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ULYSSES TIED TO THE GENERIC WHIPPING POST: THE CONTINUING ODYSSEY OF DISCOVERY “REFORM”

JEFFREY W. STEMPEL*

I

INTRODUCTION

One need not be a charter member of the Critical Legal Studies Movement (“CLS”) to see a few fundamental contradictions in litigation practice in the United States.¹ A prominent philosophical tenet of the CLS movement is that law and society are gripped by a “fundamental contradiction” and simultaneously seek to embrace contradictory objectives.² Civil litigation, particularly discovery, is no exception: New amendments to the discovery rules are the latest example of this contradiction.³ Although the new changes are not drastic, they continue the post-1976 pattern of making discovery the convenient scapegoat for generalized complaints about the dispute resolution system.⁴ One

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1. The CLS movement is the subschool of legal thought that has largely focused on the degree to which legal doctrine tends both to influence and reflect the social structure. See generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 1-14 (1987); GARY MINDA, POSTMODERN LEGAL MOVEMENTS 106-24 (1994); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 644-45 (David Kairys ed., 1998).

2. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1774-76 (1976) (illustrating the contradiction with ways in which the legal system simultaneously endorses and alternatively practices individuality and community).

3. See Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 119 S. Ct. 416 (1998); Supreme Court Promulgation of the Proposed Amendments Without Change, 192 F.R.D. 340 (2000); *infra* notes 102-110 and accompanying text.

4. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998);

change—the narrowing of the scope of discovery—could have a substantial adverse impact. Its presence on the roster of new amendments demonstrates the degree to which discovery has been blamed unfairly for society's—and the legal profession's—general disgust with litigation.

At the same time, the discovery process is never seriously rehabilitated but rather only adjusted in ways that fail to address its fundamental (but manageable) problems in the context of civil litigation.⁵ Simultaneously, a litigant's ability to obtain information significantly shrinks, favoring disputants who would provide less information. For the most part, this group is comprised of defendants, particularly products liability and statutory rights defendants.⁶ Rulemaking is viewed on the one hand as an apolitical procedure and on the other hand as a “disguised outcry for tort reform.”⁷

Historically, trial judges in the United States have been vested with great discretion over almost all aspects of litigation—in particular, discovery.⁸ Since the Federal Rules of Civil Procedure were enacted in 1938, the default has been broad-based “relevant-to-the-subject-matter” discoverability, but judges have always had ample discretion to alter this rule. For much of the long-running debate about discovery, the prevailing view seemed to be that the wise discretion of judges would save us from the potential evils and abuses of discovery (and other litigation evils).⁹ Judges were viewed as Solomon-like, able to resolve discovery disputes by contextual decisionmaking on a case-by-case basis.¹⁰

Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Court at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. DISP. RESOL. 297 (1996); Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1156-58 (1993); Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433 (1999); *infra* notes 83, 167-170 and accompanying text.

5. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998); Tobias, *supra* note 4.

6. See Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965 (1997) [hereinafter Stempel, *Contracting Access to the Courts*] (describing trend toward more barriers to discovery as largely favoring defendants); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 688-90 (1993) [hereinafter Stempel, *New Paradigm*]; Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 1, 3-6 (2000) (forthcoming) (on file with author) [hereinafter Stempel, *Politics and Sociology*]; *infra* notes 162-171 and 221-226 and accompanying text (discussing the probable impact of narrowing the scope of discovery for specific types of cases).

7. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 53 (1997) (suggesting that “[m]uch hoopla about litigation costs may be traceable to those whose real complaint is that they or their clients are exposed to liabilities that they would prefer to avoid”).

8. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 917-18 (1999); Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273 (1991).

9. See *infra* notes 48-124 and accompanying text (describing discovery amendments since 1966).

10. See JACK BASS, UNLIKELY HEROES 13-22 (1981) (praising the role of judges in the South during the desegregation litigation of the 1950s and 1960s); RONALD DWORKIN, LAW'S EMPIRE 239-40 (1986) (naming his mythical good judge “Hercules”); OWEN FISS & ROBERT COVER, THE STRUCTURE OF PROCEDURE 446-50 (1979) (using the Judgment of Solomon as a positive metaphor for interventionist judicial activity and decisionmaking); Abraham Chayes, *The Role of the Judge in Public Law*

By the 1990s, however, this school of thought seemed to have given way to the view that judges needed to be saved from their own discretion, which was not used frequently enough to limit discovery, or at least subject to a more restrictive default rule.¹¹ This prong of the "trend," if one can call it that, encompasses not only civil discovery, but also pleadings and motion papers, as well as criminal sentencing. Another—perhaps equally strong—modern trend continues to accord trial judges substantial discretion. This second trend continues the significant departure from default rules and reins in only highly idiosyncratic judicial discretion expressed through standing orders and midst-of-trial rulings.¹²

The 1993 Amendments to the Civil Rules are the strongest evidence for, and the latest chapter of, this move toward confining, or at least redirecting, judicial discretion. But at the same time, the 1993 Amendments also demonstrate the ongoing inconsistency of U.S. law on the issue of rules versus discretion. The 1993 Amendments instituted a system of disclosure in lieu of initial discovery with the aspiration that judges would be relieved of some of their discovery management duties.¹³ This reduced, to some degree, the judiciary's opportunities to exercise discretion. At the same time, however, individual district courts were given the right to opt out of the disclosure regime, and individual courts retained considerable discretion even if judges did not.¹⁴ Similarly, presumptive limits were established for interrogatories (twenty-five per party) and depositions (ten per side). But while laying down these "rules" of the litigation road, the 1993 Amendments simultaneously provided that judges retained discretion to modify these rules if a party could demonstrate that the additional discovery was justified by the cost-benefit calculus set forth in Rule 26(b)(2).¹⁵

Litigation, 89 HARV. L. REV. 1281 (1976); Martha L. Minow, *The Judgment of Solomon and the Experience of Justice*, in FISS & COVER, *supra*, at 447.

11. See *infra* note 80 and accompanying text (regarding the increasing popularity of presumptive limits on discovery and the operation of discovery removed from judicial intervention); see also Bone, *supra* note 8, at 900-17 (stating that public confidence in judicially insular Rulemaking is in decline for a variety of reasons); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 797, 833-55 (1991).

12. See Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79 (1997) (suggesting that judicial discretion over discovery should be more guided by rules); *infra* notes 98-102 and accompanying text (noting the degree to which recent Rules revisions have merely shifted loci of judicial discretion rather than eliminating it altogether).

13. I realize that my interpretation of the 1993 initial disclosure amendments is somewhat controversial. While the "official" rationale for disclosure was to reduce attorney gamesmanship and expedite cases by forcing parties to show their respective "cards" earlier in the process, because disclosure does not require more information than was generally available prior to 1993, I continue to hold the view that part of the attraction of disclosure is that it puts the case more on autopilot, with less likelihood of judicial involvement. See Jeffrey W. Stempel, *Cultural Literacy and the Adversary System*, 27 VAL. U. L. REV. 313 (1993).

14. More than one-fourth of the districts opted out of disclosure. Furthermore, these tended to be large, urban districts with perhaps more than half of the federal court caseload. See Judge Sidney Stein, Remarks at the Complex Litigation conference co-sponsored by Duke University and The Institute for Law and Economic Policy, Naples, Florida (Apr. 15, 2000).

15. See generally *infra* notes 98-101 and accompanying text (discussing the 1993 Amendments); *infra* notes 102-110 and accompanying text (discussing Rule 26(b)(2) criteria).

Now, with the 2000 Amendments, the forces of discretion seem to be in even further retreat. The judicial picture of Solomon has been reduced to Ulysses. This personification is not the resourceful Ulysses of the Trojan Horse, but the Ulysses of the Sirens' Song, who was tied to the mast so that he would not yield to the Sirens' entreaties and bring his ship to foundry on the shore.¹⁶ Rather, presumptive, systematic restraint on judicial supervision of discovery is to be the new order of the day.

All the while, discovery continues to be unfairly blamed for most of the ills of the litigation system. Broad discovery, however, is not the scourge of the United States legal system as portrayed by its political opponents.¹⁷ Although judges probably have been insufficiently diligent in policing discovery in a small set of cases, discovery does not appear to be a problem for the system as a whole. Yet recent Civil Rules changes—particularly the 2000 Amendments—do little to alter the perceived fundamental problems of discovery difficulties in a relatively small number of specific cases. They may work to reduce the availability of information in all cases, but this hardly constitutes an advance in dispute resolution.

Under the 2000 Amendments, judges are instructed to apply the brakes to discovery but are given permission to release the brakes, as long as the party seeking discovery can demonstrate the requisite compelling need or "good cause."¹⁸ The ongoing problem with discovery reform is not simply its inconsistency; the discovery initiatives of the last decade are deficient in that they (1) claim to be premised on a reasoned response to empirical study but promote changes that seem unsupported by the very studies cited; (2) continue to reduce access to information without adequate support; (3) do little to prompt more meaningful engagement of courts in the discovery process despite continued evidence that lawyers want judicial intervention in contentious discovery matters; (4) fail to address directly the issue of effective discovery in complex litigation; and (5) fail to suggest, or provide means for, the enhanced application of reasoned discretion.

Many of the new amendments make sense and promise some improvement over the status quo—but only if one is confined to the narrow field of operations that seems to govern the world of the Rulemakers. This world is one

16. See HOMER, COMPLETE WORKS OF HOMER: THE ILIAD (Andrew Lang et al. trans., Modern Library 1950); HOMER, THE ODYSSEY OF HOMER 244 (Alan Mandelbaum trans., Univ. of Ca. Press 1990). The metaphor of Ulysses tied to the Mast to prevent his succumbing to the sirens has become popular in legal literature, largely because it so well captures the role of rules in limiting discretion as a means of saving decisionmakers from potential error. See, e.g., JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (1983) (using Ulysses analogy in philosophy work); Jay Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the 17th Amendment*, 91 NW. U. L. REV. 500 (1997) (applying this analogy to the issue of political and constitutional restraints).

17. See Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1394-99 (1994) (stating that the problem of discovery abuse is largely a myth rather than fact); see also *infra* Part V (discussing empirical studies that suggest that discovery is not a major problem of modern litigation).

18. See *infra* notes 97-114 (discussing 2000 Amendments.)

where amendments proceed on a seemingly perpetual basis without sufficient study, and decisions are made by an unrepresentative cross-section of the legal profession. Although disclosure has not been the unmitigated disaster that many of us predicted,¹⁹ neither has it been a panacea. Mysteriously, the 2000 Amendments have chosen to enshrine watered-down disclosure on a nationally uniform basis rather than to rethink the entire mechanism.

II

AN ABBREVIATED HISTORY OF THE MODERN DISCOVERY RULES

To appreciate the latest round of proposed amendments, a brief recapitulation of the history of the Federal Civil Rules is in order. The Rules resulted from passage of the Rules Enabling Act of 1934,²⁰ legislation that established the present system of judicially drafted federal court rules, which are then presented to Congress.²¹ Specifically, rules are drafted by the relevant Advisory Committee, reviewed by the Standing Committee on Rules of Practice and Procedure, and submitted to the Judicial Conference for consideration. The Judicial Conference submits proposed Rules Changes to the Supreme Court, which may revise or even reject proposals before promulgating them. After the Court promulgates rules revisions, Congress has six months to act on the Court-promulgated rules, or else they become effective.²² Although Congress retained the authority to amend or reject rules, the underlying assumption of the Enabling Act is that amendments would be largely a judicial function, with Congress stepping in only on rare occasion.²³ For the most part, this aspiration was realized. Ordinarily, proposed changes to federal court rules of procedure become operative with little or no congressional intervention. The enactment of the Federal Rules of Evidence has been the most notable exception.²⁴

After passage of the Enabling Act, which was a much sought-after law reform by the organized bar,²⁵ the Supreme Court was left with the task of drafting federal rules under the Enabling Act. The 1938 Rules, still acclaimed by reformers, liberalized the requirements of pleading and joinder, with the practical

19. See, e.g., Griffin Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1 (1992); Stempel, *New Paradigm*, *supra* note 6, at 735-37.

20. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (1994)).

21. See Bone, *supra* note 8, at 893-906 (detailing a concise history of the Enabling Act and Rule-making under it). For a comprehensive history of the Enabling Act, see Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

22. See generally 28 U.S.C. § 2075 (1994).

23. See CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* § 62 (5th ed. 1994); Burbank, *supra* note 21, at 1018-20; see also Stephen B. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

24. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS* 4 (3d ed. 1996) (stating that instead of the usual quiet passage of Court Rules into law, "Congress held hearings, scrutinized the Rules [Federal Rules of Evidence], changed them substantially, and finally enacted the changed version in statutory form").

25. See Burbank, *supra* note 21, at 1024.

effect of making it easier for litigants, even those of modest means and stumbling expertise, to have their day in court.²⁶

In addition, the Committee adopted wide-ranging discovery. Document exchange, depositions, and interrogatories became available to federal civil litigants as a matter of course. Litigants could avail themselves of all these remedies under a relatively broad definition of the scope of discovery, which made material discoverable as long as it was relevant to the "subject matter" of the dispute. "Fishing expeditions" were allowed in the interests of developing facts so that legal disputes could be determined in light of maximum factual information.²⁷ Document discovery was more restricted than discovery by interrogatory or deposition, but the overall thrust of the rules was clear: Litigants were to have wide access to information about the dispute possessed by others.

Thus, in 1938, a revolution of sorts occurred.²⁸ The Rules, made possible by the Enabling Act, established a system of uniform federal procedure that expanded the trial judge's range of procedural options and the litigants' ability to obtain information relevant to the dispute. That same year, the Supreme Court decided *Erie v. Tompkins*,²⁹ which held that state substantive law applicable to a case was controlling even if the case was litigated in federal court due to diversity of citizenship.³⁰ Prior to *Erie* and the Federal Rules, the Conformity Act³¹ had required that federal courts sitting in diversity apply the procedural rules of the state in which the court was located.³² Thus, after 1938 the procedural world boasted a new uniformity across the nation's federal courts for the new, liberalized federal rules permitting discovery.

The mere enactment of the Rules, of course, did not completely change pre-existing attitudes and practices.³³ For some twenty years thereafter, judicial de-

26. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 1.8, at 20-22 (4th ed. 1992); 1 MOORE'S FEDERAL PRACTICE at xxiii (3d ed. 1997); Subrin, *supra* note 23, at 963-64, 980; see also ALEXANDER HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS 70 (1940) (in which the Special Assistant to Attorney General describes discovery regime as an "outstanding achievement" of the 1938 Rules).

27. See Subrin, *supra* note 5, at 691. Subrin's analysis is consistent with that of other commentators and the contemporaneous Supreme Court. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("[N]o longer can the time honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); *Olson Transp. Co. v. Socony-Vacuum Co.*, 8 Fed. R. Serv. (Callaghan) 34.41, Case 2 (E.D. Wis. 1944); see also *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 521 (E.D. Tenn. 1977) (permitting "fishing expeditions" under discovery rules); ROGER S. HAYDOCK & DAVID F. HERR, DISCOVERY PRACTICE § 1.4, at 1:18 (3d ed. 1996).

28. See Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TULANE J. INT'L & COMP. L. 153, 158-59 (1999) (stating that overall the 1938 discovery rules were "genuinely revolutionary"); see also *id.* at 159 n.19 (citing 1911 Kansas Supreme Court precedent decrying fishing expeditions or broad discovery).

29. 304 U.S. 64 (1938).

30. See *id.* overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

31. See Act of June 1, 1872, c. 255, 17 Stat. 197; Rev. Stat. § 914 (discussed in WRIGHT, *supra* note 23, § 61 (4th ed. 1983)).

32. See MOORE'S FEDERAL PRACTICE 1.02 (3d ed. 1997); WRIGHT, *supra* note 23, § 61 at 401-02.

33. See *Poppino v. Jones Store Co.*, 3 Fed. R. Serv. (Callaghan) 26b.5, Case 1 (W.D. Mo. 1940); *Benevento v. A & P Food Stores, Inc.*, 26 F. Supp. 424 (E.D.N.Y. 1939) (considering material "relevant" for discovery purposes only if it is "material" and "admissible in evidence"). The Advisory

cisions enforcing the Rules required lower courts and counsel to conform their conduct more closely to the Rules.³⁴ Although much of this judicial enforcement was in connection with pleading, considerable judicial effort also enforced the discovery regime.³⁵ It appears, however, that these efforts did eventually change the legal culture so that actual litigation behavior fell in line with the aspirations of the Rules and the expectations of the drafters. As we now know, notice pleading and liberal amendment became the order of the day, as did broad discovery. Arguably, the creation of the 1938 Rules sparked the counter-revolution of the late twentieth century's discovery reform movements.³⁶

In addition to the judicial efforts giving force to liberalized procedure and broad discovery, the Advisory Committee took steps to ensure that lower courts and litigators received the message of the 1938 Rules. In 1946, the discovery rules were revised to clarify the breadth of the discovery under the 1938 enactment. As noted, the 1938 language established the broad scope standard of "relevant to the subject matter," rather than a standard of relevance linked only to the claims or defenses actually pleaded. The 1946 Amendment reacted to cases construing the standard too narrowly, reiterating and explaining the distinction between "relevant" information and "admissible" evidence, as well as the notion that something may be relevant to the subject matter of a case even if not clearly relevant to an existing claim or defense.

At that time Rule 26 governed depositions but in doing so set forth important declarations as to the proper scope of discovery. The 1946 Amendment added language stating that at a deposition, "[i]t is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."³⁷ Since the 1970 reorganization of the discovery rules, this famous sentiment now applies to the scope of discovery by whatever device employed. The 1946

Committee subsequently criticized these two cases as wrongly decided in its Note to the 1946 Amendment. See *infra* text accompanying notes 36-40.

34. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944) (emphasizing the low threshold required for acceptable notice pleading and reversing the trial court's dismissal of complaint as insufficiently specific); see also *Conley v. Gibson*, 355 U.S. 41 (1957) (holding that a complaint should not be dismissed unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

35. See, e.g., *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (permitting adverse medical examination of parties other than the plaintiff but limiting exam to matters properly at issue); *Sibbach v. Wilson*, 312 U.S. 1 (1941) (holding that discovery rules that provide for adverse medical examination are consistent with the admonition of the Rules Enabling Act that rules not alter substantive legal rights).

36. The story is, of course, a bit more complicated. Even though cases such as *Leatherman v. Tarrant County Narcotics & Coordination Unit*, 507 U.S. 163 (1993), supported liberalized pleading, earlier events indicate judicial activity to constrict the broad open court model of the 1938 Rules. On occasion, Rulemakers and Congress were part of this trend while on other occasions they expanded court access. See Stempel, *Contracting Access to the Courts*, *supra* note 6, at 965; Stempel, *New Paradigm*, *supra* note 6, at 705-36.

37. 6 MOORE'S FEDERAL PRACTICE § 26 app. 02[1] (3d ed. 1997) (reproducing 1946 Amendment); see also Marcus, *supra* note 28, at 161 (describing the 1946 Amendment as a removal of restraint on discovery and as an expansion of discovery during the period 1938-1970).

Amendment also removed the requirement that a party wishing to take a deposition obtain leave of court unless the deposition was to be conducted within twenty days of the action's commencement.³⁸

As the Advisory Committee Note to the 1946 Amendment makes clear, the Amendment was added in response to judicial decisions that had restrained discovery. The most common error was requiring that the information sought be itself admissible in evidence.³⁹ Leadership of the legal profession, including the Justice Department, appeared to agree with the Committee's views favoring the new broad discovery mechanism.⁴⁰

The Supreme Court also assisted the Rulemakers' effort at cultural change. One extremely important discovery decision during this time period—*Hickman v. Taylor*⁴¹—can be regarded as an endorsement of both breadth and constraint in discovery under the Rules. In *Hickman*, the Supreme Court recognized a qualified "work product" privilege that allows counsel to withhold from the opponent materials prepared in anticipation of litigation.⁴² The practical effect of the work product doctrine was to limit the scope of discovery by recognition of a privilege against disclosure. At the same time, *Hickman* endorsed the broad scope of discovery provided for in the Rules, providing the famous dictum that after the 1938 Rules, "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."⁴³ Absent privilege, anything relevant to the subject matter of the case was discoverable.⁴⁴ The old school of trial by surprise was specifically rejected.⁴⁵

By the 1960s, broad discovery was the articulated standard and the actual result in most cases.⁴⁶ On other fronts, such as the amendment of complaints and the expansion of the class-action device, the judicial system continued to move in a direction consistent with the "open courts" ethos of the Rules. The 1963 and 1966 Amendments on discovery can be described as technical but consistent with the prevailing ethos.⁴⁷

38. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 02[1] (text of 1946 Amendment).

39. See *id.* § 26 app. 02[2] (text of Advisory Committee Note to 1946 Amendment).

40. See, e.g., ALEXANDER HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* 70-73 (1940) (describing the Rules and their initial operation as well as praising the discovery mechanism as an "outstanding achievement" of the new Rules).

41. 329 U.S. 495 (1947).

42. *Id.* at 509-10; see also ROGER S. HAYDOCK & DAVID F. HERR, *DISCOVERY PRACTICE* § 1.6.1, 130 (3d ed. 1997).

43. *Hickman*, 329 U.S. at 507.

44. See *id.* at 509-10.

45. See *id.* at 500.

46. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26; HAYDOCK & HERR, *supra* note 42, §§ 1.1, 5.5, 12.6.1; WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 35-55 (1968); Marcus, *supra* note 28, at 160-61.

47. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, §§ 26 app. 03[1][2], 26 app. 04[1][2]. The 1963 Amendment continued the norm that objections at a deposition would not preclude the taking of evidence but would preserve the objection for possible use at trial. The 1966 Amendment provided

The 1970 Amendments to the Rules, which were primarily discovery amendments, continued what might be termed the progressive movement of access to courts, claims, and information. Some of the changes were technical, such as reordering and renumbering the rules.⁴⁸ However, this change had significance in that it took the broad standard of deposition discovery (in the former Rule 26) and made it applicable across discovery devices (in the revised Rule 26). In combination with the changes to Rule 34, this had the effect of widening discovery, whatever the discovery device. Other substantial changes included new Rule 26(b)(2), which made insurance policies discoverable as a matter of course.⁴⁹ Rule 34 regarding document production was changed so that a showing of "good cause" was no longer required for a party to obtain documents.⁵⁰ The 1970 Amendments made it clear that a party was entitled to obtain a copy of its own statement from the possession of another party.⁵¹ A new subdivision of Rule 26 provided for discovery regarding expert witnesses expected to be used at trial.⁵² Rule 26(c) regarding protective orders was amended to provide for discovery sanctions where a party continued to resist discovery after having lost a protective order motion.⁵³ Revised Rule 26(d) established that discovery need not take place in any order of priority.⁵⁴

Some aspects of the 1970 changes can be regarded as favoring limitation rather than expansion of discovery. For example, the new Rule 26(e) established a regime regarding supplementation of responses, which was not required as a matter of course. Instead, it was mandated where specifically sought by the

that in a nonadmiralty case, depositions could be taken pursuant to certain statutes, as well as pursuant to then-Rule 26.

48. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[1] & [2] (1970 Amendment and Committee Note) ("Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d), (e), and (f) are transferred to Rule 32 In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general."); see also 7 MOORE'S FEDERAL PRACTICE §§ 30 app. 30[1] & [2], 31 app. 02[1] & [2], 32 app. 03[1] & [2] (3d ed. 1997); 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[3] (Advisory Committee's Explanatory Statement Concerning 1970 Reorganization of Discovery Rules).

49. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[2] (1970 Advisory Committee Note).

50. See 7 MOORE'S FEDERAL PRACTICE, *supra* note 48, § 34 app. 03[1] & [2] (3d ed. 1997); see also 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[2] (The Advisory Committee, in its Advisory Note to the 1970 Amendments justified deletion of the good cause requirement for document production in part because of divergent good cause standards being applied in the context of document disclosure. The Advisory Committee concluded that a compelling need was required for disclosure of work product and was commanded by *Hickman v. Taylor*. However, for other documents, a showing of relevance constituted sufficient "good cause").

51. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[1] & [2] (1970 Amendment to Rule 26 and Advisory Committee Note).

52. See FED. R. CIV. P. 26(b)(4); 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[1] & [2] (1970 Amendment and Advisory Committee Note). Although the 1970 changes have now been eclipsed by the 1993 Amendment providing for trial expert witness disclosure, the 1970 Amendment was a broadening of expert discovery.

53. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[1] & [2].

54. See *id.*

opposing party, where new information pertained to additional persons with knowledge of the matter, or where failure to supplement would be a knowing concealment.⁵⁵

In discussing the 1970 changes, the Advisory Committee appeared to have no misgivings regarding the scope and amount of discovery. The Committee noted research conducted by Professor Maurice Rosenberg and interpreted the findings as supportive of its intuition in favor of continued broad or broadened discovery:

The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.⁵⁶

At the same time, however, the fundamental contradiction was beginning to loom large. For reasons discussed at some length later in this article, the tide had also begun to shift against mega-litigation and against broad discovery. As to the former, a number of decisions arose, most from the U.S. Supreme Court, that limited judicial power over such instances of public law litigation.⁵⁷ As to the latter, the rhetorical attack on "discovery abuse" arose.⁵⁸ Whether one regards talk of discovery problems as a "pervasive myth" or reality,⁵⁹ there is no denying that the term and the concept began to take hold in the American psyche during the 1970s⁶⁰ as a countercurrent to the frequent expansion in the areas of the actual discovery rules, other procedural rules, and the substantive law generally.⁶¹

Counterforces of the open courts movement received a major political shot in the arm with the ascension of Warren Burger to the position of Chief Justice,

55. See *id.*

56. 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 05[3] at 26 app. 32. But, unsurprisingly in light of the ongoing imbedded contradictions of this field, the Committee added that "[o]n the other hand, no positive evidence is found that discovery promotes settlement." *Id.*

57. See Stempel, *Contracting Access to Courts*, *supra* note 6, at 970-95.

58. See ABA Section on Litigation Special Committee on Abuse of Discovery: *Report to Bench and Bar*, 92 F.R.D. 137 (1977). The Discovery Abuse Committee recommended limiting the scope of discovery and the number of interrogatories, as well as requiring a discovery conference. The Civil Rules Advisory Committee in the late 1970s supported all three suggestions. See Marcus, *supra* note 28, at 162.

59. See Mullenix, *supra* note 17. Professor Mullenix sees modern Rules amendment efforts as resulting from a continued receptiveness to the discovery abuse mythology. See Mullenix, *supra* note 4.

60. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 81 at 541 (4th ed. 1983) (stating that in the late 1970s "a new wave of criticism of discovery began, and this time the criticism was both more vigorous and from more influential sources").

61. See Marcus, *supra* note 28, at 161-62 (describing the "Post-1970 Effort at [Discovery] Containment" and noting the irony of the containment effort coming so closely on the heels of the 1970 discovery expansion). Professor Marcus describes the situation thus: "Perhaps every action invites a reaction. Certainly there was a reaction to the procedural relaxation effected by the Federal Rules. By the mid 1970s, this reaction had achieved considerable momentum, and much of that momentum focused on discovery." *Id.*

where he used the bully pulpit of the post to inveigh against perceived excessive litigation. The Burger-organized Pound Conference of 1976 has been characterized as the inaugural event of the counter-revolution against the open courts model of liberal pleading, broad discovery, and activist courts.⁶² Simultaneously, significant scholarly and judicial commentary inveighed against the perils of broad discovery.⁶³ In addition, there was wide intellectual criticism of the conventional wisdom about the efficacy and neutrality of judge-made procedural rules.⁶⁴

By 1980, things had changed enough that the Rulemakers were beginning to cut back on the model of broad discovery that they had endorsed only a decade earlier. The 1980 Amendments provided generally for more active judicial management of cases with an eye toward controlling discovery with the establishment of a mandatory discovery conference, the requirement of signing of discovery requests by counsel as a certification that the discovery request was justified, and the mandate that "directed judges to curtail discovery that was disproportionate."⁶⁵

To be sure, this was at most a small step in the counter-revolution. As Professor Marcus has noted, "even managerial judges did not necessarily view their role as riding herd over discovery."⁶⁶ And those in the discovery abuse camp criticized the 1980 Amendments for just that reason. The 1980 Amendments established the Rule 26(f) "Discovery Conference," empowering judges to "direct the attorneys for the parties to appear for a conference on the subject of discovery" and requiring the court to hold such a conference upon proper motion of a party.⁶⁷ Because the 1980 Amendment to Rule 26 was discretionary (at least on its face) and was a procedural directive ("thou shalt meet"), rather than a substantive directive ("thou shalt produce" or "thou need not produce"), critics characterized the Amendment as inconsequential. Most famously, Justice Powell, with Justices Rehnquist and Stewart, dissented from the Court's

62. See Stempel, *supra* note 4; Subrin, *supra* note 4.

63. See, e.g., Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (finding discovery too contentious, expensive, and time-consuming); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978) (suggesting that broad discovery and other liberal rules of procedure required judicial intervention to narrow issues and confine the scope of litigation activity); see also E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (describing the managerial judging trend as an ad hoc effort to rein in the breadth of the Civil Rules, including discovery).

64. See Bone, *supra* note 8, at 887-90; see also Marc S. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (concluding that even under open courts model, litigation-based rights enforcement and law reform favor society's more powerful actors); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435-36 (1986) (noting that notwithstanding the broad notice pleading provisions of FED. R. CIV. P. 8(a), many judges are requiring particularized fact and cause of action pleading of litigants making substantively disfavored claims).

65. Marcus, *supra* note 28, at 162; see also FED. R. CIV. P. 26(g), which was added in the 1970 Amendments.

66. Marcus, *supra* note 28, at 162.

67. 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 06[1].

adoption of the 1980 Rules, labeling them “mere tinkering” when more drastic discovery reform was in order.⁶⁸

Perhaps taking the hint from Justice Powell, the 1983 Amendments to the Rules increased the trial judge’s power to manage cases through changes in Rule 16. The new Rule 16 mandated pretrial conferences and directed the court to address and determine a veritable laundry list of case management matters, including the time limit for discovery, streamlining pleadings, motions, and settlement.⁶⁹ Once again, the change paradoxically imposed rules on the court while granting the court wide discretion. The new Rule 16 made pretrial conferences mandatory and urged judges to be activist case managers and settlement brokers. But new Rule 16 left it largely to judicial discretion as to how the new case management ethos was to be discharged with respect to matters of discovery, if at all.

The 1983 Amendments also continued the trend toward restricting litigation activity. Most famously—or infamously—the 1983 Amendment to Rule 11 dramatically expanded the force of the Rule and was embraced by a number of judges in ways considered detrimental to the system.⁷⁰ By 1993, Rule 11 had been substantially weakened,⁷¹ a strategy that appears to have worked.⁷² But this surge and decline of Rule 11 did not negate the general thrust of the 1983 Amendments toward restricting judicial access and narrowing discovery.

On the discovery front, the 1983 Amendments suggested a further contraction between the availability of discovery and increased judicial discretion as the front-line weapon in fighting perceived “discovery abuse.” The 1983 Amendment to Rule 26(b)(1) did not change the scope of discovery but added the following language:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the im-

68. 446 U.S. 997, 999 (1980).

69. See 6 MOORE’S FEDERAL PRACTICE, *supra* note 37, § 16 app. 03[1] (reprinting text of 1983 Amendment to Rule 16).

70. See generally GREGORY P. JOSEPH, SANCTIONS: RULE 11 AND OTHER POWERS (2d ed. 1992); GEORGENE VAIRO, RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTATIVE MEASURES (2d ed. 1992).

71. See 6 MOORE’S FEDERAL PRACTICE, *supra* note 37, § 11 app. 04[1] & [2] (reproducing 1993 Amendment and Advisory Committee Note). The 1993 Amendment to Rule 11 made sanctions under the Rule discretionary rather than mandatory, encouraged courts to impose the least severe sanction sufficient to accomplish the deterrent purpose of the Rule, and created a “safe harbor” whereby a party accused of violating Rule 11 had three weeks to withdraw the offending paper before the motion could be filed with the court. See also JOSEPH, *supra* note 70, at 80; VAIRO, *supra* note 70, at 1-51.

72. Since the 1993 Amendment, cases discussing Rule 11 sanctions have dropped by an average of 100 per year, according to a LEXIS search I conducted on August 9, 2000.

portance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice of a motion under subdivision (c).⁷³

The new Rule 26(b)(1) language was designed to encourage more fine-tuning of discovery otherwise available under the broad definition of relevance.⁷⁴

In addition, the 1983 Amendments added a new provision to discovery in the form of new Rule 26(g). The Rule stated that discovery requests, objections, or responses had to be signed. As in Rule 11, the attorney's signature constituted a certification that it was legally justified, not interposed for delay or improper purpose, or unduly burdensome in light of the discovery at issue, the stakes of the case, and other sources of information. An attorney violating Rule 26(g) was subject to sanction.⁷⁵ In conjunction with the 1983 Amendment to Rule 11, Rule 26(g) was also weakened to some degree. Current Rule 26(g) requires the court to impose sanctions upon counsel only if the violation of the Rule occurred "without substantial justification."⁷⁶ However, the Rule 26(g) sanctions language remained mandatory. The 1983 Amendments also provided that Rule 11 did not apply to discovery disputes, ceding the sanctions field in this area to Rule 26. In practice, Rule 26(g)—unlike the 1983 version of Rule 11—has been infrequently used. This comparative underuse became one of its attractions. By eliminating Rule 11 in discovery matters, the Rulemakers sought to further curb the hyperuse of the 1983 version of Rule 11. Ironically, the comparative underuse of Rule 26(g) has contributed to sentiment that more Rules revisions are needed to curb excessive discovery. This new provision was "designed to curb discovery abuse by explicitly encouraging the imposition of sanctions" and was a parallel to the Rule 11 Amendment.⁷⁷

The focus of the 1983 revisions was deterrence of discovery "abuse," which, in theory, can be either excessive seeking of discovery or excessive resistance to discovery. However, the perceived prevailing problem underlying the amendments was too much discovery rather than too little. The Advisory Committee note cited Justice Powell,⁷⁸ who damned the 1980 changes as mere "tinkering" and who was no friend of broad discovery.⁷⁹

73. See 6 MOORE'S FEDERAL PRACTICE, *supra* note 37, § 26 app. 07[1] (reprinting 1983 Amendment adding quoted language to Rule 26(b)(1), now codified at Rule 26(b)(2)).

74. See *id.* § 26 app. 07[2] (reprinting Advisory Committee Note) (concluding that "[o]n the whole, however, district judges have been reluctant to limit the use of discovery devices"; "the rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis").

75. See *id.* § 26 app. 07[1] (reproducing 1983 Amendment adding Rule 26(g) quoted above).

76. *Id.*

77. *Id.* § 26 app. 07[2] (reprinting Advisory Committee Note).

78. See *id.*, citing *ACF Indus., Inc. v. EEOC*, 439 U.S. 1081 (1979) (Powell, J., joined by Rehnquist and Stewart, dissenting from the denial of certiorari). The *ACF* dissent says a good deal more about the political views of the authors than it does about the state of civil discovery. See also Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 1, 18, nn. 97-98 (2000) (forthcoming) (noting longstanding dislike of broad discovery by Justices Powell and Rehnquist and political motivations for narrowing scope of discovery in Proposed 2000 Amendments).

79. Justice Powell was a long-time partner, and at one time managing partner, of the venerable Richmond-based Hunton & Williams, a large, wealthy law firm representing corporate defendants.

The 1993 Amendments comprised perhaps the most contested discovery changes in the history of the Federal Rules and continued to reflect the fundamental contradiction of judicial attitudes toward discovery. Regarding support for discovery, Rulemakers were on one hand voting in favor of expanded information through promulgation of the disclosure rules. But on the other hand, the 1993 Amendments can be seen—more properly in my view—as another step in the counter-revolution against the 1938 Rules with presumptive limits on interrogatories and depositions, as well as the newly created opportunities for interference. Regarding the rules versus discretion dichotomy, the 1993 Amendments establish more rules governing discovery but at the same time provide additional opportunities for exercising discretion by permitting escape from the presumptive rules.

Indeed, local districts were permitted to escape from initial disclosure altogether. Districts were given the right to opt out of the disclosure regime. Furthermore, initial disclosure was required only with regard to facts pleaded “with particularity.” Initial disclosure is essentially what would have resulted from the first wave of interrogatories and document production requests customarily exchanged by lawyers prior to disclosure. This disclosure is in some ways expansive because it requires the parties to volunteer what might be relevant from the other side’s perspective as well as their own. In general, however, disclosure increases the transaction costs of litigation and thus imposes additional burdens, a trait that generally favors defendants over plaintiffs.

A lawyer must now prepare an extensive and costly expert report that goes beyond the basic interrogatory answers that were formerly required. Although this change appears to apply evenly to plaintiff and defendant, it probably has at least some pro-defendant bias. Plaintiffs, with their burden of persuasion, generally need experts more than the defendants. Increasing the cost of offering experts at the margin makes them more difficult to retain and thus makes it more likely that plaintiffs needing experts will be defeated in wars of attrition with opposing parties.

Aside from the disclosure rules, the 1993 Amendments clearly limited discovery and reversed the spirit of the 1938 and 1970 Rules. The 1993 Amendments enacted a presumptive limit of twenty-five interrogatories per party and a presumptive limit of ten depositions per side. The limits can be expanded on a motion satisfying the court that more discovery is needed, and if permitted, would be consistent with Fed. R. Civ. P. 26(b)(2), which authorizes the court to resist otherwise relevant discovery that is cumulative, disproportionately burdensome, or unjustifiably expensive in light of the circumstances.⁸⁰

Powell was also a past President of the ABA, another badge of establishment status. It is, to say the least, interesting that this ordinarily mild-mannered Justice, viewed by most as an ideological and doctrinal centrist, should have been the Court’s firebrand on discovery.

80. See FED. R. CIV. P. 26(b)(2).

III

THE 2000 AMENDMENTS

The 2000 Amendments, like the 1993 Amendments, provide another example of the fundamental contradiction. The 2000 Amendments made the following changes:

- (1) Eliminated the local "opt-out" provision in Rule 26 for mandatory disclosure contained in the 1993 Amendments;
- (2) Modified the initial disclosure obligation so that a party need only disclose information supporting its claim rather than all information relevant to the matter;
- (3) Made disclosure mandatory in all cases, not only where the disclosure is relevant to facts alleged with particularity;
- (4) Removed certain categories of "low-end" cases from disclosure. These are types of cases thought to involve minimal discovery, and hence cases where requiring disclosure along with its attendant procedure is likely to increase disputing costs beyond their benefit;
- (5) Established a presumptive time limit for depositions of one day or seven hours;
- (6) Shrank the scope of discovery from anything relevant to the "subject matter" of the controversy to things relevant to a "claim or defense" interposed by the parties.

Of the 2000 Amendments, the narrowing of the scope of discovery under Fed. R. Civ. P. 26(b)(1) has been the most controversial.⁸¹

IV

THE DEVELOPMENT OF THE 2000 AMENDMENTS

Like most amendments to the Civil Rules (or other rules of procedure), the new rules had a relatively long gestation period, beginning in the mid-1990s. At the October 1996 Committee meeting, the Committee decided to embark on a sustained examination of discovery and appointed a special Discovery Subcommittee.⁸² The Committee's treatment of the issue, although careful at the

81. See *infra* notes 95-109 and accompanying text for a more extensive discussion of the proposed amendment on scope.

82. The Discovery Subcommittee was chaired by Judge David F. Levi (E.D. Cal.) and included Judge David Doty (D. Minn.), Judge Lee H. Rosenthal (S.D. Tex.), Carol J. Hansen Posegate, Esq. (a Springfield, Illinois attorney), and Francis Fox, Esq. (of Bingham, Dana, a large Boston-based firm). Mark Kasanin, Esq., a product liability defense lawyer with the large San Francisco-based law firm

outset,⁸³ also suggested that discovery continued to enjoy its historical scapegoat status.⁸⁴ The Committee appeared to agree on the following points: (1) that discovery was problematic; (2) that discovery practice was deteriorating for a variety of reasons; (3) that experiments with discovery reform on the state and local level appeared to be working; and (4) that some change in the Federal Rules was warranted.⁸⁵

At the October 1997 Committee meeting, Advisory Committee Chair Judge Niemeyer characterized the Committee's Discovery Project as "aim[ed] at three central questions:" (1) the cost of discovery; (2) whether costs exceed benefits sufficiently to require "remedial action"; and (3) "if remedies should be sought, whether changes can be made that do not interfere with the full development of information for trial."⁸⁶ He also established a framework for discussion that tends to support this article's critique of Rulemakers' efforts during the past decade, stating that the Discovery Project "is more likely to focus on the framework of discovery than on attempts to control abuses."⁸⁷

The Discovery Subcommittee began its report at the October 1997 meeting by identifying the first "big question" as "whether to do anything at all about discovery" and observing that "discovery seems to be working rather well in general, but there are problem spots. Lawyers are open to change, but doubt whether much can be accomplished."⁸⁸ The Subcommittee Special Reporter then summarized the changes suggested at the conferences, which included (1) increasing or mandating uniformity generally, particularly with regard to disclo-

McCutcheon Doyle Brown & Enerson, later replaced Posegate. Professor Richard Marcus was appointed Associate Reporter to work with the Subcommittee.

Discovery questions have been continually before the Committee for many years. It has been several years, however, since the Committee last explored the most fundamental issues going to the scope of discovery and the relationship between "notice" pleading and discovery. The time may have come to consider changes more fundamental than those made in recent years. The Civil Justice Reform Act manifests concern with the costs and delays associated with discovery, and may justify further study. The new disclosure practice authorized by Civil Rule 26(a) also must be studied.

Minutes, Civil Rules Advisory Committee 2 (Oct. 17-18, 1996) (visited Mar. 7, 2001) <<http://www.uscourts.gov/rules/Minutes/cv10-96.htm>>.

83. *See id.* (emphasis added):

As complex as the problems are, caution is necessary. *Lawyers and judges do not like frequent rule changes.* Discovery practice has been changed many times. The Civil Rules, moreover, have become "organic" in the sense that they are understood and implemented as a seamless whole. *Changes are appropriate only when there is a clear case for change.*

84. *See id.* at 8 (emphasis added):

When appointment of the Discovery Committee was announced, it was observed that most studies of the causes of popular dissatisfaction with the administration of civil procedure focus in large part on discovery. Discovery is expensive. Discovery is often conducted in a mean-spirited way. Discovery is used as a strategic tool, not to facilitate resolution of a controversy. . . . *If any aspect of the rules is broken, discovery is it.*

85. *See id.* at 9-10.

86. Minutes, Civil Rules Advisory Committee 4 (Oct. 6-7, 1997) (visited Mar. 7, 2001) <<http://www.uscourts.gov/rules/Minutes/cv10-97.htm>>.

87. *Id.*

88. *Id.*

sure; (2) limiting disclosure to only the facts supporting the disclosing party's case; (3) managed discovery; (4) a clear discovery cutoff time expressed in the "[c]ore discovery rules;" (5) use of "pattern" discovery; and (6) revising waiver doctrine to reduce the amount of time counsel must spend screening documents to avoid an inadvertent waiver of privilege.⁸⁹

Perhaps most important in retrospect, the Subcommittee identified as one of its potential changes "the basic scope of discovery," noting that

the American College of Trial Lawyers has long supported the 1977 proposal to narrow the scope of discovery defined by Rule 26(b)(1). There is a related view that the major problem of discovery arises with document production, and that the scope of discovery should be narrowed only for document discovery.⁹⁰

Among these suggestions, the Subcommittee identified as its "A" list of potential changes "three 'bullet' items: uniformity; initial disclosures; and the scope of discovery."⁹¹ In addition, the Subcommittee noted "many other worthy suggestions" that were deemed of "second-level priority."⁹² According to the Special Reporter, the "most important idea on [this] list is the firm trial date, an item relegated to [the B] list only because it is not a discovery matter, even though it is closely related to discovery cutoff issues."⁹³ Also noted was a "C" list of technical changes.⁹⁴

At the October 1997 meeting, the full Committee discussed at length the list of potential changes noted by the Subcommittee, particularly the issue of uniformity in disclosure, the core discovery that should be ordinarily available to litigants, and the scope of discovery relevance.⁹⁵ There appeared to be an emerging consensus within the Committee that uniformity was desirable in light of significant criticism of the local opt-out for disclosure in the 1993 Amendments and other forces fragmenting civil procedure, such as the Civil Justice Reform Act of 1990, which had encouraged local experimentation.

At its crucial March 1998 meeting, the Advisory Committee identified three options regarding the scope of discovery: (1) do nothing; (2) amend Rule 26(b)(1) with explicit language cross-referenced to Rule 26(b)(2)'s language of judicial control for the purpose of encouraging more aggressive judicial policing of proportionality; or (3) amend the language relating to the scope from "relevant to the subject matter" to "relevant to the claim or defense," but permit the court to allow the current "subject matter" scope by motion. Option 1 received no votes from the Committee. Option 2 received two votes. Option 3, now

89. *Id.* at 4-5.

90. *Id.* at 5.

91. *Id.* at 6.

92. *Id.* at 7.

93. *Id.*

94. *See id.*

95. *See id.* at 7-14.

amended Rule 26(b)(1), received nine votes.⁹⁶ This decision led to the Amendment's current language that conditions judicially-authorized "subject matter" discovery upon "good cause shown."⁹⁷

At its October 1998 meeting, the Committee also approved (by a 9-1 vote) a presumptive durational limit on depositions, with the precise contours of the limit to be decided at a subsequent meeting.⁹⁸ After some discussion, the Committee unanimously agreed to maintain the Rule 26(d) "discovery moratorium" that requires completion of initial disclosures before lawyer-directed discovery can take place.⁹⁹ The Committee also rejected ideas concerning possible changes in Rule 16 (pretrial conferences), Rule 30(a)(2)(A) (setting the presumptive number of depositions at ten per side), Rule 26(c) (protective orders), and agreed to certain technical amendments.¹⁰⁰

In August 1998, the Proposed Amendments were published for comment, beginning the public comment period that would end by February 1, 1999, and setting public hearings in December 1998 and January 1999. At its November 1998 meeting, the Committee received an interim report from its Discovery Subcommittee and again addressed proposed changes in discovery. The Special Reporter presented the draft Note explaining changes to the Committee. Regarding the scope/relevance language, the Special Reporter explained:

The goal [of the proposed change in the Rule 26(b)(1) scope language] is to win involvement of the court when discovery becomes a problem that the lawyers cannot manage on their own. The present full scope of discovery remains available, as all matters relevant to the subject matter of the litigation, either when the parties agree or when a recalcitrant party is overruled by the court. Absent court order, discovery is limited to matters relevant to the claims or defenses of the parties. No one is entirely clear on the breadth of the gap between information relevant to the claims and defenses of the parties and information relevant to the subject matter of the action, but the very juxtaposition makes it clear that there is a reduction in the scope of discovery available as a matter of right.¹⁰¹

The Committee was informed that early comments on the proposed amendment had been a mixture of praise, criticism, and uncertainty, like those regarding proposed cost-shifting.¹⁰² All at the meeting appeared to agree, however, that "[t]he most important source of the most extravagantly expensive over-discovery is document production," and that as a result, any cost-shifting device should be in Rule 34 rather than Rule 26.¹⁰³

96. Minutes, Civil Rules Advisory Committee 14-15 (Mar. 1998) (visited Mar. 7, 2001) <<http://www.uscourts.gov/rules/Minutes/cv3-98.htm>>.

97. *Id.* at 15.

98. See Minutes, Civil Rules Advisory Committee 15-16 (Oct. 1998) (visited Mar. 7, 2001) <<http://www.uscourts.gov/rules/Minutes/cv10-98.htm>>.

99. *Id.* at 21.

100. See *id.* at 22-26.

101. Minutes, Civil Rules Advisory Committee 6 (Nov. 12-13, 1998) (visited Mar. 7, 2001) <<http://www.uscourts.gov/rules/Minutes/1198civilminutes.htm>>.

102. See *id.* at 6-7.

103. *Id.* at 7.

During the period of public comment, the Committee held live public hearings (December 7, Baltimore; January 22, San Francisco; and January 29, Chicago). At the hearings, a variety of comments were made, with plaintiffs and defendants essentially presenting dramatically opposed visions of the proposed amendment regarding scope, a division that would be replicated in the Advisory Committee's final decision to send the amendment forward.¹⁰⁴

At the close of the public comment period, the Committee met again in April 1999 to assess the reaction to the Proposed Amendments. More than seventy witnesses had testified at the three hearings, and 301 numbered comments had been received, responses the Committee characterized as "thoughtful and thorough," as well as "voluminous."¹⁰⁵ The Committee regarded the comments as "generally parallel to the arguments that were considered by the Committee during the process of meetings, conferences, and subcommittee deliberations that shaped the published proposals," which in large part "reinforced the initial conclusions" of the Committee.¹⁰⁶

The Committee discussed and approved the proposed Amendments regarding the reduced initial disclosure imperative, requiring the disclosing party to produce only information it might use to support its claims or defenses.¹⁰⁷ The Committee also considered and approved the exceptions to initial disclosure for "low end" cases under new proposed Rule 26(a)(1)(E).¹⁰⁸ The Committee approved, after debate, proposed Amended Rule 30(d)(2)'s presumptive deposition time limit of seven hours and also broadened the prohibitions on instructions not to answer in depositions.¹⁰⁹

On the subject of scope, the Discovery Subcommittee maintained its support of the narrowing language in the wake of public comment. After presentation of the Subcommittee position, Committee member Professor Thomas Rowe made a motion to "abandon" the scope change, deleting the new language.¹¹⁰ Although sympathetic to many of the goals prompting the proposed change, Rowe argued that the new language was "unclear" and would both "spawn satellite litigation" and "encourage resistance to discovery."¹¹¹ In addition, it was submitted that the "central effect" of the Rule 26(b)(1) change

104. See *id.* at 13; see *infra* text accompanying notes 110-122 (discussing failed motion to delete Proposed Amendment to Rule 26(b)(1)).

105. Minutes, Civil Rules Advisory Committee 5 (Apr. 19-20, 1999) (visited Mar. 7, 2001) <<http://www.uscourts.gov/rules/Minutes/0499civilminutes.htm>>.

106. *Id.* at 5.

107. See *id.* at 8-9. The Committee also dealt with Rule 5(d) regarding filing of discovery materials and amended the rule to prohibit such filing absent court order.

108. See *id.* at 9-11.

109. See *id.* at 17-18. Under the Proposed Amendment, the prohibitions on instructing a witness not to answer will apply to any "person." The current language ("party") was thought to be insufficiently broad and protective since non-parties may be in attendance at a deposition.

110. See *id.* at 20.

111. *Id.*

would be “to narrow private enforcement of our regulatory laws.”¹¹² Possible examples were “product [liability] cases, excessive force cases, and employment discrimination cases.”¹¹³

Opponents of the deletion amendment argued in response that plaintiffs could still obtain necessary, but not overbroad, discovery through the “good cause” provision of the new language via court order.¹¹⁴ In counter-response, Professor Rowe (or his allies)¹¹⁵ argued that the proposed Amendment would shift the burden of bearing transaction costs and make it relatively unlikely that parties could get back to the level of relevant-to-the-subject matter discovery via motion and showing of good cause.¹¹⁶ “Absent a sufficient investment of judicial time, the result will, by default, be no discovery.”¹¹⁷ The Justice Department, despite some division in its ranks, supported the Rowe motion for this reason.¹¹⁸

After extensive discussion with commentary both favoring¹¹⁹ and disfavoring¹²⁰ the motion for abandonment, Judge Scheindlin also noted similar problems affecting initial disclosure and its potential for only adding another layer of litigation activity. Judge David Levi (E.D. Cal.), Chair of the Discovery Subcommittee, spoke in opposition to the Rowe Amendment, noting that it was supported by such “neutral bodies as the ABA Litigation Section, the American College of Trial Lawyers, and the Magistrate Judges Association.”¹²¹ The Committee defeated the Rowe motion on a 9-4 vote and elected to move forward with the proposal to narrow discovery scope.¹²² The Advisory Commit-

112. *Id.*; see also *Transcript of the “Alumni” Panel on Discovery Reform*, 39 B.C. L. REV. 809, 834 (1998) (comments of Judge Patrick Higginbotham).

113. Minutes, *supra* note 105, at 20.

114. See *id.* at 21-22.

115. The Minutes of the Committee Meetings record statements but do not normally attribute particular comments to particular speakers. For convenience, unless otherwise indicated, I will continue to refer to abandonment arguments as being made by Professor Rowe and comments in favor of narrowing the scope definition as being made by the Committee.

116. See Minutes, *supra* note 105, at 21-22.

117. *Id.* at 21.

118. See *id.*

119. Committee Member Judge Shira Scheindlin (S.D.N.Y.) spoke forcefully in support of the Rowe motion. She emphasized that the empirical data available suggested that the current broad scope of discovery was not viewed as a problem by lawyers. See *id.* Judge Scheindlin described the Proposed Amendment as “polarizing” and noted that “[t]he 301 written comments break down precisely—defendants champion the scope change, and plaintiffs excoriate it. [However,] the professors and most of the neutral bar associations also oppose the proposal.” *Id.*

120. The Rowe motion was opposed in particular by former Committee member Francis Fox, Esq., who spoke on behalf of the American College of Trial Lawyers. According to Fox, the College had “studied this proposal intensely” and concluded that the current “subject-matter” scope of discovery was a problem in 10-15% of all federal cases and that a broad standard of discovery needlessly increased litigation costs. *Id.* Fox also dismissed or minimized fears of satellite litigation or real substantive harm to parties, suggesting that judicial intervention to expand discovery from claim-or-defense to subject-matter would be available when needed. See *id.*

121. *Id.*

122. See Paul V. Niemeyer, Report of the Advisory Committee on Civil Rules to Standing Committee (May 11, 1999), 192 F.R.D. 354, 359 (2000); Minutes, *supra* note 105, at 24.

tee's Proposed Amendments were subsequently approved by the Standing Committee on Rules of Practice and Procedure and were then reviewed by the Judicial Conference. Before the Standing Committee, the proposed narrowing of the scope of discovery was again challenged but prevailed on a 10-2 vote. In the Judicial Conference, a similar debate ensued, with a similar result, but with a much closer 13-12 vote.

A related debate over the cost-shifting Amendment also took place at the April 1999 Advisory Committee Meeting, where a motion to delete the provision failed on an 8-5 vote.¹²³ On this issue, however, the Judicial Conference overruled the Advisory Committee, rejecting cost-shifting and failing to send it forward in the package of Proposed Rules reported to the Supreme Court.¹²⁴

V

THE EMPIRICAL DATA BEFORE THE RULEMAKERS

In crafting the new Amendments, the Advisory Committee self-consciously referred to two major examinations of the state of discovery and the impact of the 1993 Amendments, particularly the disclosure provisions. One study was by the Federal Judicial Center ("FJC").¹²⁵ In the FJC study, a sample of 1,000 cases was drawn, excluding cases thought not likely to have much discovery activity, such as Social Security appeals, student loan collections, foreclosures, default judgment, and cases terminated within sixty days of filing. Questionnaires were sent to 2000 attorneys in these cases, with 1178 lawyers responding, a fifty-nine percent response rate. The FJC Study team thought these respondents' cases were "representative of the sample as a whole."¹²⁶

The other study conducted was by the RAND Corporation.¹²⁷ This study assessed the impact of disclosure and other reforms, primarily through examina-

123. See Minutes, *supra* note 105, at 26.

124. See Niemeyer, *supra* note 122, at 360; Minutes, *supra* note 105, at 23.

125. See THOMAS E. WILLGING ET AL., FEDERAL JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE (1997). For a summary of pertinent provisions of the study and an update including additional information, see Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998) [hereinafter Willging et al., *FJC Study*].

126. Willging et al., *FJC Study*, *supra* note 125, at 528.

127. The RAND Study resulted in four reports. See JAMES S. KAKALIK ET AL., RAND, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., RAND, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., RAND, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); JAMES S. KAKALIK ET AL., RAND, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS (1996). For a summary of the RAND study team's findings, see James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998) [hereinafter Kakalik et al., *Discovery Management*]. The RAND study focused on the 1990 Civil Justice Reform Act, but the assessment was made with an eye to the impact of similar discovery and case management changes contained in the 1993 Civil Rules Amendments. See Kakalik et al., *Discovery Management*, *supra*, at 615-16.

tion of case disposition data and attorney questionnaire responses regarding discovery and disclosure activity.

The seemingly divergent data collected from the FJC and RAND examinations have for the most part been explained and harmonized.¹²⁸ The FJC and RAND studies found somewhat different patterns of expense depending on whether the court was active in managing discovery and setting early and firm trial dates. Bryant G. Garth found that the differences between the two studies were due to differences in sample size, complexity, and stakes of the cases.¹²⁹ Generally, these studies—and those that preceded them—reflect substantial consistency in the story of modern discovery. In particular, these examinations of discovery during the 1990s made the findings summarized below.

The studies found that, in many cases, little or no discovery was conducted. In a majority of cases, three hours or fewer were spent on discovery, and in a third of the cases studied, there was no discovery at all.¹³⁰

In a significant minority of the cases, discovery became a significant expense of the litigation. In cases that were not resolved quickly, approximately a third of the total attorney expenses were devoted to discovery.¹³¹ Where discovery occurred, document production was the most frequent form of discovery, occurring in eighty-four percent of the cases.¹³² Interrogatories took place in eighty-one percent of the cases.¹³³ Depositions were held two-thirds of the time. Initial disclosure occurred “only” fifty-eight percent of the time, with expert disclosure in twenty-nine percent of the cases.¹³⁴ In two-thirds of the cases that had formal discovery, there was also informal exchange of information.¹³⁵

As the findings above suggest, discovery is working adequately (if not perfectly) for most federal civil litigation.¹³⁶ The above-summarized findings are consistent with the findings of other empirical examinations of discovery.¹³⁷ Contemporaneous critiques of discovery continued to emphasize the discovery

128. See generally Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998); see also Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998) (summarizing studies of discovery during past twenty-five years).

129. See Garth, *supra* note 128, at 599-605.

130. See JAMES S. KAKALIK ET AL., RAND, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA § II(B) (1998); Kakalik et al., *Discovery Management*, *supra* note 127, at 635-36.

131. See Kakalik et al., *Discovery Management*, *supra* note 127, at 637.

132. See Willging et al., *FJC Study*, *supra* note 125, at 530.

133. See *id.*

134. *Id.*

135. See *id.*

136. See Kakalik et al., *Discovery Management*, *supra* note 127, at 636; Willging et al., *FJC Study*, *supra* note 125, at 531. These findings appear to be embraced by the Rulemakers as well. See Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 523 (1998) (Chair of Federal Civil Rules Advisory Committee interprets empirical study as showing that “[d]iscovery is now working effectively and efficiently in a majority of the cases.”).

137. See generally McKenna & Wiggins, *supra* note 128 (summarizing results of discovery studies since 1968).

abuse problem beyond what is justified by the actual empirical information on discovery abuse¹³⁸ but suggested that judicial supervision was the best means for controlling such abuse.¹³⁹ As the authors of the FJC study note:

Empirical research about discovery in civil litigation has yielded results that differ from the conventional wisdom, which claims that discovery is abusive, time-consuming, unproductive, and too costly. In contrast to this picture of discovery, empirical research over the last three decades has shown consistently that voluminous discovery tends to be related to case characteristics such as complexity and case type, that the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally—with notable exceptions—yields information that aids in the just disposition of cases.¹⁴⁰

In a very small number of cases, the costs of discovery battles became a majority of the total disputing costs, resulting in substantial expense.

Discovery expenses were, on average, hardly exorbitant. The median total attorney-related cost of litigation in the FJC sample was \$13,000 per client. Median discovery costs were only three percent of these amounts, although in five percent of the cases, attorneys characterized discovery expense as one-third of the total.¹⁴¹ The attorneys responding to the FJC sample tended to characterize discovery expense as appropriate, although there were significant subsets who characterized discovery cost as too high (fifteen percent of the sample) or too low (twenty percent of the sample).¹⁴²

In cases with pronounced discovery, lawyers did seem to find discovery burdensome.¹⁴³ The strongest predictor of discovery activity and expense was the "monetary stakes in the case."¹⁴⁴ Predictably, higher stakes were positively correlated with longer time to disposition.¹⁴⁵ Adding fuel to the debate about lawyer billing methods, the FJC study found that cases had longer disposition times where attorneys billed by the hour.¹⁴⁶ "Plaintiffs' lawyers seemed most concerned with the length, number and cost of depositions, and defendants' lawyers seemed most concerned by the number of documents required in document production and the cost of selecting and producing them."¹⁴⁷ And, although there was hardly evidence of a discovery meltdown, forty-eight percent of the

138. See, e.g., John K. Setear, Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

139. See also Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649, 650-55 (1986) (arguing that discovery abuse is rare and not a major problem for federal courts).

140. Willging et al., *FJC Study*, *supra* note 125, at 527.

141. See *id.* at 531.

142. See *id.*

143. This is probably with good reason. Although the median per client expenditures were \$13,000 per case, in a small subset of the most expensive cases (the 95th percentile of the same), per client costs were \$170,000. Thus, when ordinary litigation morphs into intensive, more discovery-laden litigation, the bill appears to increase quite dramatically. See *id.* at 528.

144. *Id.* at 532.

145. See *id.* at 554-56.

146. See *id.* at 533.

147. Niemeyer, *supra* note 136, at 527; see also Willging et al., *FJC Study*, *supra* note 125, at 540.

attorneys in the FJC study reported one or more discovery problems.¹⁴⁸ Many respondents "reported unnecessary discovery expenses due to discovery problems."¹⁴⁹

Attorneys like uniformity of rules and dislike extensive local variation.¹⁵⁰ This was perhaps the clearest finding in both the FJC and RAND studies. For example, in the FJC study, sixty percent of responding attorneys identified non-uniformity as a serious problem.¹⁵¹ When given a list of thirteen proposed reforms for reducing litigation costs, a uniform initial disclosure rule was the second most popular option, endorsed by forty-four percent of the responding attorneys.¹⁵² This should hardly be surprising in light of the many criticisms directed at the 1993 Amendments and the 1990 Civil Justice Reform Act on exactly these grounds.¹⁵³ The Rulemakers have essentially conceded this point in the Proposed Amendments, which eliminate the local district "opt-out" provision of Rule 26(a). Of course, another way of fixing the uniformity problem is to eliminate disclosure altogether. However, the Advisory Committee appears never to have seriously considered this option.

Attorneys like judicial involvement in resolving discovery disputes and believe that judicial intervention generally lowers costs and produces fair results. Among the thirteen possible discovery changes evaluated by the responding attorneys, this was overwhelmingly the most popular, endorsed by fifty-four percent of the respondents.¹⁵⁴ In particular, attorneys responding to the FJC questionnaire wanted sanctions imposed "more frequently and severely," (forty-two percent of respondents) and a civility code for counsel (forty-two percent of respondents).¹⁵⁵

Attorneys continue to prefer firm trial dates as the ultimate settlement promotion. A relatively short and fixed discovery cut-off date is also popular with counsel, but it is less clear whether the discovery cut-off has any effect on either

148. See Willging et al., *FJC Study*, *supra* note 125, at 532 ("Of those who reported problems, 44% said problems occurred in document production, 37% said they occurred in initial disclosure, 27% said they occurred in expert disclosure, and 26% said they occurred in depositions."). As might be expected, if a responding attorney reported problems of one type regarding discovery, there were usually other types of discovery problems in the case.

149. *Id.* at 533.

150. *See id.* at 541-42.

151. *See id.* at 542.

152. *See id.*

153. See Bell et al., *supra* note 19 (criticizing disclosure concept as well as potential for inconsistency); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is it Again Time for Reform?*, 138 F.R.D. 155 (1991) (also criticizing disclosure concept as well as potential for inconsistency); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992); Mullenix, *supra* note 11; Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994); Lauren Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. DISP. RESOL. 115 (1991); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

154. See Willging et al., *FJC Study*, *supra* note 125, at 542.

155. *See id.*

the speed of case disposition or the amount of resources devoted to discovery.¹⁵⁶ Moreover, counsel appear not to object greatly to the presumptive limit of twenty-five interrogatories established in the 1993 Amendments. Likewise, attorneys seem not to object to the presumptive limit of ten depositions per side.

There is no great resentment toward the mandatory disclosure system; in fact, there may even be significant support. Certainly, disclosure has not eliminated discovery and may not have greatly reduced its incidence.¹⁵⁷ In general, however, the FJC sample found considerable satisfaction with disclosure.

[I]nitial disclosure appears to be having its intended effects. Among those attorneys who believed there was an impact, the effects were most often of the type intended by the drafters of the 1993 Amendments. Far more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them. At the same time, many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them.

[There is] a statistically significant difference in the disposition time of cases with disclosure compared to cases without disclosure. Holding all variables constant, those with disclosure terminated more quickly. This finding corroborates attorneys' evaluations of the effects of initial disclosure on case duration.¹⁵⁸

Responding attorneys in the FJC study did note some problems with disclosure, usually concerning insufficient disclosure.¹⁵⁹ In general, the 1993 changes regarding expert disclosure appear to have improved pretrial development of this sort of information and evidence.¹⁶⁰

It is important to remember that although uniformity in disclosure was the greatest desire of the respondents to the FJC study (forty-one percent wanted a uniform national disclosure rule), a substantial number of the responding attorneys—twenty-seven percent—would prefer to achieve uniformity by repealing the 1993 disclosure rule.¹⁶¹ And to make decision by plebiscite even more problematic, an equivalent number (thirty percent) appear content with the status quo of local variance in disclosure and discovery.¹⁶²

Although the current Rulemakers deserve credit for bringing empirical research to bear far more than did many of their predecessors,¹⁶³ there have been

156. *See id.* at 533; *see also* Kakalik et al., *Discovery Management*, *supra* note 127, at 680.

157. *See* Willging et al., *FJC Study*, *supra* note 125, at 534.

158. Willging et al., *FJC Study*, *supra* note 125, at 534-35.

159. *See id.* at 535.

160. *See id.* at 536.

161. *See id.* at 543. I note with some irony that the percentage of surveyed counsel wishing to repeal disclosure is almost as high as the percentage favoring a narrowing of discovery scope. But, aware of similar attitudes in the bar, the Rulemakers have elected to keep disclosure but change the scope rule. Whatever is animating modern Rulemaking, it cannot be the sentiment of the bar as a whole.

162. *See id.*

163. Prior to the 1980s, procedural reform was undertaken based on what might be termed the "squeaky wheel" theory. Whether lawyers (including judges) or interest groups could draw the most attention to a matter determined the agenda of the Rulemakers and the likely areas of Rule modification. When changes were made in the Rules, this often appeared to have little basis in factual analysis.

some notable complications. To be fair, one cannot lay the Rule 11 tragedy solely at the feet of the Rulemakers. Much of the difficulty with Rule 11 was excessive infatuation with it by federal judges. They unwisely seized on Rule 11 as a tool for case management and applied it in a wooden manner to disfavored cases, claims, or counsel.¹⁶⁴ After what many regard as a horrendous first few years of Rule 11, Rule 11 jurisprudence was regarded by many as improving even in the absence of the 1993 Amendments.¹⁶⁵ But Rule 11 horror stories continued, and can still continue, even under the 1993 Amendments.¹⁶⁶ The Rulemakers may rely on empirical studies, but these are not necessarily definitive. The FJC study, for example, is primarily a survey of attorney attitudes about discovery, disclosure, and the 1993 Amendments. The RAND Study also relies heavily on attorney questionnaires. The reader and the Rulemakers are supposed to presume that attorney respondents have reasonable, accurate, and candid perceptions.

For purposes of summarizing research and planning the future of empirical research on Rulemaking, it is sufficient to note that the three recent examinations of discovery in practice, including the two studies relied upon significantly by the Rulemakers, appear not really to address what should perhaps be the central question regarding discovery: Are disclosure and discovery providing the information to which litigants are rightfully entitled without requiring production of an unacceptable amount of information that is too extraneous, disproportionately expensive to produce, private or privileged, or otherwise deserving of protection on public policy grounds?

Until the profession comes to a definitive view on this question, it seems foolish to continue revising the discovery rules, regardless of whether we label the changes "substantial" or mere "tinkering."

VI

THE DISJUNCTION BETWEEN THE DATA AND THE PROPOSED AMENDMENTS

Bryant Garth has observed that

For example, the 1983 Amendments produced the now infamous pumped-up version of Rule 11 that proved so problematic that it was substantially modified and defanged in the 1993 Amendments, in part as a result of empirical data about the Rules operation. See generally VAIRO, *supra* note 70 (describing history of Rule 11).

164. See Carl Tobias, *Public Law Litigation and The Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 301-10 (1989); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 491-501 (1988-89); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 349-54 (1990).

165. See, e.g., Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 110-16 (1991).

166. See, e.g., Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplications of Rule 11 by Harmonizing It With Pre-V verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 273-79 (1991) (noting decisions imposing Rule 11 sanctions on claims that have survived multiple motions for summary judgment or judgment as a matter of law, which should constitute essentially ironclad proof that the claim was not legally or factually frivolous).

[o]ne of the challenges for researchers is to get beyond the information that tends to be produced by the elite lawyers themselves or by lawyers and journalists parroting those lawyers. The available information, unfortunately, typically lines up according to professional and client interests. Each side provides an almost stylized account of the world of big litigation—alleged “strike suits” and settlements induced by the “blackmail” of discovery expense on one side, alleged “stonewalling,” hiding documents and harassing the plaintiffs on the other. . . . [A] consequence [of this effect] is that the reform agenda may be distorted by the domination of the paradigm promoted collectively by the contending elites.¹⁶⁷

Made at the September 1997 Boston Conference organized by the Advisory Committee, those comments now appear particularly relevant. Despite the wisdom of Garth’s observation, and the fact that empirical evidence has not made a clear case for revision, the Committee and other Rulemakers have plowed on and formulated a new package of amendments. In the area of the scope of discovery, the Committee’s error is particularly pronounced. Neither the FJC study nor the RAND study identifies the “subject matter” definition of discovery relevance as a problem. Certainly, no study has established that the proposed switch to “claim-or-defense” relevance will improve discovery.¹⁶⁸

In other areas encompassed by the Proposed Amendments, the Committee’s work does not clearly contradict the available empirical evidence. On issues of disclosure and deposition length, both the FJC and RAND studies have some data that can be used to justify the move. Neither study makes out a strong case against the changes. But neither do they make out a strong case for implementing these changes. Although the Committee’s work in this area is not the cause for alarm presented by amended Rule 26(b)(1) regarding scope, neither is it cause for celebration if one’s goal is careful Rulemaking justified by compelling information. Simply put, neither the FJC Study nor the RAND Study makes a case for any further amendment to the Rules at this time.

One must give credit to the Committee for obtaining public input and utilizing empirical data. Compared to earlier Rulemaking efforts (with the exception of the 1993 Amendments), the current Committee sought and received substantial information. But as was the case with earlier efforts, the Committee was either getting no information or getting its information as it was already embarking on a course of further amendment. Not surprisingly, the course continued and further amendment resulted even though the resulting data did not seem to make a case for the amendments.

Instead of discussing a “discovery moratorium” codified in the Rules, the Advisory Committee should have had some serious discussions about a Rulemaking moratorium—at least until the FJC and RAND studies were complete and completely assessed, and preferably after there had been more than a couple years’ experience with the 1993 Amendments. Instead, the Committee either (a) made up its mind prior to studying the issue, or (b) made up its mind on

167. Garth, *supra* note 128, at 597-98.

168. See Stempel, *Politics and Sociology*, *supra* note 6, at 43-70.

a parallel track while studying the issue. One wonders at the logic of this approach, which seems to have pervaded civil Rulemaking in the late twentieth century.

Through greater openness of its process and the use of empirical data, the Committee attempted to adhere to something resembling the scientific method. But the Committee's overall work departed from that method to an unnerving degree. In the classic scientific method, the experimenter defines the problem, observes data, forms a trial hypothesis, and tests the trial hypothesis, then makes a tentative analysis and probably engages in further research. Thereafter, a revised trial hypothesis is often advanced and tested before an experiment posits a conclusion, finding, or formula. By contrast, the civil litigation Rulemakers indeed defined a problem (discovery "abuse") and formed a trial hypothesis (discovery abuse must be rectified by Rules changes, probably constriction of available discovery), but these assessments were made on the basis of little factual inquiry and were not completely tested before the Rulemakers produced proposed amendments tending to verify their ideological predilections.

The resulting process is a pseudo-scientific method. To the outside observer (particularly Congress), it looks as though the Committee assessed the lay of the legal landscape and proposed responsive Rules changes. In reality, the Committee moved along an agenda that had little support in neutral research but is consistent with the goals of particularly important interest groups striving to affect the shape of American civil litigation.¹⁶⁹

One can understand the quandary of the Committee and of Rulemakers who attempt to act in good faith. They feel pressured to do something to avoid charges of complacency. They fear precipitous actions by Congress that might fill the vacuum created by any express or de facto moratorium in Rules revision. They are subjected to the pressures of interest groups of all stripes, many of whom can make at least a plausible case for change. Under these circumstances, Rulemakers are understandably tempted to make amendments now and ask questions later, or perhaps simultaneously. My point remains a simple and conservative one: Despite the practical political forces of the day, the Rulemakers should step off the amendment treadmill for a decent interval (a decade at least) and really engage in sustained study and reflection about the Federal Civil Rules and the litigation system in general.

Just as important, Rulemakers must realize that the larger deficiencies of American civil litigation are either (1) an unavoidable price worth paying for the advantages conveyed by the system's openness and empowerment or (2) things that require changes other than Civil Rules amendment.

By an unavoidable price, I mean this: Permitting relatively easy access to courts by claimants, including broad information availability, is useful in en-

169. *See id.* at 80-104.

forcing the laws and social norms endorsed by most citizens. Doing this comes with a cost—more litigation intended to vindicate rights is more expensive than less litigation. It may be particularly expensive for the defendants who must produce information that tends to give credence to at least some of the claims and who wish that they were not subject to the claims. But this is hardly a convincing brief for changing the system. Rather, it constitutes an endorsement of the system.

Changing the Rules has only limited power to remedy the legitimate problems with the litigation system. For example, the data seem to indicate that greater judicial involvement in managing discovery ("adult supervision," as the Subcommittee Reporter has referred to it)¹⁷⁰ would be useful. But getting judges more involved in discovery cannot be accomplished solely by Rules amendment and arguably cannot be accomplished by any of the new amendments. Section X below addresses a more effective method for improving litigation, one that does not hinge on Rules revision.

VII

CONTINUING CONCERNS ABOUT DISCLOSURE

As noted above, the data compiled to date indicate not only that the adoption of rules disclosure has not resulted in major problems, but also that it has not had much salutary impact at all.¹⁷¹ Lack of uniformity is perceived as a problem by many lawyers,¹⁷² although many courts continue to argue for local discretion, asserting that the local bench knows best what type of discovery regime produces optimal results.¹⁷³

From this data, one could argue either that disclosure needs to be expanded and made nationally uniform, or that disclosure is an experiment that was not a success and should therefore be eliminated. Either inference seems equally persuasive. But the Rulemakers continue to cling to disclosure as though it had accomplished some great feat of litigation reform. Their choice was uniformity and effectively chiseling disclosure into the stone of the Federal Civil Rules. Having survived two separate rounds of Rulemaking, the mechanism is likely to be with us for the ages.

Although the permanent presence of disclosure is hardly a disaster, neither does it accomplish much. It should be remembered that a substantial part of the U.S. litigant population has lived without disclosure during the 1990s. Many of the largest federal district courts opted out of disclosure, apparently with no ill effects or increase in backlog relative to the disclosure districts. Disclosure in

170. See Marcus, *supra* note 4, at 781; see also Minutes, Civil Rules Advisory Committee 3 (Oct. 6-7, 1997) (visited Feb. 9, 2001) <<http://www.uscourts.gov/rules/minutes/cu10-97.htm>>.

171. See *supra* notes 125-136 and accompanying text.

172. See *supra* notes 150-153 and accompanying text.

173. This was the view expressed by judges in the District of Oregon at the January 1999 hearing. See Civil Rules Committee, January 1999 hearing (testimony of Hon. Owen Panner).

the more competitive urban districts that was such a hotbed of contention under the 1983 Amendment to Rule 11 may become subject to greater strategic behavior, controversy, and transaction costs than has been the case with disclosure to date.

In the same “first, do no harm” vein, one can certainly question whether the track record of disclosure is strong enough to merit codification as our national rule of initial information exchange. As noted above, the legal profession is not up in arms over disclosure (as it was over Rule 11), but neither has the profession rallied around disclosure. A significant portion of the bar continues to believe, as I do, that the entire escapade could have been avoided with no adverse impact, and perhaps some significant cost savings from dispensing with some of the Rules controversy of the 1990s. A significant number of judges and lawyers continue to argue for local option on disclosure—a sign that these courts either wish to avoid the disclosure regime or think they have a better version of it.

One prominent lawyer, Gregory P. Joseph, has argued that “[u]nder the [amendment] to Rule 26(a)(1), mandatory disclosure simultaneously becomes (i) universal, (ii) generally toothless but (iii) a dangerous trap for the unwary.”¹⁷⁴ Because under amended Rule 26(a)(1), a party need only disclose the information that may be used to support its claims, he finds the new disclosure to add little information for other parties. Under the new language, “[t]hat is far more limited than their [former] requirement of disclosure of such information ‘relevant to disputed facts alleged with particularity in the pleadings,’” the new Rule is “so limited that one is tempted to ask what the point is, because all of this information must ultimately be disclosed no later than the pretrial order (or default disclosure provision, Rule 26(a)(3)).”¹⁷⁵

In addition, Joseph might have noted that such information was almost always unearthed prior to 1993 by interrogatories and deposition questioning, as well as motion practice that might ensue. Today, attorneys undoubtedly continue to use these devices, even in the districts that did not opt out of disclosure, to ensure that they know what they should about the opponent’s case. If Joseph is correct, amended Rule 26(a)(1) may also be more trouble than it is worth by creating this perceived trap for the unwary. Under Rule 26(e)(1), the supporting information initially disclosed must be supplemented. If it is not, the party failing to supplement is precluded from using the non-disclosed information as evidence.¹⁷⁶ The change in language regarding what must be disclosed, although generally helpful, will undoubtedly lead to some interpretative confusion and some surprised counsel barred from using evidence because he or she over-

174. Gregory P. Joseph, *Federal Practice: Civil Rules Amendments*, NAT’L L.J., Mar. 13, 2000, at A19. Joseph, a member of the Evidence Rules Advisory Committee, provides an excellent and succinct summary of the new discovery amendments and Proposed Amended Rule 5(d), which he also regards as posing a potential ground for controversy.

175. *Id.*

176. *See id.* at A20 (citing *Sears, Roebuck & Co. v. Goldstone & Sudalter*, 128 F.3d 10, 18 n.7 (1st Cir. 1997)).

looked the requirement or misunderstood what constitutes supporting information.

Similarly, the exception to mandatory disclosure for material that will be used "solely for impeachment"¹⁷⁷ under amended Rule 26(a)(1) creates interpretative problems: What are the boundaries of "impeachment"? How exclusive must the use be to qualify as "solely"? "Many documents that are offered for impeachment purposes also have non-impeachment qualities that advocates will be loath to lose,"¹⁷⁸ which suggests that counsel will err on the side of disclosure, even if this removes the surprise and "sting" a lawyer would hope to achieve when impeaching a witness. In addition, the removal of low-end cases from disclosure and some additional drafting ambiguities raise the question of whether new Rule 26(a)(1) will really provide any improvement in civil litigation.

To be sure, the Rulemakers toiled mightily to make disclosure better. My question remains: Why? Why work so hard to tune up this Delorean/Edsel when instead it could be pulled from the market in favor of the old, reliable Taurus? Disclosure, which was supposed to be an experiment, seems instead to have taken on the role of untouchable institution. The desire of Rulemakers to maintain that which they fought for only a few years earlier is understandable, but misplaced. Like most observers, I am weary of the disclosure fight and willing to accept it as non-disastrous and perhaps even modestly helpful. But it has not been helpful enough to justify its transaction costs in enactment, interpretation, modification, and enforcement. It would have been just as easy to jettison disclosure altogether as to engage in its current tentative rehabilitation and nationalization. Yet this alternative appears not even to have occurred to the Rulemakers. Once again, they forge ahead mending the unnecessary repair job of a few years earlier.

The Committee's change to require disclosure only of supporting information makes it less important,¹⁷⁹ but still disclosure continues to provide another layer of litigation activity that appears not to eliminate discovery in many cases or to reduce the overall instance of discovery. Under these circumstances, one can make a strong argument that the federal courts would be better off without disclosure at all. Uniformity can be as easily achieved by eliminating a six-year-old Rule as by imposing it nationally. Baseline information exchange would, of course, continue to occur—through the initial set of interrogatories and document production, which works smoothly in most cases.

Eliminating disclosure might have an additional benefit. Recall that the consistent complaint of counsel is insufficient judicial supervision of discovery in complex or contentious cases.¹⁸⁰ Under a traditional discovery regime, coun-

177. See FED. R. CIV. P. 26(a)(1)(A) & (B) (amended 2000), *reprinted in* 192 F.R.D. 340, 344 (2000).

178. Joseph, *supra* note 174, at A20.

179. See *supra* notes 174-175 and accompanying text.

180. See *supra* notes 127-131, 154-161 and accompanying text.

sel for the litigants usually identify significant controversy over discovery at the outset. If informal resolution fails, one or more lawyers will soon be going to court to seek more discovery or limits on discovery. The court is thereby apprised quite forcefully as to which cases on the docket have discovery problems. Anything other than a smooth "first round" of discovery thus apprises the court in pointed fashion of a need for judicial involvement. Indeed, judicial involvement is invited and mandated (unless the court elects to allow any motions to wallow undecided). Although friction at the initial disclosure stage can accomplish the same thing, discovery would seem as effective, or even more effective, in prompting judicial supervision in problem cases.

In short, although disclosure continues to enjoy a Teflon-like icon status with the Rulemakers, its utility remains seriously open to question. Before disclosure is hard-wired into the Rules through the elimination of local opt-out provisions, further study should be undertaken. Nothing suggests any significant urgency on the disclosure question. Additional study, experimentation, and reflection can be tolerated by the court system and may prove beneficial in the long run.

VIII

THE CURRENT SCOPE DEBATE

Under former Rule 26(b)(1) and the standard of relevance that had existed since 1938, discovery was available to a litigant if the information sought was "relevant to the subject matter" of the dispute.¹⁸¹ Under the new language, discovery is permitted only if the information sought is "relevant to a claim or defense" of the litigation.¹⁸² If a litigant fails to meet the "claim or defense" test, he or she can still seek the broader "relevant to the subject matter" discovery, but may obtain it only upon a demonstration of "good cause" for getting the broader discovery, which was available as of right from 1938 until 2000.¹⁸³

The restriction in the scope of discovery is misguided for a number of reasons:

- (1) There is no clamoring for the reduction in scope due to perceived problems in the field. A significant subset of influential lawyers (primarily the American College of Trial Lawyers) wants the change, but surveys suggest the profession as a whole (and the bench) were comfortable with the status quo ante of "relevant to the subject matter."¹⁸⁴
- (2) The proponents of the change to narrower discovery have not made much of an anecdotal case for change nor any sort of em-

181. See *supra* notes 48-50 and accompanying text.

182. See *supra* notes 96-97 and accompanying text.

183. See *id.*

184. See *supra* notes 127-140 and accompanying text.

pirical/statistical case for change. Studies by the RAND Corporation and the Federal Judicial Center in fact suggest the best thing to have done was to leave the scope of discovery alone.¹⁸⁵

- (3) Although the change suggests narrowing, no one is really sure what the difference is between the two verbal formulations. At this juncture, it is impossible to tell whether the 2000 Amendment will bring virtually no change, some change, significant change, or substantial change.¹⁸⁶
- (4) Whatever the true "meaning" of the new verbal standard, there will be substantial costs in litigating it for years to develop a common law dividing line between what is relevant to claims and defenses and what is merely relevant to the subject matter.¹⁸⁷
- (5) If over breadth of the "relevant to the subject matter" standard is a problem, the rules already in place before the 2000 proposals provided ample authority for courts to limit discovery. Rule 26(g), a Rule 11 of sorts for discovery requests, makes a lawyer subject to sanctions for making frivolous discovery requests. Rule 26(b)(2) provides that a judge may limit the availability of even relevant discovery if the discovery sought is disproportionate to any likely benefits from the information. Rule 26(c), of course, permits courts to impose a wide array of tailored protective orders.¹⁸⁸ This point reflects rather well the rules versus discretion contradiction of the Rulemakers. We have in place a system where judges have substantial discretion to control discovery. The Rulemakers have replaced it with a system where the rule is now one of less discovery, subject to the potential "escape hatch" of showing good cause.
- (6) The 2000 Amendment shifts the burden of uncertainty in favor of those opposing release of information and upon those who seek information. This will have a substantive impact, but the question remains as to the precise contours of the impact.¹⁸⁹

185. See *supra* notes 126-159.

186. See *supra* notes 110-122 and accompanying text (discussing Advisory Committee debate on Rowe motion to abandon the amendment).

187. See *id.* (discussing Judge Scheindlin's arguments against a change in Rule 26(b)(1)).

188. See ROGER S. HAYDOCK & DAVID F. HEUR, DISCOVERY PRACTICE § 1.2, 1.10 (3d ed. 1994).

189. See FED. R. CIV. P. 26(b) (amended 2000), *reprinted in* 192 F.R.D. 340, 346 (2000) (Under new Rule 26(b), discovery is reduced from "subject matter" relevance to "claim or defense" relevance but can be expanded back to forever "subject matter" norm "for good cause" shown.).

- (7) The 2000 Amendment is particularly likely to disadvantage plaintiffs and assist defendants, particularly in cases involving products liability, discrimination, pollution, and securities fraud.¹⁹⁰

Although one can argue about which default rules should frame the exercise of discretion, my vote is for staying with the subject matter standard of relevance that has, by and large, served the system well for most of the past century. Although the proposed amendment has become law, it is an unwise piece of Rulemaking born of the less attractive political and sociological traits of the Rulemaking process. It unwisely creates new transaction costs and, if it has a significant substantive impact at all, will accrue to the disadvantage of claimants and society's disempowered elements, who often turn to the courts to rectify injustice.¹⁹¹

On a more structural level, the scope-narrowing of amended Rule 26(b)(1) is an attack on sixty years of judicial discretion. The new Rule, as previously noted, does not eliminate discretion but shifts the default rule from one of broad discovery to one of narrower discovery. Implicit in this move is a view that courts to date have used their discretion unwisely by refusing to narrow the broad scope of discovery under their authority pursuant to Rules 26(b)(2), 26(c), and 26(g). I disagree. Unless one thinks judges are too lazy or hostile to deal with discovery, one must regard the track record of the twentieth century as an indication that judges have not seen enough abuse of the broad subject-matter standard to rein it in on many occasions. Although attorneys often complain about the broad scope of discovery, they often forego motions to limit the subject matter in their cases. They may claim that this is futile because of the broad discovery scope standard. But what they really mean is that they did not think they could convince a court to exercise its discretion in their favor against the default rule. Translated, that means that most of the time, judges do not see many cases where litigants are victimized by the broad scope of subject-matter discovery. The Committee would have done well to refrain from fixing what probably was not broken.

IX

CONTINUING SCHIZOPHRENIA ABOUT JUDICIAL DISCRETION

As noted at the outset of this article, the legal establishment has suffered a longstanding inconsistency about judicial discretion. In alternating and sometimes even simultaneous movements, Rulemakers and policymakers have both endorsed the judge's discretion and attempted to constrict it.¹⁹² The history of American jurisprudence is to some extent an example of both of these tenden-

190. See Stempel, *Politics and Sociology*, *supra* note 6; see also *supra* notes 72-81 and 162-171 and accompanying text.

191. See Stempel, *Politics and Sociology*, *supra* note 6; see also *supra* notes 6 and 158-170 and accompanying text (reviewing arguments for and against narrowing of discovery scope).

192. See *supra* notes 98-102 and accompanying text.

cies in a creative tension of yin and yang. Sometimes the rules are the more privileged end of the continuum; sometimes discretion is the favored prong. Depending on which situation obtains, results will differ at the margin. Overall, however, in both civil litigation and the law generally, there is systemic stasis: We have rules that must be followed, but adjudicators have substantial discretion in the application of the rules and often apply or create express or implied exceptions to those rules. Discretion is further enhanced because outcomes in contested matters often turn on the facts rather than the established rules of decision. Fact finders may exercise knowing or unconscious discretion affecting the outcome of disputes based on their determination of the facts.

But discretion continues to have its defenders, and its presence is always felt. Discretion, at least in application if not avoidance, always modifies the prevailing rule or rules. If anything, discretion historically has been the privileged prong in the debate and continues to be so today.¹⁹³ We normally praise judges who avoid an absurd result in contract or statutory interpretation cases by construing the seemingly literal language in a manner that avoids the result or refusing to follow the literal command to the point of absurdity.¹⁹⁴ We also praise judges who use their discretion to update laws or contract instruments so that they are consistent with current public policy and the legal topography.¹⁹⁵ But simultaneously, the rules end of the continuum asserts itself as society frequently inveighs against the overly "activist" or "result-oriented" judge who appears to decide cases based too greatly on personal preferences rather than the "law."¹⁹⁶

In short, our system has long had an inconsistent, even schizophrenic, attitude toward the polar tension of rules versus discretion. Not surprisingly, attitudes toward civil litigation and Rules revision reflect this same dichotomy. This division is not so much cause for concern as it is a necessary part of any sophisticated legal system, perhaps any sophisticated society. The Committee and the Rulemakers recognize this. The amendments of the late twentieth century have not sought to eliminate discretion entirely, only to curb it or subject it to new default rules. For current analysis of the new amendments and Rulemaking generally, the important point is that some reverence for discretion is hard-

193. See Brunet, *supra* note 8.

194. See, e.g., *Rector, Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (discussing statutory interpretation) in WILLIAM N. ESKRIDGE, JR. & PHILIP K. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 522-24 (2d ed. 1995) (approving of "absurd result" canon and outcome in case); Lawrence Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 80-81, 97-102 (1998) (finding *Holy Trinity Church* correctly decided).

195. See, e.g., Glenn Fowler, *Obituaries, Judge Joseph Lord, 3d Dies at 78; Broke Will on All-White School*, N.Y. TIMES, Apr. 26, 1991, at D17 (reviewing distinguished judicial career of the late Joseph Lord (E.D. Pa.), who in *Commonwealth of Pennsylvania v. Brown*, 270 F. Supp. 782 (E.D. Pa. 1967), applied the *cy pres* doctrine to circumvent explicit provisions in charitable bequest restricting use of funds for college to white students only; the tone of the obituary and quoted comments approves Judge Lord's refusal to follow the text in light of modern attitudes regarding racial exclusion).

196. See Stephan D. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679 (1999) (noting political attacks in popular press).

wired into the system. Rulemaking and litigation reforms logically will work best if they accept this fact and act accordingly, with an eye toward harnessing discretion in the most productive way rather than punishing it for the perceived faults of the system in general.

X

A MORE PROFITABLE DIRECTION FOR REFORM

Assessing the current 2000 Amendments in light of history, empirical information, the substance of the proposals themselves, and the ongoing tension between rules and discretion makes for a mediocre cocktail. From most perspectives, the 2000 Amendments and their siblings of the 1990s are a disappointment. They will not make litigation significantly smoother. They will not lower disputing costs and will probably increase them, at least for the predicted ten years or so that it will take for judges to define how “claim-or-defense” relevance differs from “subject matter” relevance and what constitutes “good cause” for allowing the presumably broader subject matter scope of discovery. They will not change the substantive rights and defenses available to disputes which, depending on one’s political perspective and the subject matter of the dispute, are either too expansive or too restrictive.

Judges will find that the new Rules add to their burden, rather than alleviate it. For most lawyers and clients, the 2000 Amendments are either disliked or inconsequential, although a significant minority of lawyers and clients have reason to cheer. Result-oriented, anti-discovery defendants will find some use for the 2000 Amendments in that the new Rules will give claimants generally less information and a reduced chance of victory. Elite commercial litigators may find disputing costs reduced with no adverse effect in a select class of disputes where the scope of discovery need not have the breadth of the “subject matter” standard for either combatant to have a fair shake.

Continuing the fundamental contradiction of Civil Rules revision during the latter twentieth century, the 2000 Amendments both interfere with judicial discretion and enhance it, even granting it license—after shifting to a pro-defendant default rule.¹⁹⁷ For example, under the new claim-or-defense standard of relevance with the “good cause” subject matter expansion, judges will have idiosyncratic and largely unfettered control over the discovery that actually becomes available to litigants, even though they are encouraged to give less discovery than in the past.

The 2000 Amendments are problematic and fall far short of a serious comprehensive effort to fix the perceived problems that animated their creation. This particular batch of Rules revision, however, is no worse than its immediate

197. See Stempel, *Politics and Sociology*, *supra* note 6, at 2-8; see also Elizabeth G. Thornburg, *Giving The “Haves” A Little More: Considering The 1998 Discovery Proposals*, 52 SMU L. REV. 229, 230-31, 240-46 (1999).

predecessors—a family resemblance that only serves to further indict the Rule-making enterprise of the past twenty years. We have seen the 1983 Amendments and the Rule 11 fiasco, the 1990 Balkanization of litigation through the politically interventionist Civil Justice Reform Act, the 1993 addition of disclosure and contraction of discovery, and now the 2000 Amendments.¹⁹⁸

This is hardly a track record that urges more of the same. Using cost-benefit analysis, making a case for this pattern is difficult. Some of the recent amendment efforts are downright appalling.¹⁹⁹ Others are arguably ineffectual, cost-increasing, or only of marginal benefit. Arguably the best Rulemaking efforts of this time period have been amendments undoing the folly of earlier amendments.²⁰⁰ If there has been some improvement in litigation disputing, it has been minimal, and it has come at the cost of thousands of person hours of effort and conflict.

Faced with this less than appealing reform track record, I have some heretical counter-suggestions, some linked to the Rules and others based on factors outside the structure and language of the Civil Rules. Non-Rules initiatives perhaps hold greater promise for improving problems in civil litigation. To the extent this is true, the Rulemakers can be indicted not just for insubstantial “tinkering,” but for unnecessary or counterproductive “meddling.”

A. Stop the Music Until There is a More Melodic or Stirring Tune

The available information rather clearly suggests that the discovery system is not in such bad shape that substantial revision of the discovery rules is necessary.²⁰¹ Rather, the system would benefit if the Rulemakers would back away from their mission of the 1990s. Rulemakers and other policymakers simply must realize that the Rules do not need ongoing amendment every few years.

To be sure, discovery is imperfect. So what? Litigation is imperfect. Courts are imperfect. Alternative forms of dispute resolution are imperfect. Society is imperfect. But as members of an imperfect society, we accept many things as both imperfect and beneficially acceptable on balance—and we wisely leave them intact. An example is the market system. Markets appear quite effective at creating wealth but contribute to inequality. Government programs may seek to alleviate the more severe consequences of inequality, and they may attempt better to equip citizens for participation in a market economy. Most Americans, however, have wisely rejected the notion of attempting to alter the market economy by moving toward a socialist model.

Rulemakers and policymakers should adopt a similar attitude toward litigation and discovery. Although some targeted remedial efforts may be required

198. See, e.g., FED. R. CIV. P. 11 (1983); FED. R. CIV. P. 26(b)(1) (2000).

199. For example, 1993's disclosure package, 1993's interrogatory and deposition limits, and 2000's deposition time limit.

200. Examples include the 1993 amendments rolling back Rule 11 and the 2000 Amendments undoing the 1993 disclosure provisions.

201. See *supra* notes 181-183 and accompanying text.

from time to time, the U.S. litigation system generally works well and should be supported. Discovery and litigation should be left alone, at least for some decent interval of time (ten to twenty years, in my view). If change is to come, it should be through the development of a multi-door courthouse or alternatives to litigation, in which participants are subject to something different than litigation, rather than attempting to alter litigation to look more like popular forms of Alternative Dispute Resolution. Litigation remains an effective default method of dispute resolution that works well enough most of the time; its deficiencies are not shortcomings that can be cured through Rules revision.

B. Embrace the Discretion Prong of the Rules-Discretion Dichotomy and Accept Discretion as the Essential Ingredient of an Intelligent Discovery System

Related to the advocacy of benign neglect toward Rules revision is the issue of the ongoing power struggle between rules and discretion. Although this tension will always be a part of litigation, we have reached a stasis point for discovery. There are reasonably good Rules in place governing discovery. There are no obvious improvements to be made in the Rules. The key to effective discovery practice in the courts is, literally, in the details as determined on a case-by-case basis. No amount of revision to the general Rules can change this fact or improve this situation. Only intelligent judging in particular cases can make the discovery Rules work any better—which, of course, depends on the exercise of judicial discretion in individual cases.

The essential importance of discretion will remain even with misbegotten amended Rule 26(b)(1) as law. If anything, the importance of judicial discretion will increase as judges attempt to delineate what differentiates claim-or-defense relevance from subject-matter relevance and articulate what comprises good cause for the broader discovery. The Rulemakers in this area have not so much moved away from discretion as they have merely flipped the default rule about baseline discovery entitlements. Regardless of whether one likes or dislikes the Amended Rule 26(b)(1), discretion is the heart of resolving discovery disputes.

There are also sound reasons for preferring that the default against which discretion operates be one of broad discovery, but that battle is probably lost as the 2000 Amendments have become effective. Whatever the default, there is no eliminating discretion, or even reducing its importance. Rulemakers should simply accept this fact and cede to the courts the task of making the “right” discovery decisions in particular cases. The role of Rules in this context is to set some decent default parameters that will prevent decisionmaking from becoming too ad hoc or idiosyncratic. After that, the problem is one for the frontline trial judiciary subject to the quality control of appellate review.

C. Recognize the Non-Generic Nature of Problem Litigation

The intelligent exercise of judicial discretion is even more important because of the nature of litigation and discovery disputes. Again, the available empirical evidence suggests that discovery generally works well and is not a significant problem except in a small subset of cases. Problems appear to occur more frequently in high-stakes, multi-party, complex cases. Although there is some predictability about the types of cases that will present problems, there is really no predictability about the particulars of the given discovery disputes that will arise in these problem cases. Thus, there is no substitute for individual adjudication of these disputes by judges exercising sound discretion.

Consequently, Rulemaking reform will not improve this situation. Only conscientious adjudication in the trenches can address this problem. Fortunately, the percentage of problem cases is low, and in theory, the courts should be able to resolve these cases through adequate attention. Unfortunately, the attempts at reform have made discovery a generic scapegoat, erroneously treating discovery problems as widespread, frequent, and pattern-like. The only real pattern is that big cases produce bigger problems and create an incentive for strategic behavior that is socially suboptimal. Judicial intervention is required on a case-by-case basis to cure this pathology. Treating discovery as a generic problem only clouds the diagnosis and leads to the wrong solution: more Rules instead of more exercise of judgment.

To some degree, litigation and legal outcomes are inherently *sui generis*; that is what makes lawyering a skill, and an expensive one at that. If legal disputes took place according to a rigid formula, lawyers and courts could be replaced with software. To be sure, some types of cases are recurring and somewhat predictable, or else so low in stakes that routinization is required, to borrow Holmes' phrase, as "a concession to the shortness of life."²⁰² Drafting simple wills and adjudicating speeding tickets are examples. Once we leave the realm of the routine or mundane, however, the nature of discovery disputes will be both individualistic and involved enough that only a specific response—by a judicial officer exercising discretion—can resolve the matter. Recognizing this makes it clear that we have now reached an endpoint of sorts. Further discovery Rules revision will accomplish nothing and should cease.²⁰³

For complex litigation, the imperative of discretion is even stronger because of the difficulty of predicting in advance the set of discovery rules that will lead to optimal results. Is subject matter discovery too broad? Is claim-or-defense discovery too narrow? The answer, of course, is the familiar one in law: It de-

202. *Reeve v. Dennett*, 11 N.E. 938, 944 (Mass. 1887).

203. Only if Rulemakers wish to change the very nature of litigation itself would further discovery Rules revision make sense. For example, if the legal profession and society wish to abandon the open courts ethos of the post-1938 era, one could envision a completely new set of restrictive, minimalist discovery Rules that might make litigation more like narrow arbitration. But absent such a substantive move (which should be resisted by society), further Rules revision on discovery does not make sense.

depends on the context, the facts and circumstances of the case. Although bright-line rules are a necessary part of the architecture of law, they do work well enough on their own to determine discovery outcomes in complex cases.

The need for discretion is clear even in the arguments put forth by those arguing for greater limits on discovery. For example, Paul Carrington, although generally not willing to join the stampede against discovery, finds its breadth troublesome in the context of product liability document production:

For example, there is at least some merit in eliminating the occasion for expensive document searches in product liability cases. It is in the public interest that corporate officers have discussions of risks unfettered by the threat of liability imposed on the basis of intramural discussions. . . . [I]t may be counterproductive to [the deterrent purpose of tort liability] to impose or increase liability on the basis of communications between officers of manufacturing firms discussing such risks candidly.²⁰⁴

But to address this perceived problem, Carrington argues for a substantive legal change: making the manufacturer's subjective state of mind irrelevant to liability. His implicit conclusion is that the perceived problem is one of substantive law rather than the discovery rules. In the illustration he gives, for example, it appears that the discovery sought would be relevant under either the claim-or-defense relevancy standard or the subject-matter relevancy standard.

But consider Carrington's illustration as only a matter of litigation procedure. Should intra-corporate memoranda be discoverable? Absolutely. They may reveal conscientious executives assessing risk, or they may reveal lawless swine externalizing the dangers of their products to increase profits. For example, the footnote to Carrington's illustration refers to litigation against tobacco manufacturers and breast implant manufacturers as having "entailed an intense search for correspondence between executives manifesting knowledge of dangers not disclosed to the public."²⁰⁵ True enough, and in the tobacco litigation, plaintiff's counsel unearthed some extremely damning documents tending to show that tobacco company officials were not weighing risks but instead attempting to disguise them, deceive the public, and steer children toward tobacco addiction all in the name of profit.²⁰⁶ Unless one is willing to redact this evidence out of the tort liability process, it would seem to merit discovery under any rational system of product liability.

Of course, not every allegedly defective product is tobacco (which, as the public service advertisements remind us, kills one-third of the people who use it), and not every corporate defendant engages in fifty years of deceit. But on questions of discovery, the productability, admissibility, and persuasiveness of a document will turn upon whether the document involves reasonable internal

204. Carrington, *supra* note 7, at 53.

205. *Id.* at 53 n.14.

206. See Paul A. Lebel, Symposium, *Introduction to the Transcript of the Florida Tobacco Litigation Symposium—Putting the 1997 Settlement into Context*, 25 FLA. ST. U. L. REV. 731, 815-90 (1998) (reprinting select documents produced in discovery and recounting attorney efforts to obtain the documents).

discussion or cover-up. We cannot craft a rule to make this distinction. It must be made by courts exercising discretion. For the most part, in fact, cases like Carrington's will turn on questions of evidentiary admissibility at trial (is the document more prejudicial than probative?) or privilege (may it be withheld on grounds of privilege?). To determine this, the court will need to use context; looking it up in the rulebook will not solve the problem.

If more Rulemaking is to be done, it probably should be substance-specific Rulemaking. Stephen Subrin has promoted this idea,²⁰⁷ and I have endorsed this approach.²⁰⁸ But I stop short of Subrin's conviction that the approach will succeed. It may be too difficult to effect set rules in cases such as discrimination or product liability, where the affected parties fear the distributional consequences of presumptive limits on or entitlements to discovery. But even if good substance-specific rules can be drafted and adopted, judicial discretion cannot be eliminated or even curtailed all that much. Judges viewing the totality of the circumstances will still be required to determine whether a litigant is failing to play by the substance-specific rules and whether exceptions to presumptive limits are in order. In addition, of course, the idea of substance-specific procedure runs counter to the generally transsubstantive orientation of the Civil Rules. Although some prominent scholars have supported departures from this ideal,²⁰⁹ most in the profession continue to embrace transsubstantivity.²¹⁰ But transsubstantive Rules need not impose a cookie-cutter approach to dispute resolution.

Faced with the unique nature of each complex case and discovery dispute, Rulemakers should realize that the only salvation is in discretion. Micro-specificity and presumptive limits in discovery rules do little to advance the cause. Tracking cases in hopes of identifying likely discovery problems early will help to some degree, but judicial discretion remains the key. Courts must not only rule soundly in complex cases with discovery disputes, they must also identify which cases require more or less discovery irrespective of the tracking classification of the case.

207. See generally Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994).

208. See generally Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem"*, 46 FLA. L. REV. 58 (1994).

209. See, e.g., Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732-33 (1975) (coining term). A "transsubstantive" Rule (however spelled) is one that does not vary by type of case. For example, litigants are allotted a presumptive 25 interrogatives pursuant to Rule 33 regardless of whether the underlying claim is a sensitive fraud class action or an isolated slip-and-fall lawsuit.

210. See, e.g., Paul D. Carrington, Symposium, *The Reporters Speak: 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, 2068 (1989) (noting absence of support for Cover's idea, not modified by Subrin, among Rulemakers).

D. Do More to Encourage Prompt and Engaged Judicial Resolution of Discovery Disputes and Establish a Judicial Mechanism that Gives Discovery Greater Attention if Discovery is Seen as a Problem and Support it with Adequate Resources

All of the available empirical and anecdotal research points in one direction regarding judicial involvement in discovery disputes. Lawyers prefer greater judicial involvement and believe that it results in less waste, fewer unreasonable positions, faster disposition of cases, and better substantive litigation outcomes. On this score, lawyer attitudes likely align with client interests. Regardless of whether a discovery dispute is real or the result of excess adversarialism, problems will be resolved, or at least truncated, if a neutral third party acts decisively. Unlike so much of the information we have, which is incomplete, contradictory, or laden with partisan preference, this fact stands clear. Discovery will work better if judges become involved in discovery on a prompt, decisive, and consistent basis.

Yet none of the Rule revisions of the 1990s (or, for that matter, not many since 1938) do anything to encourage greater judicial attention to discovery. The prudent exercise of discretionary judgment by the courts holds the real key to improving discovery, particularly for complex, non-generic litigation. Although the number and status of magistrate judges has expanded, indirectly helping to provide more judicial personnel for addressing discovery matters, that is not sufficient if what we really want is a better discovery system rather than simply a narrower, more pro-defendant discovery system.

Of course, decrying the situation and doing something about it are two different things. It appears that judges are perpetually uninterested in becoming embroiled in discovery matters, even though the bar seems to crave supervision. Some of this is the natural result of personal goals that are perhaps at odds with systemic goals. Few district judges are liable to make it to the appellate court or into law school casebooks by riding diligent herd on discovery. Similarly, dogged discovery management by magistrate judges appears not to be the personal preference of many magistrates nor the surest path to career advancement.²¹¹

The status of discovery's forgotten stepchild results not only from the personal preferences of the bench, but also from some compelling cost-benefit arguments. In light of what we know about discovery (that it generally works well and is a significant problem in only a few cases, usually cases that involve parties that can absorb the ravages of cost and delay and fend for themselves), courts powerfully may argue that their attention is best devoted elsewhere. As important as I find the policing of discovery, I am hard-pressed to say that it

211. See generally Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994) (noting that judges will prioritize activity that is most intellectually satisfying or career-enhancing); see also Bone, *supra* note 8, at 923-24 (agreeing in principle but finding Macey's description incomplete and an exaggeration of judicial self-interest).

should get more judicial attention than dispositive motions, actual trials, or even pro se habeas corpus petitions.

Notwithstanding this, the judicial system could probably improve the discovery practice significantly if it worked harder to make adequate time for the policing of discovery. More prompt, ongoing, and effective supervision would not only resolve the instant discovery problems, but would probably also send a powerful message that discovery shenanigans will not be effective, or even tolerated. For starters, courts could take Rule 37 seriously and begin imposing cost-shifting on losing movants as a matter of course. Rule 37 is essentially written to follow the English model of "loser pays," subject to the escape hatch of a showing of substantial justification. Instead, most courts treat Rule 37 as though it were the pre-1983 version of Rule 11 requiring subjective bad faith. Today, cost-shifting upon losing a motion to compel matter is the exception rather than the rule. It should be the other way around, subject to the court's intelligent exercise of discretion in each case. But this sort of mini-revolution cannot be legislated by Rulemaking, unless Rule 37 is made so mandatory that it kills the judicial discretion that ordinarily is best for the system.²¹² I am less willing to dismiss the chilling effect argument than Carrington. Particularly for litigants of modest means, an absolute loser-pays rule on discovery may be too chilling. The current Rule is written quite well: Discovery motion costs should be borne by the loser unless he or she has a good argument despite losing the motion. Unfortunately, the bench continues not to follow this Rule. Instead, discretion is usually applied to defang Rule 37 to the point of toothlessness.

Investing even a few more financial resources into the court system would help. Discovery gets under-adjudicated because the courts are overburdened. Prompt filling of judicial vacancies and the creation of more Article III judgeships and Article I magistrates could help the situation. As of September 13, 2000, there were sixty-four Article III judicial vacancies, twenty-two Court of Appeals positions, and forty-two district court posts.²¹³ This is from a total of 852 Article III judgeships authorized for the federal courts.²¹⁴ In other words, the federal bench is close to ten percent understaffed. Even the most rabid business efficiency expert would probably have trouble running an efficient operation that was short one-tenth of the necessary workforce. And Congress has

212. For example, Professor Carrington has suggested amending Rule 37 to make it more expressly like the English Rule on counsel fees. See Carrington, *supra* note 7, at 65-66 ("Weak enforcement [of Rule 37] by courts contributed to the problem of abuse and delay by counsel."). Carrington finds that arguments that are persuasive against the English Rule for the case as a whole do not apply to absolute fee-shifting on discovery because chilling discovery disputes is "just the result desired," even though one does not want to chill claim advocacy with an overarching English Rule. *Id.*

213. See *The Federal Judiciary Homepage* (visited Oct. 10, 2000) <<http://www.uscourts.gov/vacancies/summary>>. As of this date, there were forty-one nominees pending, but the Senate was slow to confirm Clinton appointees in an election year. See *id.*

214. See William H. Rehnquist, *The 1999 Year-End Report on the Federal Judiciary*, in THE THIRD BRANCH (Special Issue Jan. 2000) (visited Oct. 10, 2000) <<http://www.uscourts.gov/ttb/jan00ttb/jan2000.html>>.

hardly been generous in authorizing judgeships. If anything, the bench is more seriously understaffed than indicated by these figures.²¹⁵

In addition to filling judicial vacancies promptly, Congress should authorize more judgeships and provide stronger financial support, including increased pay for judges. The cost would be essentially trivial in light of national government expenditures. Potential assistance—even less expensive but likely to be helpful—could come in the form of authorization of additional law clerks for district judges and magistrate judges so that the respective chambers could devote greater attention to discovery matters. Another option is more frequent resort to case-specific discovery masters appointed from the private sector and compensated by the parties. There are approximately 1,400 federal judicial officers, if one counts appellate and district judges, magistrate judges, and bankruptcy judges.²¹⁶ Their salaries range from \$125,000 for magistrates and bankruptcy judges to \$150,000 for circuit judges.²¹⁷

Doubling judicial salaries would cost only \$141 million, approximately 3.6% of the judicial branch budget and less than one ten-thousandth of one percent of the federal budget.²¹⁸ Economic theory predicts that better pay would attract even better judges than now sit on the federal bench, which suggests more productivity, more attention to discovery, and sound, behavior-influencing rulings in discovery disputes. Doubling the size of the present judicial configuration, even at these hypothesized pie-in-the-sky salaries, would result in a net increase of less than \$600 million (fifteen percent) in the judicial budget, three ten-thousandths of one percent in the national government budget.²¹⁹

This seems an investment well worth making, not only to improve discovery management but to improve adjudication generally. Available information suggests that an early and firm trial date is a very effective means of expediting litigation fairly and making it more economical.²²⁰ But early and firm trial dates can be set only if there are sufficient judicial officers to manage litigation and conduct such trials. I do not mean to suggest that \$300 million is not a lot of money. But the federal judicial system faced 1.5 million new cases in 1999

215. To be sure, Article I judges such as magistrate judges and the more than 350 sitting bankruptcy judges in the system also conduct significant federal court business. The judiciary is not bulging with excess personnel in these areas either.

216. See WORLD ALMANAC AND BOOK OF FACTS 92 (World Almanac Books ed., 2000).

217. See *id.*

218. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 348, 350 (1999) (based on 1999 estimated federal outlays of \$1,727,071,000,000, and Judicial Branch budget of \$3,913,000,000). This rough figure is derived using the district judge's salary of \$141,300 as the benchmark, which overstates the expense since there are more lower-paid magistrates and bankruptcy judges than there are higher-paid circuit judges.

219. See STATISTICAL ABSTRACT, *supra* note 218, at 350 (1,400 judicial officers multiplied by two multiplied by \$141,000 (proposed salary increase) equals \$592,200,000 divided into \$3,913,000,000 and \$1,727,071,000).

220. See Carrington, *supra* note 7, at 63 ("With a credible trial date, the lawyers can, in most cases, plan discovery without the participation of a judge."); see also Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 889-90 (1991).

alone.²²¹ Even my unrealistically generous upgrading program for the judiciary via this double-double program would in effect cost \$200 per federal judicial matter filed annually. Many of these matters involve billions of dollars or important issues of human rights and national public policy. They are probably worth the cost.

E. Add Not Only Judges and Other Resources, but also Full-Time Discovery Masters with Primary Responsibility for Resolving Discovery Disputes

Money can only do so much. Even with an expanded, better-paid judiciary the problem of priorities and court interest would remain. Most judges and magistrates would still probably continue to place a relatively low priority on discovery management, finding more important or more enriching things to do. Consequently, more judges and better compensated judges can at best be only part of the answer to fostering better judicial administration of discovery.

A new approach or infrastructure is necessary. Rather than hope that the current cadre of judicial officers will get more interested in discovery, we should create a new cadre of judicial officers responsible *solely* for administering discovery and policing discovery disputes. The Rulemakers should urge, and Congress should create, a new type of judicial officer—the Discovery Master—an official similar in rank to the magistrate judge.

The proposed Discovery Master would be charged with presiding over discovery in the first instance in the federal district in which the Master sits. Larger districts could have two or more Discovery Masters. The Master would receive, hear, and decide discovery motions and would also conduct any conferences or other motions directed toward discovery issues. The Master would also be empowered to engage in any reasonable local administration or experimentation designed to improve discovery practice in the district.

Discovery Masters would be appointed for a ten-year term and would be paid at least the salary of a magistrate judge. As proposed above, judicial salaries probably need to be doubled if the bench is to attract and retain the most able lawyers. Accepting that this is probably not a realistic proposition in the near term, another equally unrealistic, but useful, proposition may be to pay Discovery Masters more than other judges because their more narrow work will otherwise make the position insufficiently attractive to the best potential jurists.²²²

Compared to Article III judges, the case for additional compensation for Discovery Masters is fairly pronounced. The Article III judge has life tenure, greater prestige, and a wider variety of tasks, most importantly the ability to

221. New filings included 320,194 cases in district court, 54,600 in the circuit courts, and a whopping 1.3 million in the bankruptcy courts. See Rehnquist, *supra* note 214, at 2.

222. See Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67, 79-88 (1995) (noting authorities suggesting that effective recruitment of qualified judges is more difficult where the court's jurisdiction is limited).

make substantive final dispositions of cases. By comparison, the Discovery Master would have a less prestigious and enriching job description. Giving the Discovery Master a form of "combat pay," perhaps at a rate twenty to fifty percent greater than that of today's rate for Article III judges, can be justified. Similar, but less compelling, arguments can be made for providing higher compensation when the job of Discovery Master is contrasted with that of magistrate judge or bankruptcy judge. Discovery Masters should also, of course, have adequate support in terms of staff (including more than one law clerk if the workload demands it), physical facilities, technological equipment, and library resources. In districts with heavy loads but perhaps too few cases to justify a second Discovery Master, the Master could be entitled to retain attorneys from the private sector on a per-case basis to make proposed rulings that would be reviewed by the Master for final determination. Special Discovery Masters might prove particularly useful in keeping large, protracted cases from warping a district's generally acceptable processing of discovery disputes.

Both the attractiveness of the position and the efficient disposition of discovery motions may be enhanced if the Discovery Master has considerable authority in rendering binding discovery decisions. In suggesting the Discovery Master concept, the first model that comes to mind is that of the magistrate judge, but the Discovery Master should have greater authority. A magistrate's rulings on nondispositive motions are binding on the parties unless objected to within ten days of the magistrate's order, with the reviewing district judge according *de novo* review.²²³ The ten-day period for challenge is probably apt, but the decisions of the Discovery Master should be reviewed with more deference, under either a "clearly erroneous" or an "abuse of discretion" standard.²²⁴

This model would probably work, but could remain subject to bottlenecks that currently exist in discovery enforcement due to the historical inability of district judges to find sufficient time to rule promptly and thoroughly on discovery controversies. It would sap the proposal of considerable vitality if the newly minted Discovery Masters fulfilled their intended function to the letter, only to find that parties with the weaker discovery position could paralyze the system merely by challenging the Master's ruling and letting the appeal lie dormant until the district court addressed the issue.

Worse yet, the district judge may be less well equipped than the Master to decide the discovery matter. If it is true that district judges are loath to absorb themselves in the nitty gritty and often boring details of discovery disputes, they may well have a weaker understanding of pending discovery issues than the Discovery Masters. Even a deferential standard of review may not be enough to avoid this problem, and a deferential standard of review will not solve the

223. See 28 U.S.C. § 636(b)(1)(C) (1994).

224. See STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* §§ 2.01, 2.14, 4.01 (3d ed. 1999) (explaining the *de novo*, clearly erroneous, and abuse of discretion standards of review).

problem of delay if district judges do not process appeals from the Discovery Master within a sufficiently short time.

As an alternative means of review, judicial policymakers may want to consider the Master's ruling determinative until entry of final judgment. Thereafter, the Master's ruling could be challenged as part of a new trial motion or a direct appeal to the circuit court. This would provide more authority to the Master, reduce delay, and require that review of the Master's decisions take place in a context that encourages a thorough and reasoned consideration of the discovery matters at issue. In effect, the Discovery Master's ruling would be reversed only if it was not only incorrect, but also something more than harmless error in the eyes of a reviewing district judge or appellate panel after final disposition of the case.²²⁵ With such limited review, there is, of course, some danger of error and injustice, but we have that danger already.

If policymakers are unwilling to make Discovery Masters decisionmakers of pragmatic last resort—or are unwilling to make Discovery Masters at all—review standards and procedures for magistrate judge discovery rulings could be revised. At present, the magistrate's discovery decision can be challenged by the aggrieved party and the challenge may sit for some time before a district judge who is less likely to understand the issues of the matter. The standard of review in such cases could be changed from *de novo* to the more deferential "clearly erroneous" or "abuse of discretion" standards, or a hybridized standard crafted for discovery. Additional consideration should be given to making the magistrate's discovery rulings unreviewable until after final judgment in the case, with review vested in the appellate court rather than the district court.

The Discovery Master concept appears to have worked well where it exists. Nevada state courts, for example, are empowered by civil procedure Rule 16.2 to appoint "Discovery Commissioners."²²⁶ The two largest districts, which encompass Las Vegas and Reno have each had Commissioners since 1988. Although there is no hard empirical data on discovery caseload and disposition, the system seems to have worked well. Both Discovery Commissioners find it effective,²²⁷ and their perception appears to be shared by the state's legal profession. Neither judges nor practicing lawyers perceive discovery as a significant problem, and the work of both Commissioners is generally praised.²²⁸

The Discovery Master or Commissioner model has a number of advantages over the status quo in federal court. First, the Discovery Master has one job—discovery—and is neither distracted by other responsibilities nor tempted to

225. See FED. R. CIV. P. 61 (mandating that evidentiary and other rulings are not grounds for new trial unless "inconsistent with substantial justice," and court "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

226. See NEV. R. CIV. P. 16.2.

227. See Interview with Wesley Ayres, Second Judicial District Discovery Commissioner (Mar. 15, 2000); interview with Thomas Biggar, Eighth Judicial District Discovery Commissioner (Mar. 21, 2000).

228. I have not been ambitious enough to conduct a scientific survey of opinion, but I am in relatively frequent contact with sitting judges and practicing attorneys and have heard these sentiments on the state of discovery and heard no significant complaints about the state of discovery in Nevada.

iscovery—and is neither distracted by other responsibilities nor tempted to shirk discovery policing for more interesting tasks. The Discovery Master thus can be more immediately available to litigants via telephone or hastily convened conference as she will not be in the midst of a party-consented trial. The Master will become even more expert in discovery matters than the magistrate judge and should, in theory, decide discovery disputes with greater wisdom, building a store of self-contained common knowledge about general discovery doctrine, problems of particular cases, and the tendencies of particular firms.

Second, the use of Discovery Masters will encourage greater consistency in discovery rulings. In Nevada, for example, one success of the Commissioner program has been to reduce the uncertainty and dice-rolling that lawyers face if discovery matters are primarily determined by a score of trial judges. During the 1990s, lawyers in Las Vegas and Reno had a relatively clear idea of what would ensue in their discovery disputes because of the track records of the Commissioners. Greater consistency means not only greater equity among litigants, but also appears to reduce the instances of discovery dispute.²²⁹ Unless counsel believes the Commissioner's general approach to a discovery question is erroneous, or that the instant case is truly distinguishable from precedent, counsel's only incentive to bring or resist discovery motions is to posture for the client.²³⁰ This sort of dynamic may be particularly acute in business litigation where trade secrets are at issue. Some clients simply have too much trouble voluntarily parting with such information and may be suspicious of the efficacy of protective orders, despite their willingness to abide by court directives.

To a degree, the federal system of magistrate judges dealing with discovery matters has provided some of the improvements Nevada has seen with the Discovery Commissioners. There are fewer magistrates than judges (increasing consistency and predictability), and their more limited job descriptions allow them to acquire expertise. But a Discovery Master system would further concentrate these gains, as well as send the symbolic message that federal courts will police discovery more seriously.²³¹

229. This consistency in discovery motions persists even though the Discovery Commissioner's decisions are appealed to the trial bench, which numbers twenty judges in Las Vegas and eight judges in Reno. Nevada also uses the *de novo* standard of review for Commissioner rulings rather than the heightened standard suggested by this article. See NEV. R. CIV. P. 16.2; NEV. E.J.D.C.R. 2.34 (2000).

230. Nevada Discovery Commissioner Ayres (Second Judicial District), for example, has come to believe that a significant number of discovery controversies coming before him are fueled by client resistance to discovery and a client's desire to have his lawyer "fighting for him," or a lawyer's desire to assume this "tough guard dog" role to enhance his status with the client. See Interview with Discovery Commissioner Ayres, *supra* note 227.

To the extent that clients, rather than lawyers, are part of this bellicosity problem, the swift action of a judicial officer may be necessary even in open-and-shut discovery controversies. Until the judicial officer has ruled against them, some clients are simply too resistant to discovery to accept their lawyer's opinion that they must produce material. Clothed in the force of court order, a lawyer is in a better position to counsel these clients toward reasonable litigation behavior.

231. Lest one suggest that symbolism has no place in court reforms, I note that the Advisory Committee majority and the proponents of a narrowed scope of discovery in 2000 Amended Rule 26(b)(1) argued for the change in part for the symbolic effect of "sending a message" that excessive discovery

The size of many federal districts will, however, make it unlikely that a single Discovery Master can adequately handle the volume of discovery matters on the docket. A Discovery Master may provide a consistently helpful "one voice" in the District of Vermont, but no one mortal could likely be the Discovery Master in the Southern District of New York. This problem and the risk of losing the consistency sought has surfaced in Nevada. The Discovery Commissioner in Reno (where the District's population is 500,000) has a manageable caseload and enough cushion in his schedule to react quickly to discovery eruptions. The Discovery Commissioner in Las Vegas (where the District's population is 1.5 million) is overworked and hard-pressed to fit new matters swiftly into a heavily booked docket. Eventually, a second Commissioner may be necessary. Some degree of consistency may be sacrificed, but the system should continue to be beneficial to the courts.

In addition, however, the Las Vegas Commissioner's experience shows that one judicial officer who focuses solely and authoritatively on discovery can do quite a lot. Commissioner Biggar's rulings are widely circulated in the District. Attorneys tend to see recurring issues given something of a pattern of treatment, which develops an informal precedent of likely results if they seek or resist discovery in a particular case.²³² Comparatively, one would expect that even in fairly large federal districts, one Discovery Master may be enough.²³³ In other districts, two or more may be required.

F. Take a More Philosophical Approach to Rulemaking

Although some view a more philosophical approach to discovery as evidence of irrelevant disconnection with the real world, the perception is unjustified. Consider, for example, the widely praised approach of philosopher John Rawls in *A Theory of Justice*.²³⁴ Rawls argued that social rules are best made behind a "veil of ignorance" where the decisionmaker does not know her position in society and the manner in which the rules will fall upon her. The idea of assuming this "original position" is to compel the decisionmaker to craft rules that are "fair" in the sense that they are rules under which the decisionmaker would be willing to live regardless of one's station in life.²³⁵

The Rawls perspective argues strongly for what has long been a tenet of common sense and ethics in law reform: Lawyers on committees should not

should be curbed and that courts would be less freewheeling in according discovery. See *supra* text accompanying notes 127-154; Stempel, *Politics and Sociology*, *supra* note 6, at 40-45.

232. See Interview with Discovery Commissioner Biggar, *supra* note 227.

233. As an additional financial reform, policymakers may wish to give "combat pay" to judicial officers in districts with higher caseloads to attract and retain judges who are willing to work a job and a half to stay on top of the caseloads. This, of course, flies in the face of decades of compensation practice in the government by reflecting the compensation protocols of the private sector. Generally, workers who put in longer hours and live in urban areas have higher salaries. If one really wants to bring the judiciary into the twenty-first century, perhaps a similar approach is required.

234. See JOHN RAWLS, *A THEORY OF JUSTICE* 10-12, 102-05, 118-23 (rev. ed. 1999).

235. *Id.* at 121.

vote in their own or their clients' self-interest in making recommendations or comments on the law. Consider how this might apply in Rulemaking. Rule-makers would attempt to determine the content of the Civil Rules not knowing whether they would be judges, litigants of various stripes, plaintiff counsel, or defense counsel, private or government. Consciously thinking about the Rules in this manner would make it more difficult for Rules of uneven substantive impact to emerge from the process. For example, would the defense lawyer members of the Advisory Committee vote to narrow the scope of discovery if they could envision themselves as government or plaintiffs' counsel or if they were picking a Rule to govern a product liability claim by a member of the firm, or one filed by a daughter against a sexually harassing employer?

Obviously, there are limits to any human being's ability to act completely free of self-interest. But the exercise would provide a check on self-interest in Rulemaking and would be fatal to amended Rule 26(b)(1)'s narrowing discovery scope. If a Rulemaker did not know that he or she was a member of an economic and social elite, what discovery regime would he or she select? It seems undeniable that one would want broader discovery if she needed to resort to the courts to enforce a substantive right. One who did not know her position in society, or did not have the remuneration of defense work, would seem unlikely to elect claim-or-defense discovery.

Another philosophical perspective is provided by the debate among utilitarian philosophers between rule utilitarians and act utilitarians. The rule utilitarian thinks that the cost-benefit calculus of the philosophy is best done through rules, which eliminate the transaction costs of making the cost-benefit analysis in case after case after case. The act utilitarian believes that case-by-case analysis is necessary to provide more sound, context-specific decisions.²³⁶

Judicial policy has long had elements of both rule and act utilitarianism, a mix that mirrors the classic fundamental contradiction between rules and discretion discussed at the outset of this article. Although a certain degree of rule-orientation is required for the efficient society, rule utilitarianism has significant limits. At some point, one simply cannot construct a rule that works absent substantial discretion in application, effectively requiring act utilitarianism in the decisionmaking. Even if one accepts that discovery in civil litigation should be a utilitarian inquiry, it may be that the greatest good for society is wrought by case-by-case applications of discretion, rather than efforts to rewrite the Rules to shift the defaults of discretion or to reduce the need to invest resources in the exercise of discretion.

And, borrowing from Kant, Rulemakers should ask themselves about the extent and wisdom of their commitment to utilitarianism.²³⁷ The court system exists both to serve society and to provide corrective justice for the individual

236. See BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 7 (1994).

237. See *id.* at 6-12 (discussing Kantian philosophy and utilitarian philosophy).

case. The latter goal is important enough that it should not lightly be trampled by considerations of cost and inconvenience. To be sure, it is not worthwhile to spend the entire gross national product ensuring a fair result in a single case. But we are far from that point in debating discovery. Discovery expenses are significant, but not back-breaking, in a wealthy, post-industrial society. If we do in fact have a Kantian commitment to accurate and just adjudication results, broad discovery should be a price worth paying. Thus, unless one is relentlessly utilitarian, the question of discovery should be whether broad discovery tends toward fairer results, rather than whether it imposes costs on the system.

From a utilitarian perspective as well, Rulemakers should consider whether they are correctly calculating costs and benefits. In the discussion about narrowing discovery scope, proponents of the change focused on the costs of providing discovery and gave relatively little attention to the costs of erroneous decisions, undetected defects in products, unpoliced fraud, polluters not held responsible for imposing the externalities of their operations on society, the transition costs of a new regime of Rules, and so on. If the Rulemakers are to be utilitarian, they should rigorously count all the costs and demonstrate purported benefits before enacting a Rule change. The "philosophy" of conservatism also argues for this proof of net benefit as a prerequisite for change. Unless one is convinced that the status quo is in disarray, those proposing significant change should shoulder a substantial burden of proof.²³⁸ The available information does not suggest that discovery is in disarray, particularly on the question of the scope of relevant discovery. Before changing a sixty-year-old Rule, more should have been demanded of those seeking change.

G. Make the Rulemaking Process Less Partisan By Facing the Politics of Rulemaking Openly

Historically, the civil Rulemaking process has been viewed as nonpartisan and substantively rational, rather than driven by political goals.²³⁹ A major argument for the Rules Enabling Act was that it would put Rulemaking into the hands of nonpartisan judges who best understood the issues of litigation.²⁴⁰ More recently, a number of commentators have questioned whether this ideal, if accurate, holds in modern society.²⁴¹ Certainly, we have witnessed more full-scale lobbying for Rules changes by affected interest groups.²⁴² Although one can pine for the nostalgic days of nonpartisan "wise men" deciding procedural matters divorced from substantive law, we should face reality and adjust the system to account for partisan tendencies and better to neutralize them in the Rulemaking process.

238. See *id.* at 55-56 (discussing conservative political philosophy of Edmund Burke, who counseled against changing the status quo rapidly or without compelling reason).

239. See Bone, *supra* note 8, at 897-900.

240. See *id.* at 893-97; see also Burbank, *supra* note 21, at 1106-07.

241. See Bone, *supra* note 8, at 900-06.

242. See Mullenix, *supra* note 11, at 823.

Currently, the Advisory and Standing Committees are selected solely by the Chief Justice of the Supreme Court. The Chief may establish Committees composed only of Republicans, plaintiffs' counsel, creditors' attorneys, prosecutors, liberals, or any other group he wishes to dominate the Committees. Even if the membership of Committees is largely composed of judges, these judges all had former careers in one of these roles, or continue to hold political and ideological preferences.

It is naive to suggest that judges, practitioners, or academics appointed to Committees would shed their beliefs or thought-shaping life experiences. But the Committees can be more self-consciously balanced. Today, the Committees are heavily dominated by the judiciary, which is in turn dominated by the Chief Justice of the Supreme Court.²⁴³ Depending on the politics of the time or accidents of history, today's Committees have the disturbing potential to be unrepresentatively Republican or Democratic, liberal or conservative, when what is required is some form of institutionalized centrism. Currently, for example, the Civil Rules Advisory Committee is dominated by judges appointed by Republican presidents.

As a start toward more balanced Rules revision, judges on Committees should be evenly drawn between Democratic and Republican appointees, with perhaps some slight advantage for whichever party appointed the Chief Justice. I am not trying to immunize Rulemaking from the winds of political preference, but only trying to mute its most partisan, result-oriented Rulemaking products.

Rulemakers or Congress should give serious consideration to mandating a partisan balance or near-balance on the Committees. The specific balancing of political affiliation is not unknown in American policymaking. For example, the Federal Election Commission and Equal Employment Opportunity Commission are governed by allocation formulas designed to balance the partisan composition of these bodies.²⁴⁴ Policymakers concluded that the topics regulated by these groups are so politically sensitive, and influenced by the distributional consequences of the decisions made, that political balance must be mandated and artificially achieved. Perhaps it is time to realize that litigation Rulemaking falls into this category of public policy as well.

Having closely balanced Rules Committees would probably heighten the quality of analysis and decisionmaking. Where the Advisory Committee is "stacked," all that is required to effect a Rules change is to play to the preexisting opinions of the ideological majority. Even if arguments for change are not very good, the proponent of change can probably hold a winning majority when it starts out with a super-majority. The narrowing of discovery scope pro-

243. See *infra* text accompanying notes 245-246 (discussing the dominance of judges in Rulemaking and the Chief Justice's role in selecting Rulemakers); see also 28 U.S.C. §§ 331, 2072-74 (Chief Justice appoints members of the Advisory and Standing Committees and is a voting member of the Judicial Conference); Bone, *supra* note 8, at 892-93.

244. See 47 U.S.C. § 154 (1994) (setting a limit on the number of Commissioners in one political party); 42 U.S.C. § 2000e-4 (1994) (setting three-fifths limit for EEOC Commissioners).

vides a telling example. The case against the change was strong, but the Republican judges and defense lawyers on the Committee were not about to be swayed.

My own preference is for something not quite as mandatory in Rules Committee balance. Republicans or Democrats could have more than a bare majority of a Committee—but not much more. Instead, Committees should be constituted so that changes in Federal Rules will normally be reported out only if there are at least two defectors from the expected party ideological position on an issue. For example, regarding the scope of discovery, the conventional wisdom is that Republicans, conservatives, and defense counsel prefer a narrowed scope while Democrats, liberals, and plaintiff counsel prefer a continued broad scope. I would feel considerably more comfortable with discovery "reform" (or any Rules "reform") if the proposal were supported by at least some politically counterintuitive votes. A narrowing of discovery scope would be easier to swallow as a matter of political legitimacy if it were the product of a bipartisan coalition. It would also more likely be the correct position. But in the machinations leading up to the 2000 Amendments, a supermajority of Republican Committee members was sufficient to carry forward the scope amendment despite the absence of any discernable Democratic support and some seeming defections of the moderates. If the Advisory Committees were more balanced as a matter of course, these unfortunate voting patterns could be avoided, resulting in increased confidence in the amendments.

Just as important, Committee membership should be less dominated by federal judges. The legal academy is particularly under-represented. The original 1938 Rules Advisory Committee had four law professor members.²⁴⁵ The 1999 Committee had one. When that Committee member, Professor Thomas Rowe (Duke University), moved to abandon Proposed Amended Rule 26(b)(1) narrowing discovery scope, he had a few allies, but not nearly what he would have likely had in 1938. Law faculty commenting on the Proposed Amendments to date have uniformly opposed them.²⁴⁶

Although my proposal smacks of professional self-interest, I think it undeniable that better representation of the legal academy would benefit the Rules revision process. Law faculty are less wedded to client interests. Even for the professor who engages in extensive consulting, the academician is not subject to the same financial incentives that tempt practitioner members who are voting on changes. Law faculty, unlike judges, will feel less harried by the demands of

245. See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498-500 (1986). The four law professor members were Wilbur Cherry (Minnesota), Dean Armistead Dobie (Virginia), Edmund Morgan (Harvard), and Edson Sunderland (Michigan), in addition to the powerful presence of Yale Law Dean Charles Clark, and his assistant and subsequent Yale Professor and treatise author, James William Moore.

246. See *supra* notes 162-176 and accompanying text; Comments of Professor Ettie Ward, *in* Public Comment Dkt. No. 98-CV-172; Comments of Professor Edward Cavanaugh, *in* Public Comment Dkt. No. 98-CV-D02.

day-to-day litigation. In an area like discovery, this enables the faculty member to adopt some perspective in determining whether discovery is a major problem or is only seen as such by generally overworked judges who have come to view discovery as an annoyance. Law professors will also be more thoroughly apprised of academic literature and can bring these contributions to the attention of the Committees. Although Committee Reporters already provide much of this help, there is no substitute for Committee membership if a group is to have real influence on Rulemaking.

Similarly, practitioner members of Committees should be self-consciously balanced between plaintiff and defendant, type of cases litigated, government and private, young and old. The current Advisory Committee's practitioner members are largely defense lawyers for large firms, and product liability defense lawyers at that. Their support for narrowed discovery is hardly surprising. Practitioner representation on the Committees is important,²⁴⁷ but it must be balanced.

H. Reduce the Chief Justice's Autocratic Influence on Rulemaking.

In the absence of statutory change mandating political balance, Rulemaking and committee balance could be dramatically improved if the Chief Justice sought balance in the appointment of the Committees. Chief Justice Rehnquist has done just the opposite; since his ascent to Chief in 1986, the Committees have become distinctly more conservative, pro-defendant, and Republican. The Advisory Committee producing the current Proposed Amendments has a super-majority of Republican judges and defense counsel. This is hardly what the proponents of the Rules Enabling Act envisioned.

As noted above, a major part of the Burger-Rehnquist agenda was court reform with a pro-defendant tinge. Chief Justice Burger's 1976 Pound Conference was, in many ways, the kickoff of this campaign,²⁴⁸ but Chief Justice Burger tended to use the bully pulpit of the Chief Justiceship rather than the appointment power. Chief Justice Rehnquist, however, has made appointments that surely were designed to result in a narrowing of discovery. Recall that Chief Justice Rehnquist joined Justice Powell in his famous dissents complaining about the detriments of broad discovery.²⁴⁹ It may have taken the Chief twenty years, but his victory over broad discovery is now nearly complete. He selected an Advisory Committee inclined against broad discovery, and a Discovery Subcommittee chaired by Judge David Levi, a former law clerk to Justice Powell, at the time when Powell was inveighing against discovery. In short, under Chief

247. See Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*, 27 VAL. U. L. REV. 313, 319-24 (1993) (advocating greater practitioner representation and input into Rulemaking to guard against judicial insularity).

248. See *supra* notes 62-68 and accompanying text (discussing Pound Conference).

249. See *supra* notes 68, 78-79 and accompanying text (discussing Justice Powell's anti-discovery dissents).

Justice Rehnquist, the Committee process has been ideologized and politicized to the point where its credibility is subject to serious question.²⁵⁰

One of the commentators at this Symposium has characterized this portion of my critique as an "ad hominem attack" on the 2000 Amendments.²⁵¹ To some degree, of course, the comments are personalized because the Rulemaking process has become more personalized. I am not, however, arguing that the current problems are all the "fault" of the Rulemakers or the Chief Justice. Rather, my attack is on a system that, under the guise of nonpoliticization, places so much control in the hands of a Chief Justice (any Chief, not just the current Chief) who is chosen largely for political reasons by politically motivated presidents and permits the resulting composition of the Rulemakers to become one-sided in terms of ideology, orientation, or partisanship.

The current state of Rulemaking merely underscores the degree to which it probably is unwise to vest so much power in Rulemaking in the Chief Justice. The Chief is, of course, appointed because of the sitting President's ideological kinship with the nominee, but that kinship is largely focused upon constitutional law and substantive legal philosophy. The appointing President, especially nonlawyers such as Presidents Reagan and Bush, may have no idea what procedural views are held by the Chief Justice-designate. Certainly, the Senate will not give this area prime focus in the confirmation process. In short, it is by no means clear that even the easily confirmed Chief Justice has a political mandate to seek to change procedural rules to accord with his own views.²⁵²

Certainly, the notion of the Enabling Act was that the Chief Justice would be an honest broker in making appointments so that Committees would be representative of the legal profession and of society. If the ideal of the nonpartisan Chief Justice is too elusive, the answer may be to diffuse Committee appointment authority between the Chief Justice and others. Candidates for this power-sharing include the Judicial Conference, the Court as a whole, or perhaps designated appointees by the majority and minority in Congress.

In making these proposals, I am not advocating that the Rulemaking process become more political in the knock-down, drag-out style of modern elections.

250. See generally Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589 (1987) (discussing concerns raised at confirmation hearings regarding Chief Justice Rehnquist's partisanship in Arizona Republican politics and as defender of the Nixon Administration policies, as well as Chief Justice Rehnquist's notorious decision not to recuse himself from sitting in case of *Laird v. Tatum*, 409 U.S. 824 (1972), which involved a challenge to a Nixon Administration action in which Rehnquist was embroiled); see also Dennis Roddy, *Just Our Bill*, PITT. POST-GAZETTE, Dec. 2, 2000, at A1 (reviewing, in detail, credible allegations that Rehnquist was a sufficiently partisan Republican to take an active role in discouraging blacks from voting).

251. See Comments of Gregory P. Joseph, Complex Litigation conference co-sponsored by Duke University and The Institute for Law and Economic Policy, Naples, Florida (Apr. 15, 2000).

252. Rehnquist was not an easily confirmed Chief Justice. His confirmation vote was the closest ever for a successful Chief Justice nomination and the second-closest for a successful nominee. See Stempel, *supra* note 250, at 589-90. Only the divisive Clarence Thomas nomination was a closer call for conservatives. See R.W. Apple, *Senate Confirms Thomas 52-48 Ending Week of Bitter Battle*, N.Y. TIMES, Oct. 16, 1991, at A1.

Rather, I suggest that after more than two decades of covert politicization of the Rulemaking process, we take action to level the proverbial playing field so that Rulemaking can return to a more deliberative, less partisan approach. I expect self-consciously balanced Committees of Republican and Democratic appointees, plaintiff and defense counsel, liberal and conservative law faculty, will be at least as civil as today's Committees, with results less preordained. Such Committees may even be able to resist the temptation to place the Rules in a state of perpetual amendment.

XI

CONCLUSION

Prophetically and ironically, the Chair of the Civil Rules Advisory Committee once stated: "Here we go again: are the Federal Discovery Rules really in need of amendment?"²⁵³ Unfortunately, the Chair and other Rulemakers answered the question incompletely and, arguably, incorrectly. To a degree, the Rulemakers deserve credit for tidying up some mistaken loose ends of the 1993 Amendments. But at the same time, the Advisory Committee and the Judicial Conference mistakenly embarked upon further efforts constricting the availability of information and continuing the late twentieth-century evolution favoring defendants over plaintiffs. More important, the civil discovery system, of which the Rules are only a part, continues to avoid the most effective approaches to improving discovery and litigation.

At the end of this particular day in the ongoing odyssey of discovery reform, perhaps no great harm will be done and some incremental benefit will ensue. But once again, the journey proceeds in a fashion most reminiscent of Ulysses and his long, circuitous journey home after the end of the Trojan War. There are some occasional Rulemaking adventures, wrong turns, delays, and certainly tales to tell, but nothing resembling a direct route to a desired destination. By this point in the civil discovery odyssey, the protagonist judge attempting to mete out discovery justice is hardly the clever creator of the Trojan Horse or even a decisive arbiter of important issues. Instead, the judge is increasingly but incompletely bound by restrictions and procedures.

The consequences of the latest Rulemaking iteration are, once again, a restriction on information that benefits defendants and businesses more than plaintiffs and individuals. If Congress were to have intervened, particularly by refusing to narrow the scope of discovery and the definition of relevance, the outright errors of the 2000 Amendments largely could have been cured. But the indeterminate, inconsistent odyssey would undoubtedly continue. More than litigating lawyers or workaday judges, the Rulemakers continue to hear the siren song calling them to return to another round of discovery rules revision, only to once again run the ship of reform aground.

253. Niemeyer, *supra* note 136