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## ARTICLES

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### PROCEDURE, POLITICS AND POWER: THE ROLE OF CONGRESS

*Stephen B. Burbank\**

#### INTRODUCTION

It is a privilege and a source of great personal satisfaction to participate in a festschrift honoring David Shapiro, whose influence on the fields of federal courts and civil procedure—through his scholarship, teaching, and collegueship—has been pronounced, enduring, and thoroughly constructive. Equipped with a penetrating intelligence and a wry sense of humor, David is a brilliant scholar, a thoughtful and subtle critic, a generous colleague, and a loyal friend.

David seems always to bring out the best in those around him, encouraging the search for truth, gently deflating pretension, and, by force of luminous example, demonstrating that the path to progress lies neither in raw power, intellectual or political, nor in situational expedience, but rather in hard work, in good faith, for the common weal. His is the voice of sweet reason. David's quiet and courageous example in confronting and mastering health problems has inspired those who regard him as a mentor, as I do, reminding us how fortunate we are to hear that voice and how important it is to listen.

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\* David Berger Professor for the Administration of Justice, University of Pennsylvania Law School. This Article elaborates presentations made at a June 2003 Conference on Civil Procedure sponsored by the Association of American Law Schools and at an Ad Hoc Faculty Workshop of the University of Pennsylvania Law School. I particularly appreciate the comments and suggestions of Morris Arnold, Lawrence Baum, Edward Becker, Charles Geyh, Nathaniel Persily, Louis Pollak, Judith Resnik, Kim Scheppele, Anthony Scirica, Catherine Struve, and Stephen Subrin. Peter McCabe, John Rabiej and James Ishida of the Administrative Office of the United States Courts patiently responded to numerous questions. Andrew Bradt, Harvard Law School class of 2005, provided excellent research assistance.

It may seem odd to dedicate an article about procedure, politics and power to a scholar so prominently associated with great traditions of legal scholarship—and in that sense, so old-fashioned—as David Shapiro. Yet, the opportunity to write on this subject in his honor seemed to me a fine way to emphasize what is wrong with the picture of procedural lawmaking for the federal courts that emerges from this work. To be sure, my approach is not, or at least not exclusively, old-fashioned in the above sense, since I attempt to deploy the insights of disciplines in addition to law. At the end of the day, however, my conclusions resonate with the lessons of David's life in the academy: neither unvarnished power nor unvarnished reason is the answer to our current dilemmas, and if we sincerely desire progress in the public interest, rather than personal, partisan, or institutional advantage, we must proceed with respect for others and for our traditions, and with humility.

If one is to reckon with power, it is necessary to know where it lies and to take its measure. For that reason, in Part I of this Article, I seek to identify the seats of power with respect to federal procedural law and to do so without romance. A clear-eyed view that is informed by precedent and history leaves little doubt that Congress holds the cards and that the questions of moment are, therefore, whether, when, and after what process of consultation, it should play them.

I turn in Part II to a brief history of the congressional role in fashioning procedural law for the federal courts, hoping thereby to tap *its* power in helping us to understand the past and to navigate the future. A broad historical view—one that does not proceed as if history began in 1934 and ended in 1973—confirms the analysis in Part I and, by revealing the changes that have taken place over the long run, lays the groundwork for a better understanding of the causal influences and normative implications of those changes.

With these preludes to the main event, I devote most of my effort, in Part III, to trying to tease out what has changed, and why, in the relationship between Congress, the federal courts, and the federal judiciary in the regulation of procedure. I perceive important changes in (1) the ways in which procedure is viewed by the bar, the academy and the public, affecting the jurisprudential and political landscapes of which Congress and the federal judiciary (and also the Executive Branch) are a part and to which they respond; (2) the rulemakers, their identity and interests, and the rulemaking process; and (3) Congress's ability and incentives to monitor procedural lawmaking by the judiciary and to make such law itself. Intersecting with, and at critical points contributing to, all of these changes are others that I also dis-

cuss, including changes in the bar and in the federal judiciary as an institution.

Much as I admire David and have benefited from his scholarship and counsel, there is no mistaking our personalities or our scholarly voices. We have forged different paths, and in different ways, to our respective visions of the truth. I am mindful, therefore, that he will not agree with some of what is set down here. Particularly because this is a work in progress, part of an ongoing project on procedure and power, I can only hope to be worthy of his continuing counsel, as I know I will be blessed with his continuing friendship.

## I. THE SEATS OF POWER

Careful consideration of judicial independence from an interdisciplinary perspective has prompted recognition of the weakness of the federal judiciary's defenses against congressional determination to control or influence its decisions. Life tenure subject only to removal from office through the impeachment process, protection against diminution of compensation while in office, and the other protections of Article III, such as they are,<sup>1</sup> leave Congress free, were it so inclined, to use a host of other methods to work its will: from court stripping, to court packing, to jurisdiction stripping or other jurisdictional regulation, to refusal to authorize (or fill) judgeships required to keep pace with a growing workload, to slow budgetary starvation.<sup>2</sup>

Fortunately, over the years since the Founding, Congress has rarely used the blunt instruments that are available, and when it has done so, there has usually been wide-spread agreement that such use

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1 "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. As to the "other protections," see Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 325-26 (1999).

Apart from habeas corpus and the jurisdiction of the Supreme Court, which have special status under the Constitution, if we accept the inviolability of a final federal judgment in a particular case, on the one hand, and Congress' power to change substantive federal law prospectively, on the other, the scope of debate regarding changes in the jurisdiction or powers of the federal courts that would implicate core federal judicial independence should be confined to (1) the judicial power to interpret and implement the Constitution, and (2) the irreducible powers of federal courts to act as such.

*Id.* (footnotes omitted). For a recent decision falling between the two hands, and upholding congressional power to impose an automatic stay of prospective injunctive relief in prison conditions litigation, see *Miller v. French*, 530 U.S. 327 (2000).

2 See Burbank, *supra* note 1, at 318-26; Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 327-29 (2003).

was a mistake. Indeed, it seems plausible that, as Professor Geyh has argued, there have developed constitutional customs or norms against the use of most of these instruments of power—customs or norms that, on a realistic view, may be more important to the actual health of federal judicial independence than the formal protections the Constitution affords.<sup>3</sup> It also seems plausible that the practical unavailability of blunt instruments to control or influence the federal judiciary is one reason for the greater perceived importance of the appointment process for federal court judges, as to which a custom or norm of senatorial acquiescence in presidential nominations has never developed.<sup>4</sup>

The same careful consideration of the seats of power is important when the subject is not federal judicial independence but the regulation of procedure in the federal courts. Indeed, the two subjects may be related.<sup>5</sup> Moreover, just as understanding judicial independence requires careful unpacking, so, in considering the status and relationship of the respective powers of Congress, the federal courts, and the federal judiciary in the regulation of procedure, precise analysis requires numerous distinctions. The inability to perceive (or acknowledge the importance of) such distinctions is one reason why some discussions of the question, and in particular of the role of the inher-

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3 See Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 160, 162 (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter JUDICIAL INDEPENDENCE]; see also Stephen B. Burbank & Barry Friedman, *Introduction*, in JUDICIAL INDEPENDENCE, *supra*, at 5–6; Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Congressional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153 (2003) [hereinafter Geyh, *Congressional Norms*].

[T]he formal protections of judicial independence in the Constitution are dwarfed by those formal powers that could be used to control or influence decisions, and informal arrangements and understandings reached in their shadow may be far more significant to the quantum and quality of federal judicial independence (and accountability).

Burbank, *supra* note 2, at 336.

4 See Geyh, *Congressional Norms*, *supra* note 3, at 211–20; Stephen B. Burbank, *Politics, Privilege and Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24 (2002). Professor Geyh is developing his work further in a book.

5 See Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 991 (1996) (“The power over the procedural environment in which cases are heard and decisions are rendered is probably the power that is nearest the core of institutional judicial independence.”); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 734 (1995) (“A judiciary that cannot create its own procedural rules is not an independent judiciary.”).

ent powers of federal courts, are so thoroughly unsatisfactory.<sup>6</sup> Another reason may be the incentive of any institution (and of those who champion that institution) to prefer ambiguity when clarity might diminish its power or prestige.<sup>7</sup>

The critically important distinctions for these purposes are those (1) between procedure fashioned (or applied as precedent) in decisional law and that provided prospectively in court rules, (2) between local court rules (for the regulation of proceedings in the promulgating court) and supervisory court rules (for the regulation of procedure in inferior courts), and (3) between inherent power in the weak sense (the power to act in the absence of congressional authorization) and inherent power in the strong sense (the power to act in contravention of congressional prescription).

The lawmaking powers of Congress under Article I, including its powers under the Necessary and Proper Clause in aid of its own powers and of the Article III judicial power, enable Congress to make prospective law throughout the broad field of procedure.<sup>8</sup> This has been the consistently held and oft-articulated view of the Supreme Court since at least 1825,<sup>9</sup> which means that, even if the Court's statements

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6 See, e.g., Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1319–22 (1993). In my view, the best articles remain Felix Frankfurter, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924); Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459 (1937); and A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958). For an admirably careful recent effort, see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

7 See Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002).

8 "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8. The "foregoing Powers" include, in turn, the powers both to enact rules of substantive law in areas of federal competence and to "constitute tribunals inferior to the supreme Court." *Id.* Note, moreover, that some statutory procedural provisions can be justified without reference to the Necessary and Proper Clause. For a recent decision upholding a statutory ban on the discovery or admissibility of certain information as a proper exercise of Congress's Commerce Clause power, see *Pierce County v. Guillen*, 537 U.S. 129 (2003). The Court found that it was not necessary to reach the question whether the provisions in question "could also be a proper exercise of Congress' authority under the Spending Clause or the Necessary and Proper Clause." *Id.* at 147 n.9.

9 See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965); *Sibbach v. Wilson*, 312 U.S. 1, 9–10 (1941); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

are, as a scholar has claimed, dicta,<sup>10</sup> they are very old and tenacious dicta. They are also surely correct as a matter of constitutional law. Indeed, the puzzle is not where Congress gets its power, but rather, particularly in the case of supervisory court rules, how the exercise of a power to promulgate prospective, legislation-like rules can be squared with the grant of judicial power in Article III.<sup>11</sup>

This probably helps to explain why, although (as of 1982) the Supreme Court had "never satisfactorily explained . . . the place of court rulemaking in our constitutional framework,"<sup>12</sup> it had consistently espoused the view that Congress may delegate its legislative power over procedure, and that Congress did so in the various enabling acts granting rulemaking power to federal courts.

[The theory of delegated legislative power] has not easily won acceptance in the literature. During the campaign for the uniform federal procedure bill and the national movement for court rulemaking, arguments were increasingly made that courts possessed the inherent power to regulate procedure by court rules and to do so even in the teeth of contrary legislative direction. To be sure, such arguments often reflected the passion of the reformer more than the detachment of the scholar, ignoring distinctions between local and supervisory rules of court and between rules of court promulgated in a legislative vacuum and rules of court contravening statutes; but they were, and are, persistent.<sup>13</sup>

10 See Mullenix, *supra* note 6, at 1327-28.

11 See JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 44-55 (1977). Note that this discussion concerns prospective procedural lawmaking, not procedure fashioned (or applied as precedent) in the context of deciding a case.

12 Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1115 (1982).

The Supreme Court has never satisfactorily explained—indeed it has hardly discussed—the place of court rulemaking in our constitutional framework. The early cases, starting with *Wayman v. Southard*, in which the sources and limits of the rulemaking power were treated, set a pattern of ambiguity that has not been departed from. Not even the power of federal courts to regulate procedure by court rules in the absence of legislative authorization, power assumed to exist in the 1926 Senate Report [on the bill that became the Rules Enabling Act of 1934], is made clear in those cases, and it has not been made clear since.

*Id.* (footnotes omitted).

13 *Id.* at 1116 (footnotes omitted); see *id.* at 1021 n.19. Perhaps this is not surprising, given the controversy surrounding legislative delegation more generally.

The reader should recall that those who framed our system of government adopted no explicit limitations on the scope and manner of legislative delegation. Madison and his contemporaries foresaw little danger from congressmen giving up too much of their power . . . Dangers arising from the natural inclinations of legislatures understandably received attention,

The intervening twenty years since these words were written have witnessed a major decision exploring (and, one would have thought, clarifying) the constitutional landscape of rulemaking, but that has not weakened the resistance of some to the evident implications of the dominant theory of court rulemaking when the existence of power has been more than a theoretical question. Alas, the passage of time also has not improved the quality or detachment of the arguments against the traditional theory.

Whatever else one may think about the Court's decision in *Mistretta v. United States*,<sup>14</sup> it would appear to make legally untenable the notion that court rulemaking is an inherent judicial power. To the contrary, the Court was at pains to justify court rulemaking as not "inherently nonjudicial,"<sup>15</sup> and thus as capable of being delegated to the judiciary. "[R]ulemaking power," the Court acknowledged, "originates in the Legislative Branch and becomes an executive function only when delegated by the Legislature to the Executive Branch."<sup>16</sup> By parity of reasoning, it becomes a judicial function only when delegated by the legislature to the judicial branch.<sup>17</sup>

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whereas those arising from legislatures acting contrary to their supposed natural inclinations were ignored.

Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J.L. ECON. & ORG. 33, 35 n.4 (1986).

14 488 U.S. 361 (1989). For critical commentary, see, for example, Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DEPAUL L. REV. 299 (1989).

15 *Mistretta*, 488 U.S. at 386.

16 *Id.* at 386 n.14; cf. *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731 (1980) (holding that "in promulgating disciplinary rules the Virginia Supreme Court acted in a legislative capacity" and thus was entitled to absolute legislative immunity).

17 See *Mistretta*, 488 U.S. at 392.

To be sure, *all rulemaking* is nonjudicial in the sense that rules impose standards of general application divorced from the fact situation which ordinarily forms the predicate for judicial action. Also, this Court's rulemaking under the enabling acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.

*Id.* (emphasis added). For scholarly commentary that misses the Court's point, and thus its reference to "all rulemaking," see *infra* note 19.

It appears that the Supreme Court, acting as rulemaker, gave an advisory opinion to the original advisory committee on the constitutionality of entering judgment notwithstanding the verdict without the consent of the parties or the jury. See Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L. REV. 5, 29 (1938).



Undeterred, in a series of articles in the 1990s Professor Mullenix argued that the Civil Justice Reform Act of 1990 (CJRA)<sup>18</sup> both authorized unconstitutional rulemaking and was itself an unconstitutional abridgment of separation of powers.<sup>19</sup> These articles give scant attention to history, or at least history before 1934.<sup>20</sup> Thus, Senator Thomas Walsh, who for twenty years successfully opposed the bill that ultimately became the Rules Enabling Act of 1934,<sup>21</sup> would not be the only person astonished to learn that the bill he opposed (and that was ultimately enacted) “governs and limits congressional rulemaking”<sup>22</sup> or that it contains a “central prohibitive feature . . . : that Congress may enact substantive laws, but that the judicial branch promulgates procedural rules.”<sup>23</sup> The supporters of the bill would also be astonished.<sup>24</sup> The heart of the difficulty with these articles, however, is

18 Civil Justice Reform Act (CJRA) of 1990, Pub. L. No. 101-650, 104 Stat. 5089. Virtually all of this legislation has now expired. See Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541 (2002).

19 See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 427 (1992); Mullenix, *supra* note 6; Mullenix, *supra* note 5. The last of these articles is a response to Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697 (1995).

20 See, e.g., Mullenix, *supra* note 5, at 745–46.

21 Senator Walsh’s “expressed doubts about the validity of supervisory rules of court even when authorized by Congress remained a threat to the entire enterprise throughout.” Burbank, *supra* note 12, at 1117.

22 Mullenix, *supra* note 19, at 427.

23 Mullenix, *supra* note 6, at 1312. See *id.* at 1330 (arguing that the Enabling Act codifies a constitutional limitation “that prevents Congress from compromising the constitutional independence of the judiciary by invading the inherent power of the judiciary to create rules of practice and procedure for the courts”). But see Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1472–83 (1994) (arguing that the CJRA does not violate separation of powers or statutory limits on congressional rulemaking). For an account of the legislative process yielding the CJRA that is radically different from that offered by Professor Mullenix (and in my view much more accurate), see John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551 (1999); *id.* at 555 (“Yet one of the CJRA’s most striking features is how often Congress deferred to the courts.”); and see also CHRISTOPHER E. SMITH, JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION 23–39 (1995).

24 See S. REP. NO. 69-1174, at 7 (1926).

But the bill proposed will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. On the contrary, Congress may revise the rules made by the Supreme Court, or *by legislation may modify or entirely withdraw the delegation of power to that body*. In that sense the bill is experimental. It gives to the court the power to initiate a reformed Federal

their failure to draw the distinctions referred to earlier, and to do so in the light of history.

Congress's power to prescribe procedure for the federal courts is shared with the federal courts to the extent that it covers matters subject to the power of the latter to make law when deciding cases, which is the only power that can without difficulty be deemed inherently judicial for these purposes under Article III. Moreover, Congress not only may choose to delegate its power to make prospective procedural law to the judiciary; it may choose to eschew both statutory procedural law and delegations to fashion court rules in favor of, and to displace federal common law (judge-made) procedure with, state law, borrowed as federal law. Congress has done both at various times since the Founding. Perhaps most important for present purposes, (1) I am not aware that the federal courts have ever promulgated either local or supervisory court rules for civil cases without legislative authorization;<sup>25</sup> (2) the Supreme Court never exercised its delegated power to promulgate supervisory court rules for actions at law, first conferred in 1792, prior to the Rules Enabling Act of 1934;<sup>26</sup> and (3) for more than sixty years, federal courts hearing actions at law were required to apply state procedural law, "any rule of court to the contrary notwithstanding,"<sup>27</sup> unless a federal statute provided a pertinent rule.<sup>28</sup>

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procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power.

*Id.* (emphasis added); see Burbank, *supra* note 12, at 1117; Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 851 n.79 (1993). For a strange interpretation of this passage (which the author selectively quotes), see Mullenix, *supra* note 19, at 427–28.

Of course, if supervisory court rulemaking were an inherent judicial power, congressional oversight might be unconstitutional. See *Miller v. French*, 530 U.S. 327, 343 (2000).

25 See Burbank, *supra* note 12, at 1036–40. This is not to say that court rules have never exceeded the authority conferred.

26 See *id.* at 1039–40.

27 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. This provision co-existed, however, with continuing statutory authority to fashion local rules "in any manner not inconsistent with any law of the United States . . ." Rev. Stat., ch. 18, § 918 (1878). See *Shepard v. Adams*, 168 U.S. 618, 625 (1898). According to Professor Dobie, the broad rule to be deduced from the cases . . . seems to be that the District Courts cannot by rules set at naught the Conformity Act as to the important substance and broad general methods of state practice, but that, as to what are deemed minor details and comparatively unimportant phases of procedure, the District Courts may make valid rules, when this seems necessary for the prevention of delay or the substantial administration of justice.

ARMISTEAD M. DOBIE, *HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE* 587 (1928).

More generally, unlike the judiciaries of some states,<sup>29</sup> the federal courts have very little inherent judicial power in the strong sense—power that prevails as against a conflicting legislative prescription. In order to qualify as such for a federal court the power must be “necessary to the exercise of all others.”<sup>30</sup> The federal courts do have substantial inherent power in the weak sense—power to make procedural law and “to provide themselves with appropriate instruments required for the performance of their duties”<sup>31</sup> *in the course of deciding cases*, in the absence of congressional authorization.<sup>32</sup> And it is true that one can find scattered assertions of inherent power to make procedural law by court rules, local and supervisory. Those assertions are toothless, however, both because they described a power in fact conferred by statute, and in any event because they never purported to describe

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Federal courts were thus also required to forgo at least some federal judge-made procedural law. To be sure, the Conformity Act of 1872’s direction to follow state law in “like causes” was tempered by the language, “as near as may be,” *see id.* at 584–85, but that hardly detracts from the historical improbability of an argument for inherent power to proceed *by court rules*, at least in contravention of statute.

28 *See, e.g.,* *Amy v. Watertown*, 130 U.S. 301, 304 (1889).

29 *See, e.g.,* Charles Gardner Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041, 1054–63 (1995); Helen Hershkoff, *State Courts and the “Passive Virtues”*: *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1867–74 (2001).

30 *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *see Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 799 (1987) (“However, while the exercise of the contempt power is subject to reasonable regulation, ‘the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative.’”); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

31 *Ex parte Peterson*, 253 U.S. 300, 312 (1920); *see also, e.g., Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–33 (1962) (recognizing an inherent power of court to dismiss *sua sponte* for failure to prosecute). Much as I admire the care, and much as I am in sympathy with the general tenor, of Professor Pushaw’s analysis of inherent power, *see Pushaw, supra* note 6, I am not sure that he adequately treats for these purposes the difference between rules formulated in the context of a case and prospective rulemaking, whether local or supervisory. I am also skeptical about his analysis of nonindispensable (beneficial) powers. *See id.* at 848–49. Functionally, our difference of view disappears the more generally one defines what he calls implied indispensable powers, and his definition seems very broad indeed. *See id.* at 847. In any event, one benefit of my approach is that it avoids line drawing that, perhaps inescapably, has the odor of essentialism. *See id.* at 855 n.620.

32 This power is cabined by supervisory court rules for the district courts and the courts of appeals. *See* FED. R. CIV. P. 83; FED. R. APP. P. 47; *cf. Link*, 370 U.S. at 631–32 (“It would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.”).

a power to proceed in the teeth of a statute.<sup>33</sup> One may even find that what appears to be an assertion of inherent power is merely an unattributed quotation from statutory authority.<sup>34</sup>

It is thus difficult, in light of history and doctrine, to justify federal local court rulemaking in civil cases as an exercise of inherent power even in the weak sense, both because court rulemaking ill fits within the category of judicial power to resolve cases or controversies under Article III, and because there have always been statutory authorizations when the federal courts have exercised such power. It is at least as difficult, but it has also never been necessary, to bring within that protection supervisory court rulemaking.<sup>35</sup> It is quite impossible

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33 See, e.g., *Christopher v. Brusselback*, 302 U.S. 500, 505 (1938) (dictum) (“Equity Rule 38 . . . was adopted in the exercise of the authority conferred on this Court by R.S. § 913, and of its own inherent power to regulate by rules ‘the modes of proceeding in suits of equity.’”); *In re Hien*, 166 U.S. 432, 436–37 (1897) (dictum) (“The general rule undoubtedly is that courts of justice possess the inherent power to make and frame reasonable rules not conflicting with express statute; but apart from that we think it is clear that the Court of Appeals was duly authorized by . . . the act creating the court . . . to make rules limiting the time of taking appeals . . . .”); Burbank, *supra* note 12, at 1115 n.455.

34 See Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1004 n.30 (1983).

Take, for instance, *Hecker v. Fowler*, 69 U.S. (2 Wall.) 123 (1865) . . . where the Court stated, “Circuit courts, as well as all other Federal courts, have authority to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.” *Id.* at 128 (emphasis added). The case is cited for the proposition that the federal courts possess inherent power to make rules. . . . Of course, even if the Court had been asserting inherent power, it was power subject to congressional override. But the Court was not asserting any inherent power at all. Rather, it was, in the italicized language, directly quoting the Act of September 24, 1789, ch. 20, § 17, 1 Stat. 73, 83.

*Id.* Professor Mullenix asserts that “[f]ederal courts have thus recognized a variety of powers as inherent, including the power to . . . promulgate rules of practice.” Mullenix, *supra* note 6, at 1321. In the footnote she cites *Hecker* and secondary literature relying on it, while noting in a parenthetical to a “*but see*” citation of the above article that I “refut[ed] [the] proposition that *Heckers* [sic] supports inherent rulemaking power in the federal courts,” and without assimilating the information I provided (elided from the above quotation) as to the correct name and date of decision of the case. *Id.* at 1321 n.187.

35 *But see* James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1602 (2001) (“Apart from the powers that inhere in the nature of courts as such, Article III may contemplate a special role for the Supreme Court of the United States as the constitutionally mandated leader of a hierarchical judicial department.”). Professor Pfander acknowledges that “[o]ne can hardly defend the promulgation of such rules [under the Enabling Act] as an in-

to carry an argument that either local or supervisory court rulemaking represents an exercise of inherent power in the strong sense and thus trumps a contrary legislative direction. To conclude otherwise is to ignore not only almost two centuries of Supreme Court precedent but also more than sixty years of experience under the Conformity Act of 1872. It is, moreover, to suggest that those who struggled so long and hard for the Rules Enabling Act of 1934 were wasting their time because the Court could have proceeded without congressional authorization and in the teeth of the Conformity Act.<sup>36</sup>

If Congress chooses to exercise its power, it has the last word on matters of procedure, subject only to the specific limitations of the Constitution (i.e., in the Bill of Rights) and to a limitation that, although difficult to phrase precisely, prevents Congress, as a matter of separation of powers, from depriving the federal courts of powers that are necessary for them to act as such—to function as courts exercising judicial power under Article III—when deciding cases.<sup>37</sup>

The fact that an actor has power does not mean that it should be exercised. Yet progress is not well served by accounts of either legal or

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stance of adjudication that fits within the jurisdiction of the Supreme Court.” *Id.* at 1602–03. “But,” he continues, “we have long grown accustomed to the idea that the Court’s judicial power embraces authority to fashion such rules, particularly pursuant to congressional delegation.” *Id.* at 1603. There are two problems with the latter formulation. First, the Court itself has been at pains, consistently since at least 1825, to disclaim any such theory of court rulemaking, including supervisory court rulemaking. See *supra* text accompanying notes 12–17. Second, as Professor Pfander elsewhere acknowledges, the Court has had statutory authority for its rulemaking from the beginning, see Pfander, *supra*, at 1601 n.365, which renders peculiar his use of the word, “particularly.” That usage would also be peculiar if the only point were that supervisory court rulemaking is not so “nonjudicial” as to render Congress’s delegations unconstitutional, the point that the Court was anxious to establish in *Mistretta*. See *supra* text accompanying note 15. Note, however, that this (very small) part of Professor Pfander’s article is avowedly speculative, and disagreement on this point does not detract from my admiration for the whole, which rescues *Marbury* from many of its critics by close attention to text and history.

36 Professor Wigmore, who suggested as much, should have stuck to evidence. See John H. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

37 See *supra* text accompanying note 30. A bill introduced in the House in February 2003 that would directly amend Appellate Rule 49 to require written opinions in certain cases, H.R. 700, 108th Cong. (2003), would present an interesting test of this limitation. Cf. *Miller v. French*, 530 U.S. 327, 350 (2000) (“[W]e have no occasion to consider whether there could be a time constraint [on judicial decisionmaking] that was so severe that it implicated these structural separation of powers concerns.”). Like most bills that would directly affect the judiciary’s powers and prerogatives, however, it is unlikely to go anywhere (there has been no reported action since it was referred to a subcommittee in March 2003). See *infra* text accompanying note 95.

political arrangements that obscure reality in wishful thinking or that confuse what is deemed normatively appropriate with that which the law or other instruments of social ordering provide or permit.<sup>38</sup> Such accounts are not only analytically unsatisfying; they may encourage reliance by those whose power is in question and hence lead to confrontation, with potentially serious consequences for the polity.<sup>39</sup> Ambiguity can be useful in connection with the ordering of institutional power as it can in the construction (in both sense of that word) of statutes.<sup>40</sup> It is not a scholar's job, however, to create ambiguity where none exists. If realism about procedure and power suggests inadequate defenses against improvident lawmaking, the answer lies in custom, dialogue, compromise, and statesmanship; it lies, in a word, in politics.<sup>41</sup>

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38 Cf. Burbank, *supra* note 2, at 333 (“[I]t simply will not do to read into constitutions protections that are not there or to pretend that informal norms will last forever.”).

39 See Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 231–32 (1997).

Far worse, however, is to tell Congress what it may hear as an assertion that it has no constitutional business concerning itself with matters that, notwithstanding the labels we affix to them, have attracted sustained political interest. In any event, the strategy [of the federal judiciary in opposing the CJRA] backfired, eliciting equally fatuous claims of exclusive legislative power in the Senate Report on the CJRA.

*Id.*

40 See Grundfest & Pritchard, *supra* note 7. The ambiguity that characterizes most invocations and discussions of “inherent judicial power” is also characteristic of cases and commentary involving the so-called “supervisory power.” See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1434 (1984) (“But the Court has never fully explored the source of and the inherent limitations on either its own supervisory powers or those of the lower federal courts.”); *supra* note 35; see also *United States v. Payner*, 447 U.S. 727 (1980).

41 See Stephen B. Burbank, *Making Progress the Old-Fashioned Way*, 149 U. PA. L. REV. 1231, 1234–35 (2001).

Fifteen years ago, “law is nothing more than politics” was a common refrain in law schools, and that view remains a staple of political science studies of human behavior. For [Judge Edward] Becker, the refrain is not a counsel of despair because for him, law is equally nothing less than politics: the art of seeking to improve the human condition through intelligence, patience, persuasion, and compromise.

*Id.*

## II. A BRIEF HISTORY OF THE CONGRESSIONAL ROLE

It is possible to tell the story of congressional regulation of federal procedure in many different ways. Acknowledging that any attempt to divide that history into discrete periods will inevitably be freighted with premises or assumptions that are disputable, it is probably not seriously misleading, at least for descriptive purposes, to work with three periods. Those periods are 1789 to 1934, 1934 to 1973, and 1973 to the present.<sup>42</sup>

### A. 1789 to 1934

The period from 1789 to 1934 was characterized by statutory directions to the federal courts to apply state procedural law,<sup>43</sup> either as of a certain date<sup>44</sup> or, after the Conformity Act of 1872,<sup>45</sup> dynamically, in civil actions at law, with delegations to the federal courts of the power to vary state procedure by local or supervisory rules.<sup>46</sup> The grants of local rulemaking power were circumscribed from time to time in areas of demonstrated friction, such as final remedies,<sup>47</sup> and

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42 Professor Geyh identified the same periods in discussing the *judiciary's* role in procedural rule reform. See Charles G. Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1184-91 (1996).

43 See, e.g., Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93-94; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

44 See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 32 (1825) (interpreting the Process Act of 1792 to require static conformity to state procedure as of 1789); Burbank, *supra* note 12, at 1037. In 1828, subject to the exceptions discussed *infra* note 47, the basic obligation of static conformity as of 1789 was continued for the original states, with static conformity required as of 1828 for states admitted between 1789 and 1828. See Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278. For states admitted after 1828, see Charles Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 445 (1930).

45 Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197; see Burbank, *supra* note 12, at 1039.

46 See Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518; Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278; Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; Act of Sept. 24, 1789, ch. 20, § 17(b), 1 Stat. 73, 83; I JULIUS GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 550-51 (1971) (documenting the debate leading to the Act of Mar. 2, 1793); Burbank, *supra* note 12, at 1037 n.90.

47 See Act of June 1, 1872, ch. 255, § 6, 17 Stat. 196, 197; Act of May 19, 1828, ch. 68, § 3, 4 Stat. 278, 281. The 1828 statute, which responded to the controversy caused by the Court's decision in *Wayman* avoiding the application of Kentucky debtor-relief legislation, required conformity to state law on "writs of execution and other final process issued on judgments" as of 1828 (rather than 1789 or the date of admission), with power to conform to (but not to vary) changes made in state law thereafter by court rule. The Conformity Act of 1872 contained a similar provision, applicable to both provisional and final remedies, requiring static conformity as of 1872, but with

the Supreme Court never exercised its power to promulgate supervisory court rules for actions at law.<sup>48</sup> The Conformity Act effectively withdrew most local court rulemaking power for actions at law and “enjoined continued inactivity” by the Supreme Court.<sup>49</sup>

During this first period, Congress authorized the federal courts to fashion procedural law for suits in equity and admiralty, including by local and supervisory court rules. Congress presumably eschewed conformity in equity because, even if it would have been desirable, “in 1789 equity was either non-existent or undeveloped in the courts of many of the states.”<sup>50</sup> Thus, the Temporary Process Act of 1789 provided that “the forms and modes of proceedings in causes of equity . . . shall be according to the course of the civil law . . .”<sup>51</sup> Under the Process Act of 1792, process and proceedings in equity were to be “according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law,” and they were made subject to alteration by both local and supervisory rules.<sup>52</sup> Procedure in federal suits in equity was governed by supervisory court rules promulgated by the Supreme Court from 1822.<sup>53</sup>

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the federal courts empowered to adopt subsequent state laws in general rules. Act of June 1, 1872, ch. 255, § 6, 17 Stat. 196, 197. For the historical circumstances and contemporary significance of the events prompting this legislation, see Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1322–33 (2000). For related controversies in Kentucky, see Theodore W. Ruger, “A Question Which Convulses a Nation”; *The Early Republic’s Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826, 835–55 (2004).

48 See *supra* text accompanying note 26.

49 Burbank, *supra* note 12, at 1040; see *supra* note 27 and accompanying text. The lower federal courts were, however, permitted to adopt post-1872 state laws on provisional and final remedies by court rule. See *supra* note 47. Moreover, the “Court’s authority to promulgate court rules in equity and admiralty was not affected by the Conformity Act of 1872 and was specifically continued by section 917 of the Revised Statutes of 1878.” Burbank, *supra* note 12, at 1040 n.105; see *infra* text accompanying notes 50–53.

50 RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 602 (5th ed. 2003) [hereinafter HART & WECHSLER]. See THE FEDERALIST No. 83, at 470–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

51 Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94.

52 Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

53 See 20 U.S. (7 Wheat.) xvii (1822). The Court brought out revised Equity Rules in 1842, see 44 U.S. (3 How.) xli (1842), and again in 1912. See 226 U.S. 627 (1912). For the history of admiralty procedure, see HART & WECHSLER, *supra* note 50, at 603–04. For supervisory Admiralty Rules, see 254 U.S. 671 (1921); 44 U.S. (3 How.) ix (1844). “The 1921 rules, in turn, were frequently amended until in 1966 admiralty procedure was merged with civil procedure.” HART & WECHSLER, *supra* note 50, at



Finally, the extent of statutory procedural law for the federal courts during the first period is a matter of perspective (as well as definition). Any generalization is hazardous without an independent review of the statute books. Failing that, lists of federal procedural rules trumping or not subject to the obligation of conformity that were compiled before the Rules Enabling Act of 1934<sup>54</sup> or before the Supreme Court acted thereunder<sup>55</sup> provide one basis for judgment. Yet, those compiling some such lists had an incentive to paint with a broad brush, whether to persuade others of the failure of the Conformity Act<sup>56</sup> or of the need for a comprehensive response to the Enabling Act's delegation.<sup>57</sup> Writing in 1928, Professor Dobie, who had no such incentive, observed that the Conformity Act "is easily the most important single statute in the field of procedure at law . . . and most of the law in that field turns on the applicability of its provisions. This

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604 (citing *Amendments to Rules of Civil Procedure*, 383 U.S. 1029 (1966)). On bankruptcy procedure, see *id.* at 604-05.

54 The Committee of the American Bar Association that led the campaign for Supreme Court rulemaking in actions at law for twenty years compiled a list of "fifty-odd notable exceptions to conformity." *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 514 (1920). Many of these exceptions were judge-made, however, and not required by federal statute. See *id.* at 525-27 app. E; see also Burbank, *supra* note 12, at 1041 n.109 (noting that the list became "standard fare in [the Committee's annual] reports"); *id.* at 1067-68 ("From 1920 through 1929, the core of the ABA Committee's annual report remained the same from year to year.").

55 See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 409-14 (1935).

Since Congress has legislated upon a large number of matters, such as the disregarding of defects of form and allowance of amendment, consolidation of cases of a like nature, when the right to litigate *in forma pauperis* exists, when and how service by publication may be had, the time when the defendant in a removed case must plead, and so on in a wide variety of situations, this last exception is a large one.

Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 451-52 (1935).

56 The existence of "statutory provisions regulating particular aspects of federal court procedure . . . rendering complete conformity to state law impossible, furnished an arrow in the quiver of those who sought to replace the Conformity Act of 1872 with rulemaking by the Supreme Court." Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, LAW & CONTEMP. PROBS., Summer 1994, at 103, 106 (footnote omitted).

57 "The power thus granted to the Court affords an unusual opportunity for introducing effective measures of reform in law administration into our most extended court system and of developing a procedure which may properly be a model to all the states." Clark & Moore, *supra* note 55, at 387.

is true, though numerous federal statutes control various details of that procedure."<sup>58</sup>

### B. 1934 to 1973

The second period, from 1934 to 1973, brought the long-sought delegated power to the Supreme Court to promulgate supervisory court rules for actions at law,<sup>59</sup> with authority (that was exercised) to combine them with the pre-existing supervisory rules for suits in equity<sup>60</sup> (the last revision of which, in 1912, both spurred the movement for the Enabling Act<sup>61</sup> and served as the primary model for the Federal Rules ultimately authorized thereby).<sup>62</sup> Congress did not block the originally proposed Federal Rules of Civil Procedure<sup>63</sup> or any sub-

58 DOBIE, *supra* note 27, at 584. A review of the chapter of his handbook analyzing procedure at law in the district courts reveals statutory regulation of the following subjects (or in the following areas), among others: process (form, service, and amendment); amendment of pleadings and remedies for defects of form; qualifications, selection, and waiver of jury; formal requirements of bills of exceptions; mode of proof; motions for new trial, and contempt. *See id.* at 591-658.

59 Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064; *see generally* Burbank, *supra* note 12.

60 For the provenance of section 2 of the Rules Enabling Act of 1934, which Chief Justice Taft drafted in 1923, *see* Burbank, *supra* note 12, at 1071-76.

61 *See* Thomas Wall Shelton, *Uniform Judicial Procedure Will Follow Simplification of Federal Procedure*, 76 CENT. L.J. 207, 208 (1913); *supra* note 53.

62 *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). In 1935, before it was clear whether the Supreme Court would choose to unite new supervisory court rules for actions at law with rules for suits in equity under section 2 of the Rules Enabling Act of 1934, Clark and Moore had noted that "there is at hand a substantial model for the new rules. The Federal Equity Rules of 1912 successfully accomplished their purpose in essential features and, in fact, embody for the equity practice the best of modern procedure, both English and American." Clark & Moore, *supra* note 55, at 394.

63 *See* Burbank, *supra* note 12, at 1178.

Since the Court [in *Sibbach v. Wilson*] acknowledged the attacks on Rule 35 in the 1938 House and Senate Hearings on the proposed Rules, its statement that "no effort was made to eliminate it" must be taken to characterize the results of the congressional review process. So viewed, the statement is, at best, misleading. The House Judiciary Committee recommended that the proposed civil rules be permitted to go into effect. In the Senate, on the other hand, a determined effort was made, supported by the Senate Judiciary Committee, not to eliminate one or more of the proposed Rules deemed substantive, but to postpone the effective date of the entire package so that Congress might give it "thorough study and examination." The effort failed in the Senate, in part, it may be assumed, because it came up in a "late hour of the session," and in part because the attitude toward the proposed Rules in the House made it unlikely that both bodies would agree.

sequent amendments to such Rules during this period, and the Supreme Court did not declare invalid any Federal Rule, having come close to doing so in the first case in which it considered the Enabling Act's limitations.<sup>64</sup>

After the Federal Rules were effective, most previously enacted statutory procedural law was either superseded (through the Rules Enabling Act's supersession clause)<sup>65</sup> or repealed in the 1948 revision of the Judicial Code,<sup>66</sup> or both, and Congress largely abstained from making new statutory procedural law.<sup>67</sup>

The honeymoon lasted for more than thirty years and produced subsequent grants of rulemaking authority for both criminal<sup>68</sup> and civil (e.g., appellate rules)<sup>69</sup> cases, as well as attendant supersession of

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*Id.* (footnotes omitted).

64 See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); Burbank, *supra* note 12, at 1028-32, 1176-84.

65 Section 1 of the 1934 Enabling Act provided that the rules "shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." Act of June 19, 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064 (codified at 28 U.S.C. § 2072(b) (2000)). See *Clinton v. New York*, 524 U.S. 417, 446 n.40 (1998). For the origins of and reasons for this provision, see Burbank, *supra* note 12, at 1052-54; see also 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, 1036-46; *infra* text accompanying note 82.

66 See JAMES WM. MOORE, MOORE'S JUDICIAL CODE ¶ 0.03(10), at 71-72 (1949). In a 1985 letter to the Chair of the House Judiciary Committee's Subcommittee on Courts and Administrative Practice, the Chair of the Judicial Conference's Committee on Rules of Practice and Procedure stated, "The Conference defers to your view that the supersession clause is probably unnecessary since the Judicial Code of 1948 eliminated the numerous federal procedural statutes which were the principal reason for the clause." Letter from Edward T. Gignoux, Chairman, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, to Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (Sept. 24, 1985), *reprinted in* H.R. REP. No. 99-422, at 44 (1985) [hereinafter 1985 HOUSE REPORT].

67 "Since the advent of the rules the result has been quite phenomenal. Notwithstanding many proposals, Congress has withstood all attempts to obtain passage of procedural statutes of any consequence. A search has turned up in the rules area only a single statute, one of no far-reaching import." Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 (1958) (footnote omitted).

68 See Act of June 29, 1940, Pub. L. No. 76-675, 54 Stat. 688. This rulemaking grant enlarged a previous grant, which had included only criminal proceedings after verdict. See Act of Feb. 24, 1933, Pub. L. No. 72-371, 47 Stat. 904.

69 See Act of Nov. 6, 1966, Pub. L. No. 89-773, § 1, 80 Stat. 1323, 1323 (extending rulemaking power under 28 U.S.C. § 2072 to admiralty and maritime cases, appeals in civil actions, proceedings for review of Tax Court decisions, and for judicial review or enforcement of orders of administrative agencies, boards, commissions, or officers).

statutory law.<sup>70</sup> Moreover, in 1958, two years after the Court discharged the advisory committee on civil rules, Congress gave to the Judicial Conference responsibility to “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”<sup>71</sup> and to recommend changes in and additions to those rules to the Court.<sup>72</sup>

### C. 1973 to the Present

In the third period, starting with the proposed Evidence Rules in 1973, Congress for the first time exercised its power to block and/or revise proposed Federal Rules promulgated by the Court under the Enabling Act,<sup>73</sup> doing so on a number of occasions thereafter, albeit usually proposed Criminal Rules.<sup>74</sup> On other occasions (as in 1983 and 1993) Congress seriously entertained objections to the validity, wisdom or fairness of proposed Rules but did not, for various reasons, block the proposed amendments.<sup>75</sup> Congress has also directly abro-

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For other rulemaking grants, see CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 63, at 433–35 (5th ed. 1994).

70 See Burbank, *supra* note 65, at 1044.

71 Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (2000)). The Conference has performed this responsibility through a standing committee and a variety of advisory committees. See WRIGHT, *supra* note 69, § 62, at 429. For the order discharging the advisory committee “with thanks” and revoking a previous (1942) order which had made that committee a continuing body, see 352 U.S. 803 (1956). For the immediate background, see Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 686 (1995) [hereinafter *Self-Study*].

72 See Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (2000)).

73 See Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. “Within six years, postponing the effective date of proposed amendments to Federal Rules had become ‘not a novel procedure.’” Burbank, *supra* note 12, at 1018 n.4 (quoting Rep. Robert Drinan).

74 See 1985 HOUSE REPORT, *supra* note 66, at 8 n.20 (listing twenty-four statutes modifying or suspending Federal Rules between 1973 and 1984); Geyh, *supra* note 42, at 1188; Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 843–55 (1991).

75 The 1983 amendments “became effective, it is true, but only just barely, the House having passed legislation to prevent them taking effect on August 1, and the Senate bill not coming to the floor in time.” Burbank, *supra* note 39, at 228. “It is a wonder that the 1993 amendments became effective—another very close call . . .” *Id.* at 233.

gated, amended or added discrete Federal Rules apart from proposals promulgated under the Enabling Act.<sup>76</sup>

The years after the Federal Rules of Evidence became effective as a statute in 1975<sup>77</sup> brought increasing concern in Congress about overreaching by the rulemakers, and more generally about the breakdown of the Enabling Act system (1) of allocating lawmaking responsibility and (2) because of the proliferation of local rules, of uniform federal procedure. Such concerns prompted an effort, led by the House of Representatives,<sup>78</sup> to revise that system, yielding the 1988 amendments to the Enabling Acts.<sup>79</sup>

Most of the formal changes in 1988 related to procedures for developing proposals for supervisory rules within the judiciary<sup>80</sup> and to

76 *E.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320,935, 108 Stat. 1796, 2135 (adding Federal Rules of Evidence 413–415); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7047, 102 Stat. 4181, 4401 (amending FED. R. CIV. P. 35 to enable psychologists to conduct mental examinations under the Rule), *discussed in* Mullenix, *supra* note 74, at 846–48; Act of Oct. 21, 1980, Pub. L. No. 96-481, § 205(a), 94 Stat. 2321, 2330 (repealing FED. R. CIV. P. 37(f)). As to the 1994 Act, Professor Geyh observed: “Even more remarkable is that Congress suspended the effective date of the rules it enacted for 150 days in order to permit Judicial Conference review, thereby effectively turning the Rules Enabling Act . . . on its head.” Geyh, *supra* note 42, at 1190 n.128.

77 Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

78 See 1985 HOUSE REPORT, *supra* note 66; H.R. REP. NO. 100-889, at 26 (1988); *Hearing on Rules Enabling Act of 1985 (H.R. 2633 and H.R. 3550) Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong. (1985) [hereinafter *1985 House Hearing*]; *Hearings on Rules Enabling Act (Oversight and H.R. 4144) Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 98th Cong. (1983–1984) [hereinafter *1983–1984 House Hearings*]; Burbank, *supra* note 65, at 1030.

79 See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4648–52 (1988).

80 Thus, section 401(a) of the Act both amended 28 U.S.C. § 2072 and added §§ 2073 and 2074. Section 2073 requires the Judicial Conference to prescribe and publish procedures, requires the appointment of “a standing committee on rules of practice, procedure, and evidence,” authorizes the Conference to appoint other committees to assist it, and requires that all committees appointed “consist of members of the bench and the professional bar, and trial and appellate judges.” 28 U.S.C. § 2073 (2000). Section 2073 also requires that, except as specifically permitted otherwise, committee meetings be open, and that minutes be maintained and made available to the public, to whom sufficient prior notice is also required. See *id.* Most of these requirements reflected practices the rulemakers already followed. See *infra* text accompanying note 206. Section 2074 changed the procedure for reporting proposed Federal Rules to Congress, previously contained in § 2072, requiring that any such proposal be transmitted “not later than May 1 of the year in which [it] is to become effective” and that it take effect “no earlier than December 1.” 28 U.S.C. § 2074. For the previous system, see Act of May 10, 1950, ch. 174, § 2, 64 Stat. 158 (1950) (al-

local rules.<sup>81</sup> The Senate defeated the House's attempt to repeal the supersession clause.<sup>82</sup> Yet, the hearings and legislative history cast a broad shadow,<sup>83</sup> eliciting an assurance of careful attention to the Enabling Act's limitations, which were formally unchanged, from the Chief Justice,<sup>84</sup> and increasing evidence of the sincerity of those assurances in the work of the rulemakers when considering proposals<sup>85</sup>

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lowing reporting of proposed Federal Rules to Congress not later than May 1 of each year, to become effective ninety days after they were reported) (amending 28 U.S.C. § 2072).

81 Thus, section 401(b) of the Act extended the requirement that advisory committees be appointed to assist in the review and development of local rules, previously applicable only to courts of appeals, to all courts (other than the Supreme Court) that are authorized to prescribe local rules. See 28 U.S.C. § 2077(b). Section 403 required courts (other than the Supreme Court) to give "appropriate public notice and an opportunity for comment" before prescribing local rules. See 28 U.S.C. § 2071(b). In addition, provisions in sections 402 and 403 amended the Judicial Code to provide for the review and possible modification or abrogation of local rules—district court rules by the judicial councils of the circuits, see 28 U.S.C. § 332(d)(4), and court of appeals rules by the Judicial Conference. See 28 U.S.C. § 331. Again, most of these requirements reflected practices that the judiciary had already put in place before 1988. See FED. R. CIV. P. 83; *infra* note 206 and accompanying text.

82 See Burbank, *supra* note 65, at 1036–46. Under § 2072(b) as amended in 1988, "[s]uch rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b).

83 See Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425 (1986).

84 See Letter from Hon. William H. Rehnquist, to Rep. Peter W. Rodino, Jr. (Oct. 19, 1988), *reprinted in* 134 CONG. REC. 31,874 (1988).

The Judicial Conference and its committees on rules have participated in the rules promulgation process for over a half century. During this time they have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter. The advisory committees should be circumspect in superseding procedural statutes.

*Id.*; see Burbank, *supra* note 65, at 1038 n.163.

85 See, e.g., Burbank, *supra* note 56, at 146 n.347 (discussing a "Special Note" to the 1993 proposed amendment, adding Rule 4(k)(2), that alerted Congress to questions of authority under the Rules Enabling Act). More recently, responding to the problems created by overlapping and duplicative class actions, the rulemakers considered and abandoned proposals to preclude the certification of a class or the approval of a settlement in a certified class action after negative decisions on those questions by a federal court. See Letter from Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, to Members of the Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States (May 30, 2002) (on file with author); Stephen B. Burbank, Preliminary Remarks at the Class Action Conference (Oct. 23, 2001) (on file with author). For a "thoughtful and comprehensive analysis of the state of contemporary federal supervi-

and of the Court when interpreting Federal Rules.<sup>86</sup>

Contemporaneously with the 1988 amendments to the Enabling Act, with Senate rather than House initiative, Congress considered and ultimately enacted the Civil Justice Reform Act of 1990 (CJRA),<sup>87</sup> which was in unbearable tension with some of the goals of the 1988 amendments.<sup>88</sup> Congress thereby signaled not, as previously, political interest in controversial proposals with arguable substantive impact<sup>89</sup> or in isolated goodies for interest groups,<sup>90</sup> but the capacity for political interest in the core of procedural regulation (or, as it has been called, “the heartland of Civil Procedure”).<sup>91</sup> The CJRA provided a “wake-up call”<sup>92</sup> to the federal judiciary (which, on one view of the 1993 amendments to the Federal Rules, had difficulty responding).<sup>93</sup>

The politics of the mid-1990s, including the agenda captured in the “Contract with America” and the war on crime (and criminals), brought forth legislation in which Congress prescribed substance-(or litigant-) specific procedure at variance with the Federal Rules, nota-

sory court rulemaking,” Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 721 (2002), see Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901 (2002).

It should also be noted that in 1991, the Court returned certain proposed amendments to the Civil Rules for further consideration following protest by the British Government, see Burbank, *supra* note 56, at 114, 124, and that in 2002, the Court declined to promulgate proposed amendments to Rule 26(b) of the Criminal Rules because of constitutional doubts. See William H. Rehnquist, *Letter of Transmittal* (Apr. 29, 2002), reprinted in 535 U.S. 1158 (2002); see also *id.* at 1159 (statement of Scalia, J.); *id.* at 1162 (statement of Breyer, J., dissenting).

86 See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–04 (2001); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842, 845–46 (1999); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322–24 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613, 620, 628–29 (1997); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 551–54 (1991).

87 Pub. L. No. 101-650, 104 Stat. 5089, 5089–98 (1990) (codified in scattered sections of 28 U.S.C.).

88 “Coming so closely on the heels of legislation that culminated a four year effort, led by the House of Representatives, to reform and discipline the Enabling Act process, the CJRA, driven by a powerful Senator, could be viewed as repudiation of the new treaty.” Burbank, *supra* note 39, at 235.

89 See, e.g., Burbank, *supra* note 83 (proposals to amend Rule 68).

90 See, e.g., Mullenix, *supra* note 74, at 846–48 (revised Rule 35).

91 RICHARD H. FIELD ET AL., *CIVIL PROCEDURE* 5 (8th ed. 2003).

92 Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 702 (1997).

93 See Burbank, *supra* note 39, at 232–33.

bly the Private Securities Litigation Reform Act of 1995 (PSLRA)<sup>94</sup> and the Prison Litigation Reform Act of 1996.<sup>95</sup>

Since 1996 the judiciary's system for tracking bills and legislation affecting the Federal Rules indicates that although many bills introduced would have directly amended specific Federal Rules (albeit, again, far more often Criminal than Civil Rules) or changed the requirements of the Rules in specific substantive contexts, few such proposals have been enacted.

Here again, however, quantitative judgment is a matter of perspective.<sup>96</sup> As against the virtually statute-free environment described by Judge Clark in 1958,<sup>97</sup> the recent landscape is much more crowded, and keeping the population of statutory procedural law in check requires significant effort by the judiciary.

Thus, for example, the Administrative Office identified forty-one bills and resolutions that would have affected the Federal Rules in the 105th Congress (1996–1998). Only three of those bills became law. The judiciary did not oppose one of the three; it secured an amendment to another, and it took no position on the third.<sup>98</sup>

The situation was similar in the 106th Congress (1998–2000), when the Administrative Office identified thirty-three bills and resolutions potentially affecting Federal Rules, which issued in four statutes.<sup>99</sup> The judiciary successfully opposed one statutory amendment

94 Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.). "If, however, the [CJRA] was a wake-up call, the [PSLRA] was a fire alarm." Burbank & Silberman, *supra* note 92, at 703.

95 Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 3601 (2000)). See Burbank, *supra* note 39, at 244; Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1557, 1561–62 (2003).

96 See *supra* text accompanying notes 54–58.

97 See *supra* note 67 and accompanying text.

98 See Memorandum from John K. Rabiej, Chief, Rules Comm. Support Office, to the Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States (Dec. 3, 1998) (on file with author). The three statutes in question were the "Taxpayer Confidentiality Act (Pub. L. No. 105-206) [which] contains a provision . . . establishing an evidentiary privilege for communications between a taxpayer and an authorized tax practitioner," *id.* at 1; the "Alternative Dispute Resolution and Settlement Encouragement Act (Pub. L. No. 105-315) [which] requires each court to authorize and provide by local rules . . . the option of voluntary ADR procedures," *id.* at 2; and the "Omnibus Appropriations Act [which] contained a provision . . . subjecting government attorneys to attorney conduct rules established under state laws or rules." *Id.*

99 See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE, 106TH CONGRESS (2000), available at <http://www.uscourts.gov/rules/legislation.pdf>. The four statutes were the Y2K Act, Pub. L. No. 106-37, "federalizing Y2K class actions and [with] heightened pleading



of a Federal Rule,<sup>100</sup> but it was unsuccessful in opposing the class action and heightened pleading provisions of the Y2K Act.<sup>101</sup>

In the 107th Congress (2000–2002), the Administrative Office identified forty-nine bills and resolutions potentially affecting the Federal Rules, from which six statutes resulted.<sup>102</sup> One of them includes a statutory amendment to Criminal Rule 16 that the judiciary requested because of the inadvertent omission of provisions in proposed amendments previously transmitted by the Supreme Court.<sup>103</sup> Another (the E-Government Act of 2002) requires the Supreme Court to promulgate rules.<sup>104</sup> Two others (the USA PATRIOT Act<sup>105</sup> and the Home-

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requirements,” *id* at 1; the Civil Asset Forfeiture Reform Act, Pub. L. No. 106-185, containing a provision that “may conflict with . . . Rule C(4) of the *Supplemental Rules for Certain Admiralty and Maritime Cases*,” *id*. at 8; the Federal Courts Improvements Act of 2000, Pub. L. No. 106-518, providing “for the sunset of provisions requiring a civil justice expense and delay reduction plan,” *id*.; and the Children’s Health Act of 2000, Pub. L. No. 106-210. See Memorandum from John K. Rabiej, Chief, Rules Comm. Support Office, to the Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States 2 (Nov. 27, 2000) (on file with author).

100 See Memorandum from John K. Rabiej, *supra* note 99, at 2 (discussing proposed amendment to FED. R. CRIM. P. 41(d) that would have “limit[ed] its reach explicitly to instances when tangible property only has been seized”).

101 Y2K Act, Pub. L. 106-37, 113 Stat. 185 (1999) (codified at 15 U.S.C. §§ 6601–6617 (2000)); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 99, at 1. For the pleading requirements, see 15 U.S.C. § 6607; for the class action requirements, see 15 U.S.C. § 6614.

102 ADMINISTRATIVE OFFICE OF THE U.S. COURTS, LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE, 107TH CONGRESS (2002), *available at* <http://www.uscourts.gov/rules/legislation107.pdf>. The two statutes not discussed in the text are the 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, and the Terrorism Risk Protection Act, Pub. L. No. 107-297. See *id.* at 7; Memorandum from James N. Ishida, Rules Comm. Support Office, to the Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States 3 (Dec. 4, 2002) (on file with author).

103 See Memorandum from James N. Ishida, *supra* note 102, at 1. The vehicle, ironically, was an appropriations bill. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11019, 116 Stat. 1758, 1825 (2002); *infra* text accompanying notes 283–84, 288.

104 See E-Government Act of 2002, Pub. L. No. 107-347, § 205(c)(3)(A), 116 Stat. 2899, 2914 (codified at 44 U.S.C. § 3501 (2000)).

(A) (i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to the electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

land Security Act of 2002<sup>106</sup>) amend the Criminal Rules.

In the current (108th) Congress, the Administrative Office identified “[t]hirty-three bills . . . that affect the Federal Rules of Practice and Procedure” as of December 2003.<sup>107</sup> To date, only one of those bills has been enacted,<sup>108</sup> but legislation in prospect could significantly affect the Federal Rules.<sup>109</sup>

The judiciary’s monitoring effort requires substantial staff time and often results in letters stating concerns from either members of the judiciary or the Director of the Administrative Office to members

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(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.

*Id.* In the succeeding subsections, Congress authorized the Judicial Conference to issue interim rules, *id.* § 205(c)(3)(B), and required it to submit periodic reports on the adequacy of the Court’s rules “to protect privacy and security.” *Id.* § 205(c)(3)(C). The federal judiciary has sought amending legislation. See Memorandum on E-Government Act of 2002 (undated) (on file with author).

105 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, tit. II, § 203, 115 Stat. 272, 279–81 (amending FED. R. CRIM. P. 6(e)(3)(C)); *id.* § 219, 115 Stat. at 291 (amending FED. R. CRIM. P. 41(a)).

106 Homeland Security Act of 2002, Pub. L. No. 107-296, tit. VIII, § 895, 116 Stat. 2135, 2256–57 (amending FED. R. CRIM. P. 6(e)).

107 Memorandum from James N. Ishida, Rules Comm. Support Office, to the Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States (Dec. 12, 2003) (on file with author).

108 See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE, 108TH CONGRESS (2003), available at <http://www.uscourts.gov/rules/legislation108.pdf>. As reported, see *id.* at 1, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, tit. VI, § 610(b), 117 Stat. 650, 692 “amends *Criminal Rule 7(c)(1)* to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.”

As of April 2, 2004, only one additional bill or resolution had been added, and there were no additional statutes issuing from the group identified. See Legislation Affecting the Federal Rules of Practice and Procedure, 108th Congress (Apr. 2, 2004) (on file with author).

109 See, e.g., Memorandum from James N. Ishida, *supra* note 107, at 1–3 (discussing pending class action legislation).

of Congress.<sup>110</sup> In addition, when Congress has seriously considered bills that would have substantially altered existing procedural arrangements, such as the CJRA and PSLRA, the judiciary's efforts have also included in-person negotiations.<sup>111</sup>

Finally in this aspect, as noted above, at least one recently enacted statute requires the Supreme Court to promulgate rules under the Enabling Act,<sup>112</sup> and more congressional mandates to engage in rulemaking are likely (if, for instance, H.R. 975, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, which the House passed in March 2003, becomes law).<sup>113</sup>

As the forgoing makes clear, exclusive attention to the period between 1934 and 1973 may encourage erroneous claims about the respective lawmaking powers of Congress, the federal courts, and the federal judiciary. Such a blinkered view may also obscure the extent to which, over our entire history, Congress has eschewed *de facto* or *de jure* delegations<sup>114</sup> and itself prescribed the procedure to be followed in federal civil litigation. It is hardly sufficient, however, to substitute for ignorance of history an approach that is content simply to count procedural statutes.

Thus, at a time when mandatory conformity to state law in actions at law was the preferred norm, Congress may have had good reason to prescribe some aspects of federal procedure in areas where uniformity was thought important. Certainly, legislation may have been thought necessary given evidence of (1) the Supreme Court's crabbed (and at times overtly ideological) interpretations of Congress's grants of local rulemaking power, as a result of which the federal trial courts were

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110 See, e.g., Memorandum from John K. Rabiej, *supra* note 98, at 1. More recently, the Chair of the Standing Committee wrote to the Chairs of the House and Senate judiciary committees opposing provisions in pending class action bills that were inconsistent with Rule 23(f) (discretionary interlocutory appeal of class certification decisions) and with proposed requirements for notices to members of a class that the Supreme Court transmitted to Congress (and that subsequently became effective in December 2003). See Letter from Hon. Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, to Rep. F. James Sensenbrenner, Jr. (May 12, 2003) (on file with author); Letter from Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, to Sen. Orrin G. Hatch (May 19, 2003) (on file with author).

111 See, e.g., McArthur, *supra* note 23, at 571; Burbank, *supra* note 39, at 232.

112 See *supra* text accompanying note 104.

113 See H.R. 975, 108th Cong. §§ 221, 319, 419, 433–35, 716 (2003); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 108, at 12–13. Note, however, that none of these sections would direct the Supreme Court to promulgate rules.

114 See Burbank, *supra* note 56, at 105.

stuck in the procedural worlds of the past,<sup>115</sup> and (2) the Court's disinclination to exercise supervisory rulemaking power for actions at law, even when the delegation was reaffirmed and strengthened.<sup>116</sup>

Similarly, although the ultimate success of the twenty year campaign to restore to the Supreme Court supervisory rulemaking power for actions at law should not blind us to the realities of lawmaking power, it can hardly be questioned—the evidence from the period after 1934 confirms—that the Court's bold approach to its recovered power signaled a new era in the regulation of federal procedure. For almost forty years, Congress was content to leave procedural lawmaking to the federal courts and to the institutional judiciary whose independence Congress itself had fostered, including in rulemaking.<sup>117</sup>

Congress is no longer content to accord to the federal judiciary an effective monopoly in the regulation of procedure. Today, there is no guarantee that proposed amendments to Federal Rules originating with the federal judiciary and promulgated under the Enabling Act will be permitted to go into effect; there is no guarantee that Congress will abstain from independently and directly amending the Federal Rules, and there is no guarantee that Congress will accept the procedures prescribed in Federal Rules as appropriate for all types of cases or litigants. Today, moreover, Congress may be content (provisionally) to cede its power to make prospective procedural law to the judiciary only if it is clear that the rulemakers will exercise delegated power on designated subjects and in designated ways.<sup>118</sup>

### III. WHAT HAS CHANGED AND WHY?

According to this account, we are still living in a historical period that began decades ago, and understanding what has changed and why in the relationship between Congress, the federal courts, and the federal judiciary as to the regulation of federal procedure is thus not merely of historical interest. To the extent that the arrangements, relationships, and accommodations characteristic of our current situa-

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115 See Burbank, *supra* note 47, at 1325–27; Burbank, *supra* note 12, at 1038–39.

116 See *supra* text accompanying notes 26, 48–49. Note also the Court's failure to update its Equity Rules between 1842 and 1912, see *supra* note 53, and the need for regulation, by statute or court rule, of aspects of the intersection of law and equity. See Clark & Moore, *supra* note 55, at 415–35.

117 On this important perspective, see Geyh, *Congressional Norms*, *supra* note 3, at 195–208.

118 See *supra* note 104 and accompanying text; see also *supra* text accompanying notes 112–13.

tion are deemed unsatisfactory, such understanding is essential to the development of what Professor Geyh has termed a new paradigm.<sup>119</sup>

In previous work I have sought to explain the dramatic changes in Congress's attitudes towards procedural lawmaking as between the periods before and after 1973 by reference to three primary developments. First, key members of Congress (led by Representative Kastenmeier in the House) in the 1970s and 1980s came to believe that the rulemakers were cavalier about the Enabling Act's limitations on their power, promoting changes under the banner of procedure that would have consequential effects on articulated congressional policy, including particularly policy concerning access to court. The most prominent examples of rulemaking proposals that elicited such concerns were the 1983 amendments to Rule 11, which went into effect, although just barely,<sup>120</sup> and the various proposals to amend Rule 68, which the rulemakers abandoned when it became clear both that a switch in rationale (from fee-shifting to sanctions) was an inadequate response and that Congress was watching closely.<sup>121</sup> These members of Congress promoted the 1988 amendments to the Enabling Acts, one purpose of which was to recall the judiciary to the proper limits of the rulemaking enterprise. The hope was that self-discipline by the rulemakers, reinforced by changes making the process more inclusive and transparent, would enable Congress to disengage.<sup>122</sup>

Second, lawyers, members of an increasingly diverse and fragmented (through specialization and competition) profession, came to believe that the rulemakers (who had come to be dominated by judges) were not listening, and they turned to Congress for relief from proposals to which they objected.<sup>123</sup> From this perspective, the fact that the intense opposition to the 1983 amendments to Rule 11 did not succeed may have done more harm to the rulemaking enterprise than would congressional nonacquiescence. For, those amendments were perceived (correctly or incorrectly) to create all of the problems that had been predicted, including poisoning relationships between lawyers and their clients, lawyers and other lawyers, and law-

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119 See Geyh, *supra* note 42.

120 See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1948 n.119 (1989); *supra* text accompanying note 75.

121 See Burbank, *supra* note 83.

122 See *supra* text accompanying notes 77-86.

123 See Burbank, *supra* note 39, at 224-28; Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515-16 (1996); Burbank & Silberman, *supra* note 92, at 701-02; Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 BROOK. L. REV. 931 (1993).

yers and judges.<sup>124</sup> Moreover, although opinions about Rule 11 among lawyers differed, few lawyers appeared to support the regime of mandatory disclosure ushered in—again, just barely—in 1993.<sup>125</sup> Indeed, the perception that an important community of interest had disintegrated helps to explain, I believe, the efforts made by the Civil Rules Advisory Committee under the leadership of Judge Patrick Higginbotham, to reach out to the bar (among others), and to proceed more deliberately, in the mid-1990s.<sup>126</sup>

Third, lobbying by lawyers and others led members of Congress to perceive that some issues of court practice and procedure either could be used to generate political support among certain interest groups or in any event might require attention in order to preserve such support.<sup>127</sup> Thus, Senator Biden apparently saw potential politi-

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124 See STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 4 (1989). "Thus, the Federal Rules of Evidence may have marked the beginning of the end of the judiciary's monopoly of power to fashion the rules of the game. But, I believe, it was the poisonous environment fostered by the 1983 amendments . . . particularly Rule 11, that set the stage for the more recent, and much more serious, power struggles." Burbank, *supra* note 39, at 228.

125 See Burbank, *supra* note 24, at 845–46.

126 See Burbank & Silberman, *supra* note 92, at 702–03. As noted there, having woken up to the need to reach a truce with the practicing bar, the rulemakers appear to be nodding off again. The proposal to return to a norm of twelve-person civil juries was scrapped by the Judicial Conference, and the proposal to permit greater participation of counsel in voir dire did not even get that far.

*Id.* at 703 n.138. Judge Higginbotham was not reappointed to a second term. The 1995 self-study of rulemaking carried out as part of the judiciary's long range planning recommended longer terms for chairs of advisory committees. See *Self-Study*, *supra* note 71, at 681 ("This was discussed with the Chief Justice on December 13, 1995").

127 "Members of Congress were by then accustomed to lobbying by interests opposed to or favoring proposed amendments and thus were encouraged to view rules of procedure as a magnet, if not for constituent interests, then for special interests." Burbank, *supra* note 39, at 228. Writing in 1989, Professor Resnik observed:

Over the last decade, a variety of powerful "repeat players" have sought, sometimes openly, to influence "court reform" efforts. By and large, that work has been done not by letters written to the Advisory Committee on Civil Rules, but rather by lobbying efforts directed towards legislatures and the public, by well-financed media campaigns, and by support for conferences and meetings to address and describe our "litigation crisis." However appealing might be the notion that writing the Rules of Civil Procedure . . . is a "neutral" task with diverse consequences on anonymous and interchangeable civil plaintiffs and defendants, that description is no longer available. "Tort reform," among other events of the last decade, has denied us the refuge of a comforting image.

cal gain in legislation designed to curb allegedly broad-scale and excessive expense and delay in federal civil litigation in the late 1980s,<sup>128</sup> while Republicans in particular (but not exclusively) saw it in legislation designed to curb allegedly frivolous securities fraud class actions in the mid-1990s.<sup>129</sup>

We know that Congress holds the cards—that it has virtually plenary power over federal procedure. It remains better to understand the reasons why, having left the game for almost forty years, Congress has since chosen to exercise its power, both in matters initiated by the judiciary and independently. My hope is that, by revisiting the subject informed by the recent work of other scholars and insights from other disciplines, a richer account will emerge that is useful for both historical understanding and, if and as appropriate, efforts to fashion a new order in federal procedural regulation.

#### A. *The Rhetoric of Procedure and the Reality of Power*

It is astonishing how long lawyers, judges, and scholars were able (or continued to try) to hide the reality of the power of procedure beneath layers of adjectives that were designed to persuade the speaker's audience that procedure was unimportant ("adjective law"), that it was technical (and thus for expert technicians), or that it was or could be neutral.<sup>130</sup> Even when such claims became untenable, it was possible to obscure the reality of procedure's power behind the revealed truth that there is no bright line between procedure and substantive law, continuing to portray it as the "handmaid" of the substantive law.<sup>131</sup>

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Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219–20 (1989); see also *id.* at 2226.

128 "Senator Biden is not a captive of the insurance industry any more than he is the son of a Welsh coal miner. He is a politician who wanted a statute on civil justice reform." Burbank, *supra* note 24, at 852 (footnotes omitted); see also Burbank, *supra* note 39, at 229.

129 "[T]he 1995 legislation was one of the few elements of legislative legal reform successfully enacted by a Republican Congress that had a far more ambitious agenda; it was enacted over the President's veto, and its final form was considerably less hostile to private securities litigation than the initial bills on which it was based." Stephen B. Burbank, *The Class Action in American Securities Regulation*, 4 ZZPINT 321, 330 (1999).

130 "Law reformers have long assured us that procedure is technical, details—in short, adjective law." Stephen B. Burbank, *Afterwords: A Response to Professor Hazard and a Comment on Marrese*, 70 CORNELL L. REV. 659, 662 (1985); see Burbank, *supra* note 12, at 1052, 1068; Clark, *supra* note 55, at 457.

131 See Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938); Burbank, *supra* note 12, at 1136; Subrin, *supra* note 62, at 962. "The reminder that there is no bright line between procedure and substantive law has been a refuge of

Such strategies<sup>132</sup> did not observe, any more than the desire to acquire and hold power observes, party lines, with the result that people as different politically as William Howard Taft and Charles Clark pursued many of the same goals with respect to the Enabling Act and the rules it authorized, most prominently the merger of law into equity and of rules into discretion.<sup>133</sup>

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procedural reformers for fifty years." Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985)).

132 See Burbank, *supra* note 131, at 1472 ("It is true that procedural rules are never neutral in their effects, if not their purposes. It is also likely that there has been more systematic misrepresentation about the value-free nature of procedural rules than about any other category in the traditional lexicon.") (footnote omitted). Although the Chair of the original Advisory Committee publicly stated in 1938 that the Committee "found very little difficulty" in distinguishing between procedure and substantive rights, see RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OH 183 (1938) (statement of William D. Mitchell), he had admitted in a private letter in late 1937 that he was frequently dissatisfied with himself, "because after more than two years of struggling with practice and procedure, when a question arises as to whether a matter is procedure or substance, my mind is murky on the subject and I am unable to reach a conclusion in which I have confidence whenever the question is at all debatable." Letter from William D. Mitchell, to Hon. George Wharton Pepper (Dec. 19, 1937), quoted in Burbank, *supra* note 12, at 1134 n.530; see also Burbank, *supra* note 65, at 1012.

133 See Burbank, *supra* note 123, at 513; Burbank, *supra* note 24, at 854 ("Remember that Charles Clark and William Howard Taft were dancing cheek-to-cheek."). Taft was "dedicated to reforming the judicial system to make it more efficient and thus more powerful. . . . The conservative Taft, according to Mason, saw an important link between judicial reform and the continued protection of property rights against popular reform. . . ." Sue Davis, *Alpheus Thomas Mason: Piercing the Judicial Veil*, in *THE PIONEERS OF JUDICIAL BEHAVIOR* 329 (Nancy Maveety ed., 2003); see also *id.* at 330 (discussing Taft's "dogged" lobbying for the Enabling Act and attributing failure to fact that "it was invariably viewed by members of Congress as a measure that would further aggrandize the power of the judiciary").

Professor Bone has asserted that the "distinction [between procedure and substance] made sense to early twentieth-century reformers," and that "leading federal rule proponents assumed the integrity of adversarial process." Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 (1999). Neither proposition seems to me accurate as a description of the views of the two most important architects of the Federal Rules, Charles Clark and Edson Sunderland. Both men were realists who favored greater control by judges precisely because they *did* "seriously question[ ] the basic features of adversarial adjudication." *Id.*; see Burbank, *supra* note 131, at 1477; Subrin, *supra* note 62, at 978-79; Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 116-18 (1925).



The Congress that finally passed the Enabling Act, unlike its predecessors, did not give the bill much (really, any) attention. It was enough (particularly in 1934) that the administration supported it,<sup>134</sup> and it cannot have hurt that the delegation and the rhetoric used to support it were consistent with the ethos of the emerging administrative state.<sup>135</sup> Thus, the judiciary was not alone in making claims to expertise; the political climate was receptive to such claims,<sup>136</sup> and their tendency to yield monopoly power<sup>137</sup> was predictably greater in a delegation to fashion law plausibly described as separate from substance (and also as both technical and neutral) than to flesh out substance itself.

The Congress that allowed the original Federal Rules to become effective in 1938 *did* attempt to give the proposed Rules serious consideration, but in the absence of shared (let alone coherent) conceptions of the limits of the enterprise, and given the rulemakers' decisions both to fashion trans-substantive rules and to limit the policy choices made therein (as opposed to such choices made by judges applying them), it was difficult independently to assess the Court's fidelity, as Congress's agent in fashioning prospective law, to its mandate.<sup>138</sup> Then, too, Congress was fed a heavy dose of the traditional rhetoric and was assured that the Court would be "zealous to correct its mistake, if any has been made."<sup>139</sup>

134 See Burbank, *supra* note 12, at 1096.

135 That surely would not have sufficed had not Senator Walsh, the bill's long-time Senate opponent and President Roosevelt's Attorney General designate, who recognized the rhetoric for what it was, "overtaxed his heart in the sleeping car from Washington to Florida in 1933." Letter from Hon. Henry J. Friendly, to Stephen B. Burbank (Feb. 12, 1983) (on file with author); see Burbank, *supra* note 12, at 1095.

136 See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001); Laurens Walker, *The End of the New Deal and The Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272-75 (1997).

137 "[T]he claim to expertise is also a claim to monopoly power." McArthur, *supra* note 23, at 605.

138 Moreover, an effort to secure more time to evaluate the proposed Rules founded on the difficulty of securing agreement from both bodies (and the President) within the short period prescribed in the original Enabling Act. See Burbank, *supra* note 12, at 1178. For objections to Congress "about the amount of judicial power contained in the new rules," see Subrin, *supra* note 62, at 999.

139 Letter from Edgar B. Tolman, to Hon. J.C. O'Mahoney, et al. (May 26, 1938), reprinted in *Hearings on Rules of Civil Procedure for the United States District Courts (S.J. Res 281)*, 75th Cong., 3d Sess., pt. 2, App. at 72 (May 19, 1938) [hereinafter *1938 Hearing*]; see Burbank, *supra* note 12, at 1178-79. Tolman was "the secretary of and a major force on the Advisory Committee." *Id.* at 1139 n. 551.

There were not many amendments to the Civil Rules between 1938 and the 1960s, at least by contemporary standards;<sup>140</sup> supporters represented that the Rules were the greatest thing since sliced bread,<sup>141</sup> and there was a substantial community of interests among the lawyers practicing in federal court and federal judges. Even before the influence to that end of a common educational experience, "uniformity in training, conduct and ideas could not fail to produce a class with a highly developed group consciousness."<sup>142</sup> Moreover, "community of interest stimulates association," and "bar associations [became] the recognized agencies for dealing with" problems in the administration of justice.<sup>143</sup>

Having led the fight to restore rulemaking power to the Supreme Court for so many years, the American Bar Association used the occasion of the imminent promulgation of the Federal Rules of Civil Procedure to launch "the most far-reaching and comprehensive program"<sup>144</sup> it undertook in the period between 1936 and 1950. This

140 See Clark, *supra* note 67, at 436 n.8. Even so, in 1955 there was criticism of the "alleged overamendment of the rules." *Id.* at 446 n.51.

141 See *id.* at 435, 443.

It may smack of hyperbole to say, as one commentator has, that the rules are "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law." It is nevertheless true that the chorus of approval of the rules by judges, lawyers, and commentators had been, until very recently, unanimous, unstinted, and spontaneous.

WRIGHT, *supra* note 69, at 429–30 (footnotes omitted).

142 Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 726 (1926). Professor Sunderland saw "a broadened and socialized legal education" as the best antidote to "continu[ing] to value conventionality over efficiency," and he noted with favor the campaign of the American Bar Association "for elevating legal education." *Id.* at 746.

The courts and judiciary have great influence on the bar even though the proportion of lawyers heavily engaged in contested litigation is probably less now than ever before in this country. Many lawyers still are regularly before the courts on either contested or uncontested matters, and the courts provide a common experience and common meeting ground for much of the bar.

QUINTIN JOHNSTONE & DAN HOPSON, JR., *LAWYERS AND THEIR WORK: AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND* 56 (1967); see also SMITH, *supra* note 23, at 128 (noting that the "policy community" of those concerned about court procedure is small and that lawyers and judges "share a common socialization with its attendant implications for shared values and perspectives on the judicial process").

143 Sunderland, *supra* note 142, at 745.

144 EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION* 213 (1953).

decade-long campaign “emphasize[d] the importance of eliminating outworn technicalities in the practice of the state courts and reforming their procedure along the general lines followed by the federal rules.”<sup>145</sup> As a result, one elite group of lawyers was championing and seeking to extend the influence of the practices and procedures of another.<sup>146</sup>

With the proliferation of civil rights and other legislation in and after the 1960s, the 1966 amendments to Rule 23 on class actions, the 1970 amendments unleashing document discovery from the need for prior court approval, and the litigation that these developments elicited or facilitated, the emptiness of the traditional rhetoric about procedure became hard to miss. In the ensuing culture of “adversarial legalism” so well described by Robert Kagan,<sup>147</sup> it also became increasingly clear that federal courts wielded enormous power under the banner of procedure and that many choices they made under (or under the authority of) Federal Rules had consequential substantive impact.<sup>148</sup>

Even in the absence of consensus about the Enabling Act’s limitations, it was impossible to miss the substantive implications of some of the policy choices required by the proposed Federal Rules of Evidence, and the early opposition, which was directed at the privilege provisions, put separation of powers, and hence Congress’s proper role, at center stage.<sup>149</sup> This was important, because it made clear that,

145 *Id.* at 213–14.

146 See SMITH, *supra* note 23, at 128 (“[M]ainstream lawyers’ organizations consistently defer to and support the preferences of judges on many court reform issues[.]”). For additional material on the ABA in this period, see JOHNSTONE & HOPSON, *supra* note 142, at 35–42, 71.

147 See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* 36–39, 44–50, 55–58 (2001); see also Paul Frymer, *Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 AM. POL. SCI. REV. 483, 484, 486–88, 490–91 (2003); Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 STUD. AM. POL. DEV. 61, 84 (2002) (“Every attorney has assumed the authority of a progressive administrator.”).

[I]t is precisely this decisionmaking en masse, in group cases of whatever genre, that exposes so vividly what is always true but may have been less visible: that application of rules of law to given cases is law-generative and hence that courts are (of course) lawmakers.

Resnik, *supra* note 127, at 2229.

148 “[T]his Court’s rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants.” *Mistretta v. United States*, 488 U.S. 361, 392 (1989).

149 See H.R. REP. NO. 93-650, at 27–29 (1973) (separate views of Rep. Holtzman); *id.* at 29 (stating that “[r]ules creating, abolishing or limiting privileges are legislative”); 120 CONG. REC. 1420–21, 2391–92 (1974) (statements of Rep. Holtzman).

contrary to the consistent theme of the Court's jurisprudence under the Enabling Act and of the academic literature, overreaching by the rulemakers threatened not only (and, in fact, not primarily) the lawmaking prerogatives of the states, but those of Congress itself.<sup>150</sup>

The messages that Congress was likely to derive from this evidence of the changing role of the federal courts, of the power of procedure in aid of that enhanced role, and of the potential threat of supervisory court rulemaking to its lawmaking prerogatives,<sup>151</sup> were, moreover, consistent with messages received as a result of contemporary developments in the cognate area of administrative regulation. By the mid-1970s Congress had reason for "growing skepticism about the possibility of neutral or objective judgment"<sup>152</sup> and reason to believe "that much besides expertise necessarily permeated . . . choice."<sup>153</sup> In time, Congress addressed the perceived problems in the two areas with similar strategies, (1) insisting upon greater public access to, and greater transparency in, the processes of delegated lawmaking,<sup>154</sup> and (2) relying on the interest group monitoring thereby facilitated to sound "fire alarms"<sup>155</sup> when such lawmaking strayed from the proper course.

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150 "Forty years of Supreme Court decisions and academic commentary have reversed this plan, with the result that federalism has loomed large, and allocation of powers between federal institutions hardly at all, in the discussion of Federal Rules." Burbank, *supra* note 12, at 1187. The fact that most occasions of congressional nonacquiescence in proposed Federal Rules in the period immediately after 1975 concerned proposed Criminal Rules is suggestive in this regard. See *supra* text accompanying note 74.

151 See DANIEL PATRICK MOYNIHAN, *COUNTING OUR BLESSINGS: REFLECTIONS ON THE FUTURE OF AMERICA* 123 (1980).

But if the federal courts are going to make law (a legislative function) and enforce law (an executive function)—which is what Chayes's term *the public law litigation model* implies—they are inevitably going to find themselves in conflict with the legislative and executive branches.

*Id.*

152 Kagan, *supra* note 136, at 2261.

153 *Id.* at 2262; see Walker, *supra* note 136, at 1274–75.

By the 1970s, however, concerns about regulatory capture, a loss of faith in expertise, and a growing awareness that administrative regulation involved social policy choices had eroded public confidence in administrative agencies. These same factors undermined confidence in the efficacy and legitimacy of the traditional court rulemaking model as well.

Bone, *supra* note 133, at 902 (footnote omitted).

154 See Bone, *supra* note 133, at 902–04; Kagan, *supra* note 136, at 2261–66; *supra* text accompanying notes 79–82.

155 Kagan, *supra* note 136, at 2258–59.

As a result of all of these developments, although some of the rulemakers clung to traditional rhetoric,<sup>156</sup> interested observers, including interested members of Congress, were more likely than they had been in the past to perceive overreaching, nontrivial substantive effects and lack of neutrality—encouraged to do so by attention to the Enabling Act in the scholarly literature and by calls for and the fruits of empirical research.<sup>157</sup> The claim of procedural neutrality is put at risk whenever it is proposed to study the effects of a Federal Rule. This may help to explain why, however congenial the notion of expert procedural lawmaking may have been in the progressive period or for that matter in the modern administrative state, and even though the most prominent civil rulemaker of the twentieth century was a legal realist who himself had conducted substantial empirical work,<sup>158</sup> very little such work informed the original Federal Rules or, until recently, subsequent amendments.<sup>159</sup> It also helps to explain the invocation of a “veil of ignorance”<sup>160</sup> as an appropriate normative posture for the rulemakers by the Reporter for the Civil Rules Committee in the late 1980s.

An important part of the scholarly critique of the Federal Rules system challenged both the notion that the Enabling Act’s requirement of “general rules” required that the Federal Rules be trans-substantive,<sup>161</sup> and the notion that, normatively, such rules are *always* appropriate. This strand of the critique was, of course, an outgrowth of the perception that procedure may drive substance.<sup>162</sup> In addition,

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156 See, e.g., Burbank, *supra* note 83, at 426–27; Burbank, *supra* note 120, at 1962. Of course, members of Congress can play the rhetoric game too. Witness Senator Biden’s 1994 reference to “the substantive policy goal of reducing delay and expense for civil litigants.” Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1290 (1994).

157 See, e.g., Burbank, *supra* note 24, at 844; Burbank, *supra* note 120, at 1927–28, 1939–41, 1963; Mullenix, *supra* note 74, at 828–30.

158 See Subrin, *supra* note 62, at 965–68. Thus, for example, Clark led an early attempt to gain empirical information about litigation in the federal courts. See generally AMERICAN LAW INSTITUTE, STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934).

159 See Burbank, *supra* note 39, at 242–43; Burbank, *supra* note 120, at 1927–28; Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 782–83 (1993); Thomas E. Willging, *Past and Present Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1121–22, 1203 (2002).

160 Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079 (1989); see *infra* note 162.

161 See Burbank, *supra* note 120, at 1934–35.

162 See *id.* at 1940–41.

No one I know is suggesting a return to the forms of action or a wholesale rejection of trans-substantive procedure. Some of us, however, are sug-

at least in some quarters, it was central to a vision of political accountability in which, on some matters, prospective and transparent policy choices by democratically accountable actors are preferable to buried policy choices by federal judges.<sup>163</sup> Whether or not this strand of the critique has been influential in Congress,<sup>164</sup> lawmakers and those who seek to influence them have learned the lesson that some matters of “procedure” are integrally related to substance and/or useful to the effectuation of substantive goals. They have come to understand, therefore, that to fail to address those matters, whatever the label given to them, when seeking to change the substantive law is either to surrender a potentially potent technique or to commit the fate of those substantive goals to the preferences of judges.<sup>165</sup>

In sum, informed observers have for many years recognized that “‘real procedure’ is hard to find”<sup>166</sup> and they thus also should have recognized the strength of the normative argument for greater congressional attention to the regulation of federal procedure, under the Enabling Act and more generally. Paying attention does not mean taking control, however, and particularly given the increased self-discipline of the rulemakers during the past decade (manifested in part

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gesting that it is time both to face facts, in particular the fact that uniformity and trans-substantivity rhetoric are a sham, and to find out the facts, in particular the facts about discretionary justice. A “veil of ignorance” may be an apt metaphor to describe federal rulemaking to date. It is not, I contend, an appropriate normative posture for the rulemakers of the future.

*Id.* (footnotes omitted); see Burbank, *supra* note 24, at 846–47.

163 See, e.g., Stephen B. Burbank, *Procedure, Politics and Power*, 52 J. LEGAL EDUC. 342, 344 (2002) (“For, when one knows that a rule has a statistically significant differential impact on a class of litigants or in a particular type of case, the veil is lifted, the myth of neutrality as to litigant power is exploded, and the question of lawmaking power to address the situation is unavoidable.”) (footnote omitted); see also Burbank, *supra* note 131, at 1473–76.

164 See 1985 House Hearing, *supra* note 78, at 9 (statement of Stephen B. Burbank) (“Congress too rarely adverts to the possible need for specialized procedure—as opposed to the trans-substantive procedure of Federal Rules—when it enacts legislation”); *id.* at 21 n.12 (advocating “a Procedural Impact Statement, the purpose of which would be to ensure that existing federal procedure adequately will serve a bill’s substantive policies”).

165 Considerations of this sort seem to me more important determinants of recent direct congressional regulation of procedure (as, for example, in the PSLRA) than the rejection of expertise simpliciter, let alone “new-found [congressional] confidence in its own law-making ability.” Walker, *supra* note 136, at 1285.

166 See, e.g., Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 714 (1988) (“In much of today’s litigation landscape, procedure is adjectival to substantive law in the same way that, in negligence law, reasonable is to man. In other words, ‘real procedure’ is hard to find.”) (footnote omitted).

through interest in and attempts to secure empirical evidence), the demise of the power of the procedure/substance dichotomy to order lawmaking responsibilities cannot by itself explain congressional behavior.

### B. *The Rulemakers and the Rulemaking Process*

The original Advisory Committee consisted exclusively of practicing lawyers and academics.<sup>167</sup> As late as the 1960s judges remained in the minority. Under Chief Justice Warren Burger, however, the Civil Rules Advisory Committee came to be heavily dominated by judges selected by the Chief Justice. This imbalance has continued, only partially redressed under political pressure.<sup>168</sup>

I do not know, but additional historical research may illuminate, the reasons for the change. Likely candidates seem to be either, or some combination of, (1) the quest for greater agenda control, (2) the realization that federal judges and/or the federal judiciary have

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167 For a list and description of the original Advisory Committee, consisting of five law professors and nine lawyers, two of whom had been judges, see Subrin, *supra* note 62, at 971–72.

168 For a description of the historical progression and a graph, see Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS., Summer 1998, at 229, 237–38.

Lawyer participation has declined as that of judges increased. Today, lawyers comprise just a bit more than a third of the members of the Advisory Committee on Civil Rules. The tide had begun to shift in this direction within two decades after the original Rules were enacted. In 1961, just over half of the Advisory Committee's members were practicing lawyers; that proportion held throughout the early 1980s. By 1985, the proportion had dropped to about twenty-five percent; over the last few years it has hovered between thirty-three and forty percent.

*Id.* at 237. Professor Yeazell notes that “[t]he proportion of lawyers on the Standing Committee, a body that had no analogue in 1938, is similar.” *Id.* For the pressure, see Bone, *supra* note 133, at 903 n.87; Carrington, *supra* note 160, at 2076 n.50; Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT’L L.J., Aug. 17, 1992, at 15. Professor Bone’s comment that “these efforts have failed,” Bone, *supra* note 133, at 903 n.87, is potentially misleading, since the number of lawyers did increase somewhat, almost surely in response to proposed legislation. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 59 (1995) (“[S]everal steps have been taken to enhance outside participation by [among other steps listed] increasing bar membership on the rules committees . . . .”); Burbank, *supra* note 123, at 516 (“[W]e may never see a vote on a Senate bill to require more practicing lawyers on the rules advisory committees, because the chief justice has already unilaterally increased their numbers.”). For recent commentary arguing that the Supreme Court “needs a justice who understands first hand what law practice in the trenches is like today,” see Luther T. Munford, *Recent Litigating Counts*, NAT’L L.J., Feb. 16, 2004, at 43, 43.

discrete interests, or (3) suspicion of lawyers' ability to put aside their (or their clients') interests. The latter two phenomena are related and would naturally enhance the perceived importance of controlling the rulemaking agenda.<sup>169</sup>

To say that "federal judges and/or the federal judiciary have discrete interests" is not to say that, when engaged in rulemaking, either is an interest group in the sense of "an organized body of individuals who share some goals and who try to influence public policy."<sup>170</sup> That would be an odd way to describe a group engaged in lawmaking, although it does prompt inquiry concerning the influence if any of the existence of the federal judiciary as an interest group in its relations with Congress and the Executive<sup>171</sup> on the effectuation of individual or institutional judicial interests in rulemaking. Moreover, although it is difficult to dispute the notion that both federal judges and the federal judiciary as an institution have interests, many would doubtless disagree that such interests are, or that they may properly be, influential in supervisory court rulemaking, at least if they are juxtaposed with the "public interest."<sup>172</sup> The latter question takes us into a debate spurred by public choice theory. The former may suggest that, in a world where supervisory court rulemaking is provisional (or defeasible) and no longer holds monopoly power, the need of the judiciary *qua* interest group to defend institutional interests may have prompted the heavy tilt towards judges on the rulemaking bodies.

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169 See S. Sidney Ulmer, *Researching the Supreme Court in a Democratic Pluralist System*, 1 LAW & POL'Y Q. 53, 67 (1979) ("[I]f the social balance of power among competing groups is relevant to the way in which government responds to articulated needs, one must take into consideration the relative success of these groups in getting on the formal agenda of appropriate decision making bodies."); see also *supra* note 126 (noting that Judge Patrick Higginbotham, who spear-headed outreach efforts as Chair of the Advisory Committee, was not reappointed).

170 JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 5 (1984) (emphasis omitted), quoted in SMITH, *supra* note 23, at 4. See DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 33 (1951) ("'[I]nterest group' refers to any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes.").

171 See, e.g., SMITH, *supra* note 23, at 3-4; McArthur, *supra* note 23, at 569 n.55, 571.

172 See Burbank, *supra* note 123, at 515.

A recent attempt by Jonathan R. Macey to bring public choice analysis to the service of procedure, although not without flaws, at least gives theoretical imprimatur to a view long held by some scholars, to wit, that in making and applying procedural law judges attend to their own professional interests as well as to the interests of practicing lawyers, litigants, and society.



Public choice theory has not fared well as applied to court rulemaking. An early effort by Professor Macey<sup>173</sup> encountered criticism by Professor Alexander,<sup>174</sup> and more recently, by Professor Geyh.

In other words, Professor Macey's formulation of judicial self-interest can explain almost every conceivable rule change. To the extent that desires for power, prestige, and leisure work in opposition to each other, a rule favoring one such interest will disfavor another—every hour a rule requires the judge to wield her power is an hour she will not be tanning herself by the pool. Thus, every rule change can be explained in terms of whichever interest is favored—never mind the interest that is disfavored. Likewise, insofar as one facet of a given interest comes at the expense of another facet of that same interest, every rule can be explained in terms of whichever facet is maximized. Therefore, a rule requiring the judge to exercise power that she did not have before is explicable because it increases her absolute power (as it decreases her discretionary power), while a repeal of that rule is explicable because it increases her discretionary power (as it decreases her absolute power).

At the same time as it explains too much, the premise that judges are motivated solely by appetites for leisure time, prestige, and power explains too little, because it fails to account adequately for the complexity of human motivation. . . . In short, self-interest explains judicial conduct only if self-interest is defined broadly to account for other-oriented behavior. With such a definition, however, the public choice model becomes tautological and explains nothing.<sup>175</sup>

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173 See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); *supra* note 172.

174 See Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994).

But the interests Macey examines not only are broad and vague but also seem relatively weak as possible motivations for procedural rule-making. I find it difficult to believe that the cluster of "reducing work-load" interests affect judicial decision making more than do judges' philosophical, ideological, or moral views—that is to say, their ideas about what is right and just.

*Id.* at 665.

175 Geyh, *supra* note 42, at 1215–16. Professor Geyh acknowledges that "the judiciary [may] weigh[ ] its narrow interests in power, prestige, and leisure against its broader interest in promoting the public good and take[ ] a position that furthers the former at the expense of the latter . . ." *Id.* at 1216; *cf.* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 21 (1991) ("Surely closer to reality—although not as intellectually elegant—is Richard Fenno's suggestion that the behavior of members of Congress is dictated by three basic goals: achieving reelection, gaining influence within the House, and making good public policy.").

Another problem with Professor Macey's and similar work, as applied to rulemaking, is the failure to account for, and make adjustments that may be required by, group decisionmaking—group decisionmaking, moreover, by a mix of trial and appellate judges and of judges, lawyers and academics, on behalf of institutions (courts) to which not all group members belong—rather than decisions by and on behalf of the same individual.<sup>176</sup> Moreover, Geyh's additional point that "the judiciary [may] take [ ] a position intended to promote the public good that is perceived by Congress or its constituents as promoting the judiciary's narrow self-interest at the expense of the public good,"<sup>177</sup> reminds us that the room (and need) for strategic behavior in rulemaking results not only from group decisionmaking, but also from the influence of actors other than the rulemakers. Or, as put by Professor Bone, "a public choice analysis should treat court rulemaking as a strategic game among the [rulemakers], Congress, and the various interest groups."<sup>178</sup>

Since one of the banners in the long campaign for the Enabling Act was expertise, there is apparent irony in the fact that the group responsible for drafting the original Federal Rules did not include a single sitting judge.<sup>179</sup> Even though the Supreme Court could not fairly be described as a mere rubber stamp when reviewing the pack-

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176 Cf. Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L. REV. L. & ECON. 169, 180–84 (1992) (arguing that collegiality among appellate judges determines the path of the law). Professor Macey avoids these complexities by assuming a monolithic judicial utility function, and by proceeding from the premise that "rules are not only construed by judges, they are also promulgated under the direction of judges." Macey, *supra* note 173, at 627; *see id.* at 628 (stating that the Civil Rules Committee "is composed primarily of judges, with a sprinkling of practicing lawyers and academics"). As Macey recognizes, only the Supreme Court makes the decision to promulgate a Federal Rule, but in doing so, it (usually) merely ensures procedural regularity and acts as a vetogate on proposals that are likely to be controversial and/or elicit plausible claims of overreaching. *See id.* ("To date, however, the Supreme Court has served as a mere conduit for the work of the advisory committee, approving the vast majority of changes recommended to it by the committee.").

177 Geyh, *supra* note 42, at 1216.

178 Bone, *supra* note 133, at 924. I have substituted "rulemakers" for "Advisory Committee" because supervisory court rulemaking involves multiple layers of advisory groups, differently composed, and formal promulgation by the Supreme Court, before a proposal reaches the Congress. *See also id.* at 906 ("[T]he Advisory Committee has become keenly sensitive to the risk of congressional interference in the rulemaking process."). Professor Bone failed, however, to recognize some strategic behavior by the judiciary. *See supra* note 168 (discussing additional appointments of lawyers to the Advisory Committee in response to proposed legislation); *infra* note 206 and accompanying text (discussing changes in the rulemaking process under political pressure).

179 *See supra* note 167 and accompanying text.

age of proposed Rules presented to it in 1937,<sup>180</sup> presumably no sentient observer equated its role with authorship. Indeed, one of the original rulemakers praised advisory committee and similar systems both because of his normative preferences against courts preparing rules and for rulemaking by groups that included substantial lawyer representation, and also because they provided cover to the courts in the event of controversy.<sup>181</sup>

To the extent that there was a perceived community of interests among elite lawyers, academics and federal judges, and given the extensive efforts made by the original Advisory Committee to secure comments on their drafts,<sup>182</sup> the composition of that committee may not have caused any discomfort to the purveyors of the expertise story, and their concern may in any event have been comparative lack of expertise in the legislature.<sup>183</sup> Moreover, to the extent that the lawyers and academics appointed were familiar with, or represented, a broad variety of (plaintiffs' and defendants') interests involved in federal litigation, as seems plausible in the comparatively unspecialized legal world of the 1930s—and in the absence of empirical investigation—they could plausibly be deemed to have made recommendations of “general rules” behind a veil of ignorance.<sup>184</sup> Finally, with the

180 See Clark, *supra* note 67, at 442 (discussing proposed Federal Rules that the Court rejected).

181 See Edson R. Sunderland, *Rules of Court Governing Practice and Procedure*, 9 MO. BAR J. 198 (1938) [hereinafter Sunderland, *Rules of Court*]. Sunderland there observed that “bench-drawn rules would still be colored by special interests of the branch, modified by special interests of the bar,” *id.* at 200, and that “[l]awyers . . . are in a better position than judges to understand the public attitude toward the administration of justice.” *Id.* at 202; see also Edson R. Sunderland, *Trends in Procedural Law*, 1 LA. L. REV. 477, 488 (1939). For similar views more recently expressed, see Yeazell, *supra* note 168.

182 See *1938 Hearing*, *supra* note 139, at 3–4; Burbank, *supra* note 24, at 848 n.51.

183 See Clark, *supra* note 67, at 443; Sunderland, *Rules of Court*, *supra* note 181, at 199–200.

184 See Burbank, *supra* note 24, at 847–48.

Professor Marcus is correct that the original Federal Rules were drafted “by a group of elite lawyers and law professors who acted with little empirical evidence.” They were, however, people of substantial practical experience concerned about rules that would work for lawyers and their clients while serving what Professor Garth calls “the universal principles of the profession.”

*Id.* (footnotes omitted); cf. Resnik, *supra* note 127, at 2225 (anonymity and interchangeability). Note, however, Professor Subrin’s view that “there was no one on the Committee who was a spokesperson for the small firm, the small case, or the small client.” Subrin, *supra* note 62, at 972 (footnote omitted).

It is not clear that the same can be said of lawyer members today, because of the highly specialized nature of contemporary legal practice and the perspectives, incen-

Executive Branch enthusiastically supporting the effort in a period of unified government, there was little reason to anticipate major controversy.<sup>185</sup>

Writing in 1926, Professor Sunderland remarked that “[a]lthough there can be no competition among individual lawyers, we have a very effective competition among systems and rules of practice.”<sup>186</sup> Describing the country as “a laboratory in which experiments are being actively conducted,” Sunderland expressed hope that the movement for uniform state legislation would “not extend into the procedural field,” lest it “destroy the most promising possibility for the general improvement of American procedure.”<sup>187</sup>

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tives and client pressures that such specialized practice may engender, and because everyone is now aware of the potential for differential impact in the Federal Rules. See Garth, *supra* note 123, at 953–56, 959. Compare Yeazell, *supra* note 168, at 239 (“[T]o have the rules themselves emerge from a group of once and future contestants . . . provides a splendidly Rawlsian icing on the cake . . .”), with *id.* at 244 (“American lawyers tend to represent, if not the same clients, then the same *kind* of client throughout their careers.”).

Of course, my view of the original rulemakers may reflect “the prevalent notion that the legal profession has fallen from an earlier condition of grace into an abject and debased condition.” Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 550 (1996). Professor Galanter observes that “it would be surprising if there were not many more Warren Christophers and Lloyd Cutlers engaged in public service today than there were Elihu Roots and Henry Stimson then.” *Id.* at 559. Yes, but consider the membership of the Civil Rules Committee in 1963: Dean Acheson (Chair), George C. Doub, Sheldon D. Elliott, John P. Frank, Arthur J. Freund, Albert E. Jenner, Jr., Charles W. Joiner, Benjamin Kaplan (Reporter), David W. Louisell, John M. McIlvaine, W. Brown Morton, Jr., Archibald M. Mull, Jr., Roszel C. Thomsen, Charles Alan Wright, Charles E. Wyzanski, Jr. See H.R. Doc. No. 67 (1963).

185 Cf. Fiorina, *supra* note 13, at 46 (“During the New Deal period congressional Democrats could contemplate control over the administrative process for the foreseeable future.”).

186 Sunderland, *supra* note 142, at 744.

187 *Id.* The reader may have noted the similarity between the reasoning, and indeed the language, used by Sunderland in 1926, and that used by Justice Brandeis in his famous 1932 dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Their common philosophy helps to explain (1) Sunderland’s revisionist approach to the Enabling Act after it was passed, see Burbank, *supra* note 12, at 1135 (“Sunderland’s purpose in distorting the record probably was linked with his view that national uniformity in the procedural field was undesirable because it would foreclose state experimentation.”) (footnote omitted); *infra* note 188, and (2) both Brandeis’s opposition to the bill in 1926 and his dissent from the promulgation of the Federal Rules in 1938.

Sunderland did not foresee that, in part through his efforts, and with the active support of the elite bar, the local experimentation he celebrated would be put at risk.<sup>188</sup> He also did not foresee other developments that were at war with procedural "conventionality,"<sup>189</sup> including the social revolutions worked by the civil rights and equal rights movements and the demise of (some of) the anticompetitive practices of the organized bar.

All of these developments unleashed forces that contributed to legal (including procedural) innovation and hence to pressure on supposedly uniform rules. As a result of the changing opportunities and circumstances of practice, inviting to the reformer and entrepreneur alike (for each of whom amended Rule 23, as an example, offered a golden harvest), the legal profession became less homogeneous, more competitive, and more specialized,<sup>190</sup> and the communities of interest among lawyers and between lawyers and judges shrank.

With the diversification of, and increasing specialization and competition within, the legal profession has come a greater risk that lawyers' and judges' views about desirable procedural regulation would diverge (as well, of course, as of divergent views among lawyers).<sup>191</sup> That may have been reason enough for Chief Justice Burger

See Letter from Stephen B. Burbank, to Prof. Andreas F. Lowenfeld (Mar. 6, 1985) (on file with author).

188 See *supra* text accompanying note 145. There is irony in the fact that Sunderland went on to become one of the chief architects of the Federal Rules, as there is in the fact that his enduring doubts about uniform federal procedure almost kept him from being invited to join the Advisory Committee (and, with Clark's help, did keep him from being selected as reporter). See Burbank, *supra* note 12, at 1135-36.

189 Sunderland, *supra* note 142, at 746; see *supra* note 142.

190 See Garth, *supra* note 123, at 932, 938-45. Compare the demographic description of the bar in JOHNSTONE & HOPSON, *supra* note 142, at 19 (reporting that blacks constituted "slightly over 1 percent" and women "less than 3 percent" of American lawyers in the early 1960s).

191 See Burbank, *supra* note 24, at 854 ("Divisions among lawyer entrepreneurs on questions relating to open access bode ill for the ability of the 'organized bar' to have consequential impact on civil justice reform . . .") (footnote omitted). Such divergence of views is ever present and has meant that "the legal profession has difficulty in using power for its own collective ends." JOHNSTONE & HOPSON, *supra* note 142, at 70.

As a group, lawyers are too independent, their work units too small and too fragmented and their perspectives too diverse to readily act together in their own occupational self-interest. To be sure, the organized bar fulfills traditional occupational association functions of group integration and advocacy—although less effectively than many trade unions and trade associations—and lawyers on the bench and elsewhere in government commonly favor the profession when they have a chance to do so. But by and

to change the balance of lawyers and judges on the Advisory Committee. There were other likely contributing factors, however.

The increasingly contentious nature of the reception accorded proposed Federal Rules by Congress was a threat to the prestige and influence of the Court itself,<sup>192</sup> reinforcing perhaps the tendency to equate individual with institutional judicial interests, to equate both with the public interest, and in any event to try to protect institutional interests from the start. Moreover, as the policy community concerned about procedure expanded and fragmented, the latter equation was ever more likely itself to prove controversial, and changes in the process and culture of federal court rulemaking that contributed to the expanding policy community may also have contributed to continuing controversy.<sup>193</sup>

An attempt to remove the Court from the supervisory court rulemaking process in the 1980s almost succeeded and had the blessing of Chief Justice Burger and, for a year, of a majority of the

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large, the legal profession is not particularly effective in using group pressure for its own benefit. Within the profession, on matters of general professional concern, power is widely dispersed.

*Id.* at 70–71; *see id.* at 35. The nature of “work units” has changed since this description was written, as more and more lawyers have come to practice in larger and larger firms. Although certain groups of lawyers have become powerful interests to be reckoned with, *see infra* text accompanying note 199, their conflicting interests *qua* lawyers still make it difficult to secure legislation (including legislation overriding a proposed Federal Rule) on matters implicating those interests. *See infra* text accompanying 230.

192 *See* WINIFRED R. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* 1–4, 75, 138 (1981); Burbank, *supra* note 12, at 1020–21. In a description of Brown’s study, which was undertaken by the Federal Judicial Center at his request, Chief Justice Burger noted that it “provide[d] policy makers with, among other things, a cogent analysis of the salient arguments for and against reducing the level of Supreme Court involvement in the rulemaking process.” Hon. Warren E. Burger, *Year-End Report on the Judiciary* 18 (Dec. 28, 1981), *quoted in* Burbank, *supra* note 12, at 1021 n.16.

Controversy generated by Federal Rules formally promulgated by the Supreme Court at the end of a process that has increasingly come to resemble the legislative (or administrative) process recalls Robert McCloskey’s comment on the Court’s “shrewd insight” in refusing “to perform ‘non-judicial’ functions,” to wit, “that the Court’s position would ultimately depend on preserving its difference from the other branches of government.” ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 20 (3d rev. ed. 2000).

193 *Cf.* JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA* 40 (1991) (“As a result of the expansion of the interest-group system and the change in its composition, the processes of passing legislation and evaluating public policies have become much more complicated, and policy formulation has become much more conflictual than ever before.”).

Court.<sup>194</sup> It appears to have failed because of lobbying on behalf of rulemakers in state systems modeled on the federal, who were concerned about their own prerogatives and the possible harm to rulemaking if the Court no longer formally sponsored the rules.<sup>195</sup> Continuing controversy doubtless helps to explain why members of the Court have gone to such lengths to distance the institution from proposed Rules that it formally promulgates, and it can only cause one to wonder why other members have been so enthusiastic in airing the dirty linen.<sup>196</sup>

The risk of a rupture between federal judges and the bar was realized when, in response to a perceived crisis of expense and delay, judges pursued rulemaking strategies that either empowered them at the expense of lawyers and their clients (sanctions and active case management) or that simply disempowered lawyers (discovery reform).<sup>197</sup> In so doing, rulemakers and the judges they empowered directly confronted the culture of "adversarial legalism"<sup>198</sup> and invited trouble from lawyers who, as Professor Kagan has put it, "can be an extraordinarily potent political force when their interests and ideol-

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194 Compare Letter from Hon. Warren E. Burger, to Rep. Robert W. Kastenmeier (May 12, 1983), *reprinted in 1983-1984 House Hearings, supra* note 78, at 195 ("The Members of the Court see no reason to oppose legislation to eliminate this Court from the rule making process."), with Letter from Hon. Warren E. Burger, to Rep. Robert W. Kastenmeier (June 25, 1984), *reprinted in 1983-1984 House Hearings, supra* note 78, at 195 ("On further reflection, the Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now . . .").

195 See 1985 House Hearing, *supra* note 78, at 90 (statement of Stephen B. Burbank) (noting that "the Conference of Chief Justices has gone on record very strongly in favor of keeping the rulemaking power in the hands of the Supreme Court").

196 See Burbank, *supra* note 24, at 842.

It is difficult, however, not to sense a crisis in federal procedural reform when the Chief Justice's letter transmitting the 1993 amendments to the Federal Rules disclaimed any implication "that the Court itself would have proposed these amendments in the form submitted," and when four other Justices indicated their agnosticism about, lack of competence to evaluate or disagreement with, one or more of the amendments. When a majority of the Supreme Court has washed its hands of proposed Federal Rules, and when some of the Justices have aired the dirty linen, what is it that should restrain Congress from responding to those who wish to do the same?

*Id.* (footnotes omitted); see *infra* text accompanying note 202.

197 See Burbank, *supra* note 123, at 514-15; Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 277 (1992).

198 KAGAN, *supra* note 147, at 233. "Sharp reductions in adversarial legalism, it follows, would require concentrating governmental authority and shifting power from parties and lawyers to governmental officials and programs—and in the litigative process, to judges." *Id.*

ogy are challenged.”<sup>199</sup> Their work also raised the question whether the rulemakers were serving the interests of federal judges, those of the federal judiciary, or the public interest.<sup>200</sup> It cannot have helped that the rulemakers’ decision to proceed with the 1993 proposed amendments on required disclosures, in the face of overwhelming opposition from the bar and only months after having apparently abandoned the plan, was predicated in part on an institutional desire to regain “leadership” from Congress (in light of the CJRA).<sup>201</sup>

Thus, the dissolution of the ties that bound lawyers and federal judges in rulemaking has meant that the federal judiciary is not guaranteed broad support when, functioning as an interest group, it has sought to avert congressional overrides of proposed Rules, direct congressional amendment of existing Rules, or the enactment of procedural law apart from the Federal Rules. In addition, when, as in 1983 and again in 1993, lawyers *qua* lawyers believe that the rulemakers are not listening to their objections—and particularly when they believe the rulemakers have confused the interests of judges or of the judiciary with the public interest—some of them will actively seek relief in Congress.<sup>202</sup> They can only be encouraged to do so on occasions of recorded disagreement about proposed Federal Rules by members of the Supreme Court.<sup>203</sup>

Lawyers also represent the members of other interest groups, and in that capacity as well some of them have found irresistible the opportunities for seeking to exercise influence (and/or to earn fees), which were created by the opening up of the rulemaking process, particularly in a world in which the myth of the neutrality of procedure has been exploded.<sup>204</sup>

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199 *Id.* at 245. *But see supra* note 191; *infra* text accompanying note 230.

200 “Does neutrality include the willingness to subordinate the interests of the judiciary narrowly viewed when they are in conflict with other interests traditionally valued, including by the organized bar? Is that the lesson of Rule 11, of sanctions in general, of court-annexed arbitration or of managerial judging?” Burbank, *supra* note 24, at 848 (footnotes omitted).

201 *Id.* at 845 (citation omitted).

202 *See* Burbank, *supra* note 39, at 228; Burbank, *supra* note 123, at 515–16.

203 *See supra* text accompanying note 196. In this respect recorded disagreement with the promulgation of a proposed Federal Rule may function like a dissent to a decision interpreting a federal statute. *See infra* text accompanying note 224.

204 Consider in that regard a September 1999 memorandum from the chair of the Federal Civil Procedure Committee of the American College of Trial Lawyers to his committee colleagues, reporting the “extremely good news” that the Judicial Conference had approved the proposal to narrow the scope of discovery under Rule 26(b)(1), Memorandum from Robert S. Campbell, Jr., Chair, Federal Civil Procedure Committee of the American College of Trial Lawyers, to Members of the Federal Civil



From this perspective, the changes in the rulemaking process in the 1980s that were designed to open it up to more and more diverse points of view, make it more transparent, and diminish the need for congressional involvement, may in fact have facilitated a process of redundancy wherein participants treat rulemaking that is at all controversial as merely the first act.<sup>205</sup> If so, and to the extent that those process changes, although required by statute as of 1988, originated with the judiciary,<sup>206</sup> that would be ironic. For to that extent they would constitute an example of the late Daniel Patrick Moynihan's "Iron Law of Emulation"<sup>207</sup> or, more precisely, the "more subtle process" he described, "involv[ing] the emulation by one branch of another in order to eliminate any appearance of disparate levels of legitimacy."<sup>208</sup>

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Procedure Committee of the American College of Trial Lawyers 1 (Sept. 16, 1999) (on file with author), claiming that it was "the College proposal (substantially adopted by the Advisory Committee)," *id.*, and observing that American College committee member "Fran Fox played a major role as a member of the Advisory Committee, itself, in advocating the proposed amendment." *Id.* at 3.

205 See Burbank, *supra* note 39, at 242. "In addition, far from helping to disengage Congress from the process of procedural rulemaking, the changes made in the 1980s, which assimilated it to the legislative process, may encourage Congress 'to second-guess the product of that process or to preempt it.'" *Id.* (footnote omitted); *see id.* at 244.

206 It is probably more accurate to say that they resulted from the judiciary's realization that changes were necessary in light of the controversy in the 1970s, with the interest of the organized bar and congressional oversight nudging the judiciary in the early 1980s, and 1988 legislation formally requiring a set of changes, most of which (but notably not the requirement of open meetings) had already been put in place. *See 1985 House Hearing, supra* note 78, at 92-93 (statement of Stephen B. Burbank); Burbank, *supra* note 34, at 998 n.2; Burbank, *supra* note 12, at 1020-21; *supra* note 192. Note, moreover, that in 1976 Congress had required the meetings of certain administrative agencies to be "open to public observation." Pub. L. No. 94-409, §3(a) (1976) (codified at 5 U.S.C. §552b (2000)). In any event, Professor Geyh is correct that the 1988 legislation "did little more than codify existing practice," Geyh, *supra* note 42, at 1189 n.124, and that "the trend toward politicization of the rulemaking process was in full swing by the time that the amendments were adopted." *Id.* *But see* Bone, *supra* note 133, at 903 (stating that 1988 amendments "opened the rulemaking process" and noting Geyh's contrary view).

207 MOYNIHAN, *supra* note 151, at 118. "Whenever any branch of the government acquires a new technique which enhances its power in relation to the other branches, that technique will soon be adopted by those other branches as well." *Id.*

208 *Id.* at 121. There can be little question that other actions taken by the institutional federal judiciary illustrate Moynihan's Law. Thus, at the same time as Congress was better equipping itself to *monitor rulemaking* (court and administrative) by enlarging staff, *see infra* text accompanying note 228, in 1976 Chief Justice Burger established and placed in the Administrative Office of the United States Courts a Legislative Affairs Office. *See* Robert W. Kastenmeier & Michael J. Remington, *A Judi-*

Perhaps, however, describing the phenomenon as one of redundancy is tendentious. In the absence of effective judicial review of court rules, (the potential for) congressional review becomes the only feasible alternative. Writing about the administrative process, Professor Fiorina has observed:

But as the courts came to accept interest-group interpretations of American politics in general, and of regulation in particular, judicial deferral to agency expertise began to decline. Analogous developments occurred in Congress. Much of the legislation establishing the “new social regulation” was filled with detailed procedural requirements going far beyond the APA. Congressional majorities encouraged an accessible rulemaking process, sometimes going so far as to subsidize intervenors. And these same majorities provided every opportunity for disgruntled interests to shift the conflict from the administrative arena to the judicial. Though such developments admit to various interpretations, they are consistent with legislators trying to counter evident biases in administrative process.<sup>209</sup>

More recently, in the wake of the Supreme Court’s invalidation of the one-house veto,<sup>210</sup> Congress implemented a system of review of administrative rules very much like that which has been in place for supervisory court rules since 1934.<sup>211</sup> I have previously remarked the relevance to court rulemaking of some of the concerns about this system raised by Professor Strauss.<sup>212</sup> For present purposes it is notewor-

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*cious Legislator’s Lexicon to the Federal Judiciary*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 63 (Robert A. Katzmann ed., 1988). In recent years the efforts of that office to monitor legislation affecting the judiciary, including legislation affecting the Federal Rules, see *supra* text accompanying notes 96–113, have been supplemented by the work of an expanding Rules Committee Support Office, the staffing of, and level of support provided by, which has doubled since it was created in 1991. See E-mail from Peter McCabe, Esq., to Stephen B. Burbank (Dec. 3, 2003) (on file with author).

After noting the creation of the Office of Judicial Impact Assessment in the Administrative Office, Robert Katzmann observed that “[i]t would not be surprising if Congress, following Moynihan’s Law of Emulation[,] . . . were to create its own capacity to produce such statements.” ROBERT A. KATZMANN, COURTS AND CONGRESS 102 (1997).

209 Fiorina, *supra* note 13, at 49 (footnote omitted).

210 See *INS v. Chadha*, 462 U.S. 919 (1983).

211 See Congressional Review Act, Pub. L. No. 104-121, tit. II, subtit. E, 110 Stat. 857, 868–74 (codified at 5 U.S.C. §§ 801–808 (2000)).

212 See Burbank, *supra* note 39, at 245; Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745 (1996). Thus, noting Professor Strauss’s worry that agencies might “look for alternative means of accomplishing their business,” Strauss, *supra*, at 772, I pointed out that “[t]he use of case-by-case adjudication to circumvent or preempt court rulemaking obstacles posed by the Enabling Act process is not unknown.” Burbank, *supra* note 39, at 245. Recent

thy that, although Congress has only once formally invoked its power to block a rule, the power to do so has nonetheless cast a substantial shadow.<sup>213</sup>

### C. Congress and the Legislative Process

The specific experience of the proposed Evidence Rules and a new jurisprudential climate combined to make members of Congress and their staffs aware of the potential of rulemaking choices to submerge substantive in favor of procedural policies, of supervisory court rulemaking to impinge on Congress's lawmaking prerogatives, and of procedure consequentially to affect substantive rights. Less sanguine than Professor Bone about the power of ideas to shape congressional behavior, at least on a continuing basis,<sup>214</sup> I believe that neither development suffices to explain the changed pattern and pace of congressional hold-ups and overrides of Federal Rules in the 1970s and 1980s, let alone Congress's recent willingness to act outside of the Enabling Act process.

In 1991 Professor Eskridge published a pathbreaking study of congressional overrides of Supreme Court statutory interpretations,<sup>215</sup> the influence of which has far transcended the specific topic and has extended as much to political science as to legal scholarship.<sup>216</sup> He found that, although there were on average six overrides in the four Congresses from 1967 to 1974, the average increased to twelve in the

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evidence of that phenomenon comes in an opinion of the U.S. Court of Appeals for the Seventh Circuit, holding that the district court erred in refusing to enjoin state court cases that were brought as national class actions after the Court of Appeals had held that no such class could be certified under Rule 23. See *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 333 F.3d 763, 765–69 (2003). The Seventh Circuit thus required an injunction to implement common law rules of preclusion that the rulemakers had concluded was beyond the rulemaking power to authorize. See *supra* note 85. The decision's treatment of preclusion law and of the Anti-Injunction Act, 28 U.S.C. § 2283 (2000), is adventurous, to say the least.

213 See Julie A. Parks, Note, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (2003).

214 See Bone, *supra* note 133, at 919 ("Ideas have power in the political process notwithstanding the force of raw interest. Armed with a persuasive justification of their role, court rulemakers can make it more difficult for Congress to justify intervention.").

215 See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

216 See Lee Epstein & Jack Knight, *Walter F. Murphy: The Interactive Nature of Judicial Decision Making*, in THE PIONEERS OF JUDICIAL BEHAVIOR, *supra* note 133, at 211–12.

eight Congresses from 1975 to 1990, and that the 94th Congress (1975–76) represented the turning point.<sup>217</sup>

Professor Eskridge explored the characteristics of decisions likely to be overridden and of the groups likely to persuade Congress to take that action, noting as to the former that decisions attracting scrutiny “were much more likely to have a dissenting opinion”<sup>218</sup> and that decisions “overridden were much more likely to have had an ideologically identifiable split on the Court.”<sup>219</sup> Moreover, analyzing the reasons for the change in the rate of congressional override, Professor Eskridge identified, among others, the proliferation of interest groups, “producing more monitoring,”<sup>220</sup> and he observed that between 1970 and 1975 the size of the staffs of standing committees in the House and Senate doubled,<sup>221</sup> a factor that he found to have more explanatory power than the existence of divided government.<sup>222</sup>

Because of these and other contributions, Professor Eskridge’s study is extremely useful in considering the relationship between the federal courts, the federal judiciary, and Congress in the regulation of procedure. Thus, the time period he identifies as the turning point for statutory overrides of Supreme Court decisions, 1975–1976, is equally salient for the greater incidence of overrides (and of close calls) in the rulemaking area.<sup>223</sup>

Similarly, Eskridge’s finding concerning the effect of dissents and/or an ideologically identifiable split on the likelihood of a decisional override suggests that what I have called the Court “airing the dirty linen”<sup>224</sup> may have contributed to congressional activity (and, indeed may have been intended to do so).<sup>225</sup> In any event, the greater transparency of the rulemaking process as a whole has facilitated mon-

217 See Eskridge, *supra* note 215, at 338.

218 *Id.* at 350.

219 *Id.*

220 *Id.* at 338.

221 *Id.* at 339.

222 See *id.* at 340–41 (“The evidence from the 1980’s correlates very well with the suggestion that staff size has exercised an independent influence on the level of congressional overrides.”).

223 See *supra* text accompanying notes 73–74.

224 See *supra* text accompanying note 196.

225 Cf. Eskridge, *supra* note 215, at 388–89 (discussing “institutional signaling” when, for example, “the Court will sometimes refuse to interpret a statute broadly, especially when such an interpretation would represent a major policy decision that the Court would be more comfortable allowing Congress to make”).

itoring and hence identification of ideological and/or interest group flash points.<sup>226</sup>

More important (because bearing directly on the change in Congress's attitude or behavior with respect to proposed Federal Rules and federal procedural regulation in general) are Eskridge's findings concerning congressional staff and his analysis and discussion of interest group dynamics.

The vast increase in staff between 1970 and 1975 equipped Congress to monitor supervisory court rulemaking,<sup>227</sup> and its experience with the proposed Evidence Rules during that very period indicated that there might be reason to do so. Thereafter, even before the judiciary changed its rulemaking procedures (a process completed and formalized in 1988), the proliferation of interest groups discussed by Eskridge, and the monitoring they provided for a Congress better equipped to respond, surely contributed to the pace and rate of overrides and close calls in the 1970s and early 1980s. Moreover, as suggested above, it is likely that both increased staff and the capacity it gave to Congress stimulated emulation in the judiciary, commencing with the creation of the AO's Legislative Affairs Office in 1976.<sup>228</sup>

Although review of the occasions of friction between the rulemakers and Congress as to Civil Rules proposals in the 1970s and 1980s<sup>229</sup> suggests the possibility of a partisan (or ideological) explanation, many of them are difficult to square with public choice and similar theories of legislative behavior. The 1983 sanctions/case management (as also the 1993 discovery) proposals may constitute an exception to both propositions, although both sets of proposals were recognized as having implications for access to court (which is often a partisan issue). Moreover, because lawyers do not constitute a unified interest group (and also speak for others who may constitute such groups), it may be that proposals designed to affect attorney behavior

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226 The Supreme Court has also been concerned about its ability to monitor rulemaking. "The Advisory Committee was informed in February 1992 'that the Court would in the future like a memorandum explaining the contentious issues resolved.' . . . Appendix H to the Judicial Conference Rules materials for September, 1992 is a document entitled 'Proposed Rules Amendments Generating Substantial Controversy.'" Burbank, *supra* note 56, at 124 n.177.

227 The same phenomenon may have affected congressional oversight of administrative agencies. See Kagan, *supra* note 136, at 2257 (citing JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 14, 34-37 (1990), for a "large increase in formal methods of legislative oversight, such as committee hearings and investigations, in the 1970s and 1980s").

228 See *supra* note 207 and accompanying text.

229 See *supra* text accompanying notes 73-76.

will usually produce a conflictual demand pattern, diminishing the likelihood of success in Congress.<sup>230</sup>

When one moves from congressional review of proposed Federal Rules to procedural legislation initiated in Congress, whether in the form of direct legislative amendments to Federal Rules or of discrete, substance- (or litigant-) specific provisions, additional considerations bear on the analysis. Just as the rulemakers have mistakenly treated the Executive Branch as a monolith in the past,<sup>231</sup> it is probably a mistake to treat Congress as a monolith for these purposes. Different congressional committees have different cultures and patterns of membership, including percentage of lawyer members, as well as different attitudes toward the federal judiciary.<sup>232</sup>

Invocation of "The Enabling Act Process" may mean something to the members of the House and Senate judiciary committees, most of whom will be lawyers,<sup>233</sup> and whose staffs often work closely with representatives of the judiciary. Indeed, it may function as something like a rule of law value to restrain legislative behavior reasonably perceived as a breach of that treaty.<sup>234</sup> The same may not be true of other committees, and it is interesting that some of the legislation containing provisions to which the federal judiciary has objected in recent years has come from such other committees.<sup>235</sup> Moreover, of course, there may be no point in invoking—or, worse, no occasion to invoke—rule of law values when legislation is passed in violation of Congress's own rules.<sup>236</sup>

The question, however, is whether the judiciary is differently situated from any other interest group in this respect. In one of the clearest examples of the "Iron Law of Emulation,"<sup>237</sup> Congress developed the committee system beginning in the 1790s so as to "counter the expertise and experience that until that time had been monopolized

230 See Eskridge, *supra* note 215, at 365.

231 See Burbank, *supra* note 56, at 147–48.

232 See, e.g., Mark C. Miller, *Congressional Committees and the Federal Courts: A Neo-Institutional Perspective*, 45 W. POL. Q. 949 *passim* (1992) [hereinafter Miller, *Congressional Committees*]; Mark C. Miller, *Lawyers in Congress: What Difference Does it Make?*, 20 CONGRESS & THE PRESIDENCY 1 (1993).

233 See Miller, *Congressional Committees*, *supra* note 232, at 962.

234 Cf. Eskridge, *supra* note 215, at 367–72 (noting the "critical role" of committees in screening out override proposals).

235 Thus, the PSLRA was considered by the Banking Committee in the Senate and the Commerce Committee in the House; the Y2K Act was considered by the Commerce Committee in the Senate; and the E-Government Act was considered by the Committee on Government Reform in the House.

236 See Edward R. Becker, *Of Laws and Sausages*, 87 JUDICATURE 7, 7–10 (2003).

237 See *supra* text accompanying note 207.

by the executive branch.”<sup>238</sup> Eventually, however, the power of congressional committees eroded with the adoption of reforms that brought sunshine to their meetings, “strengthened the Speaker and made him accountable to the caucus”<sup>239</sup> and proliferated subcommittees.<sup>240</sup> More recently, the power of the committee system as a whole has eroded, as more and more legislation is the product of activity on the floors of Congress, often taking the form of enormous multipurpose bills, including appropriations bills.<sup>241</sup> The Prison Litigation Reform Act was part of one such bill, for example.<sup>242</sup>

In any event, “The Enabling Act Process” has nothing properly to do (or at least not what the judiciary thinks it has to do) with most of the substance- (or litigant-) specific legislative procedure to which the judiciary has objected. The judiciary appears to be missing the points that (1) Congress has a strong claim to exclusive power to make prospective law for such matters, which it has not delegated, and (2) both ideological and interest group politics are likely to be at their apex (within the domain of procedure) when the question is the content of a substance-specific rule of procedure, contributing to, but by no

238 Kenneth A. Shepsle, *Representation and Governance: The Great Legislative Trade-Off*, 103 POL. SCI. Q. 461, 465 (1988).

239 *Id.* at 478.

240 *See id.* at 479–80.

241 *See id.* at 480.

Subcommittees get rolled by full committees, and full committees get rolled on the floor. Final legislation today is less the result of specialized consideration by experts than it is the product of whomever [sic] is skilled at assembling floor majorities. . . . The Congress becomes vulnerable to penetration from outside . . . .

*Id.*; *see id.* (“[M]ore and more legislative business is conducted on the floor with subcommittee products getting amended, often beyond recognition.”); *see also* WALKER, *supra* note 193, at 136 (noting dramatic decline in introduced and enacted bills after mid-1970s and enactment of major programs in the 1980s as part of “the ritualistic, mammoth, omnibus budget reconciliation bills compiled at the end of each session of Congress”). “But the prime example of Congress at its worst is its stewardship on appropriation bills.” Becker, *supra* note 236, at 8.

242 *See* Christopher E. Smith & Christopher E. Nelson, *Perceptions of the Consequences of the Prison Litigation Reform Act: A Comparison of State Attorneys General and Federal District Judges*, 23 JUST. SYS. J. 295, 310 (2002).

Before the enactment of the PLRA, the repeated and sustained legislative initiatives to curtail prisoner litigation and related judicial authority to intervene into correctional operations were delayed and deflected by influential Democratic senators, who were concerned about the protection of constitutional rights in correctional institutions. However, the statute eventually gained the opportunity for enactment without full examination in committee hearings because it was included in the 1996 Appropriations Act . . . .

*Id.* (citation omitted); *see* Schlanger, *supra* note 95, at 1559.

means exclusively determining, the need for circumspection in the formulation and communication of the judiciary's views.

It is quite remarkable that the federal judiciary continues to object to procedural provisions in statutes like the PSLRA and the Y2K Act on the basis of "The Enabling Act Process."<sup>243</sup> For although the Enabling Act does allocate power with respect to prospective, legislation-like procedural law, it is restricted to "general rules," language that the rulemakers have consistently interpreted to require Federal Rules that both apply in all federal district courts and that apply in all types of civil cases (i.e., are trans-substantive).<sup>244</sup> Whether or not that interpretation is correct,<sup>245</sup> it prevents promulgation of Federal Rules that are substance-specific, and behind the judiciary's objections there may, therefore, lie either a claim that the Federal Rules represent the best accommodation of procedural values, and the best vehicle for the effectuation of substantive values, for every type of case in federal court, or a claim that the costs to such values are outweighed by the benefits of formally uniform procedure. In addition or alternatively, an objection that invokes "The Enabling Act Process" may simply (albeit fecklessly) signal the judiciary's concern that, given the circumstances in which so much contemporary legislation is enacted, described above, statutory procedure is unlikely to be well made, viewed either discretely or as part of the larger procedural landscape in which it will repose.<sup>246</sup>

Yet, the numerous instances when federal courts themselves have sought to vary choices made in the Federal Rules to accommodate the perceived needs of particular types of cases is evidence, were it needed, of the implausibility of such claims about the Federal Rules.<sup>247</sup> Moreover, as already suggested, for those many matters where the Federal Rules make no choices, leaving the procedure/sub-

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243 See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 614 (2002) (opposition to heightened pleading in Y2K Act).

244 See Carrington, *supra* note 160, at 2080 (special pleading rules for RICO cases "would have violated the principle of generalism and might therefore exceed the authority of the court under the Rules Enabling Act").

245 See Burbank, *supra* note 120, at 1934-35; *supra* text accompanying note 161. Note that, in my view, most Federal Rules are only formally trans-substantive.

246 Professor Geyh suggests that the judiciary's opposition to substance-specific procedure, which reflects concern about the lack of "interest, aptitude, [and] experience" of the responsible legislators, may be motivated in part by a desire "to alert the judiciary committees that someone out there is on [their] turf (thereby prompting the judiciary committee to request a joint referral and kill the bill)." Memorandum from Charles G. Geyh, to Stephen B. Burbank (n.d.) (on file with the author).

247 See, e.g., Fairman, *supra* note 243, at 617-24; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).



stance accommodation to discretionary decisionmaking, the claim must be that Congress's substantive agenda is *always* better served by trusting to the discretion of federal judges and thus abjuring the potentially potent technique of using procedure to drive, or to mask, substance.<sup>248</sup> From the latter perspective, indeed, the claim seeks to deny to Congress a politically valuable instrument of ambiguity.<sup>249</sup> Neither the history of the past thirty years, recounted above, nor the theory of the legislative interpretation game,<sup>250</sup> suggests that Congress would, or that it should, honor such a claim across the board.<sup>251</sup>

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248 See Fairman, *supra* note 243, at 617–19. Professor Fairman is critical of the pleading provisions in the Y2K Act, as of those in the PSLRA, on which they were modeled, defending trans-substantive procedure on the ground of uniformity and because it fosters “greater social justice.” *Id.* at 622–23. But surely this is an ideological judgment that presupposes the current content of Rule 8. Moreover, the Court’s statements that “[a] requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the federal rules, and not by judicial interpretation,’” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)), should be approached with care. A Federal Rule requiring heightened pleading in “all averments of fraud or mistake” is one thing. See *FED. R. CIV. P.* 9(b); *Rombach v. Chang*, 355 F.3d 164 (2d Cir. 2004) (Rule 9(b) applicable to fraud allegations even though fraud not a necessary element of statutory claim). A proposed Federal Rule attempting to impose heightened pleading requirements as to a particular substantive claim would be quite another, something hard if not impossible to square with the rulemakers’ traditional interpretation of “general rules” and—perhaps this is the point—not something that they would conceivably attempt in the post-1988 rulemaking world.

249 My defense of statutory substance-specific procedure, occasional and tailored to meet an identified misfit between Congress’s substantive goals and the trans-substantive Federal Rules, is predicated in part on a normative preference for transparent policy choices on matters of substantive import by democratically selected lawmakers over buried policy choices by judges. See *supra* text accompanying note 163. Even if, as in the PSLRA and the Y2K Act, heightened pleading is an avoidance technique, enabling Congress to navigate substantive controversy or an empirical vacuum, see Fairman, *supra* note 243, at 607, 617; *id.* at 618 (“reach[ing] out to procedural alternatives as salves for the substantive tension”), I do not see that “congressional heightened pleading escapes scrutiny by the bench, bar, and public in the same way as the judicially imposed standards do.” *Id.* at 624. Although modern legislation may escape just about everyone’s scrutiny before enacted, that was not true of the pleading provisions of the PSLRA or the Y2K Act. Moreover, transparency is only part of the normative preference. Accountability for prospective choices having predictable and identifiable effects on the substantive law is the other, and the Federal Rules process is not the proper vehicle for such choices.

250 See Grundfest & Pritchard, *supra* note 7, at 637–50.

251 Even Professor Carrington has acknowledged that there “may be times when Congress should respond to cries for substance-specific procedural advantage.” Carrington, *supra* note 160, at 2086; see *id.* (“If necessary to effect enforcement of a substantive right . . .”).

From an interest group perspective, the judiciary's invocation of "The Enabling Act Process" as an objection to statutory substance-specific procedure may reinforce the view that the judiciary cares more for its power and supposed prerogatives than it does for the public interest.<sup>252</sup> Worse, inconsistency in the invocation of that objection may reinforce suspicion that the objection is not really based on the interests of the judiciary *qua* judiciary—or on concern for the quality and integrity of federal procedure—but rather on ideological considerations, depending therefore on the proposed legislation in question.<sup>253</sup> If so, the judiciary will be regarded as taking sides in an inevitably policy preference-laden debate and incur the same costs as if it were actually participating on the merits of such debate. Those costs may be substantial.<sup>254</sup>

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252 See *supra* text accompanying note 200.

253 Although the PLRA "changed the operation of numerous civil rules," Schlanger, *supra* note 95, at 1562, the judiciary appears to have objected specifically only to those affecting the operation of Rule 53 (special masters). See E-mail from John K. Rabiej, Chief, Rules Support Office, Administrative Office of the U.S. Courts, to Stephen B. Burbank (May 25, 2004) (on file with author).

254 As so well discussed by Professor Resnik, such suspicion has attended efforts by the institutional federal judiciary to persuade Congress not to enact legislation creating new federal rights on the ground that, in a time of crowded dockets, and in light of federalism concerns, the resulting cases would represent a misallocation of federal resources. See Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223 *passim* (2003).

On matters as to which one would expect the judiciary to try to maximize the institution's collective preferences, such as salary, terms, and conditions of employment, everyone recognizes that judges are self-interested and can discount what they say without closing off an obvious and important source of relevant information. This is also true of workload/docket concerns, although, as Professor Resnik points out, there are reasons to doubt the judiciary's ability to forecast the work that new statutory rights would create. See *id.* at 286, 289, 296. Opposition to the creation of new federal rights by the institutional judiciary on docket grounds, whether or not backed up with an explicit statement of the "proper" role of the federal courts, may carry undue weight or in any event be invoked by congressional opponents. The costs are not just the perception that the judiciary has a unified policy preference but that the preference, once expressed, may skew individual judicial decisionmaking by those socialized not to express their views *ex ante* and affected perhaps by the institutionally expressed view *ex post*. See *id.* at 308–09. In an interview in 2003, the Chair of the National Conference of Federal Trial Judges, Judicial Division, American Bar Association, stated:

One of the things that you will not find within our Conference, however, is any official position or opinion contrary to the policies of the Judicial Conference. So, while we target issues that would certainly be of interest to the Judicial Conference, such as legislation affecting independence or compensation, and we discuss these frankly and vigorously, our public position never conflicts with any official policy adopted by the Judicial Conference. We

The Civil Justice Reform Act of 1990 appears to confound the transactional model of legislation, which posits that Congress will have little interest in statutes that distribute benefits broadly (a theory under which the Enabling Act makes eminent sense so long as procedure is thought to be neutral).<sup>255</sup> It is not necessary to endorse that theory in order to believe that we shall not see the CJRA's like soon again. Legislation containing substance-specific procedure is, for reasons already adumbrated, quite a different matter. The climate for ideological and interest group politics with respect to procedure today recalls the mid-1990s. That is not good news.<sup>256</sup>

#### IV. THE FUTURE

In the current political climate—perhaps the most poisonous in forty years for the relationship between Congress and the federal judiciary—there is reason for concern about adherence to long-standing customs or norms and hence about resort to blunt instruments of influence or control by members of Congress determined to work their will on the federal courts and “to take no prisoners” in the process.<sup>257</sup>

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believe the federal Judiciary needs to speak with one voice on such policy issues.

*Conference Represents Federal Trial Judges*, THIRD BRANCH, June 2003, at 10 (interview with Chief Judge Irene M. Keeley, N.D. W. Va.).

More fundamentally, it is not, I believe, appropriate for the federal judiciary to have an institutional view about the “proper” role of the federal courts, or at least one that purports to drive official positions on proposed legislation creating new federal rights. That is a matter for Congress. The judiciary should be expected to provide data to Congress, and there is no harm in a repeated plea that Congress consider caseload implications (and adequately fund the courts). Anything beyond that is likely to be seen, perhaps with good reason, as “taking sides in an inevitably policy preference-laden debate.”

255 See WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 59 (3d ed. 2001).

256 The polarization of procedure is but part of the larger political environment, to which I turn in the next Part.

257 See Letter from Rep. Max Sandlin, to Stephen B. Burbank (Oct. 3, 2003) (on file with author):

[T]hirteen members of the U.S. House of Representatives recently formed the “House Working Group on Judicial Accountability.” The working group is chaired by Representative Lamar Smith (R-Texas) and Representative Steve Chabot (R-Ohio). The working group’s stated goals include educating Members and the public about so-called “judicial abuse,” preventing “judicial abuse,” and supporting the nomination of judges “who will not substitute their own policy views for the law.”

Representative Tom DeLay (R-Texas), House Majority Leader and a member of the working group, praised the group for its intention “to take

The proper response is not—it cannot be—assertions of power that does not exist. The federal judiciary not only lacks a purse and a sword; its shield is very narrow. Wiser heads must prevail, and, if necessary, informed public opinion must be brought to bear on those who are ignorant of, or choose not to heed, the lessons of our constitutional history.<sup>258</sup>

Power has a shadow, just as law does.<sup>259</sup> Yet, although one may have to yield to naked power, as also abide by a foolish law, neither means that one must accept irrationality or irresponsibility “without question, or for that matter, without insistence that legislative foolishness be clear for all to see.”<sup>260</sup> Rather than waging a losing battle about power, far better to seek to forestall irrationality and irresponsibility

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no prisoners” when it comes to exposing and preventing “judicial abuse.” Among other measures, the working group has committed to increasing direct oversight of the federal courts and to calling federal judges to account when they “exceed the authority given them under Article III.”

*Id.*; cf. *infra* text accompanying note 286 (noting the Chief Justice’s concerns about PROTECT Act).

258 See E-mail from Stephen B. Burbank, to Todd Metcalf, Legislative Assistant (Oct. 23, 2003) (on file with author):

Representative Sandlin would know better than I whether a self-appointed group of members of the House from one side of the aisle has any standing or power to do anything, other than further pollute discourse that is already debased. I would have thought not. The risk, however, is precisely that, by adding to a legislative corpus of misinformation and inter-branch hostility that is already too large, the House Working Group will influence those who do have power. In that regard, the quoted characterization of the group’s “take no prisoners” approach, however praiseworthy in the pursuit of termites, manifests a woefully ignorant and inappropriate attitude towards an institution for the establishment of which our ancestors fought and died and which has been a cornerstone of our freedoms.

If in fact the House Working Group is serious, it appears that the members of that group want to turn back the clock and to use the recognized power of oversight, among other legislative powers, to coerce the judiciary, the “least dangerous branch” in part because it lacks the power adequately to defend itself. Fortunately, Representative Sandlin is alert to the dangers, and if the effort subsists, he will have the support of all thoughtful citizens, who, even when they do not like a federal court decision, know that an independent (and accountable) judiciary has been critical to our development as a functioning democracy.

*Id.* (responding to Letter from Rep. Max Sandlin, *supra* note 257).

259 See, e.g., Burbank, *supra* note 1, at 321–22 (noting that the acquittal of Justice Samuel Chase on articles of impeachment nonetheless curbed partisan behavior on the bench); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 990–97 (1979).

260 Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 2009 (1997).

bility through genuine dialogue, informed and nourished by the respect that is due to all branches of government and that is required if we are to honor the genius of those who fought and died for our liberty.

The challenge is especially daunting, however, because the breakdown in norms of institutional respect and accommodation is not confined to the judiciary and Congress. It is rather a defining characteristic of contemporary politics and should be a source of the most serious concern for all thoughtful citizens. As recently put by Professor Shane, although “[w]e have a national system of government whose orderly and effective operation depends to an exceptional degree upon certain norms of cooperation among its competing branches,”<sup>261</sup> today “there is reason to worry that new habits of unalloyed combat . . . have replaced old habits of mutually respectful competition, to the long-term detriment of democratic vitality in the United States.”<sup>262</sup>

Over the last decade the rulemakers have, by and large, taken seriously the Chief Justice’s assurance to Congress that they would observe the Enabling Act’s limitations.<sup>263</sup> They have also taken seriously a number of calls, including in a 1995 self-study of rulemaking, that rulemaking attend far more in the future than it has in the past to the

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261 Peter M. Shane, *When Inter-branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups,”* 12 CORNELL J.L. & PUB. POL’Y 503, 505 (2003). I have suggested that the so-called House Working Group on Judicial Accountability is pursuing a “partisan, if not strongly ideological, effort to use the supposed excesses of the federal judiciary for political advantage in future elections.” E-mail from Stephen B. Burbank, *supra* note 258. If so, it is an example of “inter-branch aggression for political goals.” Shane, *supra*, at 521.

Informed citizens know that a Republican-initiated broadside founded in allegations of judicial abuse and judicial overreaching against a federal judiciary dominated by judges nominated by Republican presidents is unlikely to be sincerely motivated. The problem, of course, is that most citizens are not well informed and that they trust their elected representatives for accurate information and sincere legislative action when a genuine problem affecting the common weal arises.

E-mail from Stephen B. Burbank, *supra* note 258. Whether or not the group’s activities will pose “a special threat to democratic legitimacy,” Shane, *supra*, at 521, depends upon its ability to generate popular support. Of course, that is why the group seeks to “educate” the public. See Letter from Rep. Max Sandlin, *supra* note 257.

262 Shane, *supra* note 261, at 542. “I am critiquing the substitution of norms that support inter-branch consensus building and democratic deliberation with norms that favor winner-take-all politics and unproductive inter-branch tension.” *Id.* at 504 n.8.

263 See *supra* text accompanying note 85.

need for and the fruits of empirical study.<sup>264</sup> Both developments have helped the rulemakers keep their ambition under control, for evidence of which one need only consider the recently shelved proposals to address in Federal Rules problems stemming from duplicative or overlapping class actions.<sup>265</sup>

The result of the judiciary's self-restraint is likely to be few occasions of friction when the Court promulgates, and few overrides of, proposed Federal Rules of Civil Procedure in the future.<sup>266</sup> But that same self-restraint, coupled with the discovery of the power of procedure by interest groups and Congress alike, seems destined to yield more proposals for "procedural" legislation and hence the need for closer and more frequent cooperation with Congress.

When such proposals take the form of direct statutory amendments of the Federal Rules, the judiciary has a legitimate interest in focusing attention on "The Enabling Act Process," and Congress should ensure that there is a compelling reason to depart from that process, be it a genuine need for speedy adoption,<sup>267</sup> inadvertent omission from proposed Rules that are about to become effective,<sup>268</sup> or the desire to place law properly made by Congress as opposed to the rulemakers in its proper context. The last of these reasons requires no disruption in the normal process prior to congressional action.<sup>269</sup> Moreover, when considering action for any of these reasons

264 See *Self-Study*, *supra* note 71, at 699; *supra* text accompanying note 157.

265 See *supra* note 85; Resnik, *supra* note 254, at 296–305.

266 "Friction, to some extent, is a sign of the system at work. But life cannot be all friction." Shane, *supra* note 261, at 508. For a similar view as to the relations between judges and politicians in England, see Diana Woodhouse, *The English Judges, Politics and the Balance of Power*, 66 MOD. L. REV. 920, 923 (2003) (book review) ("A degree of friction between the courts and the executive is healthy. However, when it manifests itself in open conflict, as it did in 1995-96, it can undermine public confidence.").

267 See *Self-Study*, *supra* note 71, at 687.

Rulemaking today is more accessible to interested parties than ever before.

It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress readily demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

*Id.* But see *supra* note 206 (noting that the 1988 changes largely confirmed existing practices).

268 See *supra* text accompanying note 103.

269 See Burbank, *supra* note 56, at 145–46.

When prudence counsels (or the Enabling Act requires) that federal law be made through legislation rather than court rules, the desire to take advantage of the rulemakers' expertise, to facilitate comprehensive procedural re-

(or any other), the form proposed—namely, statutory amendment of Federal Rules—should remind Congress that following the normal process, if possible, is important not just to improve the quality of the product (including the coherence of the Federal Rules as a whole), and not just to show respect for the federal judiciary as an institution. “If interdependence is as critical to the Framers’ system as autonomy, then it follows that no branch should seek to eliminate longstanding forms of interdependency between the branches.”<sup>270</sup>

Those unmoved by such considerations may wish to recall that although Congress holds the ultimate power to make most procedural law, federal judges are not without power to frustrate its effective implementation.<sup>271</sup> Forbearance in one realm of power may induce similar forbearance in the other.<sup>272</sup> More generally, a “system of separated powers . . . works only if every branch is committed to effective governance and is willing to forbear from the deployment of its powers to their extreme theoretical limits.”<sup>273</sup>

When, however, Congress proposes to enact substance-specific procedural law, appeals to “The Enabling Act Process” risk the perception that the institution is advancing its own interests over the public interest or that the appeal is a cover for substantive disagreement.<sup>274</sup> In such cases, the judiciary’s legitimate interests lie rather in timely and sincere consultation on the questions whether the existing transubstantive rules are in fact not appropriate and, if so, what alternatives would be best. In addition, one need not embrace the traditional expertise story to believe that the rulemakers would have much

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form, to honor a sense of shared institutional authority, or to overcome traditional congressional inertia, may nonetheless suggest the wisdom of a two-tier process. The weak version of such a process would require only that the rulemakers bring questionable exercises of authority to Congress’s attention. The strong version would require legislation to implement the rulemakers’ recommendations on such matters. *Both versions would leave the initiative to formulate new or amended Federal Rules with the rulemakers.*

*Id.* (citations omitted). If positive legislative action were thought required or desirable, it would be appropriate for Congress to signal its interest in receiving a proposed Federal Rule from the judiciary, as it would be to proceed directly to legislation if the signal were ignored (which is highly unlikely).

270 Shane, *supra* note 261, at 512; *see id.* at 513.

271 *See, e.g.,* SMITH, *supra* note 23, at 127, 130.

272 *See* Shane, *supra* note 261, at 506 (“For the most part, each branch needs the forbearance, if not actually the agreement of, the other two branches in order to work its will.”).

273 *Id.* at 508; *cf.* MOYNIHAN, *supra* note 151, at 137 (“the tendency to introduce new conflict techniques can be restrained by the knowledge that they will almost certainly be matched.”).

274 *See supra* text accompanying notes 252–54.

to offer Congress when it considered the content of a proposed substance-specific procedural rule, and how such a rule would fit within and affect other parts of the broader landscape. Like a certain four letter word, “The Enabling Act Process” loses *its* power when invoked too often.

The Federal Rules include more than the Federal Rules of Civil Procedure, and, as has been noted, most congressional hold-ups or overrides of Federal Rules, and most direct statutory amendments, actual and proposed, have concerned the Federal Rules of Criminal Procedure.<sup>275</sup> Although some of my normative prescriptions—perhaps all of them—apply equally to criminal as to civil procedure—it is evident that, for instance, the perceived need for speedy lawmaking will be more pressing and more frequent in the criminal realm, particularly now that the war on crime (and criminals) includes the war on terrorism (and terrorists). It is also evident that the forces of partisan politics and ideology are more likely to be irresistible in that realm, rendering the reestablishment of something approaching the pre-1973 equilibrium impossible, at least in the short term. Indeed, friction in one area of the criminal process—sentencing—bids fair to do serious harm to every aspect of interbranch relations.<sup>276</sup>

I have noted, but devoted insufficient attention to, the phenomenon of Congress eschewing both “The Enabling Act Process” and substance-specific procedure in favor of (1) statutory directions to the rulemakers either requiring or encouraging rulemaking on particular subjects, coupled with (2) standards to be reflected in any such rules.<sup>277</sup> Although personal conversations have suggested that some members of the federal judiciary bristle at such directions, particularly when given to the Supreme Court, and at such standards, at least when they are inconsistent with the preferred policy of the institutional judiciary or appear to preempt a suitably deliberative process for the development of policy,<sup>278</sup> such statutory directions may be preferable to some of the alternatives. Indeed, the technique deserves careful study as a lawmaking *via media* with the promise to meet the legitimate process, institutional, and political needs of both the judiciary and Congress. Since Congress would retain power to proceed by legislation if the judiciary failed to accept an invitation to fashion rules (which, again, seems highly unlikely), and since commands to the Su-

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275 See *supra* text accompanying notes 74, 96.

276 See *infra* text accompanying notes 285–87.

277 See *supra* text accompanying notes 104, 112–13, 118.

278 Concerns of this sort appear to lie behind the judiciary’s attempt to secure amendments to the E-Government Act. See *supra* note 104.



preme Court at least may raise constitutional questions, little if anything is to be gained by requiring rather than encouraging rulemaking.

There is no necessary connection between an individual's ability as a federal judge (or rulemaker) and his or her personal political skills. For many years the federal judiciary was poorly served by some of the judges (and other rulemakers, including academics) who interacted with the public and with Congress on proposed Federal Rules. Arrogance, particularly when conjoined with ignorance (of the facts), is well calculated to yield calls for help to higher authority. The same reasoning that has shaped the constitution of the Judicial Conference's Budget Committee<sup>279</sup> is applicable to all committee leadership positions that predictably require substantial interaction with Congress, the bar, or the public.

Moreover, with the traditional rhetoric about procedure revealed as empty, when cynicism about law and those who make it is rampant, and given more than thirty years of appointments to the rules committees by chief justices appointed by Republican presidents, it has not been helpful that a few of those appointed to positions of rulemaking responsibility have worn their ideological preferences on their sleeves. In any event, a game theoretic or institutionalist perspective confirms the importance of having people in leadership positions who are aware of congressional preferences.<sup>280</sup>

Given the concerns that almost brought about the Supreme Court's removal from "The Enabling Act Process" in the 1980s, it is ironic that today the Court may be a source, rather than a victim, of the current distress of federal procedural lawmaking. For, however disingenuous claims of "judicial abuse" or "judicial activism" may appear as applied to the lower federal courts,<sup>281</sup> there is no blinking the fact that the Supreme Court has declared federal statutes unconstitutional at an unprecedented rate in recent years, and it is not unreasonable to believe "that the Court is not approaching its review functions modestly, but instead actually is inventing new reasons for invalidating legislation."<sup>282</sup> It is doubtful that members of Congress who so believe will distinguish the Court from the institutional federal

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279 See SMITH, *supra* note 23, at 20 (referring to judges "having ability, legislative experience, and congressional associations").

280 See Bone, *supra* note 133, at 906; *supra* note 178.

281 See *supra* note 261.

282 Shane, *supra* note 261, at 510. "Of the 151 federal statutes declared unconstitutional in whole or part by the Court between 1789 and June 2000, 40—over 26 percent—were declared unconstitutional since 1981." *Id.* (footnote omitted); see also *id.* at 536.

judiciary or that they will quickly embrace arguments grounded in the need for forbearance and mutual respect.

In any event, creating a system or culture in which timely and sincere consultation is accepted practice will not be easy with respect to some congressional committees, and it would not foreclose last-minute or stealth legislation, nongermane provisions smuggled into appropriation bills, and other excrescences of the contemporary legislative landscape. From one perspective, the judiciary suffers no differently than other interest groups, although its institutional experience doubtless causes special regret that there appears to be so little legal space in which to require due process in lawmaking.<sup>283</sup> From another, although the breakdown in the congressional committee system and the other forces that have led to the dominance of party influence and party discipline in legislative politics help to explain why members of Congress might in fact regard the judiciary as just another interest group, we all suffer when it is so regarded.

It is reasonable, but in the current political climate perhaps not realistic, to expect more responsible behavior from the Department of Justice, which at least twice in recent years proposed last-minute additions to bills that affected Federal Rules or responsibilities under the Enabling Act without previously consulting the judiciary.<sup>284</sup> But that is a small point at which to stick if, as is widely believed, the Justice Department was the primary moving force behind the so-called Feeney Amendment, where the absence of consultation has been the subject of much adverse comment,<sup>285</sup> including from the Chief Justice,<sup>286</sup> and some of the provisions of which have recently been declared an

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283 See Becker, *supra* note 236, at 7.

284 See Memorandum from John K. Rabiej, Chief, Rules Comm. Support Office, to the Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States 3 (Dec. 4, 1996) (describing provision concerning effective date of new Evidence Rules 413–415 “included as part of the enacted general Appropriations Law” and submitted by the U.S. Department of Justice (DOJ) to Congress “the night before the vote was taken on the legislation”); Memorandum from James N. Ishida, *supra* note 102, at 3 (reporting that provision requiring Supreme Court rulemaking in the E-Government Act resulted from “a last-minute move [inserting] language proposed by [the DOJ]”).

285 See Becker, *supra* note 236, at 7.

Excrescences indeed. I have seen too many of them, especially in recent months. First and foremost is the Feeney Amendment to the Amber Alert Bill, which resulted in a drastic cutback on the ability of federal sentencing judges to make downward departures from the Sentencing Guidelines in certain kinds of cases, and which also limited the number of judges who can serve on the U.S. Sentencing Commission. The Feeney Amendment was tacked onto an unrelated and popular bill, making it difficult for legislators to vote against it, and then rammed through the Congress in violation of

unconstitutional abridgment of separation of powers.<sup>287</sup> Moreover, if the federal judiciary's appeals for regularity and consultation are to be credible, its leaders must ensure that their house is in order, which means resisting in the future temptations to game the legislative system in the very ways the judiciary has recently decried.<sup>288</sup>

The "current political climate" and the pessimism it naturally engenders about the future of inter-branch relations in general put the problems of federal procedural lawmaking in humbling and depressing perspective. They may also suggest that past proposals about federal rulemaking or federal procedural lawmaking as a whole, including my own, are hopelessly academic and/or hopelessly naive. We have seen where the power lies, and we know that the answers to our ills do not lie either in its unilateral deployment or in indiscriminating resistance. History did not start in 1934, but a history of mutual respect and forbearance did start in that year, and although subsequent events have revealed the need for some adjustments, the reasons therefor are not also reasons to abjure norms of interdependence.

The reestablishment of such norms will not, I am confident, issue from elegant models or finely reasoned metrics, and experience suggests that commissions are also not the solution. We need to rediscover, in relations between the federal judiciary and Congress, a form of politics that seems almost a lost art in today's landscape.<sup>289</sup> The notion that the judiciary might take the lead in reestablishing such a

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House and Senate rules without any public hearings and virtually no debate regarding its effect on sentencing law, policy, or practice.

*Id.*; see also *id.* at 7–8.

286 See Hon. William H. Rehnquist, *2003 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 2004, at 1, 1–2.

287 See *United States v. Mendoza*, No. CR03-730DT, 2004 U.S. Dist. LEXIS 1449, at \*19 (C.D. Cal. Jan. 12, 2004).

288 See Becker, *supra* note 236, at 8 (noting that judiciary secured "last minute riders creating new district court judgeships" and "that too was wrong"); Kastenmeier & Remington, *supra* note 208, at 84 (noting the "tendency of the courts to seek authorizations for experimental programs directly through the appropriations process" and the "effort by the legislative representatives of the judicial branch to play off the appropriations and authorizing committees in order to obtain maximum leverage").

289 As a start, the federal judiciary should at last come to grips with questions about communications with members of Congress that have been asked (and answered) by Robert Katzmann and Charles Geyh. See KATZMANN, *supra* note 208 *passim*; Geyh, *supra* note 42 *passim*; see also Resnik, *supra* note 254 *passim*.

Perhaps the Brookings Institution could again sponsor a conference, as it did in 1986, among the three branches at which they could discuss these issues ["the matter of congressional process across the board"] at the highest level. . . . Although the impact of the perverse Congressional practices that I

politics—of “custom, dialogue, compromise, and statesmanship”<sup>290</sup>—will come as a shock only to those who believe that politics and law, like judicial independence and judicial accountability,<sup>291</sup> are irreconcilable, or those whose exposure to politically feckless judges has caused them to forget those who are adepts.<sup>292</sup> The times require Learned Hand’s (and David Shapiro’s) “spirit of moderation.”

What is the spirit of moderation? It is the temper which does not press a partisan advantage to the bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the fortuitous product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual.<sup>293</sup>

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have described affects all kinds of legislation, perhaps the judiciary can furnish the template that can persuade the Congress to clean up its act.

Becker, *supra* note 236, at 10. Note in that regard that “[j]udges and members of Congress engaged in a rare exchange of perspectives during a recent Supreme Court Fellows Program panel discussion on the relationship between Congress and the federal courts.” *A Call for More Communication*, THIRD BRANCH, Feb. 2004, at 9, 9. As also reported there, Justice Breyer “suggested reviving programs that once provided opportunities for members of Congress and federal judges to talk to each other.” *Id.*

290 See *supra* text accompanying note 41.

291 See Burbank, *supra* note 2, at 325.

The instrumental view of judicial independence taken here, on the other hand, requires no dichotomy and sees no paradox, since it proceeds from the premise that judicial independence and judicial accountability “*are different sides of the same coin.*” An accountable judiciary without any independence is weak and feeble. An independent judiciary without any accountability is dangerous.

*Id.* (footnotes omitted).

292 See Burbank, *supra* note 41, at 1234–35.

293 LEARNED HAND, *THE SPIRIT OF LIBERTY* 125 (1959).

