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RULEMAKING'S SECOND FOUNDING

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INTRODUCTION ..... 2519  
I. THE FIRST FOUNDING ..... 2520  
II. THE PROCEDURAL FRUITS OF THE FIRST FOUNDING ..... 2523  
III. THE SECOND FOUNDING..... 2527  
IV. LIFE AFTER THE SECOND FOUNDING: RULEMAKING IN THE  
FISHBOWL..... 2532  
    A. *Did The 1988 Act Actually Cause A Rulemaking Change?* .....2534  
    B. *Sunshine, Lobbyists And Outreach* .....2535  
    C. *Empiricism* .....2539  
    D. *Operating in The Subcommittee Mode*..... 2542  
    E. *A Possible Downside—Stickiness* ..... 2545  
    F. *The Alternative Route Through Congress* .....2547  
CONCLUSION ..... 2549

INTRODUCTION

This Essay takes its title from Professor Eric Foner’s 2019 Pulitzer Prize winning book *The Second Founding*.<sup>1</sup> Foner’s book traces the development and adoption of the thirteenth, fourteenth, and fifteenth Amendments and the

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<sup>1</sup> ERIC FONER, *THE SECOND FOUNDING* (2019). Actually, another legal history book with nearly the same title also appeared recently. See ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* (2020).

ensuing Reconstruction experience that endured until the election of 1876, a brief period that seemed to permit something approaching equality (at least for men) in the South. In that sense, these political developments could have amounted to a “second founding” to build on and move beyond the Revolutionary War and original adoption of the Constitution. As we all know too well today, that promise was extinguished around 1877, and during the rest of the 19th century the nation instead saw the rise of Jim Crow laws, paramilitary domestic terrorism managed by groups like the Ku Klux Klan, and stasis for at least three quarters of a century in racial justice. Indeed, as recent events in this country show, that stasis has not been left entirely behind.

But my focus is on much less weighty matters and uses Professor Foner’s title as a theme to address one of the (many) great accomplishments of Professor Burbank’s storied career—his role in the 1988 amendments to the Rules Enabling Act. No sensible person could contend that the 1934 adoption of the Enabling Act comes close to having significance similar to the founding of the nation. At least for those in the civil procedure fraternity, however, it is not so fanciful to regard the 1988 legislation as something of a second founding in rulemaking for the federal courts. That is my theme.

Appreciating the significance of that 1988 effort requires some excavation of the background and nature of the first founding for rulemaking, the fruits of that founding, and the travails that led to the second founding in the 1980s. Finally, drawing on almost a quarter century of experience from inside the rulemaking apparatus, I will reflect on the impact of rulemaking’s second founding. On the whole, that reflection shows more immediate and sustained impact than Professor Foner’s second founding provided. It also shows that the impact was mainly positive.

## I. THE FIRST FOUNDING

Professor Burbank is *the* preeminent scholar on the first founding—the 1934 adoption of the Rules Enabling Act—beginning with his seminal book-length article in this Review.<sup>2</sup> But for present purposes, it is useful to go beyond invoking that work and add some background details.

Though it did immediately take up the Constitution’s invitation to create lower federal courts, Congress did not try to regulate their procedure, and instead—through the Process Acts and later the Conformity Act—directed generally that the federal courts should adhere to the procedures of the courts of the states in which they sat.<sup>3</sup> That often was common law procedure, for the

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<sup>2</sup> Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

<sup>3</sup> See *id.* at 1036-42.

English courts had proceeded for centuries without a procedure code. But the English reliance on case law to devise procedures gradually grew burdensome, and the English judges adopted the first rules of court to have the force of law in the Anglo-American sphere—the 1834 Rules at Hilary Term.<sup>4</sup>

The English effort at positivist court-based rulemaking was an abject failure, leading to the infamous *Crogate's Case*, which was satirized in the *Dialogue in the Shades*.<sup>5</sup> This failure was followed by what Professor Sunderland described as the “English Struggle for Procedural Reform.”<sup>6</sup> That struggle led to the adoption in the Victorian era of the Judicature Acts, which sought to modernize and improve court procedure, and to put procedure “under public, not professional, regulation.”<sup>7</sup>

In this country, David Dudley Field embarked on a codification movement designed to supplant court-made common law jurisprudence with legislative provisions in a range of areas.<sup>8</sup> His greatest success was with a procedure code, leading, among other things, to the adoption of what came to be called “code pleading.” Through legislation, many states adopted the Field Code for their procedural regime; under the Process Acts and the Conformity Act, that code would apply in the federal courts of those states as well.

Though some regard the Field Code as a precursor to the Federal Rules, that conclusion may be challenged.<sup>9</sup> But the codification movement did supplant judicial rulemaking in many states, particularly in the West.<sup>10</sup> As time went by, however, the bloom came off that rose:

The early promise of the code movement began to sour as successive legislatures, in response to the importuning of special interest groups, added

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<sup>4</sup> See *Roffey v. Smith*, 172 Eng. Rep. 1409, 1409-10 (1834) (stating that the rules of Hilary Term (referred to as “rules of pleading of H.T. 4 Will. IV”) “are part and parcel of the law of the land”).

<sup>5</sup> See GEORGE HAYES, *CROGATE'S CASE: A DIALOGUE IN YE SHADES*, reprinted in 9 *A HISTORY OF ENGLISH LAW* 417-31 (W.S. Holdsworth ed. 1926). This parody was a scathing attack on the strictness of the pleading requirements of the Rules of Hilary Term. One of the most famous rulings under those rules was in *Crogate's Case*, holding that Crogate had no right to proceed due to his violation of those rules. The parody was a conversation in Heaven between the ghost of Edward Crogate and a Baron Surrebutter, supposedly a representative of Baron Parke, who was a moving force behind the Hilary Term Rules. Those rules may be gone, but they are not entirely forgotten. In his dissent in *Bell Atlantic Corp. v. Twombly*, Justice Stevens invoked the “hypertechnical Hilary rules of 1834.” 550 U.S. 573-574 (2007) (Stevens, J., dissenting).

<sup>6</sup> Edson Sunderland, *The English Struggle for Procedural Reform.*, 39 HARV. L. REV. 725 (1926).

<sup>7</sup> *Id.* at 737-39.

<sup>8</sup> See generally Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).

<sup>9</sup> *Id.* at 312-13 (referring to the “myth” that the Field Code was a precursor of the Federal Rules).

<sup>10</sup> California courts, for example, continue to function under the (amended) code of 1872. For a more general review of the codification movement, see Subrin, *supra* note 8.

layer upon layer of amendments to the code. Legislatures sought to regulate every detail of court activity and to remedy procedural problems on a piecemeal and patchwork basis. In New York, the Field Code turned into the Throop Code, and grew “from 88 sections to over 1000, making it a legal text of truly Byzantine complexity, a stellar trap for the unwary, and a source of mischief to hapless litigants.” California’s code has suffered a similar fate.<sup>11</sup>

To those conversant with local practice, however arcane, it may have been a great relief not to have to worry about a different set of rules to go to federal court. And it was probably attractive to them to be able to outmaneuver their opponents if the opponents were not equally steeped in local procedure. But as the national economy became more and more integrated, and communication and transportation improved, in the late nineteenth century, disparities in court procedure among federal courts could cause frustration as well.<sup>12</sup> At the same time, some inveighed against the tendency toward “gamesmanship” in litigation (perhaps also exploiting local procedure), an attitude at the heart of Pound’s famous 1906 address to the American Bar Association.<sup>13</sup>

There followed about twenty years of effort to supplant local practice with a national procedural code for the federal courts.<sup>14</sup> On occasion, this effort was leavened by bombast, such as the assertion that it would be a way to avoid “Bolshevism.”<sup>15</sup> For some, opposition had a more proprietary tone, as in this objection to the effort to achieve uniform procedure:

[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 Court 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

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<sup>11</sup> Glenn Koppell, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 466 (1997) (quoting Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 163 (1991)).

<sup>12</sup> See Burbank, *supra* note 2, at 1040-42.

<sup>13</sup> Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Before the Am. Bar Ass’n (Aug. 29, 1906), in 29 ABA REPS. 395 (1906), reprinted in AMERICAN BAR ASS’N NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH ADMINISTRATION OF JUSTICE (1976).

<sup>14</sup> For a chronicle of this effort, see Burbank, *supra* note 2, at 1043-95.

<sup>15</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 955, 955 n.274 (1987) (reporting that proponents of the Enabling Act “advocated simplified procedure as a means of improving democracy in order to reduce the cause for bolshevik and other radical attacks on the courts.”).

city firm . . . . Uniformity would further augment the importance of large aggregations of men and depress the individual . . . .<sup>16</sup>

In Congress, the most vigorous opponent to nationalized procedure was Senator Walsh of Montana. When President Roosevelt selected him to be Attorney General, this seemingly sunk the project for national rules. But Walsh died on his way to Roosevelt's inauguration, and Homer Cummings (a supporter of the Enabling Act) instead became Attorney General. Thus, the first founding depended ultimately on a fortuity.

## II. THE PROCEDURAL FRUITS OF THE FIRST FOUNDING

Much as the passage of the Rules Enabling Act was a breakthrough, it was a breakthrough with a vacuum at its center. There was almost nothing to show what should be included in the national procedural rules that would supplant state court procedure. The Act said the Supreme Court could promulgate a new procedure code, but it did not say how the Court was to accomplish that. The Court surely did not intend to try to draft the new code itself. After some uneven starts, the Court appointed an Advisory Committee of leading lawyers, with Dean Charles Clark of Yale Law School as Reporter. Since Dean Clark had a treatise on procedure,<sup>17</sup> that might seem to fill in some of the gaps on what might be included in the code (though not, of course, at the time Congress passed the Enabling Act). And Professor Sunderland was enlisted to address rules for pretrial, particularly discovery. He had already carved out pro-discovery positions that might suggest his later orientation.<sup>18</sup> In all, the drafting committee included a number of very prominent lawyers and several law professors, but no judges. Withal, it did not seem a revolutionary group.

Particularly when measured against current rulemaking time lines, the work of this drafting committee was extraordinary. In about two years, the committee hammered out an entire set of rules. In the process, it made some basic decisions. As Professor Subrin explained, it elected the elastic, open-ended approach of the Courts of Equity rather than the constricting attitudes of the common law courts.<sup>19</sup> In place of the strictures of common law pleading and of "fact pleading" as required by the codes, it directed only that a complaint contain "a short and plain statement of the claim, showing that the

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<sup>16</sup> Steven N. Subrin, *Federal Rules, Local Rules, and State Rules; Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2009 (1989) (quoting letter from Connor Hall to the Editor of the American Bar Association Journal dated Oct. 15, 1926).

<sup>17</sup> See CHARLES CLARK, CODE PLEADING (1928).

<sup>18</sup> See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 698-710 (1998).

<sup>19</sup> See generally Subrin, *supra* note 15.

pleader is entitled to relief.”<sup>20</sup> Altogether, the discovery package included more discovery methods, with fewer limitations, than any prior set of procedures. It was revolutionary.<sup>21</sup> That might have been surmised from the profile Sunderland already had on the subject.<sup>22</sup> As Charles Clark put it more than two decades later: “The system thus envisioned by Sunderland had no counterpart at the time he proposed it.”<sup>23</sup>

For present purposes, an important point is that none of these orientations was intrinsic in the legislation itself. Congress did not debate or even consider seriously what should go into a uniform procedure for all the federal courts. In a way, that contrasts with its closer attention to specific procedural provisions in recent decades. As Professor Burbank has written, the Enabling Act can be regarded as a sort of “treaty” between Congress and the rulemakers.<sup>24</sup> But one could also say that, at the outset, it was an extremely open-ended authorization to allow somebody to devise the new procedural system without significant tethers.

One might also characterize the Advisory Committee’s effort as infused with zeal. Clark described former Attorney General William Mitchell, the head of the drafting committee, as having “the enthusiasm and the drive of a crusader.”<sup>25</sup> Clark himself said that the dedicated reformer must pursue his goal and leave compromises to others.<sup>26</sup> One thing that might have enabled this crusading effort was its insulation from outside pressures or even input.

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<sup>20</sup> FED. R. CIV. P. 8(a)(2).

<sup>21</sup> Subrin, *supra* note 18, at 718-19. As explained by Professor Subrin:

[S]underland’s initial draft included every type of discovery that was known in the United States and probably England up to that time. The list is familiar to any American litigator, for almost every type of discovery he drafted became and remains part of the Federal Rules: oral and written depositions; written interrogatories, motions to inspect and copy documents and to inspect tangible and real property; physical and mental examinations of persons; and requests for admissions.

*Id.* at 718. Sunderland’s discovery package was unprecedented. See Charles Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959) (“The system thus envisaged by Sunderland had no counterpart at the time he proposed it. It goes very much beyond English procedure, which does not provide for general depositions of parties or witnesses.”).

<sup>22</sup> For example, Sunderland wrote the Foreword for a path-breaking book published in 1932 where he lauded a more wide-spread discovery process. See GEORGE RAGLAND, *DISCOVERY BEFORE TRIAL* (1932); see also Edson Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 871 (1932) (asserting that courts have not had any problems with a more expansive discovery system, and actually prefer its results).

<sup>23</sup> Clark, *supra* note 21, at 11; see also Subrin, *supra* note 18, at 718-19 (describing the rules’ discovery provisions as in further detail).

<sup>24</sup> Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?* 49 ALA. L. REV. 221, 230 (1997).

<sup>25</sup> Clark, *supra* note 21, at 9.

<sup>26</sup> Charles E. Clark, *Two Decades of the Federal Civil Rules of Civil Procedure*, 58 COLUM. L. REV. 435, 448 (1958) (“[R]eformers must follow their dream and leave compromises to others . . .”)

According to Paul Carrington, Advisory Committee Reporter in the late 1980s, this insulation continued into the 1960s.<sup>27</sup> Coupled with the blank slate Congress had provided, this insulation probably contributed significantly to the remarkable system that emerged. True, there was supposedly some interaction with the bench and bar as the rules were hammered out (remember that there were no judges on the drafting committee, though quite a few professors), but that was nothing like the current reality in the wake of the Second Founding.

And it is obvious that the rulemakers' work product was not only comprehensive but path-breaking—one might even say the work of crusaders. As I have put it, the work was infused with a "Liberal Ethos."<sup>28</sup> In the place of somewhat byzantine common law or code pleading requirements, the rules enshrined what came to be known as "notice pleading."<sup>29</sup> In place of trial by surprise, lambasted by Pound in 1906, the new rules introduced an unprecedentedly broad array of discovery procedures. Though they authorized a summary judgment procedure, the rules were soon interpreted to forbid its use in any case in which there was the "slightest doubt" about who should win, a very high standard indeed.<sup>30</sup> Overall, as Professor Subrin has emphasized, the new procedure was dramatically different from what preceded it and dramatically more elastic.<sup>31</sup>

As Professor Resnik has noted, it is somewhat surprising that the drafting committee made this bold break with the past.<sup>32</sup> The lawyers on the committee were drawn from what would now be called Big Law (then called white shoe firms), and their clients might soon recoil from the actuality of litigation in the new environment. Not long after the new rules went into effect, there was something of an uprising among some district judges about

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<sup>27</sup> Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991) ("I have been told by one of my predecessors, the late Al Sacks, that he was instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation.").

<sup>28</sup> See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

<sup>29</sup> See *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

<sup>30</sup> See *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945) ("A litigant has a right to a trial where there is the slightest doubt as to the facts . . ."). The following year Charles Clark, who was by then sitting on the Second Circuit, resisted the "slightest doubt" standard in another case overturning the district court's grant of summary judgment. He cited Rule 56 and criticized that majority's ruling as "a novel method of amending rules of procedure" that "subverts the plans and hopes of the profession for careful, informed study leading to the adoption and to the amendment of simple rules . . ." *Arnstein v. Porter*, 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J., dissenting).

<sup>31</sup> See Subrin, *supra* note 15 at 956.

<sup>32</sup> See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 500 (1986) (asking why the men of the drafting committee, often associated with interests linked to today to the "defense bar," sounded like "plaintiffs lawyers?") (internal quotation marks omitted).

the relaxed pleading standards, and the Ninth Circuit Judicial Council went so far as to propose amending the pleading rules to require that “facts” supporting a cause of action be included.<sup>33</sup> In 1951, then-Judge Clark convened a conference about discovery that produced objections that sound strikingly contemporary. One participant, for example, objected: “We now have about the worst and most destructive procedure devised by man to hamper the administration of justice. On top of trial by deposition, we have piled the injustices of unlimited discovery.”<sup>34</sup>

But as I have written before, the new rules swept the academy:

Professor Hazard called the Federal Rules “a major triumph of law reform.” Professor Yeazell said that the Federal Rules “transformed civil litigation [and] . . . reshaped civil procedure,” adding that the Rules were “surely” the single most substantial procedural reform in U.S. history.” Professor Shapiro opined that “they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.” Professor Resnik found that they even “became a means of transforming the modes of judging.”<sup>35</sup>

In a way, the new rules epitomized the optimism voiced by Professor Millar in the mid twentieth century about a “law of procedural progress” inexorably moving from rigidity to flexibility.<sup>36</sup>

Even after making this breakthrough, the original Advisory Committee lived on, until ultimately discharged by the Supreme Court in 1956.<sup>37</sup> But a new Advisory Committee was soon appointed, and the Liberal Ethos remained predominant. At the time, Chief Justice Warren cautioned the new Advisory Committee against “radical changes.”<sup>38</sup> In 1966, the joinder rules were revised, and the “modern class action” under Rule 23(b)(3) came into existence.<sup>39</sup> In 1970, the discovery rules were expanded and somewhat

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<sup>33</sup> See Claim or Cause of Action: A Discussion of the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure, 13 F.R.D. 253, 256 (1952) (“A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief, *which statement shall contain the facts constituting a cause of action* . . .” (emphasis in original)).

<sup>34</sup> The Practical Operation of Federal Discovery, 12 F.R.D. 131, 150 (1951) (transcribing the statement of George Pike).

<sup>35</sup> Richard L. Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 301 (2008) (footnotes omitted).

<sup>36</sup> ROBERT WYNESS MILLAR, CIVIL PROCEDURE IN THE TRIAL COURT IN HISTORICAL PERSPECTIVE 5-6 (1952).

<sup>37</sup> Order Discharging Advisory Committee, 352 U.S. 803 (1956).

<sup>38</sup> Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1566 (2015).

<sup>39</sup> See *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) (“Federal Rule of Civil Procedure 23 didn’t create the modern class action until 1966”).

relaxed.<sup>40</sup> As Professor Burbank has noted, this does not sound like what Chief Justice Warren advised.<sup>41</sup> At least in retrospect, this period has come to be known to some as rulemaking's "Golden Age."<sup>42</sup> As with other golden ages, it came to an end. Perhaps golden ages only look golden in retrospect, and not at the time.

### III. THE SECOND FOUNDING

It is somewhat difficult to pinpoint when the worm began to turn for expansive federal procedure rules. It seems pretty clear, however, that confidence in the inexorable relaxation of procedure that Professor Millar forecast in 1952<sup>43</sup> began to abate in the 1970s. Already in 1975, a Penn professor had urged changes to the Enabling Act, though focused on the Criminal Rules rather than the Civil Rules.<sup>44</sup> In 1979, Representative Holtzman introduced a bill that would amend the Enabling Act in a variety of ways.<sup>45</sup> Then, in 1980 Professor Burbank's magisterial article about the original adoption of the Enabling Act appeared.<sup>46</sup> Congressional attention to rulemaking persisted, eventually leading to the 1988 amendments to the Enabling Act.

One way of looking at the period leading up to the apogee of the Liberal Ethos is, in Professor Burbank's words, that "[t]he period from 1960 to 1971 was one in which the net balance [of rule amendments] clearly favored

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<sup>40</sup> See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748-49 (1998) (noting that the 1970s amendments continued to relax discovery rules by eliminating the requirement for a motion to obtain document production and the removal of the "good cause" standard for production of documents) (footnotes omitted). Professor Burbank expands: "The 1966 amendments to Rule 23 (Class Actions) alone constituted 'great changes,' and many would similarly characterize the 1970 discovery amendments, which included substantial revisions to Rules 26 (General Provisions), 30 (Depositions), 33 (Interrogatories), 34 (Document Production), 36 (Requests for Admissions), and 37 (Sanctions)." Burbank & Farhang, *supra* note 38, at 1566.

<sup>41</sup> See Burbank & Farhang, *supra* note 38, at 1566 ("[F]ew if any observers of federal court rulemaking would characterize the work of the reconstituted Advisory Committee from 1960 through 1971 as merely keeping the Federal Rules up-to-date . . . . [T]he Advisory Committee produced substantial packages of amendment that became effective in 1961, 1963, 1966, 1997, and 1971.")

<sup>42</sup> See Robert Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 (1999) (referring to the "Golden Age of Court Rulemaking").

<sup>43</sup> See *supra* note 36 and accompanying text (noting Professor Millar's expectation that procedure would inexorably move from rigidity to flexibility).

<sup>44</sup> See Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579, 580 (1975) (urging "a full-scale inquiry into the process").

<sup>45</sup> See 96 Cong. Rec. 63-65 (daily ed. Jan. 15, 1979) (statement of Rep. Elizabeth Holtzman) (proposing, among other things, that the rulemaking authority be moved from the Supreme Court to the Judicial Conference, that rulemaking activities would be open to the public, with votes open to public scrutiny, and that no rule change could go into effect without affirmative action by Congress).

<sup>46</sup> Burbank, *supra* note 2.

plaintiffs.”<sup>47</sup> It may be that the arrival of Warren Burger as Chief Justice played a role in the subsequent orientation<sup>48</sup> of rule changes, which Professors Burbank and Farhang demonstrate (as many had sensed) represented a shift in the trend line.<sup>49</sup> Along the way, the mix of lawyers and judges on the Advisory Committee changed, with a majority of members being judges when Burger was Chief Justice (and since). Relying on judges might tend toward relaxing the pressures to favor one side or the other, as judges as a group may be more neutral than lawyers who can be (and are) identified with defense or plaintiff interests. But, of course, judges are not interchangeable, and the Chief Justice made (and makes) the choice of which judges to appoint to the Advisory Committee.

In any event, in the 1970s there began a period of some controversy about rule change proposals. A 1978 proposal to revise the scope of discovery excited much opposition.<sup>50</sup> A proposal to dispense with filing of discovery materials in court prompted letters from Senator Kennedy (Chair of the Senate Judiciary Committee) and Representative Drinan (a member of the House Judiciary Committee) raising questions about these changes.<sup>51</sup> The 1978 proposed change to the scope of discovery under Rule 26(b)(1) was ultimately withdrawn by the Advisory Committee,<sup>52</sup> and the change to filing of discovery was shelved.<sup>53</sup> Various proposals to retool Rule 68 were examined as a way to curtail “groundless” litigation. These Rule 68 efforts were eventually discontinued, to applause from Professor Burbank.<sup>54</sup>

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<sup>47</sup> Burbank & Farhang, *supra* note 38, at 1579.

<sup>48</sup> *See id.* at 1580-85 (noting that Chief Justice Burger shifted the balance in the Advisory Committee to consist mainly of judges rather than practicing lawyers and urged the need for “major changes” in procedure, which was “very different advice” from what Chief Justice Warren had told the rulemakers a decade before).

<sup>49</sup> *See id.* at 1576-80 (explaining the authors’ statistical analysis, and concluding from that analysis that, from 1960 to 2011, the net balance of the Advisory Committee’s proposals affecting private enforcement shifted away from favoring plaintiffs).

<sup>50</sup> *See* Marcus, *supra* note 40, at 756-60 (explaining, among other proposed changes, the Advisory Committee’s proposal to narrow the scope of discovery, and a variety of critical responses that emerged in response to that proposal).

<sup>51</sup> *See* Letter from Sen. Edward Kennedy, Chair, Comm. on the Judiciary, to William Foley, Dir., Admin. Off. of the United States Cts., (July 29, 1980) (on file with author) (expressing concern about “possible harm which could result to interested parties and the general public” from implementation of the amended rule excusing filing of discovery materials); Letter from Rep. Robert Drinan, Chair, Subcomm. on Crim. Just. of the House Judiciary Comm., to Joseph Spaniol, Deputy Dir. of the Admin. Off. of the United States Cts. (June 24, 1980) (relaying concern that the rule change “not permit or encourage the waiver of the filing requirements except where the balance of public and private interest tips in favor of waiver”).

<sup>52</sup> Marcus, *supra* note 40, at 759.

<sup>53</sup> It returned in the 2000 amendments to Rule 5(d), which were adopted.

<sup>54</sup> For a chronicle of this history, see generally Stephen B. Burbank, *Proposals to Amend Rule 68: Time to Abandon Ship*, 19 U. MICH. J. L. REFORM 425 (1986).

Perhaps most telling, however, was the 1983 amendment to Rule 11, which authorized sanctions for asserting unfounded claims or defenses. The tumult over this rule change—and its seeming anti-plaintiff bias—reverberated through rulemaking. The Third Circuit embarked on a book-length study of how the rule was being applied, for which Professor Burbank was Reporter.<sup>55</sup> John Frank, a member of the Advisory Committee during the halcyon days of the 1960s, called the 1983 amendment to Rule 11 “the most unfortunate exercise in rulemaking of at least the last twenty years.”<sup>56</sup> Judge Schwarzer, soon to become head of the Federal Judicial Center, wrote in 1988 that “Rule 11 has become a significant factor in civil litigation, with an impact that likely exceeded its drafters’ expectations.”<sup>57</sup> Professor Burbank made much the same point in 1989:

The Advisory Committee knew little about experience under the original Rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of Rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the benefits and costs of sanctions as a case management device.<sup>58</sup>

In 1991, the Advisory Committee itself issued an unprecedented “call” for comment on the rule.<sup>59</sup> There followed amendments to the rule effective 1993 that Judge Shadur labeled the “fang-drawing 1993 amendments.”<sup>60</sup> John Frank, having denounced the 1983 version, spoke highly of the 1993 amendments.<sup>61</sup> Justice Scalia, meanwhile, objected to the 1993 amendments, arguing that they would “render the Rule toothless.”<sup>62</sup>

The Rule 11 episode was certainly a black eye for rulemaking. But there is at least some reason to accept Judge Schwarzer’s conclusion that the rulemakers did not see this controversy coming.<sup>63</sup> At least one published critique of the proposed 1983 amendment objected that it would “emasculate” the rule by removing the former authority to strike pleadings filed in violation

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<sup>55</sup> STEPHEN B. BURBANK, *RULE 11 IN TRANSITION* (1989).

<sup>56</sup> John Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883, 1886 (1989).

<sup>57</sup> William Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1013 (1988).

<sup>58</sup> Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927 (1989).

<sup>59</sup> See Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 335, 337 (1990).

<sup>60</sup> *Stove Builder Int’l, Inc. v. GHP Group, Inc.*, 280 F.R.D. 402, 403 (N.D. Ill. 2012).

<sup>61</sup> See Henry J. Reske, *Tinkering with Procedure: Federal Committee Back Automatic Disclosure, Restrained Rule 11*, 78 A.B.A. J. 14 (1992) (quoting John Frank as saying that the proposed revision was “a major victory for our side”).

<sup>62</sup> Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting).

<sup>63</sup> See *supra* text accompanying note 57-58.

of the rule.<sup>64</sup> At the same time the rulemakers proposed the Rule 11 amendments, they also added Rule 26(g) regarding discovery, imposing essentially the same regime for discovery requests and responses—that the lawyer submitting them certified that there was good ground for the request or response. These two amendments were expected to work in tandem and have a similar impact. But history did not turn out that way:

At the time the 1983 amendments were adopted, it was supposed that Rule 26(g) was at least as important, and would be at least as much used, as Rule 11. That did not prove to be the case. Rule 11 was invoked many times, while Rule 26(g) has not been much used. Largely as a consequence, although Rule 11 was substantially amended in 1993, Rule 26(g)(2) was slightly revised as to form but not much changed except to take account of the addition that year of mandatory disclosure obligations.<sup>65</sup>

As Professor Burbank put it in 1997, the Rule 11 experience produced a “poisonous environment” for rulemaking.<sup>66</sup> It seems unlikely that the Rule 68 episodes helped.<sup>67</sup> As explained later by the Reporter of the Advisory Committee:

Partly in response to the 1983 amendments, but especially to a proposal made in 1984 to amend Rule 68 to deter non-settlement, Congressman Robert Kastenmeier, then chair of the House Judiciary Committee, took an interest in the Rules Enabling Act. He proposed to revise the Act, partly in response to suggestions from Professor Stephen Burbank and others, to make federal judicial rulemaking more open to public view and thus more responsive.<sup>68</sup>

Before the 1988 Act, the Enabling Act was notably unfocused on the method by which the Supreme Court would exercise its delegated power to adopt procedure rules for the federal courts. As noted above, after the 1934 Act was adopted there was much uncertainty about how those rules were to be drafted, and the content of the rules was, in terms of Congressional

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<sup>64</sup> See Jonathan J. Lerner & Seth M. Schwartz, *Why Rule 11 Shouldn't Be Changed: The Proposed Cure Might Exacerbate the Disease*, NAT'L L.J., May 9, 1983 (expressing fear that the 1983 Rule 11 amendment, by eliminating the prior provision for striking pleadings signed in violation of the rule, would “place even this limited safeguard in jeopardy”).

<sup>65</sup> 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2052 at 348 (3d ed. 2010).

<sup>66</sup> Burbank, *supra* note 24, at 228.

<sup>67</sup> See generally Burbank, *supra* note 54 (asserting that proposals to amend Rule 68 raised questions about the scope of the rulemakers' power, particularly in light of the pending legislative proposals that became the 1988 amendments to the Enabling Act).

<sup>68</sup> Carrington, *supra* note 27, at 164.

directives, almost a complete blank.<sup>69</sup> As Professor Burbank urged in a submission to Congress in 1984, one could regard what was needed as “attention by the rulemakers to what might be called the substantive jurisprudence of rulemaking.”<sup>70</sup>

The 1988 Enabling Act took major steps in that direction. It did not include some ideas that were raised during the drafting process, such as moving the authority to adopt amendments to the Judicial Conference, eliminating the Supersession Clause,<sup>71</sup> or requiring that rules committees be “representative.”<sup>72</sup> But it did add a new section to the United States Code called the “Method of Prescribing,” which detailed how to make rule changes.<sup>73</sup> This provision includes many things urged during the Congressional process, including:

- The Judicial Conference must prescribe and publish procedures for consideration of rule amendments;<sup>74</sup>

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<sup>69</sup> True, the Act did say that “such rules” must not “abridge, enlarge, or modify any substantive right” and that the rule changes could not take effect until ninety days after they were presented to Congress, which might interrupt their implementation. *See* 28 U.S.C. § 2072 (1982).

<sup>70</sup> Letter from Prof. Stephen B. Burbank, Assoc. Professor of L., U. Pa. L. Sch., to Rep. Robert Kastenmeier, Rep., United States House of Rep. (Jan. 13, 1984), *in* Hearings Before the Subcomm. on Cts., Civ. Lib., and the Admin. of J. of the Comm. of the Judiciary, 98th Cong. 204-05 (1984).

It is worth noting that in 1958 Congress had added the following to 28 U.S.C. § 331:

The [Judicial] Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

Act of July 11, 1958, P.L. 85-513, 72 Stat. 356. This addition did little, however, to deal with the matters later addressed by the 1988 amendments to the Enabling Act.

<sup>71</sup> For background on the supersession issue, see 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, 1037-44 (1989).

<sup>72</sup> For those interested, here is Professor Burbank's report on the fate of this idea:

[A] requirement that “[e]ach such committee shall consist of a balanced cross section of bench and bar, and trial and appellate judges” was part of the House bill that passed in 1985 and 1988. The provision was not part of the 1988 legislation, however, which substituted the language in the Senate bill: “Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.”

Burbank & Farhang, *supra* note 38, at 1588.

<sup>73</sup> 28 U.S.C. § 2073 (2018).

<sup>74</sup> *Id.* § 2073(a)(1).

- Rulemaking committees “shall consist of members of the bench and the professional bar, and trial and appellate judges”;<sup>75</sup>
- Each meeting “for the transaction of business” of the Standing Committee and any Advisory Committee must be open to the public with minutes of the meeting made available to the public;<sup>76</sup>
- Advance notice must be given of each such rulemaking meeting;<sup>77</sup> and
- Any recommendation for a rule amendment must include an explanatory note on the rule and a written report explaining the reason for the amendment and including any minority or other separate views.<sup>78</sup>

#### IV. LIFE AFTER THE SECOND FOUNDING: RULEMAKING IN THE FISHBOWL

As suggested by Dean Carrington,<sup>79</sup> the public access directed by the 1988 Act was a break with the past. According to a 1983 report of the secretary to the Standing Committee, “Advisory committees usually meet whenever the need arises. When an Advisory Committee reaches agreement on a tentative draft proposal, the draft is then circulated widely to the bench and bar for comment.”<sup>80</sup> That obviously would no longer suffice, given the requirement for advance notice of meetings and public access to them. The various advisory committees now have a fairly set schedule of Spring and Fall meetings, and the Standing Committee meets in June and January. The precise dates vary, but the schedule is sufficiently fixed to be known to those interested.

Fairly immediately after the adoption of the 1988 Act, there was much gloom among academics about the rulemaking enterprise. Charles Alan Wright, as great an oracle as we had, said that he was “gloomier about the status of the rulemaking process than I had ever been.”<sup>81</sup> Professor Mullenix saw the guillotine in the rulemakers’ future, worrying that the Advisory

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<sup>75</sup> *Id.* § 2073(a)(2). Note that this does not go further and insist that such committees be “representative.”

<sup>76</sup> *Id.* § 2073(c)(1).

<sup>77</sup> *Id.* § 2073(c)(2).

<sup>78</sup> *Id.* § 2073(d).

<sup>79</sup> See Carrington, *supra* note 27 at 164.

<sup>80</sup> Joseph F. Spaniol Jr., *Making Federal Rules: The Inside Story*, 69 A.B.A. J. 1645, 1646 (1983).

<sup>81</sup> Charles Alan Wright, *Foreword, the Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 9 (1994).

Committee might go “the way of the French aristocracy.”<sup>82</sup> In the 1990s, Professor Walker spoke of “the most serious challenge to the procedural status quo since the adoption of the original Federal Rules in 1938.”<sup>83</sup> Professor Bone said that “the court rulemaking model is under siege.”<sup>84</sup> Professor Burbank, meanwhile, observed that federal rulemaking had become “a new ballgame.”<sup>85</sup> He was right, and it is not clear that he mourned that change.

I am here to report that federal rulemaking lives on. For nearly a quarter century, I’ve spent considerable time and energy on the inside of federal rulemaking.<sup>86</sup> One easy conclusion to announce based on that experience is that federal rulemaking remains alive and pretty well. As I said in 2008, it’s “not dead yet.”<sup>87</sup> Instead, there have been major packages of rule amendments in 2000, 2003, 2006, 2009, 2015, and 2018. In addition, in 2007 the entire set of rules was restyled, an arduous effort that received a welcome and much appreciated assist from Professor Burbank.

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<sup>82</sup> Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L. REV. 795, 802 (1991).

<sup>83</sup> Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997).

<sup>84</sup> Bone, *supra* note 42, at 888.

<sup>85</sup> Burbank, *supra* note 71, at 1035.

<sup>86</sup> Much of this Part is based on my recollection of events in which I was personally involved. That’s not terribly common in law reviews. Usually, law review articles consist of reports by the author of what turned up in research in books and other media. The heart of this paper, however, is not like that. Part IV, which is about the post-1988 rulemaking experience, is not based on what I learned from books. Instead, it is about my lived experience over the last quarter century on the inside of rulemaking. Most of what I describe is also reflected in the official records of the Administrative Office (“A.O.”) of the United States Courts and available online ([www.uscourts.gov](http://www.uscourts.gov)). But my report here is about what I remember, not about what is in those records, which consist largely of things I have written and directed be inserted into the public record. On occasion, I will refer the reader to some of these materials, but that does not mean they form the actual basis for Part IV of this paper, which is instead based on my recollection, not the contents of these records. Any who are interested in additional details can read through the thousands of pages of agenda books posted on the A.O. website.

This peculiar feature of my paper prompted repeated instructions from the law review editors that “a citation is required” to support assertions in text. Though some such citations could be found, I resisted the editors on the ground that I am not actually basing this paper on what is in these records, most of which I wrote myself. I want to thank the editors for their flexibility and emphasize that the unorthodox approach was my own doing.

Owing to my role, some of the things that Professor Burbank has noted in his writings about rulemaking are simply background for my experience, in a sense “above my pay grade.” Consider, for example, the following observation: “Among 103 *appointments or reappointments* of Article III judges to the committee, the split was 72 percent to 28 percent in favor of Republican appointees.” Burbank & Farhang, *supra* note 38, at 1572. In the same vein, the article also notes that during the period 1971 to 2013, 0.18 percent of judges appointed by Democratic presidents served on the committee, compared with 0.47 percent of judges appointed by Republican presidents. *Id.* at 1573. See also *id.* at 1574 (“[N]on-white judges are less likely to serve on the Advisory Committee.”). Reporters take the rule committees as they find them.

<sup>87</sup> See Marcus, *supra* note 35 at 300.

In this Part, I want to reflect on what rulemaking is like in the fishbowl in which it has operated since the Second Founding. I can affirm that the “sunshine” nature of the rulemaking process contrasts with the approach of other Judicial Conference committees, at least in my experience. Thus, along with two judges who were both eventually Chairs of the Advisory Committee and the Standing Committee, I attended a meeting of another Judicial Conference committee to report on matters of joint interest. The reporting session involved quite a few other people in addition to us three as representatives of the rules committees, and it lasted the full morning of the meeting. The relevant point is that, after a pleasant lunch with the committee, all of the nonmembers—even the two very distinguished judges—were politely but firmly told that they were not welcome to attend the remainder of the meeting. That is not how rules committees now operate.

A. *Did The 1988 Act Actually Cause A Rulemaking Change?*

Before addressing the ways in which the changes wrought by the 1988 Act have affected the rulemaking enterprise, it is worth reflecting briefly on whether the Act was necessary or sufficient to cause these changes. There is at least some reason to think that more openness would have occurred regardless of whether Congress had acted in the 1980s. Already in the late 1970s the rulemakers had decided to hold public hearings about the various discovery amendments under consideration.<sup>88</sup>

Despite these precursors, it seems difficult to regard the 1988 Act as irrelevant to rulemaking as it now operates. As explored below, the current openness of rulemaking, and the existence of publicly available procedures, means that members of the bar, and even members of the general public, can (and do) submit amendment proposals that are reviewed by the Advisory Committee. The Committee maintains a roster of pending proposals, and those proposals are explained and presented in agenda books and at Advisory Committee meetings, even if no action is recommended. Familiarity with what is on the agenda is fairly widespread among the *cognoscenti*, a somewhat narrow band of the profession, but one much larger than the Committee itself. Indeed, the accessibility of the agenda sometimes causes worries that even reaching the point of circulating draft language might inadvertently and incorrectly send the message that “the train has left the station.”

The reporting requirements, along with the need to provide detailed minutes of meetings, and about testimony and comments during the public comment process about proposed amendments, means that there is a wealth

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<sup>88</sup> See Marcus, *supra* note 40, at 758 n.58 (detailing how the 1978 Committee held hearings on proposed rule amendments for the first time).

of public material about what the rules committees do. Yes, the Second Founding has made a distinct difference. In Professor Burbank's words: "As a result of the House Hearings [on rulemaking practices] and the threat of legislation, as well as the earlier criticisms, the judiciary institutionalized steps previously used but sparingly (e.g., public hearings) and adopted and published rulemaking procedures."<sup>89</sup>

It is impossible to say what would have happened without the legislation, but also impossible to say the changed practices would have occurred without any outside pressure at all.

### B. *Sunshine, Lobbyists And Outreach*

The work of the Advisory Committee no longer occurs behind a screen or in the dark. As a "sunshine committee," it permits interested persons to attend its meetings. It posts the agenda books for those meetings well in advance of the meetings, and posts minutes of the meetings as well. It also posts all proposals for rule changes that it receives on the Administrative Office (A.O.) website as well as keeping tabs on when action is taken on those proposals. There is, as a result, a very large volume of material about the rulemakers' activities available online. Though mastering the A.O. website takes a bit of practice, the main impediment to following what the Advisory Committee does is volume—the agenda book for each of the two Advisory Committee meetings each year is likely to be 400 pages long.

The Advisory Committee also hears regularly from a number of organizations, which ordinarily send representatives to attend its meetings as well as make proposals for rule changes and comment on pending topics of Committee consideration and on published amendment drafts. Examples include the Litigation Section of the American Bar Association, the American College of Trial Lawyers, the Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. One could perhaps regard some of these organizations (and others who attend meetings) as lobbyists of a sort. That may relate to the possibility that rulemakers in the new order might find themselves led to the scaffold.<sup>90</sup> Though it is important for committee members and Reporters to avoid accepting any favors from these interested parties (i.e., not even a glass of wine), the participation of such people has been a boon, not a burden.

This openness flows from the 1988 Act's requirements, and has been very helpful in a wide variety of ways. It goes well beyond what the Act required,

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<sup>89</sup> Burbank & Farhang, *supra* note 38, at 1586.

<sup>90</sup> See *supra* text accompanying note 82 (expressing worry that rulemaking might go the way of the *Ancien Regime*).

however. As Professor Burbank has noted, when Judge Patrick Higginbotham was Chair of the Advisory Committee, he “concentrated on outreach to the bar and to the academy.”<sup>91</sup> That outreach continued and has flowered. Starting in the late 1990s, the Advisory Committee and/or one of its subcommittees often held conferences or mini-conferences to gather informal reactions on issues under consideration by the Committee.<sup>92</sup> The Act did not require these efforts.

Not only did such outreach enable the bar to know what was on the Committee’s plate, it also permitted the Committee to learn about what was happening in the practice. A striking example emerged in the January 1997 mini-conference on possible amendments to the discovery rules (which ultimately led to the 2000 discovery amendments). The list of ideas on display was somewhat a “plain vanilla” collection of changes, but the lawyers in attendance wanted to talk about something new and different—discovery of email. Many of them were literally tearing their hair over this problem. Several buttonholed me (as the Reporter who worked on discovery) to urge that the rules should make clear that email fell within Rule 34’s “document” production requirements. They were having trouble too often getting their clients to understand that this material was subject to discovery.<sup>93</sup> But for the outreach efforts, the Committee might not have gotten wind of these problems until much later.

Learning that there is a problem does not mean, however, that there is a rule-based solution, or show what that solution might be. To take e-discovery as an example, vehement as the lawyers were that *something* should be done, they were perplexed about what that something should be. The Discovery Subcommittee convened two mini-conferences during 2000 to examine possible rule changes responsive to this new (and rapidly changing) discovery challenge, but eventually concluded that circumstances were too fluid and uncertain to confect a rules-based solution at that time. Only at the end of 2006 (nearly a decade after the problems were first raised in January 1997) did the “e-discovery amendments” to the rules come into effect. And even then, the challenge of social media discovery lay almost entirely in the future.

The 1988 Act did command the Committee to publish draft amendments and hold hearings about them as well as inviting written comments. This requirement has sometimes seemed a chore (particularly for Reporters tasked with preparing summaries of the comments). But it was also an important

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<sup>91</sup> Burbank & Farhang, *supra* note 38, at 1591.

<sup>92</sup> For a list of early events of this sort, see Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 918 n.102 (2002).

<sup>93</sup> For a chronicle of these early efforts, see generally Richard L. Marcus, *Only Yesterday: Reflections on the Rulemaking Response to E-Discovery*, 73 FORDHAM L. REV. 1, 17 (2004) (detailing the challenges presented by adapting the rules of discovery to these technological changes).

safety valve. Recall the possibility that the drafters of the 1983 amendment to Rule 11—who did not have the benefit of the fulsome public comment period required by the 1988 Act—seemingly did not foresee the effect the amendment would have.<sup>94</sup> Hearings focus the mind and the Committee in ways that permit at least some such consequences to be discovered before they become a major force in litigation.

The first set of hearings I attended as Reporter in 1998-99 offers one example—two provisions in the amendment package that lawyers told us were linked though the Committee had not appreciated this argument would be made. One was an amendment to Rule 26(b)(1) (eventually adopted in 2000) to redefine the scope of discovery as initially limited to material “relevant to any party’s claim or defense,” rather than to anything relevant to the “subject matter” of the action, as previously provided. But the amendment allowed the judge to expand the scope to the “subject matter” limits on a showing of good cause. The other was framed as an amendment to Rule 34 that would authorize a judge to permit “disproportionate” document discovery if the requesting party would bear the cost of that additional discovery. As conceived, these proposed amendments were entirely separate. Yet lawyer after lawyer (from both the plaintiff and defendant side of the bar) told us in the hearings that whenever a judge found good cause to expand discovery to the subject matter limit under amended Rule 26(b)(1), that should automatically trigger the cost-bearing provision in the proposed amendment to Rule 34.

That reading of the amendment proposals mis-conceived their purpose. A judge’s decision that there was good cause to expand the scope of discovery would be the reverse of a decision that the proposed discovery was disproportionate. So redrafting of the Committee Notes ensued, though ultimately the Rule 34 proposal was not adopted and the issue vanished. Only with this insight from the hearing process could the Committee have appreciated and responded to what might otherwise be coming. This sort of insight is fairly familiar to rulemakers, and the resulting clarifications can avoid problems later on.

In somewhat the same vein, the witnesses that appear at hearings, along with the public comment process, help to sharpen the Committee Notes that accompany rule amendments. Unfortunately, the Supreme Court (or at least Justice Scalia) sometimes treated such explanatory material as the same as congressional legislative history, which Justice Scalia did not respect.<sup>95</sup> It may

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<sup>94</sup> See *supra* text accompanying notes 57-58.

<sup>95</sup> For discussion of Justice Scalia’s attitude toward Committee Notes, see Catherine Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1157 (2002). As Professor Struve notes there, Scalia argued that “there is no certainty that either we

well be that legislative history is drafted after the fact and never reviewed by the legislators who vote on the legislation, but Committee Notes are quite different. As Professor Rowe (a member of the Committee in the 1990s) observed after his term on the Committee expired, “the members and Reporters—as well as the members of the public commenting on possible changes—devoted considerable attention to the explanatory notes as well as to the text of the proposed rules.”<sup>96</sup>

So the public comment requirement has served the Committee well. Indeed, as already noted, the Committee regularly goes beyond what the 1988 Act requires with mini-conferences and full conferences. Beyond that, it sometimes invites comments in an informal manner not called for by the Act. For example, in mid-2020 all the rules committees invited input from the public about litigation difficulties resulting from the COVID pandemic. And in connection with consideration of changes to Rule 30(b)(6), the Civil Rules Committee sought commentary on a half dozen ideas that had been raised.<sup>97</sup>

In sum, whether or not the rulemakers would have “gone public” on their own,<sup>98</sup> the 1988 Act was much more a boon than a burden. The arrival of hundreds of comments may demonstrate that something is more controversial than previously appreciated.<sup>99</sup> But at other times, outbursts of commentary do not seem warranted by the proposed amendments. A prime example, in my opinion, was the 2017 proposal to make two minor changes in Rule 30(b)(6). That amendment cycle nonetheless drew more than 1,780 public comments, about half of them in the last week.<sup>100</sup> They were so

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or [Congress] read [the Notes], nor is there any process by which we formally endorse or disclaim them.” *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment). On the other hand, as Professor Struve also points out, when Justice Scalia dissented from the 1993 amendment to Rule 11, he discussed the Committee Note as well as the rule itself. *See* Order of April 22, 1993, 146 F.R.D. 404, 508-09 (Scalia, J., dissenting in part); *see also* *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (Scalia, J.) (“It is the Rule itself, not the description of it, that governs.”).

<sup>96</sup> Thomas Rowe, *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 29 (2001).

<sup>97</sup> For a summary of those comments, see Advisory Comm. On Civ. Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. Cts. at 217-91 (Nov. 7, 2017), <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2017>. As noted below, this informal activity can produce untoward consequences; when a more limited set of Rule 30(b)(6) changes were formally proposed, much of the commentary focused on ideas that were left on the cutting room floor in part due to the comments described above.

<sup>98</sup> *See supra* text accompanying notes 86-88.

<sup>99</sup> Burbank & Farhang, *supra* note 38, at 1595 (“The fact that more than 2,300 comments were submitted on the preliminary draft of the 2013 proposed amendments shows that, notwithstanding repeated characterization of the proposals as ‘modest’ or ‘measured’ by some rulemakers and interest groups, they in fact have ‘trigger[ed] powerful interest group mobilization’ on both sides.”).

<sup>100</sup> Advisory Comm. On Civ. Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. Cts. at 201 (Apr. 2-3, 2019), <https://www.uscourts.gov/rules-policies/archives/agenda->

numerous and repetitive that I eventually had my research assistant compile a list of the topics raised and the names of the commenters that was included in the comment summary in the official agenda book.<sup>101</sup> Moreover, a large proportion of the comments were about ideas that had been considered (and identified in the informal invitation for input described above) but were dropped before the publication of a formal amendment proposal. Continuing to object to ideas that have been dropped is not helpful.

It is also worth noting that the volume of comments does not seem always to correspond to the value of the points they make. Indeed, on occasion we have seen both “sides” reaching out to their supporters with a pitch along the lines of “The other side is sending in hundreds of comments; we have to match them.” Perhaps that is how Congress weighs public comments, but volume is not often a prime consideration for the Advisory Committee. One thoughtful insight is worth more than a hundred “me too” comments.

### C. *Empiricism*

Ultimately, any rule proposal is an empirical guess or gamble. If it does not solve the problem it is designed to solve, it is a failure. If there really is not a problem, then making a change is risky business.

In the insulated world of pre-1988 rulemaking, the best that could be obtained was some form of “armchair empiricism,” and those in the armchair were often limited to those in the room.<sup>102</sup> Five years after the passage of the 1988 Act, Professor Burbank went so far as to call for a moratorium on rule amendments pending development of sufficient empirical information to support changing rules.<sup>103</sup> Four years later he acknowledged that the judiciary “has come to recognize the value of seeking empirical data before formulating new or amended Federal Rules.”<sup>104</sup>

The Advisory Committee not only can make outreach efforts<sup>105</sup> but it can also draw on the remarkable empirical research facilities of the Federal

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books/advisory-committee-rules-civil-procedure-april-2019. For more general summaries of those comments, see *id.* at 125-202.

<sup>101</sup> See *id.* at 193-202 (consisting of a memorandum from Lauren Lee to Richard L. Marcus).

<sup>102</sup> It's worth noting that before 1988 the rulemakers began outreach designed to invite additional perspectives. For discussion of the input the Committee received regarding the 1978 amendment proposal regarding the scope of discovery, see Marcus, *supra* note 40, at 758-59.

<sup>103</sup> Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841-842 (1993). Among others, he was commenting on my article *Of Babies and Bathwater: The Prospects of Procedural Progress*. *Id.*

<sup>104</sup> Burbank, *supra* note 24, at 242.

<sup>105</sup> See *supra* text accompanying notes 91-92.

Judicial Center (FJC).<sup>106</sup> In 1985, Judge Posner urged that all proposed procedural changes be tested before adoption.<sup>107</sup> Since the adoption of the 1988 Act, the Advisory Committee has increasingly drawn on the (limited) sort of data that FJC Research can provide, but there will likely not often be the sort of testing that Judge Posner endorsed.<sup>108</sup> In all likelihood, there will almost always be something of an “armchair” aspect to the Committee’s empirical focus. “[I]f procedural reform could only be adopted after being proved effective and safe in a manner similar to the way the FDA determines whether a new drug can be sold, it seems unlikely that there would be any formal procedural reform.”<sup>109</sup> Indeed, some of the most committed Realist empiricists struck out when they tried to investigate the actual effects of legal rules on human behavior.<sup>110</sup>

And for those who insist that no changes may be made in the rules without something approaching the “FDA Seal of Approval,” it suffices to note in response that the Liberal Ethos breakthroughs had no such support. Charles Clark was associated with the Realist movement, but it is difficult to find that he marshalled the sort of empirical data now urged to support the radical reset the rules introduced in 1938. In 1906, Roscoe Pound had even less, relying on a review of reported federal cases to support his (likely justified) claims of excessive adversarialness.<sup>111</sup>

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<sup>106</sup> See generally, Thomas Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002) (commenting on how and when the Committee has contacted the FJC for assistance in empirically examining the operation of the rules).

<sup>107</sup> See Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*, 53 U. CHI. L. REV., 366, 367 (1986) (“The success or failure of the procedure [change] must be verifiable by accepted means of (social) science hypothesis testing.”). It is worth noting that there was no such social science testing of the procedures already in place from 1938 forward.

<sup>108</sup> One effort somewhat along those lines is the “pilot project” in the Northern District of Illinois and the District of Arizona testing expanded initial disclosure provisions. See, e.g., Advisory Comm. On Civ. Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. Cts. at 357-94 (Oct. 29, 2019), [https://www.uscourts.gov/sites/default/files/2019-10\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf) (reporting on initial disclosure pilot projects in D. Az. and N.D. Ill.).

<sup>109</sup> Marcus, *supra* note 40, at 780.

<sup>110</sup> See John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195, 264-73 (1980) (describing how Professor Underhill Moore of Yale spent huge amounts of time and money in a failed effort to demonstrate the effect of parking laws on parking behavior in New Haven).

<sup>111</sup> See Pound, *supra* note 13, at 413-16 (describing results of Pound’s review of published appellate case reports). In the same vein, consider Pound’s additional observation as follows:

[O]ur American reports bristle with fine points of appellate procedure. More than four per cent. Of the digest paragraphs of the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely volumes 129 to 139, covering decisions of the Circuit Courts from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two case to the volume, on the average, turn wholly upon appellate procedure.

True, the 1970 discovery amendments had support from the careful empirical work of the Columbia Discovery Project.<sup>112</sup> But compare the 1966 revision and expansion of the class action rule. That was literally a leap into the unknown. The drafters wanted a secure mooring for civil rights injunction class actions,<sup>113</sup> but they had no empirical (v. policy) grounds for adopting the Rule 23(b)(3) “common questions” class action. And they certainly did not foresee where it would lead. Thus, though the amended rule did require judicial approval for settlement of class actions,<sup>114</sup> that was almost an afterthought, and the Committee almost certainly did not realize that settlement would be the principal mode of resolving class actions.<sup>115</sup>

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*Id.* at 410. Contemporary empiricists go well beyond reported cases in providing the Advisory Committee with empirical data.

<sup>112</sup> See WILLIAM GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968) (reporting the results of that empirical investigation).

<sup>113</sup> See FED. R. CIV. P. 26(b)(2). The Committee Note accompanying that 1966 amendment explained its focus: “Illustrative are various actions in the civil-rights field where a party is charged with discriminating against a class, usually one whose members are incapable of specific enumeration.” This explanation is followed by citation to eight cases, mainly involving desegregation of schools. See Committee Note to 1966 amendment to Rule 23(b)(2).

<sup>114</sup> See FED. R. CIV. P. 23(E) (1966) (“A class action shall not be dismissed or compromised without approval of the court, and notice of the proposal of the dismissal or compromise shall be given to all members of the class in such manner as the court directs.”).

<sup>115</sup> Thus, here is the entirety of the Committee Note about Rule 23(e) as adopted in 1966: “Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.” See Notes of Advisory Comm. On Rules, 1966 amendments to Rule 23(e). This one-liner stands in startling contrast to the Committee Note discussion of the handling of *litigation* classes, which was obviously what the framers thought would be the ordinary use of the rule.

This is not to say that the risk of misuse of settlements in class actions passed entirely unnoticed during the Advisory Committee deliberations in 1966. One of the members of the Committee then was John Frank, and the Committee’s records reveal that he vehemently pressed the Committee about settlement incentives in class actions under the revised rule, particularly the new Rule 23(b)(3):

Frank was particularly vexed with the insidious incentives that spurious [Rule 23(b)(3)] class actions, whose judgments bound class members, presented to class counsel willing to settle an action on less than the most favorable terms in exchange for an award of lucrative attorney fees. In his view, defendant companies would “sell” a settlement to the lowest bidder willing to settle a class action.

John Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. COLL. L. REV. 323, 335-36 (2005). This scenario came to be known as the “reverse auction”—the defendant would try to get the lawyers who brought class actions to “bid” against one another by agreeing to lower and lower settlements in order to obtain an award of attorney fees.

As all now recognize, the settlement class action, indeed class certification for settlement only, became the dominant motif of post-1966 class action litigation. It gave rise to the possibility that Rule 23 could by this means rewrite tort law. See Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 859 (1995). Only in 2003, was additional detail added to Rule 23(e), and that was bolstered by further expansion of the settlement-approval provisions accomplished by amendments in 2018. See Richard L. Marcus, *Evolution v. Revolution in Class Action Reform*, 96 N.C. L. REV. 903, 904-07 (2016). These amendments went into effect on December 1, 2018.

So for those in the twenty-first century to insist on an FDA quality empirical basis and quality testing for rule changes before existing rules are changed, there is the small question of why that which has been in place since the 1930s or the 1960s—the Liberal Ethos—gets a pass on empirical support.

#### D. *Operating in The Subcommittee Mode*

When he testified before the House Judiciary Committee in 1983, Judge Gignoux (then Chair of the Standing Committee) resisted the open meetings plank of proposed legislation:

The evident desire of some critics to require open meetings indicates, we feel, a misunderstanding of how the rules committees operate. The initial meetings of an Advisory Committee are “drafting sessions” at which proposals for changes in the rules are received from diverse sources and drafts of proposed rules amendments are prepared for public circulation. As a legislative analogy, the work at these meetings is similar to the drafting work done by a congressional committee staff prior to the introduction of a bill in Congress for public debate and scrutiny.<sup>116</sup>

The 1988 Act included the open meetings requirement notwithstanding, producing a number of benefits noted above. At the same time, the Advisory Committee has come to rely also on subcommittees to do much (certainly not all) of the sort of drafting work Judge Gignoux described. As summarized by Judge Kravitz (then chair of the Advisory Committee) in a 2008 memorandum to the Executive Committee of the Judicial Conference, the practice began after Judge Niemeyer became Chair of the Advisory Committee in 1996, when there were simultaneous intense efforts on class actions and discovery.<sup>117</sup> That practice has continued on a regular basis since.

In a sense, one might regard this subcommittee practice to provide the sort of preparatory activity that Judge Gignoux described. That drafting activity can be intense and last a long time. As Judge Kravitz pointed out in 2008, the draft amendment to Rule 56 that was ultimately published for public comment (as required under the 1988 Act) was the thirty-second draft considered by the Rule 56 Subcommittee.<sup>118</sup> There would likely be no way for the full Committee to give the sort of sustained attention required to work

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<sup>116</sup> Hearings on Oversight and H.R. 41440 Before Subcomm. on Cts, C.L., and the Admin. of Just. of the H. Comm. on the Judiciary, 98th Cong. 101 (1983) (statement of Hon. Edward Thaxter Gignoux regarding H.R. 4144).

<sup>117</sup> Advisory Comm. On Civ. Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. Cts. at 135 (Nov. 17-18, 2008), <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2008>.

<sup>118</sup> *Id.* at 137.

through that many drafts. The likely alternative might be for the Advisory Committee Chair to collaborate with the Reporters on the drafting, but involving a subcommittee is a much more productive way to identify and resolve issues. Often subcommittees reach consensus on drafting choices, which greatly facilitates the work of the entire Committee.

The work of the subcommittees is not done behind an impenetrable curtain. When they are substantive, subcommittee conference calls or meetings produce notes that are prepared and ordinarily included in agenda books for the full Committee's meetings, making those notes accessible also to interested observers.

To take a striking example of such material, consider the Rule 37(e) preservation issues that ultimately led to the 2015 amendment of that rule. The November 2011 agenda book included more than 400 pages of background material.<sup>119</sup> After full Committee discussions, the Discovery Subcommittee continued to work on the challenges of this set of issues. Thus, the agenda book for the November 2012 Advisory Committee meeting included seventy-four pages of notes on seven Discovery Subcommittee conference calls about drafting Rule 37(e) on sanctions for failure to preserve discoverable materials.<sup>120</sup>

And it is clear that at least some observers *do* attend to what is in those notes. On occasion, those notes are invoked in later submissions on the topic under consideration. So the subcommittee practice has both made the difficult drafting task in the "fishbowl" manageable and also provided the sort of public access that the 1988 Act sought.

The subcommittee method also enables outreach and something akin to empirical work, though largely of the "armchair" variety. Subcommittees often involve Advisory Committee members who have a particular interest in, or experience with, the issues under study (usually both). These subcommittee members can then gather information from other experienced lawyers and also assist in the design and initiation lists for mini-conferences, which are usually put on by subcommittees.

Those mini-conferences, in turn, generate information for agenda books to inform the rest of the Advisory Committee on the work that the subcommittee has done. One example is the September 11, 2015, mini-conference held by the Rule 23 Subcommittee about a multitude of issues under consideration for possible inclusion in a preliminary draft of

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<sup>119</sup> See generally Advisory Comm. On Civ. Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. Cts at 53-469 (Nov. 7-8, 2011).

<sup>120</sup> Advisory Comm. on Civ. Rules, *Jud. Conf. of the U.S., Agenda: Meeting of the Advisory Committee on Civil Rules* 137-210 (Nov. 1-2, 2012), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2012-10.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2012-10.pdf) [<https://perma.cc/4GQE-SQNL>].

amendments to Rule 23(e). Those issues had been under study by the entire Advisory Committee for several years, but not at the level of detail made possible by the mini-conference. And for the ensuing Advisory Committee meeting, the agenda book included twenty-three pages of notes on the discussions at the mini-conference and the fifty-three-page background memorandum provided to mini-conference participants.<sup>121</sup>

The intense study that the subcommittee method permits also can lead to a decision that pursuing a rule change is not warranted. A recent example is the question whether a rule should be adopted (perhaps on the model of Rule 23(f)) for interlocutory review of at least some “cross-cutting” issues in at least some multidistrict (MDL) proceedings (sometimes called “mega” MDLs). In part, this effort was assisted by submissions from interested parties.<sup>122</sup> Because the issues depended on a welter of competing considerations, the consideration was long and arduous. Ultimately, MDL Subcommittee members participated in about 15 conferences or meetings about this possibility across the country, and at least three conferences largely or solely focused on it. After all this work, along with careful examination of existing case law, the MDL Subcommittee members (including all Advisory Committee members engaged in active practice) unanimously recommended in October 2020 that work on this rule change idea be discontinued,<sup>123</sup> which the Advisory Committee accepted.

Despite the extensive disclosure via agenda books of what the subcommittees have been doing and regular review during full Advisory Committee meetings of these subcommittee efforts, the Subcommittee conference calls are not open to all, or regarded as subject to the openness mandate of the 1988 Act. For one thing, the customary advance notice called

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<sup>121</sup> See Advisory Comm. on Civ. Rules, Jud. Conf. of the U.S., *Agenda: Meeting of the Advisory Committee on Civil Rules* at 163-240 (Nov. 5-6, 2015), [https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf) [<https://perma.cc/N685-N4DG>].

<sup>122</sup> See Letter from John Beisner, Skadden, Arps, Slate, Meagher & Flom LLP, to Rebecca Womeldorf, Sec’y, Comm. on Rules of Prac. and Proc. (Nov. 21, 2018) (detailing in a twenty-one page report an empirical analysis of interlocutory review in MDL proceedings), [https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion\\_beisner\\_o.pdf](https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_o.pdf) [<https://perma.cc/Z9F6-7YHL>]; Letter from Brian Devine, Seeger Salvas & Devine LLP, to Rebecca Womeldorf, Sec’y, Comm. on Rules of Prac. and Proc. (June 25, 2019) (arguing, based upon a twenty-five page analysis of empirical information on interlocutory review in MDL proceedings, that “no problem exists that could be solved by [the] proposed rule”), [https://www.uscourts.gov/sites/default/files/19-cv-p-suggestion\\_devine\\_o.pdf](https://www.uscourts.gov/sites/default/files/19-cv-p-suggestion_devine_o.pdf) [<https://perma.cc/YH47-V9YN>].

<sup>123</sup> See Advisory Comm. on Civ. Rules, Jud. Conf. of the U.S., *Agenda: Meeting of the Advisory Committee on Civil Rules* at 154-60 (Oct. 16, 2020), [https://www.uscourts.gov/sites/default/files/2020-10\\_civil\\_rules\\_agenda\\_book\\_final.pdf](https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf) [<https://perma.cc/P6TZ-L98Y>].

for (via the Federal Register, for example) would not be possible. Subcommittee conference calls are arranged on short notice (and not always easily arranged, given the crowded schedules of busy judges and lawyers in different time zones). These conference calls permit tentative views to be shared, and also are occasions when drafting ideas can be floated without creating the impression that “the train has left the station” on a given amendment effort. It has happened that outside observers have asked to be permitted to listen in on these calls, but those requests have been politely declined.

In sum, the subcommittee practice that the Civil Rules Advisory Committee has adopted for the last quarter century provides both a method for the sort of intense drafting Judge Gignoux described and the public notice that the framers of the Act sought. It might even be regarded as a win/win response to the 1988 Act.

#### E. *A Possible Downside—Stickiness*

In 1987, Judge Posner referred to “[t]he ease and speed with which the Federal Rules of Civil Procedure can be amended by those whom Congress entrusted with the responsibility for doing so” as a reason for resisting arguments to “create new forms of judicial proceeding in the teeth of the existing rules.”<sup>124</sup> That was before the 1988 Act. In 1993, Judge Winter, then a member of the Advisory Committee, objected that “even amendments best characterized as trivial or incremental may encounter enormous resistance.”<sup>125</sup> Fifteen years later, I observed that “in this politicized environment almost everything is poisoned by suspicion; the most mundane of changes provoke strident over-reactions from those who suspect a malign hidden agenda.”<sup>126</sup>

Maybe that is not such a bad thing. Writing in 2015, Professor Burbank described Chief Justice Burger’s efforts in the 1970s to “retrench” via rule change as having a causal relation to the adoption of the 1988 Act: “[T]he attempts to use court rulemaking for retrenchment that he [Chief Justice Burger] encouraged caused a backlash, leading to changes in the Enabling Act Process (and the Enabling Act itself) that had the effect, and for some the purpose, of impeding retrenchment by Federal Rule.”<sup>127</sup>

Perhaps it is not coincidental that the initial disclosure draft rule amendment published for comment in 1991 (right after the adoption of the 1988 Act) produced “a flood of objections unprecedented in 50-plus years of

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<sup>124</sup> *Henson v. East Lincoln Township*, 814 F.2d 410, 414 (7th Cir. 1987).

<sup>125</sup> Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 263 (1993).

<sup>126</sup> Marcus, *supra* note 35, at 308.

<sup>127</sup> Burbank & Farhang, *supra* note 38, at 1562.

judicial rule-making.”<sup>128</sup> It was probably this outcry that Judge Winter had in mind in his objections quoted above.<sup>129</sup>

At least from some perspectives, then, “stickiness” (a political science term for difficulty in making change) may be a good thing. As a leading litigator has put it, “[f]or practicing lawyers (not to mention trial judges), relentless rulemaking is relentlessly inconvenient.”<sup>130</sup> From an academic perspective, stickiness might be attractive to the extent that it impedes change from the Liberal Ethos for procedure that was installed in the 1934-1970 era. But even those generally ill-disposed toward rule changes may welcome the ones that really matter. Thus, the lawyer who criticized “relentless rulemaking” also strongly endorsed serious attention to rule changes to address spoliation (as was done in Rule 37(e)).<sup>131</sup>

At the same time, stickiness can be overdone. On that score, one example might be the Rule 30(b)(6) project, dealing with depositions of organizational litigants. This project initially included discussion of a variety of ideas that were not ultimately in the preliminary draft published for public comment, which included only a directive that the parties confer about the matters to be subject to examination and the identity of the organizational representative to testify.<sup>132</sup> That is a pretty cautious proposal, particularly in comparison to some of the more aggressive ideas originally offered.

Notwithstanding, more than 1780 public comments were submitted, many dealing with topics not included in the actual published amendment proposal. Eventually, the directive to discuss the identity of the witness was not included in the amendment, which went into effect on December 1, 2020. It

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<sup>128</sup> Ann Pelham, *Judges Make Quite a Discovery: Litigators Erupt, Kill Plan to Reform Civil Rules*, L. TIMES, March 16, 1992, at 1.

<sup>129</sup> See Winter, *supra* note 125.

<sup>130</sup> Gregory Joseph, *An Instinct for the Capillary*, LITIGATION, Summer/Fall 2012, at 9.

<sup>131</sup> See *id.* (“Spoliation litigation is a prime example [of a major issue]. It is the sport of the century. It’s an extreme sport with often fatal consequences.”).

Mr. Joseph thought very differently of another Advisory Committee project—the restyling of the entire set of Civil Rules:

The rulemaking process too often displays an instinct for the capillary. I won’t get started on the whole notion of “restyling.” Rewriting every rule to say the same thing but with better syntax is a sort of a Lady Bird Johnson approach to rulemaking—the highway sits in exactly the same place but has been beautified. Is there someone who reads the rules for their syntax? Too much attention is devoted to minute refinements.

*Id.* What is striking about this comment is that Greg Joseph agreed to join Professor Burbank in an exceptionally valuable effort to review and evaluate that rewriting of the entire set of Civil Rules. See generally Advisory Comm. on Civ. Rules, Jud. Conf. of the U.S., *Agenda: Meeting of the Advisory Comm. on Civ. Rules* (Nov. 18, 2005), [https://www.uscourts.gov/sites/default/files/fr\\_import/CV2005-11.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV2005-11.pdf) [<https://perma.cc/5FN7-S5D3>] (containing the very detailed report compiled by Burbank and Joseph and the blue ribbon consortium they assembled to perform that review). We are eternally grateful.

<sup>132</sup> See *supra* text accompanying notes 100-101.

will hopefully produce some positive change. It will not revolutionize 30(b)(6) depositions.

#### F. *The Alternative Route Through Congress*

Political scientists who speak of “stickiness” probably have Congress in mind. But on occasion Congress may become “unstuck” on procedural reform. To take an example from the same era as the 1988 Act, consider the Civil Justice Reform Act (CJRA) of 1990.<sup>133</sup> That called for each district in the nation to appoint a local CJRA Advisory Group.<sup>134</sup> It emerged from the Senate Judiciary Committee headed by then-Senator Biden.<sup>135</sup> As one of the aides to that Senate Committee put it, it represented a “users united” attitude to counterbalance the “near-mystical reverence of the rulemaking authority exercised by the Judicial Conference.”<sup>136</sup> In 1996, Professor Geyh noted “a startling transformation of the Judiciary’s role” due to the more active posture of Congress.<sup>137</sup> Indeed, representatives of Congressional judiciary committees sometimes take the initiative to influence the Advisory Committee’s work.<sup>138</sup>

It can sometimes seem that Congress—or at least one house of Congress—is a bit *unsticky*. One example is the Fairness in Class Action Litigation Act of 2017.<sup>139</sup> This legislation included many aggressive changes to class action practice and a variety of new provisions for MDL litigation that corresponded to topics under study by the MDL Subcommittee of the

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<sup>133</sup> See Marcus, *supra* note 115, at 800-05 (commenting on the “sudden appearance and passage” of the CJRA).

<sup>134</sup> *Id.* at 801 (reporting that since 1990, all ninety-four federal districts had created Advisory Groups that study local docket conditions and develop district plans to cope with litigation expense and delay). I admit to having served as Reporter of the Northern District of Cal. Advisory Group for several years.

<sup>135</sup> See Jeffrey Peck, “Users United”: *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 105 (1991) (“Across the country, federal district courts have been implementing the Civil Justice Reform Act of 1990 (‘the CJRA’ or ‘The Act’), widely referred to as the ‘Biden Bill’ in recognition of its principal sponsor, Senator Joseph R. Biden, Jr. (D. Delaware), chairman of the Senate Judiciary Committee.”).

<sup>136</sup> *Id.* at 117.

<sup>137</sup> Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996).

<sup>138</sup> See Richard L. Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV., 615, 616-17 (2014) (contrasting letter from member of House Judiciary Committee to the Advisory Committee urging constraints on discovery, with the November 5, 2013 hearing before the Senate Judiciary Committee criticizing the package of discovery amendments the Advisory Committee had actually published as possibly imposing undue constraints on discovery).

<sup>139</sup> H.R. 985, 115th Cong. (2017).

Advisory Committee.<sup>140</sup> It was introduced on a Thursday. By the following Tuesday morning, a letter from the Chairs of the Advisory Committee and the Standing Committee reporting many concerns about the proposed legislation was hand delivered to the chairs and ranking minority members of both the House and Senate Judiciary Committees.<sup>141</sup> Notwithstanding that commentary (and other commentary), and without regard to efforts by Democratic members of Congress, no hearings were held on this bill. And the bill did not receive unanimous support from Republican House members. To the contrary, a group of Republican representatives called the House Liberty Caucus issued a statement opposing it.<sup>142</sup> Nevertheless, the House passed the bill about a month after it was introduced, without holding any hearings.<sup>143</sup> The Senate did not act on the bill, however. At least in this instance the Senate was sticky even though the House was not.

So rulemaking may sometimes be stickier than Congress. The topics addressed in the 2017 bill passed by the House were closely examined by two Advisory Committee subcommittees—the Rule 23 Subcommittee and the MDL Subcommittee. The actual Rule 23 changes that went into effect in 2018 were not nearly as aggressive as those in the bill. And the MDL Subcommittee has not yet concluded that any rule changes are warranted despite giving intense attention to various topics addressed in the 2017 House bill. If, as Professor Burbank has put it, the Enabling Act is a “treaty” between Congress and the rulemakers,<sup>144</sup> it may sometimes seem that Congress is not adhering to the treaty.

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<sup>140</sup> For discussion of this bill, see Howard M. Erichson, *Searching for Salvageable Ideas in FICALA*, 87 *FORDHAM L. REV.* 19 (2018) (“The bill represents the most aggressive attempt in recent memory to dismantle the apparatus of mass litigation through procedural reform”).

<sup>141</sup> See Letter from Judge David Campbell, Chair, Comm. on Rules of Prac. and Proc. and Judge John Bates, Chair, Advisory Comm. on Civ. Rules, to Hon. Robert Goodlatte, Chairman, House Comm. on the Judiciary (Feb. 14, 2017) (criticizing H.R. 985, the Fairness in Class Action Litigation Act of 2017, for amending the federal rules “by legislation rather than through the deliberative process of the Rules Enabling Act.”). This letter is included in the Supplemental Materials for the June 12-13, 2017, meeting of the Standing Committee 40-42 (available at [www.uscourts.gov](http://www.uscourts.gov)), and can also be found with a Google search. Despite the reservations expressed by Judges Campbell and Bates (and others), the House passed the bill in March 2017 without holding a hearing. The Senate did not act on the bill.

<sup>142</sup> See Marcus, *supra* note 115, at 939 n.196 (2016) (quoting the House Liberty Caucus’s Letter that class action lawsuits are “a preferable alternative to government regulation because they impose damages only on bad actors rather than imposing compliance costs on entire industries.”). For a thorough argument favoring private litigation via the class action to government regulation, see BRIAN FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 58-73 (2019) (arguing that conservatives should favor use of class actions because they depend on private initiative rather than action by government).

<sup>143</sup> See Erichson, *supra* note 140, at 19-20.

<sup>144</sup> See *supra* note 24 and accompanying text.

## CONCLUSION

Compared to the Second Founding of the post-Civil War era, Rulemaking's Second Founding has been a signal success. Indeed, both Professor Foner<sup>145</sup> and Professor Woodward<sup>146</sup> referred to the civil rights revolution of the 1950s and 1960s as a "Second Reconstruction" because the Second Founding did not work. Perhaps it never could have worked; the Panic of 1873 and resulting depression likely guaranteed what did happen in 1877—the end of Reconstruction and what can be seen as the North's abandonment of the promises embodied in the thirteenth, fourteenth, and fifteenth Amendments. Only with the Warren Court did those return toward the fore. We continue to have unfinished business on these fronts today.

Rulemaking's Second Founding, on the other hand, has endured and produced positive effects. Had all the ideas mentioned during the process leading up to the 1988 Act actually been included in the legislation that was adopted, it might be a great deal more difficult to take this view of it.<sup>147</sup> But perhaps my judgment is pollyannish. As Professor Burbank said about me with regard to an article on rulemaking I wrote nearly twenty years ago, "he remains, for my taste, a bit too old-fashioned in the apparent nostalgia he feels for the simpler days when the experts controlled the process, Congress was essentially indifferent to it, and everyone had to live with the results."<sup>148</sup> Well, some things never change. With gratitude to Professor Burbank, I look forward to continuing to operate under the regime of Rulemaking's Second Founding.

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<sup>145</sup> See Foner, *supra* note 1, at 169.

<sup>146</sup> See C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 107 (1960).

<sup>147</sup> I have in mind Rep. Holtzman's proposal that no rule amendment take effect without an affirmative vote of Congress. She proposed that the authority to adopt rule changes be moved from the Supreme Court to the Judicial Conference, but also the following new 28 U.S.C. § 2074(f): "Rules adopted under this chapter shall not take effect until they have been approved by Act of Congress." See Cong. Rec. – House, Jan. 15, 1979, at 65. The enormous effort involved to get FED. R. EVID. 502 enacted by Congress stands as a caution against any such requirement for action by Congress.

<sup>148</sup> Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. UNIV. L.Q., 705, 720 (2002). He added that the 2002 article was "informed and judicious—one might even say old-fashioned," but explained in a footnote: "This is a compliment." *Id.* n. 68.

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