the single assignment system,¹²⁴ and managerial judging was first urged in the late 1950s and early 1960s.¹²⁵ The actual embrace of judicial management by a significant number of judges as we now see it seems to date from the early 1970s.¹²⁶ It was embraced by the Advisory Committee in 1983 with the expansion of scheduling directives in Rule 16, and was approved with gusto by Congress in the CJRA in 1990.¹²⁷ It has moved from the periphery to the mainstream.

If one views the cardinal feature of the Federal Rules as expanding the freedom of movement of individual lawyers and litigants, this development seems retrograde. But Rule 16 was always in the rules,¹²⁸ and judges were able to fit much judicial management under the rules before the 1983 amendment. Indeed, that amendment was designed in large measure to

the Report Entitled Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States, Sept. 26, 1951, 13 F.R.D. 41, 62 (1951) (commenting on pre-trial practices developed to adjudicate complex problems); Proceedings of the Seminar on Protracted Cases for United States Circuit and District Judges, 21 F.R.D. 395 (1957) (discussing the use of pre-trial procedures in protracted litigation); Proceedings of the Seminar on Protracted Cases for United States Judges 23 F.R.D. 319 (1958) (same).

¹²⁴ See Resnik, *supra* note 26, at 523 & n.127.

¹²⁵ See *Resolutions at the Seminar on Protracted Cases*, 23 F.R.D. 319, 614-15 (1958) (asserting that the judge should "take actual control of the case and rigorously exercise such control throughout the proceedings"); see also Sylvester Ryan, *Effect of Calendar Control on the Disposition of Litigation*, 28 F.R.D. 66 (1960):

The early and expeditious termination of a civil suit largely rests in judicial supervision of litigation. A Court is charged with the duty and obligation of supervision that is primarily directed to see that the claims in issue are prosecuted and brought to final termination within such short time as due process, justice and the reasonable interests of the litigants allow and the facts of the particular litigation fairly permit. We must be mindful that, while unreasonable delay should not be permitted, justice is essential. Calendar control is but one phase of the judicial supervision required to be exercised over all civil litigation.

Id. at 67.

¹²⁶ See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 379 (1982) ("During the past decade, enthusiasm for the 'managerial movement' has become widespread.")

¹²⁷ 28 U.S.C.A. §§ 471-82 (West 1993).

¹²⁸ Indeed, the English anticipated the movement by some time. An 1881 report from the Lord Chancellor endorsed "a change in procedure which would enable the court, at an early stage of the litigation, to obtain control over the suit, and exercise a close supervision over the proceedings in the action." See SAMUEL ROSENBAUM, *THE RULE-MAKING AUTHORITY OF THE ENGLISH SUPREME COURT* 75 (1917).

prod other judges to follow the lead of their managerial brethren. Moreover, there is reason to suspect that Charles Clark, the guiding spirit of the original rules, would have found this development congenial.¹²⁹

It is difficult to find in this development of the 1970s grounds for declaring certain classes of litigants winners or losers. A more active judge might press either or both parties to expedite preparation of the case.¹³⁰ Indeed, for those concerned about power imbalances among litigants with great and few resources, the substitution of the judge as a main actor in litigation could be seen as a boon. An animating force also seemed to be the experience of the public law cases that served as the avatars for the movement to achieve social justice through the courts. Accordingly, Professor Chayes made the role of the judge the centerpiece of his epic 1976 article on public law litigation.¹³¹ As with the 1966 amendment to Rule 23, therefore, this development might be interpreted in political terms as a victory for the progressive forces.¹³²

¹²⁹ "Clark distrusted lawyers and trusted judges. Indeed, recent procedural reforms that grant judges additional power to shape and control litigation are consonant with Clark's outlook." Stephen Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 116 (Peninah Petruck ed., 1991); see *id.* at 143 ("Clark was aware that flexible procedural rules would expand the litigation process, thus necessitating a good deal of judicial interpretation and management.").

¹³⁰ See, e.g., Joan E. Steinman, *Women, Medical Care and Mass Tort Litigation*, 68 CHI.-KENT L. REV. 409 (1992):

Judges could use their powers to tightly rein in defendants' efforts to delay, stonewall and keep damaging testimony and documents out of the hands of injured parties, and to urge the propriety of large settlements, OR they could use their powers to impede plaintiffs by, for example, limiting their discovery, limiting their ability to unite or to share information, liberally allowing discovery to be taken of plaintiffs that would chill their vigorous prosecution of the litigation . . . and by urging plaintiffs to accept small settlements. I don't know whether an empirical study of past cases would show that one or the other of these patterns predominates.

Id. at 420.

¹³¹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

¹³² That image seems reinforced by the identities of prime movers in the field. The movement was fueled by individual federal judges, and those who developed it were not from the right wing of the federal judiciary. A leading proponent, Judge Robert Peckham of the Northern District of California, was a life-long Democrat and an aggressive activist in a variety of social action litigations. For a portrait of the judge, see *In Memoriam, In the Memory of Chief Judge Robert F. Peckham*, 44

This is not to say that case management could not validly be criticized, and it has been. The critique, however, is based not on political grounds but on the classical adversary vision of Fuller,¹³³ and has prompted the response that it represents a laissez-faire approach to litigation.¹³⁴ From the procedural justice perspective,¹³⁵ this development erodes litigants' satisfaction with litigation by weakening their control over it. Another problem is that the traditional judicial role in our legal system does not equip the judge to comprehend a case sufficiently to control it so fully, and the scheme of appellate review in our system affords little real check on what the judge does. Thus, one might see the seeds of a procedural apocalypse¹³⁶ in which judges manipulate forces to coerce the parties to settle their cases.

Settlement promotion is indeed the feature of managerial litigation most vulnerable to criticism, the one most likely to foster a flight from law. Thus, Professor Fiss has criticized settlement promotion essentially on the grounds that it adopts the Fulleresque view that the parties should be in complete control of the litigation.¹³⁷ He urges that the judge should take responsibility for the litigation beyond the involvement of the parties—essentially inviting some activism such as managerial judging. One gathers that Fiss expects the judge's involvement to benefit the outgunned party,¹³⁸ although there is no particu-

HAST. L.J. 973-89 (1993). If anything, one suspects that the more conservative elements of the federal judiciary were less likely to take up the cry of managerial judging. Moreover, there seems no reason to question the judges' motivations. They were hardly seeking to reduce their workload. At least at the outset, active case management took increased effort on the part of the judge.

¹³³ See Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1979); Resnik, *supra* note 126, at 379.

¹³⁴ Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 264-65 (1985).

¹³⁵ See *supra* notes 38-39 and accompanying text.

¹³⁶ See Richard L. Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267, 1284-85 (1987).

¹³⁷ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

¹³⁸ Of course, imbalances of power can distort judgment as well. Resources influence the quality of presentation, which in turn has an important bearing on who wins and the terms of victory. We count, however, on the guiding presence of the judge, who can employ a number of measures to lessen the impact of distributional inequalities. He can, for example, supplement the parties' presentations by asking questions, calling his own

lar assurance that it would. The basic point is that managerial judging could benefit either plaintiffs or defendants and, therefore, is not generically likely to make either defendants or plaintiffs the winners.

Nor does the managerial judging experience require acceptance of the trans-substantive critique. It does show that judges may constrain the moves allowed in individual cases and opens the possibility of generalization for types of cases. But this generalization may well turn out to be trans-substantive, keying on the complexity or magnitude of the case rather than its substantive content (except to the extent that affects complexity). The basic point again is that judges are restricting the freedom of action of lawyers.

For our purposes, managerial judging may be most useful as an example of the diffusion of innovation in federal civil procedure. This innovation has resulted from a grass-roots campaign by judges who experimented with the approach and were happy with the results. Unfortunately, there is limited empirical evidence that managerial judging actually achieves what its proponents say it should, but the campaign was sufficient to persuade the Advisory Committee to sign on with amendments to Rule 16 in 1983, to prompt Congress to embrace managerial judging as the hope of the future in 1990 and to persuade the Advisory Committee to expand Rule 16's authorization for judicial management in 1983.¹³⁹ Hence it is a harbinger of things to come under the CJRA.¹⁴⁰

E. *Rule 11*

If managerial judging is an example of innovation that originated without significant involvement by the Advisory Committee, the 1983 amendment to Rule 11 is surely a coun-

witnesses, and inviting other persons and institutions to participate as amici. These measures are likely to make only a small contribution toward moderating the influence of distributional inequalities, but should not be ignored for that reason. Not even these small steps are possible with settlement.

Id. at 1077.

¹³⁹ The 1993 amendments included broadening Rule 16 to authorize more settlement promotion. See *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 427-31 (1993) (Effective Dec. 1, 1993).

¹⁴⁰ See *infra* notes 166-89 and accompanying text.

ter-example that shows how the Advisory Committee can precipitate—although not control—significant change. But it is hardly proof of the success of the rules process. No rule amendment has aroused more ire recently than this one. John Frank, himself a member of the Advisory Committee that drafted the 1966 revision to Rule 23, called the Rule 11 amendment “the most unfortunate exercise in rulemaking at least of the last 20 years.”¹⁴¹ The effort is often cited as proof of the critics’ views, but on closer examination proves more ambiguous.

To begin with, the concept on which Rule 11 was based was hardly invented in 1983. David Dudley Field included a “strong verification requirement” in his 1848 Code¹⁴² and the Framers of the Federal Rules seriously considered but rejected such a provision ninety years later.¹⁴³ They did, however, adopt original Rule 11, which required that pleadings be signed in good faith and authorized striking them if they were signed in violation of the rule. Everyone seems to agree that this was a paper tiger, although it may have supported imposing some duty on a lawyer to investigate claims and defenses before asserting them in a case.¹⁴⁴ Certainly there was widespread reluctance among judges (much criticized in some quarters)¹⁴⁵ to impose sanctions, and particular reluctance to punish clients for what was clearly the attorney’s fault.

Most agree that the adoption of the 1983 amendment was preceded by widespread concern about abusive behavior by some attorneys and parties, although there is disagreement about the extent of that abuse and whether, generally speaking, it came more often from the defense or plaintiff’s side. Persuaded that the problem was serious, although without particularly impressive empirical evidence to support that conclusion, the Advisory Committee hit upon “a return to the oath as an attempt to gain some of the goals of the Field verifi-

¹⁴¹ John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1886 (1989).

¹⁴² Subrin, *supra* note 31, at 936.

¹⁴³ Subrin, *supra* note 31, at 977.

¹⁴⁴ See D. Michael Risinger, *Honesty in Pleading and its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 54 (1976).

¹⁴⁵ See, e.g., Charles Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264, 272 (1979).

cation."¹⁴⁶ The proposal excited considerable opposition on the grounds that it would lead to a cottage industry of routine sanctions motions, that it would poison relations between attorneys and that it would immobilize attorneys who were considering new and aggressive legal theories. The Advisory Committee protested in its notes that it wished to avoid chilling attorney creativity, but stuck to its guns on adopting the amendment.¹⁴⁷

It is hard to know what the framers actually expected that the amendment would do. Given the ineffectiveness of the original rule and the longstanding judicial reluctance to impose sanctions, they might not have been surprised if the amendment had no significant effect. At least some commentators protested at the time that the amendment would "emasculate" Rule 11 because it eliminated the power to strike offending pleadings.¹⁴⁸ Perhaps because of fears that the amendment would have no effect, the Advisory Committee made sanctions mandatory in the event of a violation.

Obviously the amendment did not sink without a trace in the sea of litigation behavior. Instead, Rule 11 became the hottest rule around, and reported decisions on sanctions multiplied. As Judge Schwarzer noted in 1988, "Rule 11 has become a significant factor in civil litigation, with an impact that has likely exceeded its drafters' expectations."¹⁴⁹

The amended rule was also the focus of heated commentary, for some academics, at least, seemingly created a cottage industry of writing about Rule 11, most of it drawing on only reported cases. Many of the original objections were renewed, and the 1983 amendment was repeatedly attacked as having a disproportionate effect on civil rights plaintiffs. Beyond that, it presented numerous doctrinal difficulties. Some courts asserted that it was a cost-shifting measure, finding that it was violated on the basis of an offending lawyer's "bad" work product, without focusing on the actual investigatory activity of the lawyer

¹⁴⁶ Subrin, *supra* note 80, at 331.

¹⁴⁷ FED. R. CIV. P. 11 (Advisory Committee Notes to 1983 Amendments).

¹⁴⁸ Jonathan Lerner & Seth Schwartz, *Why Rule 11 Shouldn't Be Changed: The Proposed Cure Might Exacerbate the Disease*, NAT'L L.J., May 9, 1983, at 13 ("elimination of the motion to strike would effectively emasculate proposed Rule 11").

¹⁴⁹ William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).

in question. As Professor Burbank has put it, some courts were "reading Rule 11 in the teeth of its language."¹⁵⁰ It is hard to see how the Advisory Committee should have foreseen this development.

After the first burst of commentary, more careful empirical work was undertaken, and it provided reason for more caution in condemning the amendment. The Third Circuit Task Force examined every instance in which the rule had been invoked in that circuit during a year and issued a report in 1989 raising serious questions about earlier analyses that looked only at reported cases. Contrary to the cottage industry concern, it found that Rule 11 had been raised by motion in only one-half of one percent of civil cases in the circuit.¹⁵¹ Moreover, the frequency of Rule 11 issues did not seem disproportionate in civil rights cases compared to diversity cases, although the success rate of motions directed at civil rights plaintiffs was disproportionately high, a circumstance the Task force attributed in part to uncertainty in the underlying civil rights law.¹⁵² The Task Force also concluded that the cost-shifting and "product" interpretations of Rule 11 adopted by other courts were wrong as interpretations of the amended rule and wrong-headed as a matter of policy. A study by the Federal Judicial Center, undertaken at the same time, found widespread support for the amendment among attorneys, but noted a number of areas in which there was a high risk of being sanctioned—securities, antitrust, commercial, RICO, employment discrimination cases, mass tort cases and class actions.¹⁵³

As the Third Circuit Task Force recommended, more empirical work has been done, some of which has also yielded mixed results. Professor Nelken, an early critic of the amended rule, recommended in articles published in 1990 that the 1983 revisions be further amended but not repealed.¹⁵⁴ A Federal

¹⁵⁰ Burbank, *supra* note 40, at 1933.

¹⁵¹ See BURBANK, *supra* note 1, at 60-61.

¹⁵² *Id.* at 68.

¹⁵³ THOMAS WILLGING, THE RULE 11 SANCTIONING PROCESS 9-10 (1988). Willging surmised that "[t]he common features of these high-risk cases seem to be complexity, high stakes, personal allegations of moral turpitude, and a difficulty in pinning down facts before filing." *Id.*

¹⁵⁴ Melissa Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a*

Judicial Center study of Rule 11 activity in five districts concluded that in those districts the rule had been raised in 2% to 3% of cases, but that there were actual rulings in only 48% to 79% of those instances. Moreover, where there were rulings, sanctions were denied 58% to 80% of the time.¹⁵⁵ Focusing on civil rights cases, these researchers concluded that the frequency of motions targeting represented plaintiffs or their lawyers was similar to that in other types of cases with substantial Rule 11 activity (contract and tort cases) in four of the five districts, and that the rate at which courts imposed sanctions in civil rights cases was comparable to that for all types of cases.¹⁵⁶ Even Professor Tobias, the indefatigable critic of using the rule in civil rights cases, acknowledged in 1991 that such developments "have led me to be more optimistic about Rule 11's application than I was several years ago."¹⁵⁷

In a more positive vein, this empirical effort has shown that the amendment did have some of the effect the framers sought—prompting attorneys to stop, think and investigate more fully before taking actions in court.¹⁵⁸ It is impossible to say how much of this caution should be considered evidence of "chilling" effects. These consequences have prompted some to suggest, perhaps tongue in cheek, that the rule should be declared a success and retired.¹⁵⁹

The Advisory Committee responded to the tumult, however, by issuing an unprecedented "call" for comment on the rule.¹⁶⁰ It then circulated a proposal to amend the rule again,

Middle Ground on Rule 11 Sanctions, 41 HASTINGS L.J. 383, 385 (1990) [hereinafter Nelken, *Chancellor*]; Melissa Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147 (1990) [hereinafter Nelken, *Impact*].

¹⁵⁵ Elizabeth Wiggins et al., *The Federal Judicial Center's Study of Rule 11*, FJC DIRECTIONS, Nov. 1991, at 8-9. The five districts were selected because they used computerized docketing systems that allowed quick identification of all cases involving Rule 11, and the study was limited to the period of time when these computerized docketing systems were in effect in each district.

¹⁵⁶ *Id.* at 22-23 (Memorandum from Elizabeth Wiggins, Thomas Willging & Donna Stienstra to Readers of *FJC Directions* correcting Table 13 (Dec. 23, 1991)).

¹⁵⁷ Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 953 (1991).

¹⁵⁸ See, e.g., BURBANK, *supra* note 1, at 75-76 ("in this circuit, the Rule has had an impact on pre-filing conduct of a kind that the rulemakers intended").

¹⁵⁹ Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801, 815 (1992) ("The principal difficulty, litigation abuse, which prompted the 1983 revision, has been ameliorated . . .").

¹⁶⁰ See *Call for Written Comments on Rule 11 of the Federal Rules of Civil*

including a number of changes responsive to the critique by the Third Circuit Task Force. After public comment, the Advisory Committee made some further modifications and sent along a revised rule that, with one small but highly significant change inserted by the Judicial Conference,¹⁶¹ became effective on December 1, 1993, and may go far toward abating the tumult.¹⁶² Even John Frank, who urged abolition of the 1983 changes, pronounced himself happy with some of the proposed revisions.¹⁶³ Justice Scalia, on the other hand, objected that "[t]he proposed revision would render the Rule toothless."¹⁶⁴

This is not an entirely happy history, and there are good reasons for doubting the wisdom of the entire effort to police litigation behavior with sanctions. But those objections do not translate into support for the critics' more general views. The basic objective of the framers of the 1983 amendment to Rule 11, however maladroit their work product, was to provide a tool to combat what they perceived to be a serious problem in civil litigation. When difficulties emerged with the implementation of the change, the Advisory Committee promoted study of the issue, invited commentary and proposed changes to deal with them. This is hardly an experience that supports conclusions about a hidden agenda inimical to the interest of certain groups of litigants. Indeed, it might even be cited as evidence

Procedure and Related Rules, 131 F.R.D. 335 (1990).

¹⁶¹ As proposed by the Advisory Committee, the 1993 amendment to Rule 11 would have directed, as did the 1983 version, that on finding a violation the court "shall" impose sanctions, but the Judicial Conference changed "shall" to "may" in the version transmitted to the Supreme Court which ultimately was adopted. Compare Attachment B to letter from Hon. Sam Pouiter (Chair of the Advisory Committee) to Hon. Robert Keeton (Chair of the Standing Committee on Rules of Practice and Procedure), May 1, 1993, 146 F.R.D. 519, 524 (1993) (explaining that majority of Advisory Committee favored retaining "shall") with Rule 11(c) as transmitted to the Court, reprinted in 146 F.R.D. at 580 (1993) (court "may" impose sanctions).

¹⁶² See *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 419-24 (1993). Among other things, the amendments make imposition of sanctions discretionary, limit the sanction to that needed to deter repetition of the misconduct, provide that monetary sanctions ordinarily should not be paid to the opposing party and provide a twenty-one day "safe harbor" during which a paper can be withdrawn or corrected, thereby avoiding any sanctions. Thus, they respond to a number of the concerns about the 1983 amendments.

¹⁶³ Henry J. Reske, *Tinkering With Procedure*, 78 A.B.A. J. 14 (1992) (quoting Frank as saying that the proposed revision is "a major victory for our side.").

¹⁶⁴ *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting).

that empirical work can profitably inform the rules amendment process and, thus, as an episode that contrasts with the current controversy surrounding mandatory disclosure, which is discussed below.

Furthermore, the much-trumpeted negative effect on civil rights plaintiffs seems a weak ground for condemning the rules' trans-substantive orientation. It is still not fully clear how substantial this impact has been. There is no reason why the rulesmakers should have foreseen this development and, unless we assume that they were lying through their teeth when they cautioned against chilling creative advocacy, it hardly seems that they intended this result (if it occurred). To the extent a disproportionate impact on civil rights plaintiffs has occurred, the reasons for it are still not fully understood, although it may best be linked to a more generally unfavorable reception of civil rights claims recently.¹⁶⁵

Approached in terms of winners and losers, the Rule 11 experience is difficult to gauge. Behind the tumult the question is whether the overall dose of caution in connection with litigation positions warrants the turmoil resulting from increased sanctioning. Certainly overzealous use of Rule 11 seems to have negative effects, much as it may have served the private agendas of some judges. Perhaps, then, the most meaningful lesson is caution; radical changes in direction not only make it too difficult to predict winners and losers, but also loose forces that the framers cannot foresee.

F. *Civil Justice Reform Act of 1990*

For loosing unforeseeable forces, the CJRA may have no peer; surely it has been greeted in apocalyptic terms. Professor Mullenix remarks that it "is fomenting a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure."¹⁶⁶ She adds that it was "stealth legislation"¹⁶⁷ and finds most disturbing "the blatant as well as disguised political agendas behind the legis-

¹⁶⁵ Nelken, *Chancellor*, *supra* note 154, at 404.

¹⁶⁶ Mullenix, *supra* note 24, at 377.

¹⁶⁷ *Id.* at 397.

lation."¹⁶⁸ Professor Robel similarly finds the sudden appearance and passage of this statute as evidence of political ideology—the hidden agenda of insurance companies—capturing the initiative in civil litigation innovation.¹⁶⁹

The initiative for the legislation came principally from Senator Biden, who arranged for the Brookings Institution study on which it was based, and evidently arranged for some of the funding for the study effort as well. Brookings produced a slim report, on which the original Biden Bill was based. After the Judicial Conference tried to head off that legislation with its own fourteen-point program of delay reduction, Senator Biden persisted and pushed through a revised plan within a year of the issuance of the Brookings Report.¹⁷⁰ Since 1990, all ninety-four federal districts accordingly have busied themselves with Advisory Group studies of local docket conditions and development of district plans to cope with litigation expense and delay. Whatever else these efforts have produced, they have proved to be a cottage industry for some academics—including this author¹⁷¹—who are enlisted to serve as reporters for local Advisory Groups at seventy-five dollars per hour. The work product of these local activities has been somewhat uneven; while some have been cautious, others have been extremely aggressive. There remains uncertainty about whether districts must conform to the Federal Rules in their plans. It is clear that some do not feel so constrained.¹⁷²

The entire experience thus far has been most troubling for those concerned with responsible innovation. As Professor Robel has pointed out, despite Congressional findings of serious delay problems, there was limited evidence, empirical or

¹⁶⁸ *Id.* at 439.

¹⁶⁹ See Robel, *supra* note 2, at 115.

¹⁷⁰ For a somewhat tendentious description of some of this history, see S. REP. NO. 146, 101st Cong., 2d Sess. 3-6 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6805-09.

¹⁷¹ I am the reporter of the CJRA Advisory Group of the Northern District of California.

¹⁷² See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1417 (1993) ("The baldest assertion of authority appears in the plan for the Eastern District of Texas, which proclaims that 'to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling.'").

other, to support this conclusion.¹⁷³ To the contrary, Congress had available, but disregarded, a Rand Corporation study showing no significant increase in delay in civil litigation in the federal system since 1971,¹⁷⁴ a point seemingly within the "golden age of federal civil procedure." Yet concerns about delay in the federal courts had been around since the late 1960s¹⁷⁵ and are implicit in Professor Subrin's critique of the Federal Rules, for expense and delay "seem like what one would expect from an all-equity procedure system."¹⁷⁶

The method by which the proposal was developed was also troubling. Whether or not federal judges were consciously excluded from the Brookings Study, they were in fact conspicuously absent. It does seem that the rule amendment process was consciously sidestepped; Senator Biden's chief aide later derided the "near mystical reverence of the rule making authority exercised by the Judicial Conference."¹⁷⁷ When the Judicial Conference opposed the bill, relations between it and the Senate Judiciary Committee became decidedly chilly, and the Committee report in support of the bill was rewritten to include an initial section with a heavy emphasis on the power of Congress to make rules for the operation of the courts, which, the report asserted, was much broader than the power of the Supreme Court to make rules under the Rules Enabling Act.¹⁷⁸ Rather than rely on the Advisory Committee, the Act adopted a "bottom up" reform orientation that rings populist bells but seems designed to erode the authority of the national rulemaking apparatus. The incipient antagonism between Congress and the courts augurs ill for reasoned procedural development.

¹⁷³ See Robel, *supra* note 2, at 115.

¹⁷⁴ See generally TERRANCE DUNGWORTH & NICHOLAS PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990).

¹⁷⁵ Letter from Benjamin Kaplan Reporter to Dean Acheson, Chair of the Advisory Committee (March 2, 1969) (asking "whether our Committee should not turn its attention to large procedural themes such as 'delay in the courts' which in the end are far more important than technical questions of rule amendments"), *reprinted in* Burbank, *supra* note 40, at 1964.

¹⁷⁶ Subrin, *supra* note 31, at 974; see also *id.* at 986-87 ("An all-equity procedure may be so expensive that many legitimate lawsuits are not initiated.").

¹⁷⁷ Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 117 (1991).

¹⁷⁸ See S. REP. NO. 146, 101st Cong., 2d Sess. 3-6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6811-15.

The content of the Brookings proposals, and the thrust of the Act, are similarly troubling. By empowering districts to act independently on a variety of matters, perhaps without the Federal Rules' constraint, the Act mandates a patchwork of local innovation without concern for the process of federal rulemaking. Indeed, to the extent it seeks to authorize intrusion into the minutiae of judicial activity, it may run up against the hard core of inherent judicial power.¹⁷⁹ Nevertheless, this sort of intrusiveness may be expected from legislatures that become activists about speeding up courts. In California, for example, the Fast Track program has been imposed on the courts as part of the Government Code, not the code of civil procedure.¹⁸⁰ It may be that legislatures intrinsically approach court procedure on mechanistic terms, seeking to achieve improved output by speeding up the assembly line.

Despite these ominous portents about the rulemaking process, the CJRA experience provides limited support for the critics' doomsday views. The political critique focuses on the prominent role of corporate counsel in the Brookings Task Force,¹⁸¹ and the insight that "the [Biden] bill is being driven by special interests."¹⁸² We are reminded that Senator Biden, whose "single minded determination"¹⁸³ brought the bill to prompt fruition, "is, of course, the senator from Delaware, home of hundreds of corporations."¹⁸⁴ Anyone can draw the obvious conclusion. But this conclusion seems too hasty. Undoubtedly the sparkplug behind the legislation was Senator

¹⁷⁹ Regarding state courts, Levin and Amsterdam conclude that an effort by the legislature to "dictate to the courts every detail of their internal regimen" raises separation of powers concerns. See Levin & Amsterdam, *supra* note 11, at 29-30. They add:

Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge, or how he shall comport himself in judging, or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of separation of powers.

Id. at 32; cf. John Papachristos, Comment, *Inherent Power Found, Rule 11 Lost: Taking a Shortcut to Impose Sanctions in Chambers v. NASCO*, 59 BROOK. L. REV. 1225 (1993) (discussing origins and limitations of the inherent judicial power).

¹⁸⁰ CAL. GOV'T CODE §§ 68600-20 (West 1992).

¹⁸¹ See Robel, *supra* note 2, at 117.

¹⁸² Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 103 (1991).

¹⁸³ Mullenix, *supra* note 24, at 423.

¹⁸⁴ Robel, *supra* note 2, at 129.

Biden, but his prominence, if anything, belies conspiratorial theories. His vigorous personal involvement seemed to result from a strong personal commitment to these issues as much as fealty to Delaware corporations. Indeed, he apparently roused himself from a hospital sick-bed to direct an assistant to get going on the Brookings project.¹⁸⁵

More significantly, it is hard to say who will benefit from whatever changes result from the activities of CJRA Advisory Groups. Professor Tobias reports that the planning process has "fostered a healthy dialogue between the bench and bar,"¹⁸⁶ and the open-ended nature of the legislation provides such latitude that innovation on the local level undertaken pursuant to the Act could benefit anyone. Although some assert that fast track procedures "are of greater benefit to the better-financed parties,"¹⁸⁷ that conclusion is belied by the traditional reluctance of defendants to hurry to trial.

Another easy conclusion that looks dubious is that the national rules process is mortally wounded by the balkanization that local control may be producing. Without minimizing the challenge to the rules process, it is important to recognize that there were already substantial variations among local rules from place to place. The Act might even produce a modicum of greater uniformity if it reduces the tendency of judges to insist upon promulgating their own personal rules. Even though the experimentation with voluntary disclosure under the Act was urged as a reason for delaying that experiment on the national scale, the Advisory Committee is hardly out of business at present (although it may be weakened by controversy surrounding the voluntary disclosure pro-

¹⁸⁵ Mark Gittenstein, who was Chief Counsel for the Senate Judiciary Committee and Reporter of the Brookings Task Force, describes the situation as follows:

Senator Biden, during his convalescence from surgery in 1988, called me into his hospital room and said he wanted me to look at this issue. What he had always wanted to do was try to create some sort of constituency outside the system for reform. So in the Fall of 1988 we convened a meeting of distinguished members of the bar, who would meet on a bi-monthly basis at the Brookings Institution.

Videotape of Program *Court Reform: What Makes for Success?* (May 17, 1990) (on file with University of Pennsylvania Law Library).

¹⁸⁶ Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115, 122 (1993).

¹⁸⁷ Cohn, *supra* note 182, at 100, 101.

posal discussed below). Indeed, Congress has acted recently to expand its authority to adopt rules that affect appealability,¹⁸⁸ and it seems likely that even on matters requiring legislative action, Congress will continue to rely on outside expertise, as it did with the supplemental jurisdiction statute.¹⁸⁹

Nevertheless, the CJRA episode suggests that there are good reasons to prefer the neutrality and care with which the Advisory Committee approaches innovations. Whatever the reality of a hidden agenda underlying the Act, it is undeniable that moneyed interests have a more direct, even sanctioned, avenue of access to the traditional political process. Moreover, because Congress necessarily takes a sporadic interest in such matters, it is more likely to embrace simplistic or mechanical solutions. Accordingly, not only is the crisis mentality more likely to prevail, but it can be expected to prevail at the thirty-second sound bite level.

G. *Mandatory Initial Disclosure*

Our final development is the Advisory Committee's proactive response to the longstanding realization that in too many instances parties play hide-the-ball with basic information despite broad discovery. A possible solution was to direct that they exchange this information at the outset of the litigation without the formality of a discovery request. In 1990, the Reporter of the Advisory Committee began informally circulating a "fairly radical"¹⁹⁰ proposal along these lines. The resulting controversy illustrates the possible impact of approaching procedural innovation in terms of winners and losers.

Although the concept of some mandatory exchange of information in litigation goes back further,¹⁹¹ forceful opposition to the extreme adversarialness of discovery in civil litigation

¹⁸⁸ See Federal Courts Administration Act of 1992, 28 U.S.C. § 1292(e) (1993).

¹⁸⁹ See Charles Geyh, *Complex Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401, 414-15 (1991) (discussing unique role of academics in regard to court reform legislation).

¹⁹⁰ Mullenix, *supra* note 21, at 807 (citation omitted); see *id.* at 858-61.

¹⁹¹ *Brady v. Maryland*, 373 U.S. 83 (1963) (mandatory disclosure of exculpatory material by prosecution in criminal cases). *Brady* did not necessarily change the world in criminal cases, however; "30 years after its inception, the Supreme Court ruling has not changed criminal practice as dramatically as first was hoped." Cris Carmody, *The Brady Rule: Is it Working?*, NAT'L L.J., May 17, 1993, at 30.

can be traced to a 1978 law review article by then-Professor Wayne Brazil.¹⁹² Similar initiatives were surfacing on other fronts at approximately the same time; the Central District of California adopted a local rule with disclosure features, and two other districts later followed suit.¹⁹³ In March 1983, the *ABA Journal* carried a proposal by Gerald Glaser, a North Dakota state court judge, that each party be required to disclose any information it possessed regarding a matter on which it had the burden of proof.¹⁹⁴

¹⁹² Wayne Brazil, *The Adversarial Character of Civil Discovery: A Critique and a Proposal*, 31 VAND. L. REV. 1348 (1978).

¹⁹³ Local Rule 6.1 requires that the parties meet shortly after the answer is filed for a number of purposes, including the following:

1. *Documents*: To exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the party. Documents later shown to have been reasonably available to a party and not exchanged may be subject to exclusion at the time of trial.

3. *Other Evidence*: To exchange any other evidence then reasonably available to obviate the filing of unnecessary discovery motions.

4. *List of Witnesses*: To exchange a list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party. The parties will then be under a continuing obligation to advise the opposing party of other witnesses as they become known.

C.D. CAL. R. 6.1.

Two other districts have very similar local rules. See S.D. FLA. R. 14 (adopted Feb., 1984); D. GUAM R. 235(5). Evidently the Central District of California Rule developed independently of the Federal Judicial Conference session described in the text, and the judges of the Southern District of Florida learned of it when Chief Judge Manuel Real of the Central District of California temporarily sat in Florida. Telephone Conference Between Chief Judge Manuel Real and Richard Marcus (Sept. 2, 1993) (notes on file with the author).

Testimony at hearings concerning the 1993 amendments to Rule 26 indicated that these requirements were not applied by all judges and that meetings of counsel may have functioned more to establish a schedule for exchange of information than to effect immediate disclosure. See *Hearings on the Proposed Amendments to the Federal Rules of Civil Procedure*, Atlanta, Ga. 259-79 (Feb. 19, 1992) (testimony of Hon. Thomas Scott). Judge Scott, a former district judge in the Southern District of Florida, described himself as "one of the few judges in the Southern District of Florida who believed in the meet and confer rule and who mandatorily enforced the meet and confer rule." *Id.* at 261. Even Judge Scott, however, evidently expected the conference mainly to produce a schedule. See also *id.* at 280-81 (testimony of Douglas Chumbley, a practicing attorney) ("My experience has been, in the numerous Rule 14 meetings that I have had with opposing counsel, invariably there are no documents exchanged, and there are no witnesses exchanged.").

¹⁹⁴ Gerald Glaser, *A New Law of "Supply and Demand" in Discovery*, 69 A.B.A.

In November of that year, the Federal Judicial Center convened a Bench/Bar "Workshop on Curtailing Abuse of the Discovery Process" at which Judge Glaser presented his proposal, with Professor Brazil also on the panel as a commentator on the proposal.¹⁹⁵ In 1988, Judge William Schwarzer (now the Director of the Federal Judicial Center) advocated the development of some such disclosure during a symposium at the University of Pittsburgh Law School.¹⁹⁶ A year later, the Brookings task force was the springboard for the CJRA's proposal for voluntary exchange, which was a reform to reduce cost and delay in litigation; Congress listed it as one of the provisions districts should consider for inclusion in their local plans for cost and delay reduction.¹⁹⁷

Against this background, the Advisory Committee (of which then-Judge Brazil was a member) produced a proposed amendment to Rule 26 which was circulated for public comment.¹⁹⁸ Evidently the passage of the CJRA was an important catalyst in the Advisory Committee's decision to act when it did.¹⁹⁹ The Committee's initial proposal, circulated for public

J. 320 (1983).

¹⁹⁵ See Bench/Bar Workshop on Curtailing Abuse of the Discovery Process (Nov. 14, 1983) (presentation of Hon. Gerald G. Glaser) (on file with author).

¹⁹⁶ William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721-23 (1989).

¹⁹⁷ See 28 U.S.C. § 473(a)(4) (1990).

¹⁹⁸ See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence*, 137 F.R.D. 53, 87-89 (1991). During roughly the same period of time, but relatively independently, the state court system in Arizona developed its own brand of mandatory disclosure. See ARIZ. R. CIV. P. 26.1; Symposium, *Mandatory Disclosure and Limiting Discovery: The 1992 Amendments to Arizona's Rules of Civil Procedure and Comparable Federal Proposals*, 25 ARIZ. ST. L.J. 1 (1992).

¹⁹⁹ Judge William Bertlesman (E.D. Ky.), who was a member of the Standing Committee on the Rules of Practice and Procedure and the liaison to the Advisory Committee on the Civil Rules, offered the following explanation for the Advisory Committee's decision to proceed with mandatory disclosure in 1990:

The main factor in all this is somewhat political, not Republican or Democrat political, but more economical political. It was the initiatives of Senator Biden and the passage of the Biden Bill. Paul Carrington [reporter of the Advisory Committee] had been working on these concepts for a long time, but when the Biden Bill passed, like so many things happen—whether its the medical profession or the legal profession—when a reform is proposed, all of a sudden the group says we better reform ourselves or somebody else is going to do it for us.

So the incentive to get this started in the practical order, I think, was the passage of the Biden Bill, when it looked as though the Judicial-

comment in 1991, called for each party to provide, without the need of a discovery request, information including the name of any person likely to have "information that bears significantly on any claim or defense," and a description of any document the person possesses that is "likely to bear significantly on any claim or defense."²⁰⁰

This proposal provoked "a flood of objections unprecedented in fifty plus years of judicial rule-making."²⁰¹ The bulk of opposition came from the defense side, which emphasized the uncertain breadth of the duty to disclose and the potential burden that it would entail for large organizational litigants. Indeed, to the unbiased reader, that would seem to be the main bite of the proposal, and that source of opposition was predictable in character, if not in intensity. Less predictable, though, was opposition from the plaintiff side. Almost as if looking for something to object to, public interest plaintiffs' lawyers protested that informal disclosure would hurt "information poor" litigants.²⁰² Nan Aron from the Alliance for Justice was quoted as saying that if adopted, the proposal "would end public interest litigation as we know it."²⁰³ There also was academic opposition on the ground that the need for fur-

ry was going to lose control of itself. So the first draft was proposed in a meeting at Duke University in October of 1990 and, as presented to the meeting, there was a pretty complete draft on how this disclosure would work. Senator Biden and whatever constituency he represents perceived that there were great abuses, that the rules since 1938 had not worked, that they had failed, that the billable hour and the necessity to produce lots of billable hours was leading to unreasonable and oppressive discovery requests, and that something needed to be done to speed it up and reduce expense and delay—that being the magic phrase in the Biden Bill. So, for better or worse, that is how it began. I don't think anybody realized at that time, in October, 1990, realized how controversial this was going to be.

Remarks of Hon. William O. Bertlesman on "The Practical Implications of Discovery Reform" at the Annual Meeting of the Association of American Law Schools, Orlando, Fla. (Jan. 7, 1994) (audiotape on file with the author).

²⁰⁰ *Preliminary Draft of Proposed Amendments to Federal Rules of Civil Procedure*, 137 F.R.D. 53, 87-89 (1991). The proposal also directed that the parties disclose expert testimony in the form of a written report, *id.* at 89, and expanded the duty under Rule 26(e) to supplement discovery responses with subsequently-acquired information. *Id.* at 96.

²⁰¹ Ann Pelham, *Judges Make Quite a Discovery; Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, LEGAL TIMES, Mar. 16, 1992, at 1.

²⁰² Mullenix, *supra* note 21, at 823-26.

²⁰³ Pelham, *supra* note 201, at 14.

ther changes had not been demonstrated,²⁰⁴ and criticism by lawyers who objected that the Advisory Committee did not include enough practicing lawyers.²⁰⁵

In the face of this opposition, the Advisory Committee regrouped and reconsidered. Initially it decided to shelve the voluntary disclosure idea altogether and await information on the experience of such programs adopted by districts under the CJRA.²⁰⁶ Then it decided to go forward, adding a requirement that the parties meet and confer early in the litigation with disclosure deferred until after that meeting, thereby shifting toward the model presented by the three districts that had adopted a modified disclosure system by local rule. It also limited the disclosure requirement to information and documents "relevant to disputed facts alleged with particularity in the pleadings," thereby responding to some of the complaints about the overbreadth of the original proposal.²⁰⁷ In April

²⁰⁴ Thomas Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155 (1991).

²⁰⁵ See Laura Kaster & Kenneth Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15 (arguing that practicing lawyers have constituted a larger proportion of the Committee in the past, and that absence of practicing lawyers prompted Committee to undervalue lawyers' obligation to protect attorney confidences compared to their institutional obligations).

²⁰⁶ Some 20 Early Implementation Districts have adopted some form of voluntary disclosure. See Tobias, *supra* note 186, at 126. It might be helpful to consider the provisions of one such local initiative. The Northern District of California requires that each party file disclosures within 90 days of the filing of the complaint. It specifies the following "Content of Initial Disclosures":

After making in good faith such inquiry and investigation as is reasonable under the circumstances, each party shall disclose:

1. The full name, title, work or home address and telephone number of each person known to have discoverable information about *factual* matters relevant to the case.
2. All unprivileged documents in the party's custody or control that are then reasonably available that tend to support the positions that the disclosing party has taken or is reasonably likely to take in the case.
3. Copies of any apparently pertinent insurance agreements.
4. A computation by claimant(s) of any category of damages sought or likely to be sought, e.g., in a counterclaim.
5. All unprivileged documents and other evidentiary material in the party's custody or control that are then reasonably available that relate to damages, except punitive damages.

N.D. CALIF. GENERAL ORDER 34, § VII B (effective July 1, 1992).

²⁰⁷ See *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 431-32 (1993).

1993, the Supreme Court promulgated this amendment, and the House Judiciary Committee promptly held hearings during which opponents urged that Congress scuttle or delay the mandatory disclosure amendments to the Federal Rules.²⁰⁸ Although the House passed a bill to this effect,²⁰⁹ the Senate did not enact it and, therefore, the rules became effective on December 1, 1993, with mandatory disclosure intact.²¹⁰ But it is fair to say the rule survived by the skin of its teeth.

Certainly this tumult shows that some people are approaching proposed reforms primarily in terms of whether they will be winners or losers; it is tempting to accept Judge Winter's exasperated conclusion that "even amendments best characterized as trivial or incremental may encounter enormous resistance."²¹¹ On their face, disclosure requirements seem to be a plausible effort to curtail some obstructive behavior and afford a shortcut to meaningful knowledge about the evidence. Indeed, their thrust appears helpful to less-financed litigants because they are designed to afford access to basic information without the cost and delay of formal discovery. Moreover, their bite would seem to be greater with larger litigants, such as corporate defendants.

The potential flaw, however, is that the entire undertaking may be naive. The Advisory Committee's aspiration certainly cuts against the grain of the adversary system as it has evolved in the discovery context, and there is room for real misgivings about whether the proposal will work. Far from reducing controversies about discovery, the proposal could backfire and provide another point of conflict, particularly with its current invocation of Rule 9(b)'s particularity requirement.

²⁰⁸ Although lawyers testifying were mostly opposed to the disclosure amendment, John Frank testified that he disagreed: "I think that my colleagues [at] the bar who are troubled at this Rule 26 are spooked over nothing. The plain fact is that disclosure is the contemporary wave. The disclosure system adopted in my own state of Arizona is so much more radical than this that the proposal before you seems child's play." *Hearings Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary Proposed Amendments to the Rules of Civil Procedure*, 103d Cong., 1st Sess. (1993) (statement of John P. Frank).

²⁰⁹ H.R. 2814, 103d Cong., 1st Sess. (1993).

²¹⁰ See, e.g., Randall Samborn, *Rules for Discovery Uncertain*, NAT'L L.J. Dec. 20, 1993, at 1.

²¹¹ Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 263 (1992).

As one district judge has objected, adoption of the proposal could "lead to ancillary disputes" without "any useful purpose."²¹² But these misgivings hardly explain the extent or stridency of the opposition.

The reality appears to be that many in the legal community fear that *any* change comes with a malign hidden agenda. For the defense side, the agenda is fairly overt, and there are some grounds for the suspicion from the plaintiff side. One fear is that this proposal is an ice-breaker for the abolition of discovery. Some judges seem willing to reinforce that fear. For example, when the tumult was at its peak, a district judge began a reported decision by noting that "[s]ome observers of civil litigation believe that discovery rights will be taken from lawyers within the next decade or two, to be replaced by a system of standard disclosures."²¹³ Judge Schwarzer, in an article supporting the changes, added another suggestion that would be likely to stimulate fear in some quarters. He foresaw that the requirement would work in tandem with Rule 11 because "those plaintiffs who lack the basis for a claim that Rule 11 requires will likely be deterred because the disclosure rules will leave them exposed."²¹⁴ Those who are up in arms about Rule 11 are likely to blanch at this prospect.

Despite these comments, there is little in what the Advisory Committee actually did to support the hidden agenda argument. Presumably in response to objections, the Committee adopted a disclosure regime focusing on an early meeting of counsel and implicitly recognized that the parties retain a right to do discovery.²¹⁵ The narrowing of the requirement to matters alleged with particularity seems to be a legitimate effort to curtail what could otherwise be an incredible production burden. The process of adoption hardly supports the conclusion that a back-room fix was occurring to subvert the interests of plaintiffs. According to the official minutes, the debate

²¹² Pelham, *supra* note 201, at 16 (quoting District Judge J. Frederick Motz).

²¹³ Wauchop v. Domino's, 143 F.R.D. 199, 200 (N.D. Ind. 1992).

²¹⁴ William W. Schwarzer, *New Discoveries for the Discovery Process*, LEGAL TIMES, Nov. 25, 1991, at 25.

²¹⁵ See *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 642-43 (1993) (Advisory Committee Notes explain that the rule requires an early scheduling proposal to assure "that the commencement of discovery is not delayed unduly").

was confined to the merits of the proposal, and a newspaper reporter described the discussion, in a somewhat disappointed tone, as "highly intellectual and often tedious."²¹⁶

What this episode shows, therefore, is the high level of suspicion that now attends the reform process, a suspicion that probably has resulted in part from focusing on winners and losers. Perhaps lawyers are pessimistic by inclination, and are better able to discern ways in which changes will hurt than help them and their clients. But whether or not Charles Clark was right to say that "the bar as a whole always opposes all change,"²¹⁷ it does seem that lawyers seeking to determine whether changes will make them winners or losers have a remarkable facility to find a dark lining for any silver cloud, and probably a malign hidden agenda as well.

III. A PRAGMATIC PROGNOSIS ON PROCEDURAL PROGRESS: BACK TO THE FUTURE?

Each of the above episodes was intended to achieve "progress" with procedural changes. Once there was great confidence that procedural progress was virtually inexorable. Forty years ago Professor Millar was able to begin his study of the history of procedure by positing a "law of procedural progress" that procedure will move from rigidity to flexibility.²¹⁸ Unfortunately, particularly recently, progress seems to mean removing some of the warts of the last set of reforms. Perhaps we should abandon the promise of progress; it does seem that current initiatives involve concepts that have reasonably close parallels in the past. What we are doing in more or less radical ways is tinkering with the system. This is a very pragmatic

²¹⁶ Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1.

²¹⁷ Letter from Charles Clark to Douglas Arant (Oct. 8, 1934), *quoted in* Subrin, *supra* note 129, at 118. Besides "client" interests, some mention should be made of the self-interest of lawyers. However unlikely it is that the drafters of the Federal Rules of Civil Procedure during the 1930s were feathering their own nests with prospects of discovery profits for law firms, the litigation bar could be seen to have a self interest in preserving the business of broad formal discovery that might prompt it to oppose the 1993 disclosure amendments. *See supra* text accompanying note 95.

²¹⁸ ROBERT MILLAR, *CIVIL PROCEDURE IN THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 5-6 (1952).

enterprise, and the results are almost always susceptible to attack as insufficient by those who entertain the vision of a more perfect arrangement. In that sense, one of the major obstacles for reformers (like presidents) is coping with the shortfall between what they promise and what they deliver. For the pragmatist, the question is not so much whether changes achieve an ideal but whether they work an improvement. The above review of episodes of reform suggests a number of pragmatic reactions.

A. *Toward a New Paradigm?*

To achieve dramatic progress, one must have a paradigm. As Charles Clark put it, “[R]eformers must follow their dream and leave compromises to others.”²¹⁹ Although the Liberal Ethos presently is a weary construct, it has not been replaced by another. Much as settlement promotion, cost-shifting and sanctioning may serve as protective devices to rein in excesses of the open-ended latitude of the Federal Rules at their most expansive, they do not offer a new vision. Neither have the critics of trans-substantive procedure offered any positive proposal. The point they seem to make in general is that unconfined litigation is just that—unconfined. Put more generally, failing faith is not a new faith.

One obvious possibility is to seize on the growing ADR mood as a new paradigm. From the perspective of some adherents, the conciliatory orientation of ADR is a new direction away from the adversary emphasis of twentieth-century litigation. In limited areas such as family law, where the parties will need to have ongoing relations with each other, this attitude may have some currency. But the conciliation paradigm does not fit the bulk of settlement promotional activity. That effort is caseload driven and often targets cases in which the cost of litigation makes settlement a reasonable alternative. More generally, the goal is to simplify litigation so that the adversary conclusion can be reached without the impediments of the ornate procedural apparatus which the Federal Rules permit. Simplification where needed, or informal counseling

²¹⁹ Charles Clark, *The Federal Rules of Civil Procedure: 1938-58, Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 448 (1958).

about the realities of litigation, do not seem to be evidence of a new paradigm so much as efforts to cope with the existing one.

Alternative possibilities can be imagined, however, generally taking off from the movement toward managerial judging. Looking to the Continent, some see a German advantage in civil procedure that would replace the current party preparation of the case with judicial gathering of evidence.²²⁰ This would surely confine the litigation, but at the cost of important elements of party control. Moreover, it would require a corps of judge/investigators. The current move to more judicial control is a coping mechanism more than an embrace of this paradigm. To go further would tend to blunt the creative synergy between procedure and substance that has characterized civil litigation in this century. Moreover, it bears noting that there are some indications that the Germans are moving toward our model as we adopt reforms that embody some features of theirs.

More aggressively yet, we might respond to another strain of criticism of trans-substantivity—that what matters are results, not process. Several years ago Professor Damaska explored the implications of such an approach, which he labelled the “activist state.”²²¹ Interestingly, the imagery is the same as that offered for contemporary procedure:

[P]rocedural rules and regulations in the activist state occupy a much less important and independent position: procedure is basically a handmaiden of substantive law A proper procedure is one that increases the probability—or maximizes the likelihood—of achieving a substantively accurate result rather than one that successfully effects notions of fairness or protects some collateral substantive value. In this sense, then, the procedural law of the activist state follows substantive law as faithfully as its shadow.²²²

This vision resonates with the rhetoric of much current criticism, but Damaska's prescription for the activist state is neither accurate for current developments nor likely to sit well with the critics of the current situation and direction of reform. Thus, the activist state radically diminishes the role and importance of the party and lawyer, greatly enhances control in

²²⁰ See, e.g., John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

²²¹ MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

²²² *Id.* at 148.

the hands of officials of the state, allows the decisionmaker great latitude for involvement in the proceedings (including some latitude for acquisition of knowledge extraneous to the proceedings) and accords judgments little stability, leaving them to revision in light of later learning.²²³ In addition, the hierarchy of such a system reposes little discretion or final responsibility in judicial officials of the initial tier, which fosters piecemeal disposition with frequent and plenary review by higher officials.²²⁴

The reality of the American tradition, and particularly of much recent innovation, bespeaks the alternative model Damaska offers—the “reactive state.”²²⁵ In this regime, the objective is to resolve conflict and the parties’ autonomy and control over the process are of great importance. This adversarial activity depends heavily on the involvement of counsel and, thus, the judge plays a relatively passive role.²²⁶ The principal judicial authority and discretion repose in the trial judge, with the decision dependent on a single continuous trial-type proceeding, subject to limited review by higher officials.²²⁷ Whatever moves we have made or contemplate away from the most extreme version of this model, we are hardly on our way to embracing the activist state as our new paradigm.

B. *Winners, Losers and Who Makes the Rules*

Whether we switch to a new paradigm or struggle with difficulties presented by our own, many critics (and the organizers of this Symposium) suggest that we might usefully focus on winners and losers. In paradigm shifts, the implications really make such speculation little more than guesswork because the long-term, and often even short-term, advantages are so hard to predict. With more modest revisions it has become very popular to approach matters on such a basis. In academic circles the general trend is to try to further the interests of certain plaintiff groups who, perhaps, can generally be characterized as the disempowered. Certainly other groups also have

²²³ See generally *id.* at 152-80.

²²⁴ *Id.* at 47-56.

²²⁵ See generally *id.*

²²⁶ *Id.* at 104-46.

²²⁷ *Id.* at 57-62.

self-interested perspectives.²²⁸

This tendency toward self-interested analysis has become increasingly common in criticizing recent episodes of reform. Whereas the adoption of the Federal Rules and the 1966 amendments to Rule 23 arguably prompted "establishment defendants"²²⁹ to initiate protective efforts to deflect or defeat change, this effort did not make much headway.²³⁰ The strident turmoil over the proposals for voluntary exchange of information, on the other hand, shows how unabashedly various litigants now pursue their perceived goals through the reform process.

Nevertheless, little in experience suggests that this is a tendency to be encouraged. Even without a new or riveting paradigm, reformers can be moved by more than the self-interest of the loudest or best-financed supplicant, and this is the orientation the Advisory Committee has assumed. Despite the controversy surrounding some of the recent proposals, there is no significant indication that the proposals themselves reflect the importuning, as such, of those who might be affected. For those who dislike specific changes to conclude that the wise solution is to switch to another venue is a curious preference, particularly for those who wish to protect the interests of the disempowered. For the present, however, those who wish alternative venues will find a variety available. As the experience with managerial judging and voluntary disclosure shows, reform has become a grass-roots affair among judges. The CJRA makes it much more so, as well as providing a commission for significant independence in innovation. In the absence of congressional deletion of mandatory initial disclosure from the

²²⁸ Consider a recent article by Peter C. Schaumber in a banking journal regarding the Bush Administration's civil justice initiative entitled *Lawsuit Reform Would Help Banks, Too*, AM. BANKER, Aug. 26, 1992, at 4.

²²⁹ Kaplan, *supra* note 100, at 2127.

²³⁰ For an example of criticism of Rule 23 favoring that it be curtailed, see Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299 (1980). This is not to say that lobbying never moved the rulemakers before. Regarding a proposal to adopt a work product rule in the mid-1950s, a study of its evolution reported that the Advisory Committee cut back on a preliminary proposal "due to the stiff opposition the preliminary draft met from insurance counsel and railroad defense attorneys, groups with a strong interest in discouraging free discovery of accident reports." *Special Project, The Work Product Doctrine*, 68 CORNELL L. REV. 760, 782 (1983).

1993 amendments, local opt-outs from that provision may blunt its effectiveness.

Congress, meanwhile, may be lurching toward greater activism of its own;²³¹ to borrow from another area, if the effects of the CJRA are not satisfactory "Congress may not permit the judiciary to clean its own house again."²³² This prospect is extremely disturbing. Apparently some have no compunction about inviting Congress to adopt special side-deals for their favored groups,²³³ but the experience of the 1980s is not a happy one even for them. As Paul Carrington has pointed out, if the interests of the National Association of Process Servers can alter or supplant the rules process, what self-interested mischief could more powerful and wealthier political players accomplish?²³⁴ Even while lambasting the existing rules process in 1976, Professor Lesnick acknowledged that "[i]t would be difficult to find a supporter of a return to the days of legislative rule-making."²³⁵ Developments since then do not call for a change of view. Those who support more activism by Congress seem oblivious to the vast difference between what they label "ideological" motivations behind recent proposed changes and the reality of legislative lobbying activities by special interests, especially those whose interests they do not share.

²³¹ Thus, Professor Moore concludes that "[t]he events of the last decade suggest that Congress is moving to reclaim some degree of involvement in the rulemaking process, not withstanding the continued broad delegation of rulemaking power to the court." Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1059 (1993).

²³² Stephen Burbank, *Procedural Rulemaking Under the Judicial Councils and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 289 (1982).

²³³ See, e.g., Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801, 813 (1992) ("Congress should amend certain federal rules of civil procedure, making the rules more responsive to the needs of civil rights plaintiffs.").

²³⁴ See Carrington, *supra* note 18, at 165. Professor Carrington also describes the 1988 modification of Rule 35 by Congress at the behest of Senator Inoye (and without following the rules amendment process) to authorize a court to order examinations by licensed clinical psychologists, and suggests that this effort was undertaken because the Senator's daughter-in-law is a clinical psychologist in Hawaii. Whether this effort was undertaken for the Senator's daughter-in-law is now unclear, however, more recent information suggests that it may have been undertaken for the daughter-in-law of Chief Justice William Richardson of the Hawaii Supreme Court. Letter from Paul Carrington to Richard Marcus (May 2, 1993). For another account of the Rule 35 episode, see Mullenix, *supra* note 21, at 846-48.

²³⁵ Howard Lesnick, *The Federal Rule-Making Process*, 61 A.B.A. J. 579 (1975).

This is not to say that the rules should be immune from Congressional alteration. The Rules Enabling Act clearly says that they are not, and trying to insulate them completely would probably be a step in the wrong direction. What is required is self-restraint. The CJRA confrontation between the Senate Judiciary Committee and the Judicial Conference suggests the downside of a lack of moderation in the area. We may hope that Congress will heed the wise words of Judge Weinstein: "It is the good sense to avoid intolerable conflicts by refusing to push the notion of independent branches of government to its logical conclusion that has made it possible for our government to survive."²³⁶

The Advisory Committee is not entirely helpless. In the past it has fought for its work product. In at least one case, it filed an amicus brief in the Supreme Court in defense of its rules.²³⁷ More recently, its members have appeared before Congress to testify regarding amendments, and a former Reporter even exhorted the American Judicature Society to come to the support of the rules process.²³⁸ Although such efforts may have some effect, ultimately the principal question is whether Congress will respect the process. If it does not, a variety of winners in the legislative influence game may begin to exercise considerable influence over rules they care about, a development that would seem likely to make losers of us all. But the political challenge to mandatory initial disclosure should not obscure the reality that the rules process has nevertheless produced substantial changes in 1993. Even without the much-maligned aspect of initial disclosure, the amendments add significant disclosure provisions and an array of other important changes²³⁹—surely a significant package despite the likely deletion of the initial disclosure requirement.

²³⁶ WEINSTEIN, *supra* note 103, at 78.

²³⁷ See Burbank, *supra* note 13, at 1115 (describing brief in *Sibbach*).

²³⁸ Carrington, *supra* note 18, at 166.

²³⁹ Even if Rule 23(a)(1) had been deleted by Congress, Rule 26(a)(2) and 26(a)(3) would require other disclosures of consequence, and other amendments alter a variety of important aspects of discovery and change the handling of additional matters, such as service of process.

C. *Crises to Come: Fear and Loathing on the Reform Trail*

The innate conservatism of the legal profession may explain the prevalence of crisis rhetoric in discussions of reform of judicial procedure, but more seems at work recently. Taking the initial disclosure episode as an example, the penchant for alarmist responses is striking. Whether or not there is a crisis that justifies the experiment with initial disclosure, it is obvious that many feel that the experiment will precipitate one.

On its face, the response is difficult to credit. Some such experiments have been around for some time,²⁴⁰ and there does not appear to be evidence that they have had the dire consequences that were predicted, such as "end[ing] public interest litigation as we know it."²⁴¹ At least twenty districts have adopted some version of voluntary disclosure pursuant to the CJRA, and the world has not ended.²⁴²

What explains the response? One answer is that it is a play for political attention. Unless an amendment proposal threatens to cause disaster, Congress is unlikely to take much interest in it except, perhaps, in service to the interests of such groups as the National Association of Process Servers. Thus, the strident response is a symptom of the growing politicization of the rules process; having concluded that a given change will not make them winners, interest groups try to paint it in the direst of terms. Even with such efforts, the campaign to kill mandatory initial disclosure failed in 1993, although more by happenstance than on purpose.

Another explanation for the tenor of this response is that recent experiences have made some groups gun-shy about change. Whatever its actual impact in actual cases, the psy-

²⁴⁰ See, e.g., C.D. CAL. R. 6.1, quoted in note 193 *supra*.

²⁴¹ See *supra* text accompanying note 203 (quoting Nan Aron of the Alliance for Justice).

²⁴² As Reporter for the CJRA Advisory Group for the Northern District of California, which has adopted a program of voluntary exchange that is fairly demanding, see *supra* note 203, I can report that preliminary indications are that it is working smoothly. Put differently, there are no indications of the apocalyptic consequences predicted by some. As the initial study of our district's program concluded: "While it is too early to pronounce the pilot program a resounding success, it also is clear that the pilot program has not had any of the disastrous consequences feared by some." Steve Albert, *Early Study of Discovery Plan Shows Little Effect*, S.F. RECORDER, Nov. 18, 1993, at 3; see *supra* note 208.

chological impact of the amendment to Rule 11 may have been very substantial in some circles. Similarly, the high-speed adoption of the CJRA, over the objection of many judges and seemingly on the strength of endorsements by corporate counsel, is a very threatening portent whatever the actual impact of local changes in practice adopted pursuant to the Act may be. Thus, there is a good deal of fear and loathing out there on the reform trail. The political critique contributes to this attitude, of course, by suggesting that there is a malign agenda, hidden or overt, lurking behind the scenes, which taints even the most benevolent-appearing reforms. If there is an atmosphere of fear and loathing, it is not soon likely to be dispelled, for it results from a loss of confidence in the rulemakers' probity or capacity, or both.

One explanation for this skittishness is that there is an exaggerated sense of the stability that should "normally" prevail. Recalling my friend at the ALI who wished there were no standing committee on the rules, one has an image of a very placid world in which radical change, or even significant change, is rarely indicated. Perhaps civil litigation in this country enjoyed such placidity for the 1940-1965 period, but it seems more reasonable to expect that periods of stress and turmoil will outnumber those of docile inactivity. As we are now beginning to see on the international stage, the end of one source of great stress does not eliminate all stress; the demise of the Cold War may lead to more turmoil instead of less.

So crisis rhetoric and crisis concerns are here to stay, and it will be a job for all of us to try to determine which are the real crises. If dramatically wrong judgments are made about that subject, the resulting reforms will ultimately produce few long-term winners. For the present, outward signs suggest that the most serious crisis for the federal courts involves criminal cases and, only incidentally, civil cases. Certainly the silence on this subject among those who decry cost, delay or other aspects of civil litigation is striking. Moreover, it is hard to feel that the growing law enforcement orientation of this society produces any winners except politicians seeking reelection for being tough on crime. The recent emergence of "three strikes" proposals across the country shows that things are moving in the wrong direction. If it is true that approximately twenty to twenty-five percent of senior federal district judges are pres-

ently refusing to take drug cases,²⁴³ that seems to be a sign of a true crisis in the offing. Let us hope that political rhetoric and interest groups do not deflect attention from it.

D. *The Pendulum Effect and Societal Trends*

The potential crisis over the War on Drugs underscores another feature of judicial reform that can influence who is a "winner" or a "loser"—the pendulum effect of procedural revisions, and the political pendulum seemingly at work in society.

The political pendulum certainly connects to prominent civil litigation issues. For those who exult in the social activism role of the federal courts during the post-World War II era, any retreat from that commitment is a serious error. Presumably that social activism commitment is what Professor Fiss had in mind when he said that "courts exist to give meaning to our public values, not to resolve disputes."²⁴⁴ But federal courts *do* exist in large measure to resolve disputes, not the least because their power is limited to "cases and controversies." Moreover, much of the value pronouncement activity has abated. As Professor Chayes has noted, even at the time he was chronicling the emergence of a new public law model of litigation in 1976, "[t]he long summer of social reform that occupied the middle third of the century was drawing to a close."²⁴⁵

The presidential elections of 1980, 1984 and 1988 represented and produced a spirit very unsympathetic to social

²⁴³ See Joseph B. Treaster, *2 U.S. Judges, Protesting Policies, Are Declining to Take Drug Cases*, N.Y. TIMES, Apr. 17, 1993, at A6 (reporting that "[f]ederal court officials estimated that about 50 [senior] federal district judges are refusing to take drug cases"). A review of the list of judges in a recent bound volume of Federal Supplement indicates that there are 257 senior district judges. 802 F. Supp. VII (1993). Although the volume does not indicate how many of these are actively handling cases, as of 1991, the records of the Administrative Office of the United States Courts indicated that there were 204 active senior district judges. Telephone conference between Richard Marcus and Karen Rudman of the A.O. (April 23, 1993). The *New York Times* article reports that two judges—Jack Weinstein and Whitman Knapp—decided to refuse further drug cases to protest against national drug policies and sentencing guidelines. The reasons for the decisions of other judges are less clear.

²⁴⁴ Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979).

²⁴⁵ Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 7 (1982).

activism litigation. That attitude is evident in connection with some social action litigation, such as challenges by nonwhite parents to court-ordered integration schemes. Perhaps with the national election of 1992 we have turned another corner. These shifts should not come as a surprise; throughout our history periods of social activism have alternated with periods of complacency, or "normalcy," to use Warren Harding's word.

This pendulum affects courts as well, albeit less rapidly or radically. But in terms of judicial reform, there is another pendulum at work. As Professor Resnik has observed, "[t]he history of procedure is a series of attempts to solve the problems created by the preceding generations's procedural reforms."²⁴⁶ That is what the retreat from the more aggressive manifestations of the Liberal Ethos has involved, and it has occurred at the same time as the more general retreat from social activism by government. This coincidence also fuels fears of hidden agendas; those who generally decry the trend of legal decisions in certain areas lump together procedural and substantive rulings into a general denunciation.²⁴⁷ But like other pendulums, this one will swing back at some future time. The direction of the next swing might be affected by a new paradigm, were one to emerge. For the present, however, it seems likely to swing back in the same direction if the Liberal Ethos continues to provide the dominant paradigm.

E. *Babies and Bathwater*

The pendulum image emphasizes something that receives insufficient attention nowadays—the thrust of modern procedure has produced many advantageous developments that would be jeopardized by abandoning its neutral aspirations. Those endorsing a more political rules process because they expect to cut advantageous side-deals for their favored sort of litigation need to realize that this litigation may have come into existence in large measure *because* procedure has had a neutralist and trans-substantive orientation.

Social activism litigation was only dimly foreseen or foreseeable at the time the Federal Rules were adopted, or at the

²⁴⁶ Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984).

²⁴⁷ See, e.g., Baumann et al., *supra* note 48, at 212.

time the Rule 23 amendments were drafted. Because those reforms were shaped in a neutralist and trans-substantive fashion, they created a litigation apparatus well suited to a new type of litigation. Hence the avid resistance of many to any dismantling of that apparatus as the procedural pendulum swings back from the most aggressive embrace of the Liberal Ethos. Thus, the question of winners and losers should be considered with a longer view; in this view there is much reason to believe that the orientation of our judicial reform has made social activism litigation a net winner.

Other forms of litigation also seem to be net winners. To take the litigation most pilloried recently, product liability litigation seems clearly to have depended on the flexibility and ready discovery of modern procedure to stake out new substantive ground. Even Japan is reportedly considering expanding consumer protection partly in view of the warnings its companies put on products sold in this country—but not on the same products sold in Japan—to avoid product liability suits.²⁴⁸

It is impossible to predict with confidence where litigation trends will go in the coming decades, although environmental litigation seems a probable growth area. Whatever the trends may be, the orientation of our trans-substantive system seems likely to provide advantages to those seeking to expand the law. True, the unruliness of the system has drawbacks, some of which recent reforms have tried to control. But turning our backs on this approach in favor of tailoring procedures to particular claims, or of cutting side-deals in procedure for favored (or disfavored) claims, threatens to throw out the baby of modern procedure along with the bathwater.

²⁴⁸ See generally Andrew Pollack, *Japan Debates Broader Power For Consumers*, N.Y. TIMES, Mar. 8, 1993, at A1. The story begins with Nintendo's explanation that it provided warnings about risks to children on its video games in the United States to protect itself from lawsuits, but that no similar warnings were provided in Japan because product liability lawsuits were extremely rare.

CONCLUSION

The placid prospect of gradual procedural evolution that my friend at the ALI embraced seems to have been based on wishful thinking. Far from stirring up trouble to justify its existence, the Advisory Committee appears in many ways a stable and cautious institution in the present climate of multifaceted and aggressive procedural reform in civil litigation. But much of its recent work has provoked opposition that may threaten its existence or power; calls for a moratorium on further amendments²⁴⁹ may in effect bring about what my friend desired by neutralizing the Advisory Committee.

Increasingly, assessment of procedural reform has been reduced to questions of winners and losers, with many urging their preferred prescription as the only antidote for disaster. Viewed through political lenses and in their worst light, recent reforms can be characterized as harmful or worse. I believe that this picture relies on overstatement. We need to remember that the task of designing procedures is extremely difficult, and subject to criticism on a variety of sometimes inconsistent grounds. We need to appreciate that those who undertake this task can do so without hidden agendas, and that they seem to have done just that whether or not influenced by some personal "ideology." Indeed, the agendas of the doomsayers seem to have been advanced by a number of the innovations adopted by the existing process. More recent changes, whether symptomatic of the procedural pendulum or of a more general political pendulum, do not necessarily pose the threat that the critics find in them. Even those innovations that appear to be mistaken may result from something other than evil motives.

And yet the rulemakers need to appreciate the tethers under which they operate. As the Rule 11 experience shows, the Advisory Committee can loose forces that it may not have foreseen even if it can try belatedly to rein them in. As suggested above, the turmoil that resulted from the 1983 amendment to Rule 11 should counsel caution about radical reforms. Whether diffidence or delay might have been warranted on mandatory initial disclosure, particularly given the vigor of the opposition from broad sectors of the bar, is a difficult question.

²⁴⁹ See generally Burbank, *supra* note 23.

In the end, it is important to remember that the dangers posed are real should the views of the critics prevail. Before we turn our backs on the neutral and trans-substantive system we have today, we should reflect long and hard on the benefits that system has provided. Whatever the short-term advantages of deals that may be arranged politically for favored types of litigants or litigation, the long-term risks of throwing out the baby with the bathwater seem to me very serious. Perhaps the whole idea of procedural progress is in some senses deceptive because it suggests that there is a perfection that can be achieved where the reality probably is that tinkering is all we will ever be able to do. Even if some of the tinkering recently seems ill-advised, or the direction wrong-headed, the experience nevertheless has produced more winners than losers and abandoning it could do the reverse without creating any surer sense of progress.

