HALTING DEVOLUTION OR BLEAK TO THE FUTURE: SUBRIN'S NEW-OLD PROCEDURE AS A POSSIBLE ANTIDOTE TO DREYFUSS'S “TOLSTOY PROBLEM”

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∗ Professor of Law, Brooklyn Law School. This article is a considerably expanded version of comments I made as moderator at the January 7, 1994 joint program of the Association of American Law Schools Sections on Civil Procedure and Litigation. It also draws upon comments made by other law faculty in attendance and upon prior research supported by a Brooklyn Law School summer research stipend. Thanks to Professors Steve Subrin and Rochelle Dreyfuss, not only for developing their fine papers, but also for discussing these issues with me at length before and after the program. In addition, outgoing Civil Procedure Section Chair Mary Twitchell and outgoing Litigation Section Chair Minna Kotkin, as well as executive committee members Janice Toran and Eric Yamamoto, deserve special thanks for formulating and administering the program.
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I. INTRODUCTION

Professors Rochelle Dreyfuss and Stephen Subrin first presented their ideas on the 1993 Amendments to the Federal Rules of Civil Procedure (Civil Rules) at the 1994 Annual Meeting of the Association of American Law Schools (AALS) in a program titled, "The 1993 Discovery Amendments: Evolution, Revolution, or Devolution?" After the program, I was left with the depressing view that the answer was devolution, which is defined as a "retrograde evolution," or "degeneration." Dreyfuss provides a detailed but succinct review of the changes in discovery occasioned by the new rules as well as a vantage point for assessing the social and political forces behind this unusually controversial rulemaking event. She not only describes the tortured history of problematic Civil Rules amendments but she also implies that this problematic history should prompt

1. Editor's Note: THE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS were originally published in a House Document at H.R. Doc. No. 74, 103d Cong., 1st Sess. 98 (1993). The House Document appears in its entirety at AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401. The Florida Law Review has elected to cite to Federal Rules Decisions for the sake of efficiency. The reprinted in form is used throughout the symposium issue to refer to the original publication of the material in House Document form, however, the citation to H.R. Doc. No. 74 will appear only in the initial citation to the amendments in each article. Thereafter, the citation will be to AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401. As a final note, portions of the material are also in the Interim Edition of the 114th volume of Supreme Court Reporter.
2. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 348 (1988). This is the secondary meaning of devolution. Id. The primary meaning is transfer of power from a central government to local authorities. Id. Ironically, the 1993 Amendments are to some degree devolutionary in this sense as well, in that they permit individual federal district courts to opt out of the system of initial disclosure and presumptive limits on interrogatories or depositions.
4. Id. at 9-10.
the profession to rethink the rulemaking process. Subrin convincingly suggests that the 1993 Amendments will not do much good and advances an alternative vision of discovery reform, a proposal he thinks will both respond to perceived problems with American litigation and militate against the increasingly partisan politicization of Civil Rules revision.

When Dreyfuss and Subrin presented their papers, civil procedure and litigation professors reacted with vigor and engaged in animated discussion during the informal question period following the presentations. The need to leave time for the second panel of the program curtailed the professors’ discussion. Obviously, the legal profession remains engaged in the discovery reform debate even though the momentary political storm over the latest Civil Rules amendments subsided when the amended rules took effect December 1, 1993. Although it remains possible that

5. See id. at 10.
7. Id. at 28-29.
8. Id.
9. Professors Stephen Burbank (University of Pennsylvania), David Crum (University of Houston), Howard Fink (Ohio State University), Richard Marcus (University of California), John Oakley (University of California-Davis), Liz Schneider (Brooklyn Law School), and Edward Sherman (University of Texas) made valuable comments prior to the session’s end.
10. Despite the varied viewpoints of this group of diverse scholars, the general consensus of the law professor audience appeared to accord with the view that the 1993 discovery amendments would not be successful. Participants diverged, however, regarding their reaction to Subrin’s proposal for substance-specific discovery guidelines.
11. The second panel included Judges William Bertelsen (W.D. Ky.), Norma Shapiro (E.D. Pa.), and Barrington Parker (S.D.N.Y), then still in private practice, and Legal Defense Fund litigator Bill Lee, with Professor Minna Kotkin (Brooklyn Law School) moderating.
12. Although the AALS program focused on changes in the discovery rules, particularly the new disclosure requirements, the package has other important aspects. Most notably, FED. R. CIV. P. 11 was revised, largely to reduce its potential in terrorem effect, yet some aspects of the rule were made more stringent. See FED. R. CIV. P. 11 advisory committee’s note. Rule 16 was amended to make the trial judge’s case management powers available at the pretrial conference more explicit. See FED. R. CIV. P. 16 advisory committee’s note. Rule 4 was amended to establish a “waiver of service” procedure, to provide expanded service and personal jurisdiction in some cases, and to establish the primacy of international agreements governing service such as the Hague Convention. See FED. R. CIV. P. 4 advisory committee’s note. Rule 54 was altered to require that counsel seeking attorney’s fees act within 14 days of judgment. See FED. R. CIV. P. 54 advisory committee’s note. In a related change, Rule 58 was amended to permit the court to either decide the fees issue alone or delay appellate review on the merits, so that both the merits and any appeal on fees can be heard together. See FED. R. CIV. P. 58 advisory committee’s note. Some of these changes, particularly those regarding Rule 11, are touched upon later in this article concerning the political reciprocity imbedded in the 1993 package of civil rules amendments. See infra notes 88-93 and accompanying text.
13. Although the storm may have subsided, it has hardly dissolved. When the new rules took effect, many of the federal district courts quickly exercised their prerogatives under new Rule 26(a)(1) to exempt themselves from the new disclosure regime and their prerogatives under new Rule 26(b)(2) to suspend, alter or add to the presumptive limits on interrogatories and depositions. Marcia Coyle & Marianne Lavelle, Half of Districts Opt Out of New Civil Rules, NAT’L L.J., Feb. 28, 1994, at 5.
the new disclosure and discovery rules will defy the predictions of their critics, I find this unlikely. Time will prove Dreyfuss, Subrin, and other critics correct in their misgivings. In this article, instead of echoing others' criticisms of the 1993 Amendments, I hope to place the 1993 Amendments in broader issues of the current litigation reform debate and to specifically ask of Subrin's proposal the same questions posed about the 1993 Amendments: Is it evolution, revolution, or devolution?

In Part II of this article, I address several problems with the current debate over civil litigation reform which Dreyfuss' and Subrin's articles highlighted. Part III focuses on the merits and possible attainment of Subrin's proposal. In Part IV, I suggest that Subrin's proposal, although it has merit and should be explored in earnest, is plainly not enough to pull litigation reform out of its present mire. To truly be reformed or rejuvenated, the litigation system needs an infusion of renewed institutional focus. This focus must be possessed of something akin to a civicly republican vision of lawyering coupled with a more stable mechanism for hearing all voices of the profession, and the clientele the profession serves, in an institutionalized, deliberative pluralism of litigation reform. Additionally, judges and lawyers must acknowledge that the two-decade ascendancy of the "case management" approach has failed in important respects and that lawyers and judges must focus their energies on what they do best—litigation and adjudication.


A spokesman for the Administrative Office of the United States Courts attempted to minimize these defections, contending that the local opt-outs resulted largely from the previous success of similar rules contained in many of the districts' Delay and Expense Reduction Plans mandated by the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (Supp. V 1993) [hereinafter Biden Bill, for Sen. Joseph Biden (D-Del.), its principal sponsor and advocate], Coyle & Lavelle, supra, at 5 (reporting the comments of David Sellers). This is wishful thinking. Although some of the opting out districts may have viewed the 1993 disclosure/discovery changes as superfluous or in conflict with local Biden Bill plans, many others, such as the important Southern District of New York, opted out and had previously rejected disclosure in their Biden Bill plans. Shartel & Housen, supra, at 1. The inevitable conclusion is that many district courts simply do not like the 1993 Amendments and were eager to opt out when given the opportunity.

14. I do not mean to imply that Subrin himself makes grand claims for his proposal. He is modest in suggesting that it would help, but does not describe it as a panacea. See Subrin, supra note 6, at 56.
II. MISDIRECTED MANEUVERS: THE FUNDAMENTAL OVERSIGHTS OF LITIGATION REFORMERS

In this diverse stew of concern over pretrial fact development, it appears to me that the legal profession, particularly those members with the greatest control over the process, has drifted into analytical ruts on several litigation reform issues. I discuss these issues below.

A. The Various Segments of the Profession Fail to Appreciate Both the Relative Needs of One Another and the Manner in Which a Given Segment of the Profession Will Actually React to Rules Changes

The disclosure/discovery changes of 1993 are an unfortunately problematic example of a tendency in the profession toward self-absorption. Judges generally want discovery streamlined but want attorneys to do the streamlining, a formidable task after a quarter-century of lax discovery practice, with minimal court supervision. Consequently, the bench wants to change discovery practice by altering the Civil Rules in one fell swoop. In advocating such an approach to discovery practice change, the bench avoids the more arduous and less glamorous task of supervising discovery by ruling firmly, promptly, and fairly on the discovery disputes brought to court. Instead of taking a brick-by-brick approach toward building litigation's imagined new "City on the Hill," the 1993 rulemakers have placed their faith in the "magic bullet" of disclosure and have fixed presumptive limits on discovery, regardless of the type of case in question. The new amendments do provide for judicial power and discretion, but

15. I have addressed this point at some length in Jeffrey W. Stempel, Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective, 27 VAL. U. L. REV. 313, 316-42 (1993) [hereinafter Stempel, Cultural Literacy]. The present article concludes, much like Dreyfuss's invocation of Tolstoy, Dreyfuss, supra note 3, at 25, that elements of the bench, the bar, and legislators are each so focused on their own unhappiness and pressures that they fail to recognize, or perhaps even to seek, the larger common good of a better functioning litigation system. See infra notes 165-81 and accompanying text (discussing the role of public-spirited "civic virtue" in litigation reform).

16. Law teachers and scholars are undoubtedly guilty of this self-interested focus, too, but less so than judges and lawyers, at least in my view. For example, most law professors who have spoken to the issue have criticized the 1993 Rules changes, see supra notes 3 & 6, even though these changes will largely benefit law professors, at least in a narrow, self-interested way. Because of the changes, law professors have something new to teach, are positioned to acquire "ground floor" expertise about new rules, and have a market for new or updated scholarly work. For example, a book on which I am a coauthor is being published in a third edition just two years after the second edition largely to address the 1993 Rules changes. See ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION (3d ed.) (forthcoming 1994). Notwithstanding these advantages, law professors worked against adoption of the rules changes. But as a practical matter, the behavior of law professors is far less important than that of judges and lawyers in determining what actually occurs in civil rules revision.

17. Indeed, most of the Civil Rules amendments and other litigation changes of the past two
the changes slant toward invoking that power and discretion for case management rather than for case adjudication. My fear is that the City on the Hill sought by the 1993 Amendments will turn out to be a Potemkin Village.  

Practicing lawyers have hardly been blameless or public-spirited in bringing on the current murky status quo of prettrial fact development. Although in my view critics confer scapegoat status on lawyers too quickly, critics are correct in noting that lawyers can, through strategic behavior and avarice, engage in excessive discovery pursuit or resistance. However, as Subrin convincingly observes, the 1993 Amendments adopt the "attorney-as-the-problem" presumption but then paradoxically attempt to fix the problem by placing more responsibility on lawyers to get the discovery house in order through a de facto "honor system" of disclosure. In addition, the aim of the rule changes—reducing discovery to what is necessary rather than what is profitable for counsel—is unlikely to be achieved by depending on counsel to work against presumptive limits on depositions or interrogatories. Only strong judicial supervision or market forces beyond the control of the rulemakers will make much prog-

decades have looked toward judicial discretion as a means of curing the system's shortcomings. See Edward Brunet, The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies, 10 REV. LITIG. 273, 297-308 (1991).

18. My misgivings about the 1993 changes are not new. See Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 BROOK. L. REV. 659, 674-83 (1993) [hereinafter Stempel, New Paradigm]. Both Dreyfuss' and Subrin's papers have, however, increased my misgivings by highlighting additional problematic aspects of the changes. See supra notes 3, 6. Justice Scalia's statement in dissent of the discovery amendments' adoption has proven increasingly correct. Dissenting Statement of Justice Scalia, in H.R. DOC. NO. 74, 103d Cong., 1st Sess. 98 (1993), reprinted in AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 507-13 (1993) [hereinafter AMENDMENTS] (indicating the changes to Rule 11 would render it "toothless" and that changes to Rule 26 would add new layers of discovery, not reduce unnecessary delay and expense). Except for the rulemakers, almost no one else in the profession has much hope for the new disclosure/discovery provisions. Id.


20. Subrin, supra note 6, at 42-43.

21. See Panel Discussion, supra note 19, at 1221 (comments of Kenneth R. Feinberg) (asserting that in addition to attempting to control incentives toward excessive litigation created by potential exorbitant counsel fees, system requires what another panelist described as "judges with backbone").

22. For example, a number of clients have pushed for alternatives to hourly billing, see Robert E. Litan & Steven C. Salop, Reforming the Lawyer-Client Relationship Through Alternative Billing Methods, 77 JUDICATURE 191 (1994), while some law firms have begun to offer their services under a package rate, "value billing" or other fee arrangements. See Zoë Baird, A Client's Experience with Implementing Value Billing, 77 JUDICATURE 198 (1994). As anyone who has glanced at the trade press of the past decade knows, this has been a virtual personal crusade of American Lawyer publisher Ste-
ress toward reduced discovery, even if one assumes a more public-spirited bar.

The solution to the Gordian Knot of self-interest does not lie in attempting to slice through the congestion by decreeing changes in the discovery rules like those of the 1993 Amendments. Already it is apparent that the Civil Rules Advisory Committee has been considerably less successful than Alexander the Great.23 Rather than rely on Delphic solutions

ven Brill. See, e.g., Steven Brill, The New Leverage, AM. LAW., July/Aug. 1993, at 5 (describing economic incentives toward leaner case staffing and streamlined discovery for firms willing to depart from profit-making premised on associate leveraging); John E. Morris, Two Pioneers Make a Fixed-Fee Deal Work, AM. LAW., Dec. 1993, at 5 (describing agreement where Alcoa committed all litigation to the LeBeouf law firm for three years for a flat fee of between $6-7 million in lieu of the prior hourly billing arrangements).

To the extent that the marketplace for legal services encourages payment of lawyers based on efficiency rather than inefficiency, this is progress. But progress of this kind requires sophisticated clients who know the difference between getting inadequate representation at a cheaper price and getting real value for services. It also will occur largely independently of Civil Rules amendments, at least the type of amendments embodied in the 1993 Amendments.

In addition, the traditional contingent fee of plaintiff's personal injury lawyers can certainly be seen as an incentive toward efficiency. This is because it provides motivation to minimize discovery unless counsel expects the information obtained to increase the size of the award. Unfortunately, contingent fee arrangements may create incentives to bring marginal cases that would otherwise not be brought or may prompt counsel to "blackmail" the opposition into settlement by increasing discovery demands. My own view is that the defense bar has cried wolf in making this argument. To be successful, blackmail requires a victim who will yield to it. If defendants based their settlement decisions solely on the merits of the claim, plaintiff's counsel would find it too inefficient (and likely to result in sanctions) to engage in discovery abuse simply to "up the ante" for settlement.

Fee application arrangements could also be a vehicle for encouraging streamlined discovery. They will not be used, however, as long as the courts employ the "lodestar" approach. See Arnold M. Quittner, Employment and Compensation of Appointed Professionals, 688 PLI Com. Litig. & Practice Course Handbook Series (PLI) 445 (1994), available in WESTLAW, PLI-Comm database. This method which calculates fee awards based largely on counsel's hourly rate and time spent on the case—a strong incentive to overlawyer a matter to pad a planned fee petition. Id. Although courts appear to be moving away from this to some degree in class action litigation that creates a common fund or common benefit to the class, see, e.g., O'Neill v. Church's Fried Chicken, 910 F.2d 263, 265 (5th Cir. 1990), the lodestar continues to rule in most fee petition matters, such as civil rights or discrimination litigation. Rethinking this area of counsel fees law—with a sensitivity to the particular discovery problems in such cases and the role of these laws in vindicating dignitary interests that may not result in large monetary awards—might do more to streamline litigation than any global change in Rule 26. An exciting extension of Subrin's proposal, see supra note 6, would be to use it in crafting presumptive rules of fee shifting and assessment, as well as discovery rights and responsibilities, in such cases.

23. But the Committee has had a longer life. The Advisory Committee has enjoyed permanent status for nearly 40 years. Many lawyers feel it was a mistake to institutionalize the Advisory Committee. See Richard L. Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 BROOK. L. REV. 761, 761 (1993). Once given ongoing existence, they argue, it was inevitable that the Committee would strain to find something to do on an ongoing basis. Id. Although the danger noted is real, I support an ongoing Advisory Committee. Litigation rules should receive consistent scrutiny. The solution to the potential "over-amendment" problem is restraint by both the Advisory Committee and those reviewing its work, such as the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. Although the path of the 1993 Amendments
(to continue the ancient Greek metaphors), a structured dialogue between judges, scholars, interest groups, clients, and lawyers from all segments of the field, would better serve the litigation system. Such a dialogue between the diverse entities interested in litigation should occur during the early stages of reform proposals, not as after-the-fact electioneering maneuvers designed to thwart proposed changes or push them over the top. 24

B. Efforts to Alter Litigation Have Reflexively Been in the Vein of Case Management and Settlement Brokering Rather Than the Potentially More Fruitful Areas of Adjudication and Enforcement 25

The 1980s and 1990s have seen a relative flurry of Civil Rules amendment activity including amendments that beef up Rule 11, expand Rule 16 conferences and case administration, mandate disclosure and presumptively limited discovery, encourage enhanced pretrial disposition, and establish restrictions on class action practice. Additionally, some have suggested modifying Rule 68, moving in the direction of the English Rule on fee-shifting. 26 At the same time, judicial vacancies have remained open for months or years with modest expenditures directed toward expanding the courts' adjudicatory capacity. Prestigious judges and organizations such as the Federal Courts Study Committee have called for a strictly limited federal judiciary, perhaps capped at 1000 judges. 27 In ad-

detailed by Dreyfuss creates some cause for pessimism, see supra notes 4-5, I remain optimistic that all five of these institutions can recover from the excessive tinkering of the 1980s, in which the disclosure scheme had its origin, and return to a regime of "if it's not broke, don't fix it" that had previously prevailed in the system. In the midst of the amendment mania, for example, the Standing Committee refused to endorse Advisory Committee revisions of summary judgment under Rule 56 which would have essentially told lawyers how to write their motion papers. See Carl Tobias, Collision Course in Federal Civil Discovery, 145 F.R.D. 139, 139 (1993).

24. I have elsewhere proposed several specific changes in the rulemaking process in order to meaningfully broaden participation and to ensure that it occurs earlier in the rulemaking process. See Stempel, New Paradigm, supra note 18, at 737-59. I address this proposal at length in this article. See infra part IV.

25. I have developed this point at great length in Stempel, New Paradigm, supra note 18, at 714-37 (arguing that American litigation has moved from an open courts adjudicatory model of litigation toward a more restrictive model, thereby raising barriers to access and encouraging settlement rather than decision).


27. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 6-8 (1990) (stating that to be adequately expert, prestigious, and cohesive, the federal bench must not be much larger than its present size); Jon O. Newman, 1,000 Judges—The Limit for an Effective Federal Judiciary, 76 JUDICATURE 187, 187 (1993) (Chief Judge of the Second Circuit urges that the federal judiciary have an absolute ceiling of 1000 judges). The Long-Range
dition, a large alternative dispute resolution network has emerged as businesses frequently stipulate to arbitrate disputes and courts have expanded court-annexed arbitration. Mediation has proven popular as well. If this much energy had been directed toward actually hearing and deciding cases, perhaps today’s supposedly tottering system could have been restored to glory. My view is that when an adjudicatory system adjudicates, settlements will follow as a matter of course.

Apart from the largely empirical, but yet unanswered, question of whether a looming trial date or case management is more likely to reduce caseloads, rulemakers and litigation reformers should ask themselves a few hard questions about professional competence. For example, what is it that judges and lawyers do best? Although judging and lawyering require some minimum level of organizational skill, both jobs and the training for them focus upon knowledge of law, intelligence, writing skills, persuasive powers, and the like. Subrin is correct in suggesting that what judges do best is adjudicate. Absent some individual serendipity, there is no reason to expect that a lawyer who becomes a judge will be a good manager. Yet, perversely, the thrust of the past decade’s rulemaking activity has aimed to expand the judge’s case management role as the means to improving litigation. This raises obvious problems of fairness, problems others have well-chronicled. In addition, the aim of judicial case man-

Planning Committee of the Judicial Conference of the United States, although it has issued no formal papers yet for public comment, has tentatively decided not to endorse a specific numerical limit, but will urge that future growth of the federal bench be strictly limited. Interview with Judicial Conference staff (Jan. 26, 1994).


30. To belabor the obvious by extreme example: A judge who routinely engages in unrealistic scheduling or loses the parties’ briefs might well be considered a bad judge notwithstanding his or her intellectual pedigree and talents; a lawyer who routinely misses filing deadlines or is late for court is a bad lawyer no matter what his or her other attributes.

31. See Subrin, supra note 6, at 50.

32. See, e.g., Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 385 (1982) (criticizing managerial judging because questions of fairness arise when a judge hears a case and then renders judgment on it after advising the parties to settle). See generally Symposium on Litigation Management, 53 U. CHI. L. REV. 305 (1986) (canvassing the potential for arbitrariness inherent in managerial judging). Notwithstanding the ongoing debate over judicial management, the steady drift of rules amendment and litigation reform efforts have been toward more management. For example, under the 1993 Amendments to Rule 16, lawyers must have a pretrial planning meeting with the judge if the judge finds the meeting would expedite the case and discourage wasteful pretrial activities. See Fed. R. Civ. P. 16 advisory committee’s note. Any plans and disagreements between the parties must be addressed by the judge at this initial pretrial conference, an event at which the judge is encouraged to plot out the entire path of the litigation by issuing a pretrial scheduling order. See Fed. R. Civ. P. 16
agement raises questions of misplaced effort and diluted resources. If judg-
ing is what judges do best, then judges should be spending as much of the
working day as possible judging.\textsuperscript{33} Is the system really better served
when, instead of deciding discovery and summary judgment motions, the
judge talks about planning them with counsel?

Although running hopelessly against the zeitgeist, I remain suspicious
of the benefits allegedly resulting from judges spending time on pretrial
conferences and case management rather than adjudication. Consequently,
I am attracted to Subrin's proposal. Subrin designed the proposal not so
much to have judges administer their cases but to decide them.\textsuperscript{34} Under
Subrin's proposal, the judge's decisionmaking is guided by presumptive
entitlements to, and limits upon, discovery which various members of the
legal community who are expert and interested in such cases have tailored
to particular classes of cases.\textsuperscript{35} At the same time, the judge retains discre-
tion to disregard or alter such limits and entitlements.\textsuperscript{36} By using these
presumptive discovery guidelines, judges can spend less time administ-
ering their cases and more time adjudicating them.

Here and elsewhere, I have consistently criticized the judiciary's disint-
erest in supervising discovery by swiftly deciding discovery disputes,
shifting fees under the clear language of Federal Rules of Civil Procedure
Rule 37, and using a fairly narrow view of what constitutes a "substantial-
ly justified" discovery request or resistance.\textsuperscript{37} Notwithstanding the sweep
of Rule 37, judges remain relatively disinterested in policing discovery
disputes. Sometimes a change in the rules will trigger new or renewed
interest. For example, Rule 11 was a virtual dead letter until the 1983
Amendment. Although the 1983-1993 Rule 11 language empowered courts
to more closely police frivolous claims, the real impact of Rule 11 was
that it sparked judicial interest in these matters. In fact, Rule 11 may have
sparked too much interest; complaints of uneven application and overuse
prompted the Advisory Committee (in what I regard as its finest hour in
recent memory) to listen to lawyers' complaints and respond with the
kinder, gentler Rule 11 now in effect.\textsuperscript{38} Perhaps the 1993 disclo-

\footnotesize{advisory committee's note; Dreyfuss, supra note 3, at 11-12 (describing the recent changes to Rule
16).

33. Continuing legal education, service on the rules committees, and interaction with the bar,
policymakers, and members of the public at large, are sufficiently important forms of public service
that the bench should be encouraged to pursue them even at the cost of some diversion from case-
related duties. But this tail of auxiliary activities should not wag the adjudicatory dog.

34. See Subrin, supra note 6, at 50.

35. See id. at 48-49.

36. See id. at 48.


38. Rule 11's 1983 Amendment empowered the courts to award expenses, including attorney's
fees, to a litigant whose opponent acts in bad faith. See Fed. R. Civ. P. 11 advisory committee's note,
sure/discovery Amendments will have a similar impact, but I remain skeptical. However, Subrin’s proposed consensus list of discovery groundrules may make judges more willing to ride herd on the discovery fray by providing a ready template for deciding such disputes with a minimum of pain and distraction.  

C. The Profession Has Fallen Under the Spell of Crisis  
Rhetoric and a Corresponding Rush to Reform  

Last year, I received a letter inviting me to the American Bar Association’s symposium called “Reaching Common Ground: A Summit on Civil Justice Improvements.” In general, this is exactly the type of event that should occur more often—assembling different segments of the profession to discuss litigation reform. I am troubled, however, by the apocalyptic tone of the invitation, which read like a direct mail fundraising letter for a far right- or left-wing interest group. In much the same way that political extremists talk vividly of a Rockefeller-Kissinger conspiracy to control the world, or the ubiquitous influence of the military-industrial complex, the ABA Letter labeled the current situation a “crisis” and identified a goal of the symposium as “[launch[ing] efforts to rescue our civil justice system from its present crisis.”

I am being a bit unfair, of course. The ABA only used the word “crisis” twice in the two-page letter. Compare that to former Vice President Dan Quayle’s Council on Competitiveness which, in its Agenda for Civil Justice Reform, suggested that the American litigation system was responsible for most problems of postindustrial society. Similarly, Congress fell prey to crisis rhetoric in enacting the Civil Justice Reform Act of 1990 (Biden Bill), acting as if only a “drop-everything-and-focus-on-delay-reduction” approach could save the federal courts. The discourse


39. See supra notes 34-36 and accompanying text.


41. The Common Ground program was held December 13-14, 1993, in Washington, D.C. and contained an impressive roster of judges, practitioners, scholars, and policymakers.

42. See Invite Letter, supra note 40.

43. Id.

44. See PRESIDENT’S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (Aug. 1991).

45. Id.


47. See generally Lauren K. Robel, The Politics of Crisis in the Federal Courts, 7 OHIO ST. J. ON DISP. RESOL. 115 (1992) (questioning the fundamental assumption that reducing delay and cost

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of litigation reform has become too feverish.

As others have noted, sound public policy seldom results from a Chicken Little approach to changing the status quo.  Although I am perhaps stretching the metaphor to describe the Civil Rules amendment process, a process which seems to require almost four years from the germ of an idea to the effective date of Rules under the Enabling Act, I think the analogy is apt. As Dreyfuss demonstrates, the forces favoring disclosure pushed ahead in the face of substantial opposition, despite the conflict between the proposed disclosure rules and the 1990 Biden Bill’s edict that each district experiment with delay and expense reduction. The rulemakers seemed to accept as a given that alternatives to major Civil Rules revision such as adding judges, enhancing court capacity through improved technology or staffing, or modifying the Speedy Trial Act or the Sentencing Guidelines to relieve the criminal pressure that squeezes the federal civil docket, were nonstarters. In similar fashion, the rulemakers summarily rejected as insufficient the bar’s most popular alternative to disclosure, a mandatory meet-and-confer rule forcing counsel to address discovery matters early in the case. In my assessment, the rulemakers failed to seriously consider less drastic alternatives because of the political turf battling described by Dreyfuss and because the judiciary has been brainwashed by the crisis mentality surrounding litigation issues. During the journey of the disclosure rules, the rulemakers acted as though only fairly dramatic rules changes would do, despite the withering criticisms directed at disclosure.

will provide increased access to justice).

48. See id. at 136-37.
49. See Dreyfuss, supra note 3, at 10.
50. See id.
51. See Fed. R. Civ. P. 26(f). The meet-and-confer rule, patterned after a variety of local rules, was expressly or implicitly advocated by the ABA Litigation Section’s Task Force on Discovery Reform, the Association of the Bar of the City of New York, the Chicago Bar Association, other bar associations, and lawyers.
52. See Dreyfuss, supra note 3, at 24 (describing the judiciary’s apparent view that it must maintain control of rulemaking and litigation reform efforts lest Congress step in).
53. Even absent the rhetoric of outsiders, the judiciary perhaps has a natural predisposition to see litigation problems as larger than their actual girth because judges are on the front line of the system, absorbing the annoyances of its imperfections on an unrelenting daily basis. See Lauren K. Robel, Caseload and Judging: Judicial Adaptations to Caseload, 1990 B.Y.U. L. Rev. 3, 6 (finding that survey research showed federal judges are disheartened by growing caseload pressures and feel unfairly overworked). The proposition that too little experience with the system may impede a rulemaker’s judgment seems readily accepted. See Statement of Justice White, in AMENDMENTS, supra note 18, at 501-06 (expressing concern over ability to assess proposed amendments due to long absence from private practice). So, too, we should realize that persons too engrossed in the system’s daily operational headaches may lack perspective regarding the overall seriousness of the shortcomings of the litigation system.
54. I should note that I am referring to the “rulemakers” as members of the Advisory Committee,
D. The Profession, Particularly the Judiciary, Has Become Concerned That It Reform at a Rapid Pace Lest It Lose Control Over the Litigation System

This effort to preserve institutional jurisdiction is one of the most understandable and defensible of the trends reflected in the story of the 1993 Amendments. For the most part, judicial primacy in rulemaking has worked well in the fifty-plus years of the Enabling Act. The elite bench’s concern that it might be leapfrogged by another aggressive, Biden Bill-like congressional effort to reform civil litigation is real, as the Biden Bill and the Bush Administration’s Quayle Report illustrate. Nonetheless, I would prefer that judicial rulemakers show greater resistance toward the political forces counseling a rush to judgment.

In the face of an onslaught of litigation reform proposals by partisan and personally ambitious amateurs, the bench’s desire to try to maintain a hold on the process is quite admirable. It does not necessarily follow, however, that the bench best accomplishes this by racing to implement a watered down version of the oft-criticized disclosure system as a preemptive strike against the other branches of government. Perhaps the public interest would have been better served if the rulemakers had adopted and defended a more restrained approach. Congress did make a restrained approach available throughout the Biden Bill’s mandated experimentation and analysis by local courts.

Furthermore, the judiciary could have taken the initiative in attempting to shape public debate, perhaps by at least standing up against the shallow Quayle-like attacks on the system. If lawyers were to stand up to such attacks, their obvious self-interest and scapegoat status would doom much

the Judicial Conference, and the Court as well as a few influential jurists who are not formally part of these organizations. For example, Judge William Schwarzer, Director of the Federal Judicial Center, is a rulemaker under my definition due to his stature and activism on the issue. Indeed, he and Magistrate Judge Wayne Brazil are the fathers of disclosure and were important to its adoption in the 1993 Amendments. See Subrin, supra note 6, at 37. This group of rulemaking insiders should be distinguished, however, from the bench at large. See Stempel, Cultural Literacy, supra note 15, at 322-24 (suggesting that discovery rulemaking experience shows continuing judicial difficulty in understanding the effect of the adversary system and the legal profession in the implementation of rules). According to informal conversations that I and other lawyers have had with judges, it has appeared to me throughout the rulemaking process that the Advisory Committee's enthusiasm for disclosure was not widely shared by the rank-and-file bench. The tendency of so many federal courts to opt out of disclosure seems to confirm that large segments of the judiciary have reservations about the 1993 Amendments.

55. See Dreyfuss, supra note 3, at 24.
56. See supra note 13.
57. See supra note 44.
of the effort to ineffectiveness. If the bench took to the public a more reflective view of litigation reform, the public and policymakers might listen. Chief Justice Burger's criticism of trial lawyer competence illustrates the power of the bully judicial pulpit. It spawned increased emphasis on trial practice and clinical education in law schools. The former Chief Justice's promotion of alternative dispute resolution (ADR) was also instrumental in the success of the ADR movement. Unfortunately, much of Chief Justice Burger's success came at the expense of lawyers (who he painted as a large part of the problem) and public perception of the system (which he seemed to portray as so bad that most litigants should readily jump to ADR except in the most high-stakes constitutional cases).  

In addition, as Subrin reminds us, the rulemaking process was originally less dominated by the judiciary. Strong nonjudge Advisory Committee members, such as former Attorney General William Mitchell, and Reporters, such as Yale Law Dean Charles Clark and Harvard Law Professors Albert Sacks and Benjamin Kaplan, provided many of the ideas and modifications of earlier procedural reform efforts. In the rules revision of the 1980s, particularly the disclosure amendments, the leading figures on the Advisory Committee or influencing the Committee were judges. I would be the last person to suggest that a rulemaking product was presumptively problematic because of the influence of people like Judges Wayne Brazil, William Schwarzer, Sam Pointer, or Ralph Winter. Just the same, I would be more confident in the rulemaking product if practicing lawyers and scholars had been more involved in generating the disclosure proposal or evaluating and altering the proposal in the earlier stages of consideration.

E. The Continuing Frontloading of Litigation

The 1993 Amendments continue the increasing emphasis on early activity in the processing of litigation in part because they continue in the vein of case management. The 1993 Amendments add to the frontloading of litigation activity by requiring that counsel swiftly meet and plan discovery and other litigation events. The presumptive deposition limit also forces an earlier assessment of the case and its needed discovery and

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60. See Subrin, supra note 6, at 29-30.
61. See id. at 29, 34.
proves. Additionally, lawyers will likely need to assess expert witness contributions to the case earlier. Because of both Rule 11 and discovery/disclosure concerns, more lawyer time (which is not free, although rulemakers and policymakers seem to forget to count such costs) must be focused on the case before it is filed and during the first month or two of the litigation.

At the risk of sounding like some politically incorrect proponent of delay, I question whether faster and frontloaded is uniformly better. In my own experience as a litigator and a law teacher, I find some extended period of germination and ability to react to it useful in illuminating issues. Although advance planning is part of the analysis, it should not lock lawyers into particular claims, arguments, or discovery strategies that later prove misplaced. For litigants with fewer resources, the frontloading also has a distributional effect. It makes litigation, even litigation that settles, more expensive and perhaps less worth undertaking. Thus, the entities most likely to be claimants may be particularly adversely affected.

Frontloading will make solo and small firms lawyers’ practices more difficult. With less litigation capacity, small firms will be hard pressed to give each case a thorough, frontloaded workup during occasional “crunch” periods or bottlenecks. Undoubtedly, many lawyers in both small and large firms will do a poor job of grasping all aspects of the case at the outset. Should their clients suffer because of the new litigation frontloading? Is the system really benefitted if cases are disposed of with less time between complaint and resolution but where the resolution shifts in favor of some parties? Is litigation really improved if cases settle faster but consume more legal expense or yield less defensible results?

The frontloading also reflects another problem with the 1993 Amendments noted by both Dreyfuss and Subrin. According to the information available, in only a small proportion of cases are the parties and counsel engaged in the sort of discovery war that prompted the rulemakers to propose the disclosure rule. However, paradoxically, the disclosure regime forces many lawyers to spend more on “average” or “typical” litigation than they would have absent disclosure. To make things worse,

64. See Fed. R. Civ. P. 26(b)(2).
65. See Dreyfuss, supra note 3, at 19.
66. See Subrin, supra note 6, at 45-47.
67. For example, most cases have no discovery events at all. Most of the rest have only a few simple and discreet discovery events. See Paul R. Connolly et al., Judicial Controls and the Civil Litigation Process: Discovery 36, 44 (1978) (concluding that comparatively few cases have several discovery events or motions); Terrance Dungworth & Nicholas Pace, Statistical Overview of Civil Litigation in the Federal Courts 26-29 (1990) (reporting that 40% of cases terminate without any court involvement and 35% terminate by motion); Early Endings, Wall St. J., Feb. 11, 1994, at B3 (reporting that 44% of cases settle without completing pretrial discovery).
disclosure is unlikely to change significantly in the problematic mega-cases. In such mega-cases, aggressive lawyers and high-stakes clients will not hesitate to ask for court permission to do more; they will spend a lot of money trying to get such permission and will probably succeed. Disclosure and presumptive deposition and interrogatory limits may prove to be the metaphorical atom bomb used to eradicate the mosquito of excessive or abusive discovery in a few cases.

F. Political Horsetrading

Although many lawyers and judges say politics and law are quite divorced, I think them inextricable. The question is not whether litigation policy is political. It surely is political, just as the judiciary is a political branch of our politically constituted government. The questions worth debating are: "How do we prevent the system from becoming partisan?" and "How do we control and supervise the resolution of political issues inherent in litigation policy?" As I have suggested elsewhere, my preferred solution is to institutionalize consideration of the political issues (e.g., whether a rule's change will favor defendants over plaintiffs, or whether discrimination suits are more likely to be targeted under a new rule) early in the rulemaking process by a diverse cross-section of the legal profession and concerned parties such as litigants and interest groups.

The 1993 Amendments involved politics, but the wrong kind of politics. There was too little cross-sectional deliberation of the public interest and too much brute positivism and pluralism. The proposed rules were well-formed and the Advisory Committee aligned behind them well before a significant sampling and consideration of professional opinion. In response, the practicing bar took a "this is all bad" and "you can't do this to us" attitude. The rulemakers essentially responded by saying "oh, yes we can" but then proposed a compromise.

Many in the bar remained unsatisfied. The next significant political move in this contest was lobbying Congress to abrogate the changes. More politicking in response served to break down the interest groups sufficiently that the Senate failed to consider the House's bill which removed disclosure from the 1993 Amendments. Combined with the deadlines of the Enabling Act, this failure served to save disclosure, presumptive limits, the new Rule 11, and a provision allowing easier tape recording of depositions. As chronicled by Dreyfuss, this "Tolstoy Problem" of idiosyn-

68. See Stempel, Cultural Literacy, supra note 15, at 354-56; Stempel, New Paradigm, supra note 18, at 737-59.
69. See infra note 93 and accompanying text.
70. See Dreyfuss, supra note 3, at 25.
cratic unhappiness among the interested parties was not a pretty sight. It was, of course, political and rather partisan. However, rulemaking and litigation reform's inevitably political aspects can take place on a higher plane, a point I develop more in Part IV of this article.

G. The Special Politics of Civil Rulemaking May Push Toward a Form of Compromise Unrelated to the Merits of Wise Civil Litigation Policy

In addition to the external politics affecting the 1993 amendment process, a good deal of internal politics affected the process. Here, I use the term "politics" to refer to the rulemakers' desire to accommodate different facets of the legal profession and the legal policymaking community, not to partisan electioneering or questions of governmental role. As Dreyfuss has noted, partisan jockeying for position was not far from the surface of the rulemaking process. For example, lawyers representing manufacturers/product liability defendants were particularly well organized in monitoring the development of disclosure and working against it before both the Advisory Committee and Congress. Issues of the government's role also lurked in the background as the rulemakers worked to stave off both congressional interference and the perception of inaction or unconcern regarding what the laity perceived as a litigation crisis.

The politics to which I now refer are more in the nature of reciprocity or logrolling among competing professional groups. For example, the original proposed rules amendments established an unavoidable disclosure regime for every case regardless of substance. In response to criticisms leveled during the public comment period and hearing, the Advisory Committee modified the draft disclosure rule in 1992 so that disclosure regarding knowledgeable persons, their information, and documents would be triggered only when a claim was "alleged with particularity." Responding to the concerns of the defense bar, particularly the product liability,
securities, and antitrust defense bar, the Advisory Committee sought to make disclosure fairer by eliminating fishing expeditions for disclosure through vague "hunch" pleading in cases characterized by great asymmetry of information between claimants and defendants. At the time, it seemed like a decent compromise to me, even though I thought that nothing would make the disclosure dog hunt.

After reading the analyses of Dreyfuss, Subrin, and others, I now see the essential contradiction in the Advisory Committee's proposed compromise. Where the plaintiff can plead with particularity, the plaintiff generally neither needs nor will profit by disclosure of the basic information. The plaintiff already possesses this information or it could not have pleaded with particularity in the first place. The plaintiff may need some discovery to tease out other incriminating facts or nail down its theory of the case but this will ordinarily require pointed questioning through depositions or interrogatories. Defendants are hardly likely to serve these sort of facts to plaintiffs on the silver platter of disclosure. Paradoxically, the plaintiff who lacks the knowledge necessary to plead with particularity is perhaps precisely the sort of litigant who would be substantially aided by the basic disclosure envisioned by the 1993 Amendments.

Thus, although well-intentioned, the particularity compromise seems ill-suited to the mission of streamlining discovery and may even have the

76. See generally Griffin B. Bell et al., Automatic Disclosure in Discovery—The Rush to Reform, 27 GA. L. REV. 1 (1992) (arguing that the new disclosure rules, adopted in haste without listening to public comment, represented a radical and untested change to Rule 26); Thomas M. Mengler, Eliminating Abusive Discovery Through Disclosure: Is It Time Again for Reform?, 138 F.R.D. 155 (1991) (asserting that initial disclosure requirements are not the solution to discovery problems).

77. In relatively simple cases, such as a workplace injury resulting in a claim against a manufacturer, e.g., where a worker who lost a hand in a punch press sues the manufacturer, the particularity requirement is not hard to achieve, even for the unsophisticated and underinformed plaintiff. For example, alleging that "on the 14th of February, 1994 at 10 a.m., Plaintiff Smith's hand was crushed while using the punch press at Acme Industries as Smith attempted to align a piece of metal on which he was working" should suffice even to the courts that have taken Rule 9(b) most seriously. Obviously, when the dust has settled after disclosure/discovery/expert reports, etc., the plaintiff will be asserting that the punch press should have had a guard rail to prevent Smith from placing his hand in the machine or an automatic shutoff which is activated when hands and fingers are not clear of the machine.

However, this sort of case is not particularly improved by disclosure no matter how well executed. Defendants and plaintiffs will almost always get as much information during the first round of discovery as is produced during disclosure and may often require discovery on top of disclosure to clear up issues or avoid being deceived by the opposition. Under these circumstances, it is hard to discern what changes disclosure brings, other than more delay, increased cost of litigation, and opportunity for mischief. In more complex cases, such as securities fraud, a pure, universal disclosure rule does not only suffer from these failings but the "particularity paradox" is also at its zenith. Plaintiffs who do not need disclosure will get it, while plaintiffs who could perhaps be aided by disclosure, but who are not particular enough, will not get it. Similarly, defendants are forced to spend extra time and money disclosing information to the knowledgeable, yet are permitted to take a less forthcoming approach toward those who have less information.
opposite effect. The possibility that rules changes may backfire, or that law professors will predict their inefficacy, is nothing new. What is new is the fairly self-conscious Advisory Committee’s decision to attempt a political compromise in rulemaking, a compromise linked more to segmentation of opinion in the legal profession than to any logical construct. The particularity requirement did not arise from any compelling policy argument. Rather, it arose as a means of attempting to level the playing field between certain classes of litigants. Although I wholeheartedly endorse the view that the rulemakers should routinely become apprised of all significant aspects of professional opinion on a rules matter, I have in mind something quite different than a straight quid pro quo exchange. In effect, a quid pro quo exchange is what the rulemakers accomplished: disclosure remained in the 1993 Amendment package even though by late 1993 only a few influential people in America seemed to like it. To sweeten the bitter pill of automatic initial disclosure, the rulemakers proposed that automatic disclosure would only be compelled in a subset of cases where, according to the theory underlying Rule 9(b),\textsuperscript{78} the plaintiff’s claims were probably better than average, or at least nonfrivolous.\textsuperscript{79} The disclosure rule the rulemakers originally proposed was mitigated, but to what gain for either proponents or opponents? Like the proverbial camel resulting when a committee tries to build a horse, the rulemakers’ response to pluralist pressures in the legal profession produced a new Rule 26(a) that will neither win the Kentucky Derby nor navigate desert sands on minimal food and water.

The local opt-out provisions of Rule 26(a), permitting each federal district court to abrogate disclosure and presumptive interrogatory and deposition limits,\textsuperscript{80} strike me as the same sort of mutant by compromise. However, this creature of inconsistency is hardly the fault of the rulemakers. In passing the 1990 Biden Bill,\textsuperscript{81} Congress implicitly declared the 1990s to be a period of massive federal court experimentation with procedures to curb delay and costs. Congress mandated that each district construct its own delay and expense reduction plan, providing that each plan be studied and reported on to Congress.\textsuperscript{82} Much of the legal profession\textsuperscript{83} objected to the original version of the 1993 Amendments, because it was premature to change the Federal Rules significantly before

\begin{itemize}
\item \textsuperscript{78} See James W. Moore, Moore's Federal Practice 116 (1994) (observing that Rule 9(b) requires that to successfully plead fraud or mistake, the pleader must state the circumstances which led to the claim with particularity).
\item \textsuperscript{79} See Fed. R. Civ. P. 26 advisory committee’s note.
\item \textsuperscript{80} Fed. R. Civ. P. 26 advisory committee’s note.
\item \textsuperscript{83} This includes me as a representative of the Association of the Bar of the City of New York.
\end{itemize}
the congressionally mandated experimentation and study had concluded.

Faced with this intractable logical inconsistency and heavy opposition from the bar, and arguably Congress, the Advisory Committee could have staged an orderly retreat, taken time to assess various local initiatives, and renewed the disclosure proposal at a later date. Instead, the rulemakers again crafted a mutant compromise, rather than a hybrid compromise. They continued to advocate disclosure and presumptive limits, yet they permitted federal district courts to exit or alter this supposedly advanced litigation system at will. The result has been a crazy quilt of discovery regimes in federal courts across the country. Some courts have opted out completely, some have altered the Civil Rules regime, and some have embraced the 1993 Amendments with varying degrees of enthusiasm. For example, New York City’s four federal district courts have dramatically different rules governing pretrial fact development, none of which has been empirically tested or has proven efficacious. The local opt-out feature may have been a good political compromise for selling the 1993 Amendments to Congress in the face of strong adverse lobbying by lawyers, but it is hardly sound litigation policy.

In addition, at least in my view, not all political compromises attending the 1993 Amendments were imbedded within Rule 26. Also included in the package were substantial amendments to Rule 11. Although the disclosure/discovery changes were generally unpopular with the bar, the Rule 11 amendments generally enjoyed the bar’s support. Not coincidentally, new Rule 11 is expected to lower the heated temperature of sanctions practice and to decreased the likelihood of sanctions on lawyers and clients. This is particularly important with substantial monetary awards

84. I say “arguably” because Congress has sent mixed messages: it passed the Biden Bill, 28 U.S.C. §§ 471-482, but appears to regard the judiciary as nonetheless not moving fast enough to streamline civil litigation. See Stempel, Cultural Literacy, supra note 15, at 332-37.

85. The distinction I draw upon, and perhaps excessively torture, in the biological analogy is this: a hybrid compromise is one which combines different approaches, theories, and rules and creates a new compromise rule that has significant advantages in terms of effectiveness, efficiency, durability, or some other attribute widely regarded as positive. By contrast, a mutation is usually a change in the species that makes it less fit for its environment, often so much so that the mutant cannot survive for a normal lifespan. Of course, biological mutations do not strictly result from compromise, as do hybrids, but rather from intrinsic alterations in the life form. Nonetheless, I find the slightly twisted analogy apt to emphasize a point—compromise does not necessarily yield a net improvement; it may produce an unsuitable result.

86. See Cortese, supra note 13.

87. See Dreyfuss, supra note 3, at 21.

88. See FED. R. CIV. P. 11 advisory committee’s note.


90. See Tobias, supra note 23, at 140.
linked to the counsel fees of the successful Rule 11 movant. Because certain elements of the bar and other interest groups wanted the new Rule 11 more than they feared the drawbacks of disclosure, they prevailed upon at least one Senator to prevent a vote on the House bill to abrogate disclosure from the 1993 Amendments, as such a vote might have subjected Rule 11 to congressional tinkering and possible strengthening.

In retrospect, coupling new Rule 11 with new Rules 26-37 suggests superb planning by those who might define politics as the art of the possible or the science of compromise. Whether this was intended is difficult to discern. I am not sure that disclosure supporters can be given credit for the "tying arrangement" that helped the disclosure provisions take effect. Rule 11 and the disclosure rules had such different origins and took such different paths in development that one cannot be sure the rulemakers knew that political palatability of the 1993 Amendment package would be more than the sum of its parts. Nevertheless, the 1993 Amendments illustrate the power and possible perverse effects of aggregating proposed amendments involving quite disparate aspects of the civil rules. A combined Civil Rules package may be undefeatable even though none of its significant component parts enjoys widespread favor or could have stood alone. Arrow's Theorem comes to civil rulemaking. At a minimum, the episode suggests that perhaps the rulemakers should reflect more seriously and openly about whether they will present Civil Rules amendments in isolation or in combination and why.

III. Subrin's Substance-Specific Procedure: A Potential Way Out of the Maze

I generally agree with those who have criticized the past fifteen years as a time of excessive tinkering with the Civil Rules, but I do not advocate abolition of the Advisory Committee's permanent status. Generally, I favor making litigation simpler rather than more complex, and regard the litigation process as simpler with fewer rules governing the process. Nonetheless, I find Subrin's proposal exciting. Bench and bar should explore the proposal through serious and sustained experimentation with it. I say


93. Arrow's Theorem, derived from the work of economist Kenneth Arrow, posits that the manner in which votes are taken may result in political outcomes that do not reflect the complete support for, or opposition to, the policy eventually adopted. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 38-62 (1991).

94. See supra note 23.
this although, as detailed more fully below, I have some criticisms of aspects of Subrin’s sales pitch for substance-specific procedure. In addition, properly attempting Subrin’s thesis will require a massive professional commitment of time and sustained interest, as well as experimentation in the real world. Yet, the requisite investment in attaining selective substance-specific procedure should not deter the legal profession from exploring the procedure. If Subrin’s thesis is correct, and after substantial initial skepticism I now believe that it is, the legal system’s frontloaded investment in developing and testing presumptive discovery entitlements and limits will pay dividends for decades to come.

A. Confessions of a Recalcitrant Transubstantivist

When the late Robert Cover brought a rethinking of universal or “transubstantive” civil procedure to the forefront more than fifteen years ago, the possibility of departing from Judge Charles Clark’s “one size fits all” model immediately achieved currency in the academic community although the model seemed too dramatic for policymakers to seriously consider. Thus, despite the frequent rulemaking activity of the 1980s and 1990s, there appears to have been no formal consideration of departing from the norm of transubstantivity and, instead, addressing some litigation matters with substance-specific procedure. In the legal academy, support for substance-specific procedure appears to have increased.

95. See Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 YALE L.J. 718, 732-33 (1975). Professor Cover spoke of “trans-substantive” rules, id., while Subrin spells out the genre as “transubstantive” rules. See Subrin, supra note 6, at 50. I have adopted Subrin’s spelling because this portion of my article focuses on his paper, because I generally prefer to avoid hyphenating words, and because speaking of “non-trans-substantive” procedure is particularly awkward. “General” or “universal” procedure are perhaps better labels than “transubstantive.” Without question, it is easier to refer to “substance-specific” procedure rather than “non-transubstantive” procedure.

96. See Paul D. Carrington, Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogey of Non-Trans-Substantive Rules of Civil Procedure, 137 U. PA. L. REV. 2067, 2068 (1989). Professor Carrington notes that Cover’s vision has been echoed by other skeptics in the years since his writing, but it has never been “tran-substantiated” as a draft of procedure rules that might be considered as an alternative to the “trans-substantive” rules sometimes decried. It has survived as a ghost in the darkness surrounding academic discussions of the future of civil procedure.

Id. (citations omitted).


These three sources are noted by Carrington, supra note 96, at 2068 n.4, regarding the popularity of the substance-specific concept in academic circles. However, Carrington implies that, at least
spite the absence of any particularly concrete proposals for departing from the transsubstantive ideal.

Until now, I have been part of the academic group resistant to substantive-specific procedure. The lure of the transsubstantive model, to me at least, is obvious: it tends to make for a leaner set of procedural rules more attuned philosophically to a common law system of adversarial adjudication. For the past fifty years, the prevailing conventional wisdom has posited that attempting to codify civil procedure according to the type of lawsuit at issue leads to a massive civil code, one that is both more complex and more likely to be inapt for the particular disputes that will later come before the court. Because I now have sufficient doubt about this conventional wisdom, Subrin’s proposal strikes me as a particularly apt experiment for testing an alternative approach.

Part of my attraction to Subrin’s idea stems from the shortcomings of the current status quo of transsubstantivity. Application of the model over time has shown that a transsubstantive code of civil procedure is no guarantee of either simplicity or equitable results in particular cases.

Regarding simplicity, we have seen the Civil Rules change and expand, particularly in the past thirty years: the 1966 class action98 and pleading amendments,99 the 1970 changes broadening discovery,100 the 1980 changes attempting to nudge counsel toward a more streamlined and cooperative approach to discovery,101 the 1983 Rule 11 amendment,102 by 1989, the notion of substance-specific procedure had run out of steam among law school faculty, as well as failed to influence rulemakers. Id. Subrin’s renewal of the proposal, see Subrin, supra note 6, at 55, and the discussion engendered at the 1994 AALS Meeting, see supra note 2, suggest to me that a large portion of law faculty teaching procedure or civil litigation remain attracted to greater substance specificity in procedure.


99. See Kaplan, supra note 98, at 410 (discussing problems of the pre-1966 rule on amendment and relation back of pleadings, particularly where the initial party was misnamed, as illustrated in the case of Martz v. Miller Bros. Co., 244 F. Supp. 246 (D. Del. 1965), where plaintiff’s claim was lost due to naming the “wrong” Miller Brothers Department Store, with no decision on the merits). See generally Robert D. Brussack, Outrageous Fortune: The Case for Amending Rule 15(c) Again, 61 S. CAL. L. REV. 671 (1988) (discussing the need for revising Rule 15(c)); Harold S. Lewis, Jr., The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 85 MICH. L. REV. 1507 (1987) (describing continuing problems regarding change of parties and relation back).


101. See FED. R. CIV. P. 26(g) advisory committee’s note (establishing discovery conference procedure under Rule 26(f)); Fed. R. Civ. P. 37(g) advisory committee’s note (regarding sanctions for failure to “participate in good faith in the framing of a discovery plan by agreement as is required by
1991's revision of Rule 15(c) to overturn a problematic Supreme Court decision,\textsuperscript{103} the massive 1993 changes,\textsuperscript{104} and numerous technical changes as well. If the Judicial Conference had not intervened and deleted a proposed revision of Rule 56 from the 1993 package of amendments, we might now have a rule regarding summary judgment that scripted the conduct of counsel regarding the form of their motion papers in a manner akin to what lawyers are increasingly encountering through local rules and standing orders. Although one can argue that such micromanagement of lawyering by national rule is a good thing,\textsuperscript{105} it certainly does not promote a lean, minimalist code. Rulemakers are willing to consider such proposals, to actually enact involved schemes like initial disclosure and planning meetings, and to describe in detail what must be contained in an expert witness report. Given the already long and complex Civil Rules, a desire for simplicity alone should not act as a bar to allowing rulemakers and others to seriously consider substance-specific procedure.

The long-expected efficacy, flexibility, and fairness associated with transmutable procedure have recently come into question. We now have substantial grounds for doubting the notion that broad and uniform rules achieve acceptable results by freeing judges to craft optimal solutions to emerging problems. Indeed, much of the history of the most recent generation of Civil Rules revisions has involved efforts to amend the Rules to foreclose erroneous or harsh judicial interpretations of the Rules’ broad transmutable language. For example, Rule 15 regarding misnamed par-


\textsuperscript{103} See \textit{Benjamin Kaplan, Comment on Carrington, 137 U. Pa. L. Rev. 2125, 2128 (1989)} (referring to Schiafone v. Fortune, 477 U.S. 21 (1986), which prompted the 1991 amendment, as a "monstrous" decision misreading Rule 15(c)).

\textsuperscript{104} See \textit{Dreyfuss, supra} note 3, at 10-11.

\textsuperscript{105} The argument, as I understand it, holds that too many lawyers will, if left to their own devices, fail to adequately display the summary judgment issues for judicial resolution. Although this may be true, I disagree that it requires a national rule change or even regulation by local rule or standing order. Judges who find motion papers too cumbersome or indecipherable should address the issue at the oral motion hearing and, if necessary, rule adversely to the party whose counsel has failed to present the issue properly for decision. A fixed rule scripting motion papers is overkill. Counsel should generally be allowed to make motions, summary judgment or otherwise, in the manner seen as most persuasive.
ties and relation back has twice been revisited for this purpose because the revised Rule was either unclear or did not anticipate possible unfairness. 106 Rule 11 was transsubstantively changed in 1983 to make it a tougher tool against frivolous litigation. Because Rule 11 proved too tough, the rulemakers substantially revised it in 1993.

The major academic defense of transsubstantivity advances several axioms that Subrin and I seem to regard as completely incorrect. The first axiom is that the flexibility of transsubstantive rules is preferable because it frees judges to act flexibly, fairly, and correctly. 107 The second fallacious axiom is that transsubstantive rulemaking is, by definition, politically neutral while substance-specific rulemaking is less neutral. 108 This view concludes that substance-specific rulemaking invites judicial rulemakers to be less neutral and invades the proper authority of Congress. 109 The third axiom is that judges, despite having a “stake” in the rules and political preferences of their own, are “not advancing personal agendas” when acting as rulemakers. 110 The fourth axiom supporting transsubstantive rules is that more particularized substance-specific procedure will make rulemaking more vulnerable to interest group politics. 111

The events of the past twenty-five years and the current and historical data described by Dreifuss 112 and Subrin refute these contentions at length. 113 The assumed saintliness of judges is but a fudge point, the weakness of which I discuss further below. 114 Judges, like practicing lawyers, are vulnerable to personal interest. Transsubstantive rulemaking has resulted in both unwise judicial application of the Civil Rules and today’s histrionically politicized interest group model of rulemaking. Despite its transsubstantivity, the current rulemaking regime seems to have triggered congressional concern on both policy and democracy grounds. In short, general procedure appears to suffer the same failing that critics usually attribute to substance-specific procedure. In addition, the tendency of broad general rulemaking to disguise political and distributional issues of procedure strikes me as a greater failing. With substance-specific procedure, the politics of rulemaking may be more open and, therefore, less

106. See authority cited supra notes 99, 103.
107. See Carrington, supra note 96, at 2081-85.
108. See id. at 2074-76, 2085-87 (Former Civil Rules Advisory Committee Reporter of longest tenure argues that transsubstantive rules are less likely to have political impact).
109. Id.
110. See id. at 2077.
111. See id. at 2085; Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. REV. 795, 835-42 (1991) (suggesting that the promulgation of substance-specific rules is politicized because it necessitates input from interested parties).
112. See Dreyfuss, supra note 3, at part II.
113. See Subrin, supra note 6, at part III.
114. See infra text accompanying notes 115-20.
problematic.\footnote{115} Furthermore, the increasing politicization of the federal bench has undermined the transsubstantive model. As Subrin's historical scholarship demonstrates, Charles Clark and the other "fathers" of the 1938 Federal Rules of Civil Procedure assumed vastly unrealistic talents of federal judges. They were thought to be omniscient, steadfastly neutral, enduringly patient, and wise.\footnote{116} This deified view of judges was more than a mere "fudge point" in the original rulemakers' plans for discovery practice; the view was a gaping blind spot that pervaded the entire structure of the Civil Rules. The original rulemakers overestimated judges' ability to efficiently control discovery, to shape litigation in the face of notice pleading, to appreciate the fine distinctions between a weak case and one deserving summary disposition, and to control errant lawyers and juries.

This blind spot is particularly inconsistent with the original Advisory Committee's notion that juries were barely to be trusted and lawyers not at all. To state the obvious but often overlooked: judges are human beings and, perhaps worse yet, former lawyers. It is hard to imagine that the selection process for federal district judges has become so refined that those attaining the bench are free of negative traits normally afflicting humanity and the legal profession. If anything, the situation has worsened over the past fifty years and made the original rulemakers' fudge point even less tenable. Once a crowning jewel capping a distinguished career, many view appointment to the bench as an unattractive job offering poor working conditions and inadequate compensation.\footnote{117}

In addition, the confirmation process has become more politicized both in terms of the "vetting"\footnote{118} of nominees, a practice that may discourage some candidates, and the more conscious consideration of their political

\footnote{115} Furthermore, Subrin's proposal of substance-specific discovery procedure seems quite different from the procedure envisioned and attacked by Carrington, supra note 96, who argued that a summary judgment rule should be transsubstantive. Carrington may be correct in arguing that the standard for determining whether a claim has factual or legal support must be broad and general to be sufficiently fair and flexible. See Carrington, supra note 96, at 2099. But these arguments seem less persuasive regarding discovery, an area of civil litigation where recurring issues of fair access to information arise that are often largely divorced from the merits of particular cases.

\footnote{116} See Subrin, supra note 6, at 35.


\footnote{118} See WEBSTER'S NEW NINTH COLLEGIATE DICTIONARY 1312 (1988). The dictionary definition, after the preferred definition providing medical or veterinary care, is "to subject a (person or animal) to a physical examination or checkup" or "to subject to expert appraisal or correction: EVALUATE." Id. Examples of the phenomenon in modern politics include the well-publicized situations of Attorney General nominee Zoë Baird (opposed because of irregularities in her child care arrangements) and United States District Judge Kimba Wood (dropped from consideration for nomination to the Supreme Court based on her concededly legal child care arrangements).
orientation. In my view, there was something of a “Reagan Revolution” in judicial selection as well as fiscal policy.119 In the Nixon Administration, the Executive Branch was expressly committed to nominating a more politically conservative, “strict constructionist” type of judge. However, continued deference to Senators and other important local politicians meant that Nixon-Ford appointees did not look much different from Eisenhower or Kennedy-Johnson appointees.

The Carter Administration expressly endorsed a merit selection process although many Democrats argued that merit selection resulted in too many Republican appointees by a Democratic president. The Reagan Justice Department took a more aggressive approach to nominating only judicial candidates espousing the President’s own conservative judicial philosophy. The Reagan Administration was willing to jettison senatorial courtesy if necessary to maintain this approach.

As the well-publicized battles over the nominations of Robert Bork and Clarence Thomas reveal, much of the Reagan-Bush policy was contested, especially in high profile appointments. Overall, the 1980-92 period produced a more conservative breed of federal judge than prior periods. Although the Clinton Administration has made few judicial appointments, it appears that Clinton is opting to return to centrist-liberal appointees.

How do the politics of federal bench appointments relate to civil discovery procedure? In my view, today’s more politically polarized federal bench means more extreme and less consistent judicial responses to discovery matters. My working hypothesis is that Republican and Democratic appointees will often differ substantially in their views of the general worth of lawsuits alleging discrimination, securities fraud, or claims of product defect. Their general view of such suits will accordingly affect their decisions on discovery motions attending such litigation. A Carter or Clinton appointee might be willing to permit a discrimination plaintiff more than the presumptive twenty-five interrogatories or ten depositions. A Reagan-Bush appointee, however, will deny the request for more discovery to facilitate summary judgment, secretly thinking that the case is worth only two depositions. Similarly, liberals and conservatives will undoubtedly diverge about what constitutes relevance to disputed facts for purposes of policing compliance with the new disclosure provisions of Rule 26(a).

As lawyers and citizens, we can debate vigorously as to which perspective is correct for each type of claim. It seems to me, however, that there is no debate on one key point: the current litigation process seems

119. Although, to be sure, judicial nominees before 1981 were also probably selected on factors other than pure merit, such as personal friendship with influential politicians. See Harold W. Chase, Federal Judges: The Appointing Process 26-34 (1972).
characterized by de facto substance-specific procedure operating under a smokescreen of transsubstantively written Civil Rules. Because the transsubstantive ideal no longer seems to exist in reality (assuming it ever did), I advocate at least experimenting with substance-specific procedure. Because of the increasing variety and complexity of law and the decreasing cohesiveness of judicial views regarding particular claims, I am prepared to accept the idea that a transsubstantive procedural code fails to sufficiently guide judges and constrain judicial discretion.

Experimenting with substance-specific procedure will not resolve problems stemming from the length and complexity of the Civil Rules. Because Subrin's suggested standards would not be codified in the Civil Rules until universally accepted, the standards would not pad the already thickening Rules until viewed as an improvement upon the current system. Although non-Rules directives like local rules, standing orders, and Subrin's suggested substance-specific discovery standards place more pressure on lawyers and judges, there are now serious questions as to whether Subrin's suggested new directives and standards will materially increase the overall gird of the procedural rules game. The creeping growth of transsubstantive rules like disclosure, rules that increase the burdens on counsel and clients but are predicted not to achieve offsetting benefits, persuade me to suggest that introducing case-specific discovery guidelines may make civil discovery less complex, less erratic, and easier to administer.

B. The Advantages of Subrin's Approach

Subrin's proposals present a number of advantages to the status quo foreshadowed in the previous discussion and discussed in Subrin's article. Because the current omnibus Civil Rules have already departed from the original expectations of the 1938 rulemakers, the introduction of more concrete standards will not create any great detriment of confusion and may reduce confusion by providing more guidance. The notion of substance-specific discovery guidelines also responds directly to my perceived inconsistent politicization of the litigation process; substance-specific discovery guidelines will decrease such politicization.

Subrin's proposal suggests that we move the phenomenon of judicial division over the discovery worth of different types of claims outside the subterranean reaches of the often unreported caselaw and engage in widespread discussion of what constitutes presumptively appropriate discovery in discrimination cases, product liability cases, antitrust cases, securities cases, and so on. His vision assumes that a common ground of consensus

120. See Subrin, supra note 6, at 44.
exists upon which the diverse perspectives of the profession could coalesce. Subrin envisions codification of this common ground to limit extreme and probably unfair exercises of discretion by the more extreme ranks of the judiciary.

It is important to emphasize that Subrin’s proposal, at least as I understand it, would operate not only as a set of presumptive limits on discovery in certain cases, but would also create a set of presumptive discovery entitlements for claimants and others seeking information to support their claims.121 Consequently, Subrin’s proposal has the potential intellectual merit and political feasibility of becoming a set of discovery guidelines. The guidelines would be both fair and perceived as fair for plaintiffs and defendants. Furthermore, the concrete set of standards envisioned by Subrin would not only guide district judges in policing discovery but would also provide a yardstick for appellate courts to apply in reviewing trial court discovery decisions.

It is possible that no such consensus is attainable. Nonetheless, the legal profession should at least attempt consensus. If after serious effort the divisions in discovery viewpoint remain too great, the profession, and society, face at least two possible choices for resolving the matter. We can either continue the current status quo characterized by ad hoc resolution of discovery disputes regardless of subject matter or we can make some hard political choices and legislate specific discovery groundrules according to type of case, even if such legislation would infuriate the losers in the battle. Because either of these “solutions” has obvious drawbacks, Subrin’s proposal is worth a serious try.

Consider maintaining the status quo. It would not be such a bad path if, in fact, judges seriously focused on discovery matters in the cases before them, decided them in thorough, written opinions, published these opinions, and saw rigorous appellate review of the opinions. In time, a common law of discovery by case type would emerge and commentators could collect and assess the common law. This has happened to a degree, but, for the most part, judges do not take discovery disputes as seriously as they should.122 Judges seldom write detailed opinions, publish discovery rulings infrequently, and rarely have their discovery decisions reviewed.123 Consequently, the current common law of discovery is com-

121. To the extent I have a major quibble with Subrin’s presentation and defense of his idea, it is this: he emphasizes too greatly the degree to which substance-specific guidelines will limit discovery. In many cases it will expand discovery. Just as many defendants may be “blackmailed” into excessive discovery, many plaintiffs are successfully “stonewalled” by obstructionist defense counsel and prodefendant judges.


123. Under the final order doctrine, appellate review ordinarily occurs only if the case has been completely adjudicated on the merits. Where litigation settles, there is obviously no appeal, even of
posed of local custom, common sense, and the grapevine. None of these methods for determining whether to press a discovery position is necessarily bad, but they do not lead to the type of precedential certainty that makes for efficient litigation. Historical judicial reluctance to invoke Rule 37 sanction powers against abusive discovery seekers and resisters also prevents precedential certainty.

In short, maintaining the status quo seems likely to perpetuate the current discovery situation that so many view as unsatisfactory. Uncertainty, individual judicial differentiation, and opportunity for lawyers' strategic behavior are byproducts of the current discovery situation. As Dreyfuss, Subrin, and others have demonstrated, the 1993 Amendments are unlikely to eliminate these byproducts and may exacerbate them by giving counsel new general rules to invoke, ignore, or haggle over before disinterested judges. For this reason, maintaining the present system might prove acceptable to lawyers so long as views of a discovery crisis do not escalate sufficiently to result in more sweeping legal reforms that, for example, would eliminate certain claims or cap counsel fees.

For example, one lawyer's reaction to Subrin's proposal was to view it as too difficult to achieve; the lawyer saw the status quo as acceptable. If one judge ruled adversely in Case A, the next judge might rule favorably in Case B. Over the long haul, this lawyer saw the current situation as better than the possibility of a rule or guideline limiting discovery in all cases. At least under the status quo, the lawyer was prevailing fifty percent of the time.

On one level, this lawyer's reaction is colorable: an inconsistent half loaf is better than no loaf (if one assumes that a rule of none is the incorrect rule). On another level, the reaction is pure self-interest. Lawyers and other repeat players (such as insurers, manufacturers, and brokers) can average out gains and losses over time. However, many litigants have only one litigation experience in their lives and will almost certainly have only one case on a particular claim. Thus, a legal system that bats .500 on their discovery rights is nothing to brag about. Despite some difficulty bizarrely incorrect discovery rulings. In the few cases eligible for appeal, the reviewing court is unlikely to scrutinize discovery rulings unless quite convinced that the discovery ruling affected the outcome of the case. Although discovery is sometimes reviewed under exceptions to the final order rule, such as the collateral order doctrine or a petition for a writ of mandamus, this is unusual. See DAVID F. HERR ET AL., MOTION PRACTICE § 25.9, at 590 (1985).

124. See Dreyfuss, supra note 3, at part II.
125. See Subrin, supra note 6, at 55-56.
126. Interview with commercial litigator, Jan. 28, 1994 (who requested anonymity in the recounting of this conversation).
128. Of course, batting .500 on discovery is not as bad as batting .500 on substantive outcomes.
in comparison because of individual case variance, the legal system should
aspire to give each litigant in every case a reasonable amount of discovery
opportunity or discovery protection. Consequently, a finely tuned set of
presumptive discovery entitlements and limitations could provide more
equalized procedural justice.

On this point, however, I have a relatively minor objection to the way
in which Subrin has packaged his plan for sale. He trumpets substance-
specific discovery guidelines as a means for making life easier for lawyers
and judges129 but says relatively little about what litigants might gain or
lose. For example, Subrin sees his plan as giving a big efficiency boost to
contingent fee lawyers, stating that they “should embrace the idea of pre-
announced procedures geared to some types of cases because such proce-
dures should reduce time, delay, and costs for the lawyers and their cli-
ents.”130

However, the contingent counsel’s interests are not always so congru-
et with the client or prospective client’s interests. A plaintiff’s product
liability lawyer might like practicing under poorly calibrated but clearer
discovery guidelines even if this forces the lawyer to turn away some
difficult cases, settle cases more cheaply, or lose cases at trial. The lawyer
can average things out over time and reduce the number of meritorious but
unprofitable cases taken. By contrast, the unsuccessful, undercompensated,
or rejected client is considerably less fortunate. Consequently, litigants will
embrace substance-specific discovery guidelines only if they are essentially
fair as well as clear and easy to apply.

This rationale holds for defendants as well as plaintiffs. For example,
a defendant required to produce truckloads of barely marginal documents
under Subrin’s guidelines will know what is expected, and as a result, may
pay more settlement ransom to avoid this exercise. However, the defend-
ant might prefer the status quo. If Subrin’s discovery scheme is to be
worthwhile, his proposed guidelines must “get it right” at least as often as
judges do in ad hoc cases.

The catch, of course, is that it might prove very difficult to achieve
any consensus as to the proper scope and limitations of substance-specific
discovery under Subrin’s plan. If such consensus proves unattainable, the
second obvious solution—letting the politically stronger coalition impose

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Many errors regarding discovery will not affect the substantive outcome of the case, and may not even
affect its settlement value. Most such errors probably do redound, however, to the real detriment of the
party that should win the discovery dispute. At a minimum, some nontrivial, “wasted” litigation ex-
 pense is almost certainly involved in every case of discovery error.

129. Subrin, supra note 6, at 56. Commenting on a prior draft of this article, Subrin emphasized
that he does indeed see his proposal as benefiting litigants as well as lawyers and that my criticism
probably stems from a presentation problem (his) or an interpretation problem (mine).

130. Id. at 47.
its will on the others—looms as a possibility. Many in the profession will shrink from this solution because it implies that legal rules are the product of political choice rather than substantive rationality. However, as detailed in Dreyfuss’s and Subrin’s articles, litigation today has an inescapable element of political choice. The “wise men” model of rulemaking under the Enabling Act provides the impression that rules are made by impartial reflection. This is only a veneer because rules are really a culmination of many value choices. Congress implicitly acknowledged this when it passed 1988 Amendments to the Enabling Act mandating more openness in the rulemaking process. Although rulemaking should never take on the overtly partisan tones of a political convention, rulemaking should consider and debate differing views of the litigation system to adequately respond to the diverse interests new rules will affect.

One strength of Subrin’s proposal, a strength I extrapolate upon below, is that the proposal encourages real dialogue and reflection among different facets of the national legal community. Even if the standards Subrin envisions result from a divisive political struggle dominated by some factions of the litigation community, the standards might still significantly improve the status quo. The process might even benefit the losers of the political struggle by forcing open political debate and decisionmaking.

The advantages of Subrin’s proposal become apparent when one optimistically makes the inferential leap that his proposal could be operationalized with a set of presumptive discovery entitlements and limits for all major types of cases that now trigger significant discovery disputes. Subrin’s proposal gives judges a useful template for deciding such disputes efficiently. It encourages consistency and allows easier enforcement by appellate review. His proposal offers guidance to lawyers and clients and may encourage agreement or avoidance of the fruitless discovery fight.

131. See Dreyfuss, supra note 3, at 26.
133. See supra text accompanying notes 116-17.
134. Of course, the term “community” has become somewhat of a buzzword in the 1990s. In my opinion, this term is invoked too frequently. It too often is used to connote an assemblage of decisionmakers who happen to agree with the author, thereby invoking the nostalgic image of a cohesive community. See Linda S. Mullenix, Mass Tort as Public Law Litigation: Paradigm Misplaced, 88 Nw. U. L. Rev. 579, 584-85 (1994) (“Communitarianism is a frightening ethical system because one person’s community is another person’s exclusion.”).

Despite the debasing of the term and controversy surrounding it, I think it apt for describing those who administer, frequently participate in, or have serious interests in American civil litigation. There is a community of lawyers, repeat clients, interest groups, and politicians who regard litigation as important, and try to shape and reform it toward what they regard as improvement. This community is far from cohesive; among others it includes ATLA, Lawyers for Civil Justice, Public Citizen, Aetna, Dan Quayle, Senator Joe Biden, and the variegated views of the Supreme Court. But it is quite an identifiable community in that it is a “litigation village” in which civil litigation policy is made.
far better than the disclosure regime under the newly amended Civil Rules. Counsel can debate concepts like relevance at length. However, when faced with fixed limits on access to witnesses and documents in a product liability case, counsel’s freedom to debate is limited. Unless armed with compelling arguments, the lawyers must accept the concrete guidelines Subrin envisions and move on with the case. Where they fail to do so, judges will have a clearer yardstick for determining the propriety and amount of sanctions necessary. Under Subrin’s guidelines, judges should be able to better police discovery misbehavior without slipping into the potential excessive deterrence many observers associate with the 1983-93 version of Rule 11.

Indeed, as Subrin himself suggests, the main attraction of his proposal is that it could move litigation reform, and the judges who administer the system, away from case management and toward making decisions. By temperament, training, and skill, the bench is better equipped to decide discovery and nondiscovery legal issues than to administer lawyer and litigant behavior. Although some rudimentary case management is required of the system, the movement has, in my view, passed the point of diminishing returns. The 1993 Amendments illustrate this failing clearly. Instead of clarifying discovery rights and responsibilities via new standards or swifter decisionmaking, the bench-led drive has produced a disclosure system that essentially asks lawyers to work things out faster, cheaper, and with less acrimony. In light of the adversarial structure of American civil litigation and the duties and economic incentives of lawyers and clients, the disclosure solution alone is no solution. By contrast, Subrin’s proposal shifts the focus from mere edicts hoping for better lawyer behavior to a set of more concrete standards which direct greater judicial attention to policing discovery disputes rather than to merely wishing them away.

C. Operationalizing Substance-Specific Discovery

The means of working toward Subrin’s proposed Eden are, I think, considerably less complicated than the actual task of crafting his presumptive guidelines. An established and respected legal organization should be the first to attempt implementing Subrin’s proposal. This suggestion narrows the field considerably. Obvious candidates are the Judicial Conference of the United States, the American Law Institute (ALI), the American Bar Association (ABA), substantial state and local bar

135. See Subrin, supra note 6, at 50.
136. See Stempel, Cultural Literacy, supra note 15, at 324-28 (describing incentives for both attorneys and litigants to test the limits of rules in order to prevail in disputes).
137. The American College of Trial Lawyers might be such an organization as well, but its small-
associations, specialized bar associations (for certain classes of cases), or a consortium of special interest professional organizations. Of these organizations, the ABA seems best positioned to experiment with Subrin’s proposal, preferably through a special subcommittee or task force of its Litigation Section Trial Practice Committee.

The Judicial Conference has been in the rulemaking business for more than fifty years and, despite well-taken criticisms to some of its more recent work, has not done badly. However, the history of the 1993 Amendments as told by Dreyfuss and others leaves me with the firm conviction that someone else needs to take a hard look at discovery reform. In particular, the group that takes on substance-specific discovery must solicit a wider array of opinion from practicing lawyers and clients of all stripes, not merely from the elite lawyers and firms. The Judicial Conference simply does not have a particularly good track record of tapping mass opinion. This problem is particularly acute in the discovery context considering the bench’s long record of treating it as the poor stepchild of litigation issues. The forlorn search for the magic bullet of disclosure, and the crude control of general presumptive limits on interrogatories

er size and focus on trial lawyering makes it a less favorable candidate than either the ALI or ABA. This is because its membership is less diverse and its recommendations may not receive widespread support. Subrin suggests the National Conference of Commissioners on Uniform State Laws as a possibility, see Subrin, supra note 6, at 54, but I view this as a trial balloon that quickly should be shot down. Although the Commissioners do fine work (e.g., the Uniform Commercial Code), they are primarily in the business of attempting to improve and make uniform the substantive areas of law which traditionally have been regulated by the states. Discovery in federal litigation is, to state the obvious, a matter of federal procedural law, and should be addressed by a group that specializes in federal civil procedure. Although one can make too much of the often-blurred distinction between substance and procedure, even substance-specific discovery clearly falls on the procedural side of the line. See Carrington, supra note 96, at 2068 (asserting that despite difficult issues, substance-procedure distinction “is not meaningless”).

138. This would include associations like the Association of the Bar of the City of New York, the Chicago Bar Association, or virtually any state bar association. However, large state bars, such as those in New York and California, are more likely to have the diversity and resources required for the task.

139. For example, the Tort and Insurance Practice Section of the American Bar Association might be quite apt for drafting discovery guidelines for insurance or tort matters, since the group appears to have a balance of plaintiff and defense interests among its active membership. Many specialized bar associations, however, are too one-sided in perspective and could not craft workable rules unless part of a joint venture with an opposing organization. For example, many would not trust the American Trial Lawyers Association, a plaintiff’s lawyers group, to draft the product liability discovery guidelines envisioned by Subrin. However, a joint effort of ATLA and the Defense Research Institute might be effective in implementing the proposal.

140. See supra note 139. This sort of stratified pluralism could combine representatives of generally opposing lawyer’s organizations and also include client interest groups. For example, the product liability discovery guidelines committee might include not only ATLA and DRI, but also representatives of the insurance industry, the National Association of Manufacturers, and Ralph Nader’s Public Citizen, which has normally supported plaintiff’s rights to make product liability claims.

141. See Dreyfuss, supra note 3, at part I.
and depositions suggest that the Judicial Conference is not suited to experi-
ment with Subrin’s proposal.

The ALI is an elite and well-respected organization whose Restate-
ments of the Law have become signature examples of the ability of reflec-
tive wisdom to influence actual legal doctrine and case outcomes. None-
theless, the ABA is probably better suited than the ALI to implement
Subrin’s proposal. There is nothing wrong with a little elitism where the
elite entity provides expertise, insight, and results (and the professional
consensus is that ALI’s Restatements qualify on that score); however, the
recent round of discovery reform has been too driven by spectres of the
large, mushrooming “Frankenstein Monster” litigation spawning discovery
abuse. The 1993 Amendments, as Subrin points out,142 can be convinc-
ingly accused of changing the Civil Rules out of overreaction to fewer
than ten percent of all cases. Because practitioners in ALI are more likely
to be in the bar’s elite of big firms with big cases (or highly successful
small plaintiffs’ practices with big cases), I have some concern that an
ALI-led examination of Subrin’s proposal would lead to guidelines aimed
more at large or complex litigation rather than generic discrimination or
products suits.

In addition, the nature of the suggested discovery guidelines is less
doctrinal and more practical. A cross-sectionally experienced group of the
profession should ideally pursue the guidelines, not just the most presti-
gious lawyers, judges, and scholars. Lawyers from large firms do appear
to be well-represented in ALI, but plaintiffs’ counsel members are less
visible and more likely than the average plaintiff’s lawyer to have a case-
load that is unusually large, complex, or lucrative. This may not be the
optimal group for crafting rules for regular cases or determining how
courts should differentiate between regular cases and big cases.

Although state and local bar associations are certainly capable of initi-
at ing Subrin’s proposal, they will suffer some of the same diversity prob-
lems as the ALI and may also have difficulty obtaining acceptance in view
of their nonnational membership. However, if a local bar association suc-
cessfully crafts effective discovery guidelines, I am enough of a believer
in the marketplace of ideas to expect that their product would spread to
other regions.143 However, this sort of grass roots distribution method is
likely to be slow and ineffective. Consider the many local rules of court
on discovery. Although some rules have attracted considerable attention,

142. See Subrin, supra note 6, at 45.
143. For example, after Subrin’s presentation at the 1994 AALS Meeting, one commentator noted
that the Rochester, New York bar association was considering the adoption of some form of substance-
specific discovery. If this group successfully formulates useful guidelines, there is no reason that their
product could not eventually gain widespread acceptance.
such as the Southern District of New York's Local Rule 46 regulating the timing of types of interrogatories and the Central District of California's Local Rule 9 mandating that counsel meet and confer regarding discovery, those rules have neither become national in scope nor have they served to shape litigation practice as a rule promulgated by a body with a national constituency might.

Specialized or interest group legal organizations have considerable expertise in certain types of cases, yet they are almost always too partisan on their topics of expertise to gain widespread following, even if they are institutionally capable of drafting neutral and objective rules. Although having interest groups or specialized bar associations work jointly on discovery guidelines might reduce this difficulty, this joint approach seems to me less preferrable than a program which would obtain their expert input within the auspices of a respected national association. In addition, a joint venture of partisan bar associations may yield "sweetheart deals" which satisfy the lawyers' interests but not necessarily those of the litigants or society.

In my mind, this analysis leaves the ABA Litigation Section as the entity most likely to maximize the potential of Subrin's proposal. The ABA suffers from some of the same limits afflicting the ALI in that its members—and certainly its activists—are disproportionately part of the nation's elite bar. Lawyers who generally deal with bigger cases, work in bigger firms, or make more money are not necessarily unable to draft the sort of guidelines Subrin envisions, but the resulting product is liable to be better and better received if the working group is cross-sectional. Despite some lack of diversity, the ABA seems better suited to the task than the ALI. ABA membership is neither selective nor restricted. The ABA currently contains approximately 325,000 members. The ABA Litigation Section itself contains nearly 65,000 members. By contrast, the ALI has a current maximum of 3000 members. Any admitted lawyer can join the ABA while ALI members are selected after application, a process which requires the recommendation of two current ALI members. Conventional wisdom holds that much more of the ABA's membership includes "main street" lawyers, lawyers in sole practice, or lawyers in small firms.

Both the ALI and the ABA are, however, vulnerable to manipulation and slanted electioneering. For example, the ALI's consideration of its Principles of Corporate Governance was marked by what some observers regarded as an organized effort by some ALI members and corporate management clients to shape the outcome of ALI Meeting votes on the

144. See Telephone interview with ABA Public Information Officer (Mar. 9, 1994).
project. According to the anecdotal history of the Corporate Governance Restatement battle, a group of ALI members representing corporate management flew to the Annual Meeting, stayed only long enough to cast key procorporation votes, and then flew home. This is not the sort of deliberative, impartial assessment of legal policy the ALI Restatement process envisions. Nor should it be the way in which Subrin’s posited task forces determine presumptive discovery entitlements and limits. However, such manipulation is a danger whenever an organization acts.

Nonetheless, I am relatively confident that a special ABA Litigation Section task force, or group of substance-specific task forces, could impartially and fairly discharge the mission Subrin’s article articulates. My confidence stems in part from previous experience with a similar group, the Rule 11 Subcommittee of the Trial Practice Committee of the ABA Litigation Section, which drafted a balanced and useful set of guidelines for Rule 11 practice. This group met repeatedly during 1986-87 to craft guidelines which the full Litigation Section and ABA House of Dele-

146. When adopting its Restatements of the Law, the ALI votes upon each section of a Restatement, and on acceptability of the Restatement as a whole, at its annual meeting. Although any ALI member may attend the annual meeting and vote, my experience indicates that there is seldom more than 15% of the membership on the meeting floor for a particular vote. Consequently, a well-organized but unrepresentative subgroup of ALI members can “pack” the meeting during voting on a particular Restatement provision. As a result, this subgroup can affect approval or rejection of the provision, even though the opposite result might be favored by the entire ALI membership or the legal community at large. ALI membership divides into roughly one-fourth judges, one-fourth academics, and one-half private practitioners. In my opinion, under normal circumstances, the Annual meeting votes probably overrepresent the academics, whose schedules allow them to attend more frequently.

147. Several ALI members requesting anonymity have made such statements to me, but no private practitioner ALI member with corporate clients has confirmed such electioneering. Whatever the cosmic truth, many ALI academic and plaintiff counsel members seem to believe the votes were purposely packed.

I am not opposed to electioneering of this type as long as it is founded on vigorous ideological debate by members based on their actual views of an issue. I am unalterably opposed, however, to members of any other purportedly nonpartisan organization making substantive policy as a result of the electioneering of self-interested lawyers. Often these lawyers are attempting to get a better deal for their clients or to protect their personal interest, with no real consideration of the merits of an issue.

As far as I can tell, the battle over the Principles of Corporate Governance was pitched because of both ideological and practical divides. On the ideological front, conservatives wanted little or no legal restrictions on corporate form and operations, reasoning that market forces would reward good or efficient corporate behavior and punish bad or inefficient operations. Liberals wanted more legally imposed protection for shareholders and others who deal with corporations, contending that market forces alone would not provide such protection.

On the practical front, allies of corporate management wanted less legal regulation, thereby reducing the amount of litigation and liability that their corporate clients would face. Conversely, lawyers who profit from suing corporations wanted them to face heightened legal regulation and liability. In terms of voters, the practical corporate allies appeared to have greater numbers than did the practical corporate opponents. The ideological camps appeared more evenly divided.

gates subsequently approved and published in 1988.\textsuperscript{149} Courts and commentators have cited the resulting \textit{Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure (Guidelines)},\textsuperscript{150} and in my view, have constituted a very positive yardstick for interpreting the 1983-93 version of Rule 11. To the extent that the 1993 Rule 11 Amendment does not materially alter the prior Rule, the \textit{Guidelines} should continue to be influential. The format of the \textit{Guidelines} is to set forth a series of interpretative principles for Rule 11 including explanations and citations to illustrative cases and references to different or contrary approaches for particularly difficult or controversial matters. The reader of the twenty-page document can quickly learn a great deal about Rule 11 and its application in frequently recurring disputes. The \textit{Guidelines} also denote the ABA’s preferred approach to Rule 11 issues. In short, the \textit{Guidelines} document is a useful yardstick for applying Rule 11 and functions in many ways like the ALI Restatements.

Although small, the Subcommittee that drafted the \textit{Guidelines} contained a representative cross-section of private practitioners and law professors. The final product was a set of guidelines well within the mainstream of the litigation community’s attitudes toward Rule 11. The group was dominated to some degree (both numerically in terms of interest) by commercial lawyers from large firms, but the drafting committee contained a majority of law professors.\textsuperscript{151} Nonetheless, I do not think that the \textit{Guidelines}, as a whole, adopts a perspective favoring large firm clients, nor does it read like a law review article. It is practical, direct, and restricted to the limits of Rule 11’s language. Perhaps this occurred because many of the lawyer members represent both plaintiffs and defen-

\textsuperscript{149} See \textit{id.}

\textsuperscript{150} But they probably have not been cited as often as they deserve. My Lexis search indicated only 16 specific citations. See, e.g., Pelletier v. Zwiebel, 921 F.2d 1465, 1575 n.88 (11th Cir. 1991); Ueseman v. Ueselman, 464 N.W.2d 130 (Minn. 1990) (indicating that the \textit{Guidelines} were cited in support of the correct outcome).

\textsuperscript{151} \textit{Guidelines}, supra note 148, at 105. The Subcommittee was chaired by Alvin K. Hellerstein of Stroock & Stroock, and contained approximately 25 members from private practice and academia. \textit{Id.} Gregory P. Joseph, of the Fried, Frank law firm, not only chaired the Drafting Committee for the \textit{Guidelines}, but also served as the principal author. \textit{Id.} Mr. Joseph also wrote a book on the subject. \textit{See Gregory P. Joseph, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE (2d ed. 1994).} Other lawyer members of the Drafting Committee were Jerome Goikin of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.L. (Boston), and Standish F. Medina of Debevoise & Plimpton (New York). The academic members of the Drafting Committee included Professors Margaret A. Berger (Brooklyn Law School), Maurice Rosenberg (Columbia University), Georgene Vairo (Fordham University), Etie Ward (St. John’s University), and the author.

Of this group, Mr. Joseph was clearly the most influential in shaping the \textit{Guidelines}, and he invested the most time in the project. In my view, Mr. Medina was the second most influential. A group working on Subrin’s proposal would need members with more geographic and professional diversity than this group.
dants in litigation and are particularly thoughtful practitioners.

The full ABA Litigation Section did not merely rubberstamp the Subcommittee’s work. The Section gave the work substantial review, even reversing the Subcommittee’s view on a significant substantive point. Consequently, I find the ABA Litigation Section’s Rule 11 Guidelines an encouraging harbinger of how Subrin’s proposal might be implemented. However, by contrast to the Guidelines project which merely involved interpretation, Subrin’s proposal imposes a greater burden of decisionmaking on whatever group attempts to implement it. This burden, however, will fall on any group that seeks to determine the parameters of substance-specific discovery. The successes of groups like the ABA Litigation Section Rule 11 Subcommittee suggest to me that the ABA is the best organization to attempt to establish substance-specific discovery procedure. I suggest a task force initially devoted toward one important and problematic discovery area. If the task force is successful in this area, other task forces tailored to other subject matter areas should be convened. My own preference is to address job discrimination first. This area would test Subrin’s thesis adequately because it is significant in scope, tends to be divisive, exhibits judicial divergence in the caselaw, and can be complex.

I have chosen to analyze the ideal task force composition and process in the products liability context because this is the area where Subrin would prefer to begin. Ideally, an experienced litigator who has represented both plaintiffs and defendants in products claims would chair the task force. An alternative approach would use cochairs, one a noted plaintiff’s lawyer and the other a respected defense lawyer. Another possibility is appointing a respected judge as chair, although I do not advocate this alternative. First, practical problems with the judge-as-chair alternative exist. Judges are unlikely to want to take the time in response to a bar association call and may find it unseemly to be acting as chief point per-

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152. In its draft, the Subcommittee had taken the view that a legal paper, as long as it asserted a position with adequate factual or legal support, could not violate the “improper purpose” prong of the 1983 Rule 11 Amendment. The Litigation Section as a whole took the view that even technically meritorious positions could violate Rule 11 if they were interposed in order to delay, impose costs, or otherwise harass an opponent. Guidelines, supra note 148, at 121.

Since I was in the Drafting Committee minority on this issue, I was pleased to see the full ABA Litigation Section employ such close scrutiny, as well as reach this particular result. In retrospect, I can see how this issue illustrates the need to ensure that a study committee not be too heavily weighted toward the elite bar. Although I did not retain notes of the Subcommittee vote on the issue, I do remember that the majority view was carried largely on the strength of the vote of members from prestigious large firms. They took the position that a claim which was legally and factually sufficient should be immune from sanction, even if it was being used to leverage a weaker opponent. If the Subcommittee had more members who represent such weaker opponents, it might well have arrived at the position ultimately adopted by the full, and presumably more representative, Litigation Section.
son in reporting to a bar association and in defending task force proposals to the association. Second, a judge presiding at task force meetings is almost certain to limit the exchange of ideas, as even ordinarily dynamic lawyers with no shortage of ego defer with servility to the judge’s views. Although this danger remains to some degree so long as there are any judges on the task force, the stifling effect will be much greater where a judge is the task force chairperson.153

For example, the experience of some local Biden Bill committees was that judges rejected some committee suggestions out of hand and did not seem to take the lawyers seriously.154 However, at least the suggestions were made and pursued as a matter of public record. Where a judge chairing the task force opposes an idea, it is unlikely to receive the serious consideration it probably deserves. The task force reporter should be a law professor who has taught civil procedure, torts, or both. The committee should include two or three members each from large products defense firms, small products defense firms, large plaintiff practices, small plaintiff practices, and general practice firms. In addition, manufacturers and insurers should be represented either directly, through either executives or in-house counsel, or through lawyers who frequently act as outside counsel. The task force should also include representatives of broader interest groups such as the generally proplaintiff Public Citizen or the generally prodefendant Manhattan Institute. A few members from law schools or less partisan think tanks would round out the task force. The task force might be well served by including one or more members of the ALI Advisory Committee currently considering revision of Section 402A of the Restatement of Torts.

Ultimately, the task force should number approximately twenty-five persons, a number similar to the ABA Litigation Section Rule 11 Subcommittee and similar to the working committees of the Association of the Bar of the City of New York (in my experience, these working committees also consistently produce worthwhile and nonpartisan reports on legal issues). Undoubtedly, a bulk of the guideline drafting would fall on the Reporter who would work closely with a small drafting subcommittee. Additional task force members or law student research assistants could assist by exploring caselaw, much of which may lie below the surface of reported cases.

Before drafting, the task force would confer to identify issues, propose rough objectives and standards, and debate these matters, giving the Re-

153. Some of these dangers are reduced if a retired judge chairs the task force, although I remain hesitant to endorse this job profile for the mythical task force chair.

porter and drafting subcommittee essential guidance in formulating a working draft of discovery guidelines. Further consideration and task force discussion would refine the working draft. The Litigation Section would then approve the final guidelines and publication would make the guidelines widely available to the litigation community.

Of course, outlining this march to Nirvana is much easier than actually taking the trip. The task force, to make a useful contribution, would need to resolve certain issues such as the ordinarily relevant time period for product liability discovery. For example, should courts permit product liability plaintiffs to view five years of defendant records concerning the allegedly offending widget? More? Less? Once a rule of thumb is chosen, what must a plaintiff or defendant show to persuade a court to expand or contract the historical limits of discovery? What sort of evidence or argument should be persuasive? The same tough issues loom concerning the plaintiff’s work history and prior experience with the widget and like products, the defendant’s economic status and motives, and the scope of deposition practice.

The best means of providing guidance to the profession on these sorts of nuanced issues is probably a format fusing the ALI Restatements and the ABA Section’s Rule 11 Guidelines. I envision a successful task force articulating a set of clear discovery presumptions. The black letter portion of the task force report should also articulate the standard governing a court’s departure from the guidelines. An accompanying note should explain the rationale for the resulting rule. This note, or a separate “comparison with case law” section, should cite the rule in relation to decided cases or prevailing practices, identifying possible majority and minority approaches. The note should contain or introduce a separate illustrations section akin to the Restatement format wherein the task force discusses hypotheticals or anticipated problems, resolves the illustrations, and explains its rationale.

This type of product obviously cannot end difficult case-by-case discovery decisions. However, like the Restatements and the ABA Rule 11 Guidelines, it can make the court’s task easier and the results more consistent by providing guidance and reducing decision-making costs. In addition, its clarity and comprehensiveness should encourage more informal resolution of discovery disputes by setting a standard of reasonableness for both plaintiffs and defendants. If courts utilize the discovery guidelines, their informal influence will naturally increase. Unlike the 1993 disclosure/discovery amendments, the guidelines I envision will not merely urge lawyers to cooperate in broad terms and hope for the best; they will provide more concrete standards of proper discovery behavior and a ready means for judicial control over misbehaving lawyers.
IV. POGO’S REVENGE: REVIVING LAWYER PUBLIC-SPIRITEDNESS THROUGH ENSURED DIVERSITY AND PARTICIPATION

Perhaps the most famous bon mot ever delivered by a cartoon character is the aphorism of Walt Kelly’s Pogo that “we have met the enemy, and he is us.”\textsuperscript{155} Although the phrase is now so oft-used as to appear trite, it encapsulates nicely a substantial problem of the current litigation reform debate. The component neighborhoods of my posited litigation community are too narrowly focused and self-interested to work toward a fair and feasible set of reforms.\textsuperscript{156} Judges want a magic bullet that will keep them from being bothered by discovery and, for some odd reason, seem more attracted to managing cases than to adjudicating them. Lawyers want to take adversarialism to the brink for fun and profit without danger of sanction. Clients want fast, accurate, and fair dispute resolution but seem oblivious to the contribution of their own behavior to litigation problems.\textsuperscript{157} Policymakers also want accurate and fair resolution but are unwilling to pay the price by, for example, advocating expenditures to maintain a sufficient number of judges and well-supplied courts. Instead, Congress passes legislation like the Biden Bill, a law which essentially does nothing more than command judges and lawyers to try to fix the exaggerated problems of cost and delay through local action.

What, beside the obvious, is wrong with this picture? It illustrates a litigation community unable to rise above self-interest. It also gives a political, even partisan, spin to rulemaking. However, this spin is not genuinely pluralist in that it does not give fair representation to all parts of the community yet operates under the guise of a nonideological, objective approach to rulemaking and litigation reform. I recently suggested some relatively minor reforms in the rulemaking process that I believe will institutionalize more openness, broader representation, and more delibera-

\textsuperscript{155} See Walt Kelly, Pogo: We Have Met the Enemy and He Is Us (1972) (containing Pogo cartoon with this quote). According to Walt Kelly’s obituary, the quote was first used in an antipollution poster drawn by him in 1970. See Walt Kelly, Pogo Creator, Dies, N.Y. TIMES, Oct. 19, 1973, at 46. After its inaugural use during the early 1970s, the phrase quickly caught on, especially with politicians, who invoke it as an illustration of the need for Americans to face up to pressing policy challenges, but ironically fail to do so themselves. It has also made it into law reviews. See, e.g., Peter B. Edelman, Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet, 81 Geo. L.J. 1697, 1723-24 (1993); Laurence Tribe, Bicentennial Blues: To Praise the Constitution or to Bury It?, 37 AM. U. L. REV. 1, 6 (1987); Aaron Wildavsky, Comment, “Help, Ma, I’m Being Controlled by Inanimate Objects,” 65 S. CAL. L. REV. 241, 253 (1991).

\textsuperscript{156} See Stempel, Cultural Literacy, supra note 15, at 313-38 (making this argument in more detail).

\textsuperscript{157} See Milo Geyelin, Soaring Legal Expense: Motorola Bemoans It But Runs a Big Tab, WALL ST. J., Oct. 5, 1994, at A1 (large corporation active in efforts to streamline litigation spends more than $15 million on its own defense in one suit).
tive, less self-interested rulemaking. I now realize that to some extent, I was suggesting a fusion of two leading models of rulemaking while perhaps giving short shrift to an emerging third approach.

Most viewers of the rulemaking process, a group comprised largely of administrative law scholars rather than litigation experts, see three major schools of thought on rulemaking. The first is the substantively rational model. In this model, rules are regarded as something akin to problems to be solved. The rulemaker proceeds according to a semiscientific method by defining the task, articulating alternative means of addressing the task, calculating the costs and benefits of the alternative means, and then selecting the optimal alternative. The second school of thought is the "pluralist" model. In this model, rulemaking is not viewed as an apolitically rational process with objectively correct answers. Rather rulemaking is seen as an inherently political and distributional process in which choices must be made that tend to favor some elements of society at the expense of others. Under the pluralist model, these various elements compete to dominate the rulemaking process, making alliances and compromises along the way, and eventually resulting in rules that, if not universally acceptable, are at least seen as politically legitimate and controlling. The third school of thought is the civic republican model. In this model, rulemaking is seen as an alternating mixture of both the substantively rational model and the pluralist model. In deliberating about rules, rulemakers are urged to seek the optimally rational system consistent with political notions of the "common good" or "civic virtue."

One proponent of a civic republican approach to administrative law regards it as "embrac[ing] an ongoing deliberative process, inclusive of all cultures, values, needs, and interests, to arrive at the public good," which is seen as the fundamental purpose of democracy. Public good is not the same as majority rule. Rather, civic republicans, at least in theory, see

158. See Stempel, New Paradigm, supra note 18, at 659, 739-54.
159. Id. at 659, 748-50 (summarizing suggestions of incorporating this approach for civil rulemaking found in Laurens A. Walker, A Comprehensive Reform of Federal Civil Rulemaking, 61 Geo. Wash. L. Rev. 455, 484-89 (1993)); see also Colin S. Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 393, 409-21, 428-34 (1981) (describing the rational model and outlining areas in which it is appropriate for making policy in an administrative law context).
160. See Diver, supra note 159, at 413-21.
161. See Stempel, New Paradigm, supra note 18, at 751 & n.299.
162. See id. at 751.
166. See Poisner, supra note 163, at 382-88; Seidenfeld, supra note 165, at 1528-36.
167. Seidenfeld, supra note 165, at 1528.
the public good as distinct from the mere aggregation of private preferences. The relevant community deliberates over the issue at hand and reaches a conclusion. The conclusion may be a compromise or it may result from a given position ultimately proving persuasive even if it would not have enjoyed majority support on an initial straw vote.\(^{168}\)

Thus, civic republican deliberation to achieve consensus differs from negotiation to reach an outcome acceptable to all. Negotiation implicitly assumes a trade-off of private interests to arrive at a compromise. Deliberation involves an ongoing attempt at persuasion that has the potential to alter how all participants view the contested subjects of debate.\(^{169}\)

Even where consensus does not result, "the process of deliberation increases understanding of the positions of others and thereby facilitates outcomes that are accepted as closer to the ideal and hence more democratic and just."\(^{170}\)

Civic republican theory, even in pure form, has drawbacks in that it can be unduly dismissive of minority viewpoints that do not fare well in the deliberative process. Civic republicanism also has substantial practical weaknesses in that it presumes relative ease in defining the community and unrealistically smooth fairness and candor in the community’s deliberative processes.\(^{171}\) Consequently, one may question whether American rulemaking or politics should convert \textit{en masse} to the civic republican ideal. I am not assuming the burden of advocating complete, across-the-board republicanism in all aspects of litigation policymaking. Rather, I want to see a greater dose of republicanism in rulemaking fused with a more meaningful pluralism and a more rigorous substantive rationality.

One commentator suggests that to comport with republican theory, government policymaking must do three things.\(^{172}\) First, it must "engage in public discourse about whether the action will further the common good."\(^{173}\) Second, government policymaking must be accessible to the public.\(^{174}\) Third, it must treat any preference as legitimate until the deliberative process reveals it to be "inconsistent with universally shared norms

\(^{168}\) See \textit{id.} at 1529.
\(^{169}\) \textit{Id.} at 1529 n.89.
\(^{170}\) \textit{Id.}
\(^{171}\) See \textit{id.} at 1535-40. Although an advocate of the republican approach, Seidenfeld recognized its limitations or "pitfalls." \textit{Id.} For a more critical view of these pitfalls, see generally Stephen G. Gey, \textit{The Unfortunate Revival of Civic Republicanism}, 141 U. PA. L. REV. 801 (1993).
\(^{172}\) Seidenfeld, \textit{supra} note 165, at 1529-30.
\(^{173}\) \textit{Id.} at 1529.
\(^{174}\) \textit{Id.} at 1530.
of ethics or justice."175 Decisionmakers should evaluate the positions of participants in the political process by the persuasiveness of their arguments and not by the identity, status, or number of individuals supporting each position.176 In the end, reasonable members of the litigation community will probably find that the boundaries of these three schools of thought blur considerably. In a large, modern, heterogenous nation and litigation community, the republican deliberative process requires interest groups and institutionalized pluralism. Without these two ingredients, we will have no assurance that enough voices are being heard. However, the interest groups must play fair and be willing to deliberate honestly. Decisionmakers must play fair and be willing to listen with open minds. Compromise should be adopted where it is a substantively rational accommodation of the public good rather than where compromise is merely an acceptable tradeoff between politically powerful interests. Where consensus is unattainable, decisionmakers must make hard choices and subject such choices to the tests of reasoned judgment, political acceptability, and continued empirical evaluation.

The notion of rulemaking implicit in the Rules Enabling Act and as practiced by the Judicial Conference has historically been a notion of unstructured substantive rationality. The rulemakers act under an assumed regime of political neutrality and reflect over rules changes, but they act with insufficient rigor regarding public input, policy deliberation, the process of rulemaking, and the means for evaluating the efficacy of rules.177 Although I see civil litigation rules as political and distributional, I do not feel they are purely political nor do I feel that the rules should be partisan.

There are substantively rational right and wrong answers to many questions of how to structure and conduct civil litigation. Consequently, the basic Enabling Act framework remains viable if both the rulemaking institution and the litigation community undergo adjustments. The 1988 Amendments to the Enabling Act initiated many of these adjustments in a pluralist manner.178 These Amendments also opened up the rulemaking

175. Id. at 1531.
176. Id. at 1531.
177. See Walker, supra note 159, at 461-64. In particular, Professor Walker chides rulemakers for failing to acquire adequate information about rulemaking, failing to consistently assess the costs and benefits of new rulemaking early in the rulemaking process, and failing to self-consciously seek low cost rulemaking solutions which benefit society the most. Id. Walker's reliance on the cost-benefit/substantive rationality approach may be appropriate for administrative rulemaking. This is because administrative rules are designed primarily to regulate society. Litigation rules, on the other hand, are primarily designed to ensure that individual members of society receive their due under society's substantive laws. Consequently, a completely utilitarian calculation of cost and benefits is probably not appropriate for litigation rulemaking. Society should probably suffer some aggregate inefficiency to limit individual injustice. See Stempel, New Paradigm, supra note 18, at 750.
178. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642,
process to greater public participation and scrutiny.\textsuperscript{179} More institutionalized openness and participation is necessary, particularly at the early stages of the process.\textsuperscript{180} In particular, rulemakers should listen earlier, more closely, and more often to a wider spectrum of the profession. Thus, I must disagree with Dreyfuss, as she appears to agree that “too many cooks spoil the [rulemaking] broth.”\textsuperscript{181} My thrust, however, is not to further fragment the drafting or decisionmaking but to expand the inputs and early assessment available to rulemakers. More than cooks, I want many tasters before presentation of the rulemaking banquet.

In making rules of civil litigation (regarding pleading, pretrial disposition, or discovery), rulemakers and the larger litigation community should do more than analyze, listen, and debate. They should also seek a perspective useful to the entire litigation system. They should attempt to ensure that their choices of reform preferences are not solely the product of personal political preferences or seemingly objective rationality that unfairly treats some segments of the community.

They must take care not to plunge through the thin ice of their own proposals by overweighing the benefits and excessively discounting the costs of their own rulemaking preferences because of their own ideological fudge points. As corny as it sounds, they must work even harder than they previously have to identify the common good. In short, I am suggesting that, in testing Subrin’s proposed substance-specific discovery standards or any other rulemaking reform, a dose of civic republicanism be added to the basic framework of pluralist rationalism to which our civil litigation policymaking process currently aspires. Implementing, or even attempting to implement, Subrin’s proposal may provide a prototype for better rulemaking in the future.

\textbf{V. CONCLUSION}

Perhaps my own fudge points have led me to naively conjure up a representative and deliberative process that can never be achieved in the real world. Nonetheless, I find Subrin’s proposal exciting and worthwhile, not only for its potential to improve discovery practice, but also because it offers an opportunity to test a refined vision of civil litigation policymaking. By testing Subrin’s thesis in an open manner such as that outlined above, the unhappy Tolstoyian families that grumbled along to-

\textsuperscript{179} See Stempel, \textit{New Paradigm}, supra note 18, at 737-59 (suggesting that self-conscious analyses of perceived problems, and widespread input from the litigation community, precede draft rulemaking so as to avoid the inertia of a small group capturing rulemaking reform initiatives).

\textsuperscript{180} Dreyfuss, supra note 3, at 23-24.

ward the 1993 Civil Rules Amendments might yet find a constructive outlet for their energy, creativity, and even for their displeasure. Although few would see the 1990s as a golden age of civil litigation, we need not view the decade as a bleak expanse. Subrin’s notion of substance-specific discovery guidelines, created by integrative conversation within the litigation community, represents a most welcome opportunity for positive evolutionary change. This change might begin to halt the threatened devolution of litigation procedure and policy chronicled by Dreyfuss.