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IGNORANCE AND PROCEDURAL LAW REFORM: A CALL FOR A MORATORIUM

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In 1881, Oliver Wendell Holmes, Jr. observed that "[i]gnorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning."[1] In 1982, I concluded a study of the Rules Enabling Act of 1934[2] with a question for federal rulemakers, namely, whether "ignorance can continue to be 'the best of law reformers.'"[3] My question was prompted by the studied indifference of those responsible for the Federal Rules of Civil Procedure to questions of rulemaking power. In the intervening decade, I also have had occasion to lament their studied indifference to empirical questions.[4] The two phenomena are related. The papers for this session provide a welcome occasion to explore that relationship, however briefly.

I want to suggest that by failing to take seriously the task of defining limitations on the rulemaking power, the Supreme Court and those who assist it have encouraged Congress also to ignore the question of appropriate allocation rules. Similarly, by failing to seek empirical evidence on the operation of the Rules or proposed amendments, the rulemakers have both put their workproduct at risk of

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[1] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 64 (Mark DeWolfe Howe ed., 1963).

[2] Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. The current version of the Enabling Act is contained in 28 U.S.C. §§ 2072-74 (1988 & Supp. III 1991). *See also* 28 U.S.C. § 2075 (1988) (bankruptcy rules).

[3] Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1197 (1982) (footnote omitted).

[4] *See, e.g.*, Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28, 1934-41, 1957-59 (1989).

legislative override and encouraged Congress to initiate its own half-baked reforms. We need a moratorium on procedural law reform, whether by court rule or by statute, until such time as we know what we are doing. The knowledge needed concerns alternative reform strategies and their likely impacts, but we also need to know who is responsible for what.

If this sounds like crisis rhetoric, which Professor Marcus correctly suggests can be overblown, self-serving or both,[5] so be it. It is difficult, however, not to sense a crisis in federal procedural reform when the Chief Justice's letter transmitting the 1993 amendments to the Federal Rules disclaimed any implication "that the Court itself would have proposed these amendments in the form submitted,"[6] and when four other Justices indicated their agnosticism about,[7] lack of competence to evaluate[8] or disagreement with,[9] one or more of the amendments. When a majority of the Supreme Court has washed its hands of proposed Federal Rules, and when some of the Justices have aired the dirty linen, what is it that should restrain Congress from responding to those who wish to do the same?

It cannot be Congress' confidence that those who draft the Rules are alert to the limitations on the rulemaking power contained in the Enabling Act. Ignorance on that score has persisted despite a serious effort to invigorate and clarify the desired scheme of allocation in the legislative history of the 1988 overhaul of the Enabling Act.[10] To be sure, there has

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[5] *See* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993).

[6] H.R. DOC. NO. 74, 103d Cong., 1st Sess. 1 (1993) (letter from William H. Rehnquist to Thomas S. Foley (April 22, 1993)), *reprinted in* 113 S. Ct. (Preface) 477 (1993).

[7] *See* H.R. DOC. NO. 74, *supra* note 6, at 102 (statement of Justice White), *reprinted in* 113 S. Ct. (Preface) at 575.

[8] *See* H.R. DOC. NO. 74, *supra* note 6, at 101-02, *reprinted in* 113 S. Ct. (Preface) at 581.

[9] *See* H.R. DOC. NO. 74, *supra* note 6, at 104 (dissenting statement of Justice Scalia), *reprinted in* 113 S. Ct. (Preface) at 581. Justice Scalia dissented from the Court's adoption of amendments to Rule 11 (sanctions) and to Rules 26, 30, 31, 33 and 37 (discovery). Justice Thomas joined in full, while Justice Souter joined in the dissent with respect to the discovery rules.

[10] *See* H.R. REP. NO. 422, 99th Cong., 1st Sess. 1 (1985); 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, 1029-36; Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44

been progress, including one Reporter's acknowledgement that separation of powers is an Enabling Act concern,[11] the Supreme Court's willingness, for the first time since *Sibbach v. Wilson & Co.*,[12] to take at least somewhat seriously an Enabling Act challenge to a Federal Rule (Rule 11),[13] the Court's refusal to transmit proposed amendments because of foreign relations concerns[14] and the acknowledgement by the Advisory Committee that one of its proposals may transgress the Enabling Act's limitations.[15] There is still no consensus among the rulemakers, however, about the nature and scope of the limitations on their power. In the absence of consensus, the Advisory Committee is apt to equate controversy with politics, which is for Congress,[16] and the statement of controversial issues that the Supreme Court now expects to receive with rulemaking proposals[17] is apt to tempt Justices to "discuss a

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HASTINGS L.J. 1039, 1043-53 (1993).

[11] *See* Burbank, *supra* note 10, at 1015, 1017 n.31, 1018-19; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 298.

[12] 312 U.S. 1 (1941).

[13] *See* Business Guides, Inc. v. Chromatic Comm'n Enter., Inc., 498 U.S. 533 (1993). *But see* Ralph U. Whitten, *Developments in the* Erie *Doctrine: 1991*, 40 AM. J. COMP. L. 967, 967-70 (1992). "It remains true that the Court has never invalidated a rule promulgated under the Act." *Id.* at 970.

[14] *See* H.R. DOC. NO. 77, 102d Cong., 1st Sess. 3 (1991) (letter from William H. Rehnquist to Thomas S. Foley (April 30, 1991)); Letter from William K. Suter, Clerk of the Supreme Court, to L. Ralph Mecham, Secretary of the Judicial Conference of the United States (Dec. 11, 1991) (returning proposed amendments to Rules 4, 4.1, 12, 26, 28, 30, and 71A and enclosing documents presenting foreign relations concerns).

[15] The Advisory Committee Note to the 1993 amendments to Rule 4 is prefaced by a "Special Note" as follows: "Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to the new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule . . . ." H.R. DOC. NO. 74, *supra* note 6, at 154-55, *reprinted in* 113 S. Ct. (Preface) at 631.

[16] *See* Advisory Committee on the Federal Rules of Civil Procedure, Minutes of Committee Meeting 4-5 (April 13-15, 1992) [hereinafter April 1992 Minutes]. "Unless there is consensus about the limits of the rulemaking function, however, it is doubtful that all the procedural safeguards in the world will prevent controversy where it counts—in Congress—because the rulemakers' reaction to controversy in the lawmaking process will necessarily continue to be *ad hoc*." Burbank, *supra* note 3, at 1195.

[17] The Advisory Committee was informed in February 1992 "that the Court would in the future like a memorandum explaining the contentious issues resolved." Advisory Committee on the Civil Rules, Minutes of Committee Meeting

question on general principles [even] when they [acknowledge that they] have forgotten the knowledge necessary for technical reasoning."[18]

Perhaps, however, Congress should stay its hand because, although the rulemakers have no shared sense of the limitations on their power, in Professor Marcus' words, they approach innovations with "neutrality and care."[19] Is that how anyone else would describe the process that yielded the two most notorious Rules in the last decade, Rule 11 as amended in 1983 and Rule 26 as amended in 1993?

First, as to care, amended Rule 11 was promulgated in a virtual empirical vacuum,[20] but with numerous warnings from the bar about its potential costs.[21] I applaud the rulemakers' willingness to consider and propose additional amendments and to seek empirical evidence in the process, but they did not exactly volunteer.[22] Moreover, this irresponsible experiment with court access[23] was in place for ten years.

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1 (February 21, 1992) [hereinafter February 1992 Minutes]. Appendix H to the Judicial Conference Rules materials for September 1992 is a document entitled *Proposed Rules Amendments Generating Substantial Controversy*.

[18] *See* HOLMES, *supra* note 1, at 64.

> Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address.

H.R. DOC. NO. 74, *supra* note 6, at 110, *reprinted in* 113 S. Ct. (Preface) at 587.

[19] Marcus, *supra* note 5, at 805.

[20] *See* Burbank, *supra* note 4, at 1927-28.

[21] *See id.* at 1955.

[22] Rule 11 was discussed again. It was noted that the anger level in the bar is high. It was again noted that the criticism is impressionistic. It was also observed that the furor is different than that bearing on Rule 23 in 1966 with respect to the number and identity of persons involved. It was also urged that the Committee should strive to be sufficiently receptive to the concerns of others that people will not generally think it necessary or desirable to go to Congress for help.

Advisory Committee on the Civil Rules, Committee Minutes 53-54 (April 27-29, 1989).

[23] "Theory is an irresponsible basis for lawmaking about something as important as access to court, and it is especially irresponsible when the lawmaking involves judicial amendment of a Rule that, in part because of access concerns, only barely escaped the bright light of the democratic process." Burbank, *supra* note 4, at 1947-48; *see also id.* at 1962.

And what of the provisions for "required disclosures" in the 1993 amendments to Rule 26?[24] Do they demonstrate the Advisory Committee's "care?" Again, there was little relevant empirical evidence[25] and, indeed, the Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under local rules.[26] Having once abandoned ship,[27] the Committee was apparently persuaded to reboard by the view that it "had a duty to provide leadership in light of its study and hearings,"[28] by expressed doubt that ongoing experimentation would yield any useful empirical data[29] and by the argument that a national rule would be necessary to effect "the cultural change the Committee sought."[30] What the

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[24] *See* H.R. DOC. NO. 74, *supra* note 6, at 28, *reprinted in* 113 S. Ct. (Preface) at 680.

[25] The Advisory Committee Note states:

> The rule is based upon the experience of district courts that have required disclosure of some of this information through local rules, court-approved standard interrogatories, and standing orders . . . . While far more limited, the experience of the few state and federal courts that have required pre-discovery exchange of core information . . . indicates that savings in time and expense can be achieved . . . .

H.R. DOC. NO. 74, *supra* note 6, at 94, *reprinted in* 113 S. Ct. (Preface) at 702.

Yet, the information considered by the Committee was essentially anecdotal, and it was not extensive. *See, e.g.*, Advisory Committee on the Civil Rules, Minutes of the Committee Meeting 5, 8 (November 17-18, 1989); Advisory Committee on the Civil Rules, Minutes of the Committee Meeting 2 (Nov. 29-Dec. 1, 1990); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 810-20, 821 (1991).

[26] *See* Advisory Committee on the Civil Rules, Minutes of the Committee Meeting 1 (May 22-24, 1991); April 1992 Minutes, *supra* note 16, at 7; Mullenix, *supra* note 25, at 816-17 n.114; Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 458-59 (1993); *see also infra* note 30.

[27] *See* February 1992 Minutes, *supra* note 17, at 4.

[28] April 1992 Minutes, *supra* note 16, at 7.

[29] *See id.*

[30] *Id.* The Committee agreed, however, that "the national plan [should] be subject to local variation." *Id.* Thus, amended Rule 26(a)(1) begins: "Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties . . . ." H.R. DOC. NO. 74, *supra* note 6, at 203, *reprinted in* 113 S. Ct. (Preface) at 680. Professor Stempel asserts that this feature of Rule 26(a)(1) "reduc[es] the force of th[e] objection," made by Justice Scalia, that "[a]ny major reform of the discovery rules should await completion of the pilot programs authorized by Congress." H.R. DOC. NO. 74, *supra* note 6, at 109, *reprinted in* 113 S. Ct. (Preface) at 586. Yet, local variation under the Rule requires that "a court act[ ] affirmatively to impose other requirements or indeed to reject all such requirements for the present," H.R. DOC. NO. 74, *supra* note 6, at 226, *reprinted in* 113 S. Ct. (Preface) at 702, and the

Committee's "study" involved, other than thought experiments by judges and law professors and consideration of some anecdotal experiences,[31] and what light the hearings shed to dispel the massive opposition of the practicing bar[32] are not clear. Moreover, one would have thought both that care in drafting should produce an easily comprehensible rule and that a vehicle of cultural change should not be riddled with escape hatches.[33]

Second, as to neutrality, Professor Marcus and I are in substantial agreement, which is to say that from my perspective he is dealing with a number of straw men (and women). We both know the difference between the inevitable non-neutrality of procedure and the notion that the rulemakers are or might as well be animated by an overtly political agenda.[34] We also know that no responsible scholar who has seriously considered the issue of non-trans-substantive procedure proposes a revolutionary reform. The impact of the critique is, indeed, "relatively modest."[35] I agree with Professor Marcus—indeed, I have been at pains to point out[36]—that "[i]t does not reject the general idea of a common model of procedures for most or all cases, but only asks that special circumstances be noted."[37]

Committee has provided little guidance for the exercise of the discretion conferred. Neither that aspect nor the ability of the parties to stipulate out of Rule 26(a)(1) bodes well for controlled experimentation. *See* Rhonda McMillon, *ABA Seeks Delay in Amending Federal Discovery Rules*, A.B.A. J., Sept. 1993, at 119.

[31] *See supra* note 25 and accompanying text. "Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing." 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).

[32] *See* Marcus, *supra* note 5, at 810.

[33] *See* A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 68 ST. JOHN'S L. REV. (forthcoming 1993); *see also* McMillon, *supra* note 30, at 119 (quoting report recommending ABA policy that predicts adverse impact on CJRA experimentation process "as litigants and courts struggle with the meaning and impact of the new national rules").

[34] *See, e.g.*, Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1472-73 (1987) (book review).

[35] Marcus, *supra* note 5, at 778.

[36] *See, e.g.*, Burbank, *supra* note 4, at 1940; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716-17 & n.172 (1988).

[37] Marcus, *supra* note 5, at 778.

Here, I think, is the rub. For although Professor Marcus appears to agree that it makes sense to consider "the likely effects of a change, including possible gains and losses for identifiable groups,"[38] and for a judgment to be made "whether some adjustment in the general procedural regime should be undertaken to ameliorate the impact on a particular area,"[39] he does not tell us who should make that judgment and, if it is the rulemakers, how they can possibly retain their neutrality. Indeed, Professor Marcus' discussion of the "risks and costs"[40] of substance-specific procedure demonstrates one reason why the rulemakers so rarely seek facts bearing on the impact of their proposals and why Professor Carrington advocated a "veil of ignorance"[41] in rulemaking.[42]

If neutrality is not to be a prescription for ignorance, the rulemakers must have other sources of information about the likely impact of proposed Federal Rules or amendments that will serve as a surrogate for empirical work. Three possibilities come to mind: the collective experience and wisdom of the rulemakers, information provided through written comments and public hearings and the fruits of scholarly inquiry. It seems to me that the rulemakers' own knowledge base has been shrinking, or should I say narrowing, that their professed distaste for politics and unwillingness to share power have consequentially diminished the utility of public comment and that the nature of scholarship in the aid of legal reform has changed depressingly little since the days when Charles Clark was rewriting the Enabling Act as a scholar to suit his purposes as a rulemaker.[43]

Professor Marcus is correct that the original Federal Rules were drafted "by a group of elite lawyers and law professors who acted with little empirical evidence."[44] They were, however, people of substantial practical experience[45] concerned

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[38] *Id.* at 775.

[39] *Id.*

[40] *Id.* at 779.

[41] Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079 (1989).

[42] *See* Burbank, *supra* note 4, at 1934-41.

[43] *See* Burbank, *supra* note 3, at 1136-37, 1186.

[44] Marcus, *supra* note 5, at 782.

[45] *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal*

about rules that would work for lawyers and their clients while serving what Professor Garth calls "the universal principles of the profession."[46] That seems to be the view Justice White takes of the current rulemaking group or at least so one might infer from his professed reluctance, as one long away from trial practice "to second-guess the careful work of the active professionals manning the rulemaking committees."[47] Active at what profession and serving whose interests?[48] Does neutrality include the willingness to subordinate the interests of the judiciary narrowly viewed when they are in conflict with other interests traditionally valued, including by the organized bar?[49] Is that the lesson of Rule 11, of sanctions in general, of court-annexed arbitration or of managerial judging?[50]

Although drafts of the original Federal Rules were distributed for comment,[51] in recent years the rulemaking

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Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 971-72 (1987).

[46] Bryant G. Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931, 959 (1993) (identifying "the traditional legal values asserted by the organizations of the legal profession—access, judicial independence, official public courts").

[47] H.R. DOC NO. 74, *supra* note 6, at 101, *reprinted in* 113 S. Ct. (Preface) at 575.

[48] *See* Laura Kaster & Kenneth Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15 (noting small number of practicing lawyers on Advisory Committee).

[49] *See* Burbank, *supra* note 34, at 1476-83; *cf.* Burbank, *supra* note 3, at 1191 ("But there is reason to fear that if the rulemakers are left to make choices in such areas [between procedure and substance], and whatever the purpose of the dichotomy, they will choose to advance those policies that are their special province and to subordinate those that are not."). Of course, I agree with Professor Walker that "federal courts are operated for the benefit of the parties and society as a whole, not for the benefit of attorneys." Walker, *supra* note 26, at 478.

[50] *See* Burbank, *supra* note 34, at 1476-87. On managerial judging, see also Marcus, *supra* note 5, at 790-94.

[51] The original Advisory Committee

> produced two preliminary drafts, one in 1936 and one in 1937. Thousands of copies were printed. Everybody in the country had an opportunity to examine them. At the suggestion of the Attorney General, the Federal judges throughout the country appointed local committees of the bar, which have worked on this problem. Thousands of suggestions came to the advisory committee as a result of these two drafts.

Hearing on S.J. Res. 281 Before a Subcomm. of the Senate Comm. on the Judiciary, 75th Cong., 3d Sess. 3-4 (1938). *But see* Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 667 (1993) (asserting that committee "deliberated in relative anonymity before producing a fully

process has come to resemble the legislative process.[52] Professor Stempel believes that greater assimilation is called for.[53] I am not so sure.

The legislative process is, after all, an overtly political process, and a visible participant in a political process may, as Professor Chayes suggested of judges involved in public law litigation, find it difficult to sustain her disinterestedness.[54] The rulemakers' current strategies of burying their heads, dismissing arguments with which they disagree as special pleading or leaving it for Congress to second-guess them if it chooses to do so on "political" grounds[55] are hardly satisfactory. Yet, just as empirical data have been an effective antidote to crisis rhetoric in recent years—as Professor Marcus points out[56]—so could they provide a neutral counter to special pleading in the future. Moreover, perhaps we should not give up on the profession's ability to reassert the primacy of "universal principles"[57] over narrow practice interests. In any event, the more we fashion the rulemaking process in Congress' image, the more Congress will be tempted to second-

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developed code of civil procedure").

[52] *See* 28 U.S.C. § 2073 (1988); Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 998-99 n.3 (1983); Mullenix, *supra* note 25, at 830-34.

[53] *See* Stempel *supra* note 51, at 762. He also advocates more involvement by the Supreme Court. *Id.* at That is hardly the Court's present inclination. *See supra* text accompanying notes 6-9. Moreover, I am doubtful that the Justices have either the time or expertise to make a useful contribution, and I fear that, except when they are agnostic about a proposal, *see supra* text accompanying note 7, a congressional veto entails some cost to the institution.

[54] "Can the disinterestedness of the judge be sustained, for example, when he is more visibly a part of the political process? Will the consciously negotiated character of the relief ultimately erode the sense that what is being applied is law?" Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1309 (1976).

[55] *See* Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. (forthcoming 1994). For a recent example of some of these techniques from a member of the Advisory Committee, see Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992).

[56] *See* Marcus, *supra* note 5, at 762. Civil justice issues involve value choices—and that means political choices. But an enhanced knowledge base can rescue us from a debate dominated by bogus questions and fictional facts." Marc Galanter, *News From Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 102 (1993).

[57] *See supra* text accompanying note 46.

guess the product of that process or to preempt it.[58] In other words, I agree with Professor Marcus that "neutrality is at least a pursuable goal in designing procedures for civil litigation."[59] The trick is to be candid in identifying policy choices and clear about the allocation of power to make them.[60]

As one whose work is cited twice in uncomfortably close proximity to Professor Marcus' characterizations of criticisms or commentary as "heated,"[61] I should probably have better sense than to dilate on the impoverishment of current procedural scholarship. It is not a new story,[62] which may be answer enough to Professor Stempel's attempt to use civil procedure textbooks as evidence of the vibrancy of the old paradigm.[63] Another look at those textbooks, however, should suffice to drive from his mind the curious notion, at least as applied to procedure, that "constitutional rights of federalism, historically . . . have not been given the same force as separation of powers principles."[64] If that were true, *Sibbach v. Wilson & Co.*[65] and *Hanna v. Plumer*[66] might have come out the other way and we might not be here today.[67]

From this perspective, the teeth gnashing and general hysteria that have greeted the Civil Justice Reform Act of 1990 ("CJRA")[68] in some quarters are mystifying if not downright funny. What is a member of Congress who hears that "[t]he reigning sensibility for fifty years of federal rulemaking has been an ethos of elitism and secrecy"[69] to make of the charge that the CJRA was "stealth legislation"?[70] If that same

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[58] *Accord* Walker, *supra* note 26, at 463.

[59] Marcus, *supra* note 5, at 773.

[60] *See, e.g.*, Burbank, *supra* note 34, at 1473.

[61] *See* Marcus, *supra* note 5, at 776.

[62] *See, e.g.*, GEOFFREY C. HAZARD, JR., RESEARCH IN CIVIL PROCEDURE (1963).

[63] *See* Stempel, *supra* note 51, at 688.

[64] *Id.* at 415.

[65] 312 U.S. 1 (1941).

[66] 380 U.S. 460 (1965).

[67] *See, e.g.*, Burbank, *supra* note 3, at 1028-35, 1187.

[68] 28 U.S.C. §§ 471-82 (Supp. III 1991).

[69] Mullenix, *supra* note 25, at 837. *But see supra* note 51 and accompanying text (noting wide distribution of drafts of original Federal Rules).

[70] Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 397 (1992). The charge is, in any event, silly. *See* Jeffrey J. Peck, *"Users United:" The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS.

legislator knows something about the present composition of the rules committees,[71] how should she react to criticisms of the Brookings Task Force,[72] and why in any event should she care since it did not enact anything?[73] Should she be moved by criticisms that the legislation is founded on a questionable empirical base[74] if she knows the history of the 1993 amendments to Rule 26?[75] Should she be moved by criticisms that it will "transform the reigning procedural aesthetic of simplicity and uniformity"[76] if she knows that, as a result of a vast underbrush of local rules and standing orders, the supposed aesthetic has nothing to do with reality?[77] And what about the claim that the statute violates the separation of powers?[78] Is it *Sibbach* or *Hanna* that so exalts the allocation of lawmaking power between the branches?[79]

105, 109, 116-17 (1991).

[71] *See supra* note 48 and accompanying text.

[72] *See* Mullenix, *supra* note 70, at 406-07.

[73] The same question might be asked about the advisory groups created under the Act. *See* Levin, *supra* note 33; Stempel, *supra* note 51, at 733 ("A frequent complaint voiced by practitioners serving on Advisory Groups is the unreceptiveness of the bench to their ideas."). *But see* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1298 (1993) ("In delegating rulemaking power to civilian, non-expert advisory groups, and in statutorily requiring that these advisory groups consider and implement certain types of procedural reforms, Congress engaged in procedural rulemaking."). More astonishing than this assertion is Professor Mullenix's conclusion that Congress "violate[d] separation-of-power doctrine by impermissibly infringing on the power, prerogatives, and independence of the federal courts to promulgate procedural rules." *Id.* For a more sober judgment, see LAUREN K. ROBEL, FRACTURED PROCEDURE: THE CIVIL JUSTICE REFORM ACT OF 1990 (forthcoming). *See also infra* text accompanying note 79.

[74] *See* Mullenix, *supra* note 70, at 396-97 & n.90; Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 101 (1991). Again, the same question might be asked about the work of advisory groups under the Act. *But see* Mullenix, *supra* note 73, at 1287 ("under the Act, grassroots, amateur local rulemaking groups will recommend problematic local rules, measures, and programs based not on considered contemplative study, but rather on ill-conceived social science, anecdote, and interest-group lobbying.").

[75] *See supra* text accompanying notes 24-33.

[76] Mullenix, *supra* note 73, at 1287.

[77] *See* Burbank, *supra* note 4, at 1929, 1941. Professor Mullenix admits that "[t]oday, federal practice and procedure is impossibly arcane." Mullenix, *supra* note 70, at 380.

[78] *See generally* Mullenix, *supra* note 73.

[79] "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules." Sibbach v. Wilson & Co., 312 U.S. 9 (1941)

Please do not misapprehend. I am no fan of the CJRA or of the process by which it was passed. In fact, I have found it very difficult to read, let alone to take seriously. Professor Robel's paper suggests that I have been on the right track,[80] although some of the questionable local rules promulgated under the CJRA's supposed authority, which she analyzes in another paper, should be taken very seriously.[81]

Senator Biden is not a captive of the insurance industry[82] any more than he is the son of a Welsh coal miner.[83] He is a politician who wanted a statute on civil justice reform. After some nervous moments, the end product was quite innocuous. Against a background of the rulemaker's inattention to the allocation of lawmaking power and to empirical evidence, many criticisms of the CJRA from that quarter have the odor of sour grapes.[84] Moreover, to the extent that the Act as finally passed is seen as an attempt to fill an empirical vacuum or an

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(footnote omitted). "For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts." Hanna v. Plumer, 380 U.S. 460, 472 (1965). Professor Mullenix's attempt to deal with these cases is based on a fundamentally flawed view of the Rules Enabling Act and its antecedent history. *See* Mullenix, *supra* note 73, at 1327-29.

Indeed, the most astonishing aspect of her assault on the Civil Justice Reform Act is the attempt to enlist the Rules Enabling Act in aid of her constitutional thesis. *See, e.g.*, Mullenix, *supra* note 73, at 1321-37. Senator Walsh, who prevented passage of the legislation from 1915 until 1934, must be spinning in his grave. *See* Burbank, *supra* note 3, at 1063-98. More important, the main sponsor of the legislation, Senator Cummins, would be shocked. "It is probably true that, in the absence of any legislation, courts have the inherent right to make rules for the government of the matters mentioned in the bill: but this is purely an academic question because the Congress has legislated upon the subject, withdrawing that power, insofar as the district courts are concerned." S. REP. NO. 1174, 69th Cong., 1st Sess. 2 (1926); *see also id.* at 7-9. On Cummins and the importance of the 1926 Senate Report to the interpretation of the Enabling Act, see Burbank, *supra* note 3, at 1071-92, 1098-1101; Peck, *supra* note 70, at 115. Finally, all of us (including Professor Mullenix) should remember that the Enabling Act was revised in 1988. *See supra* text accompanying note 10.

[80] *See* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879 (1993).

[81] *See, e.g.*, ROBEL, *supra* note 73.

[82] *See* Marcus, *supra* note 5, at 804. *But see* Cohn, *supra* note 74, at 103 ("it appears that, given the financing of *Justice for All*, the precursor of the Biden Bill, the bill is being driven by special interests.").

[83] *See* William Safire, *On Language: No Heavy Lifting*, N.Y. TIMES, Sept. 27, 1987, § 6, at 12.

[84] *Cf.* Robel, *supra* note 80, at 883 n.22 (quoting federal judge's remark, "Being told you're inefficient by Congress is like being told you're ugly by a toad.").

expression of distrust in the rulemaking process,[85] Justice Scalia's dissent can only flag the 1993 amendments to Rule 26 as salt in Senator Biden's wounds.[86]

I am not sure that I agree with Professor Stempel's prediction that "the judicial branch and the legal profession at large will regain some of the ground lost."[87] I am doubtful because practicing lawyers play such a small role in decisionmaking about the Federal Rules,[88] and also because, as Professor Garth suggests, it may no longer make sense to talk about *the* legal profession in connection with procedural reform.[89] Indeed, it may be that the winners in the reforms of the last decade have been the judiciary and some lawyers (and their clients). If so, however, the lesson is not that neutrality and generality are progressive or at least benignly unpredictable, as Professor Marcus, taking a cue from Professor Hazard,[90] would have it.[91]

Whatever the motivations of the original Advisory Committee,[92] the procedural system that group produced was a bonanza for lawyers—lawyers, it is important to note, of all types. A system of open access to the courts is a lawyer-friendly system,[93] one that permits lawyers, or at least those who subordinate their clients' interests, not to worry about what Professor Garth calls "the tension—or even contradiction—between the legal profession and legal practice."[94] And whatever accounts for the pressure to shrink the litigation pie in recent years, the prospect has meant both that it was more difficult for lawyers to subordinate their clients' interests and that some lawyers (and their clients) would lose. The choices about who wins and who loses typically are not made in Federal Rules; they are made by judges

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[85] *See, e.g.*, Marcus, *supra* note 5, at 852-53; Peck, *supra* note 70, at 113-16.

[86] *See* H.R. DOC. NO. 74, *supra* note 6, at 108-09, *reprinted in* 113 S. Ct. (Preface) at 584-86; *see also supra* note 26 and accompanying text.

[87] Stempel, *supra* note 51, at 735.

[88] *See supra* text accompanying notes 44-50.

[89] *See generally* Garth, *supra* note 46.

[90] *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2247 (1989).

[91] *See* Marcus, *supra* note 5, at 773, 775, 785.

[92] *See id.* at 765.

[93] *See generally* Garth, *supra* note 46.

[94] *Id.* at 931.

exercising the vast discretion that a system of general rules of procedure reposes in them.[95] Remember that Charles Clark and William Howard Taft were dancing cheek-to-cheek.[96]

Divisions among lawyer entrepreneurs on questions relating to open access bode ill for the ability of the "organized bar"[97] to have consequential impact on civil justice reform, wherever the focus of the reform effort. Worse, experience under the CJRA suggests that, unless local experimentation is tightly controlled, "various sections of the organized bar" may collaborate with the federal judges who appoint them in what Professor Robel calls the "destructi[on] of important procedural values."[98]

These phenomena—the growing impotence of the organized bar, the increase in the number of difficult choices federal judges must make in the exercise of their discretion under the national rules and the temptation to make such choices in local rules—are hardly a firm basis on which to predict that Congress will, let alone to believe that it should, leave the field.

Some years ago I half-facetiously asked whether, given the assimilation of the rulemaking process to the legislative process and the pace of proposed amendments, there is "reason to fear that the Federal Rules of Civil Procedure will become a latter day Throop Code."[99] There would be nothing facetious about such a question today, particularly with Justice Scalia parting *his* veil of ignorance to assert that "[c]onstant reform of the federal rules to correct emerging problems is essential."[100] The "continuous study of the operation and effect"[101] of Federal Rules required by statute need not be, and it should not be, construed as an invitation to "[c]onstant reform." It is

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[95] *See, e.g.*, Burbank, *supra* note 34, at 1473-76.

[96] *See* Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOK. L. REV. 31, 33-34 (1988).

[97] Garth, *supra*, note 46, at 932.

[98] ROBEL, *supra* note 73.

[99] Burbank, *supra* note 52, at 999 n.3. "This Code . . . was attacked by bar committees for intermingling substantive and procedural provisions, and for being too long, too complicated, 'too minute and technical, and lack[ing] elasticity and adaptability.'" Subrin, *supra* note 45, at 940 (footnote omitted).

[100] H.R. DOC. NO. 74, *supra* note 6, at 109-110, *reprinted in* 113 S. Ct. (Preface) at 586-87.

[101] 28 U.S.C. § 331 (1988).

time for a breather, for a group that includes rulemakers, members of Congress and members of the bar carefully to review where we have been, where we are going and where we should be going.[102] It is time for a moratorium on ignorance and procedural law reform.

[102] The study group I have in mind, which might take the form of a national commission, should consider the interesting proposal recently made by Professor Walker, among others. *See generally* Walker, *supra* note 26.