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NEW PARADIGM, NORMAL SCIENCE, OR CRUMBLING CONSTRUCT? TRENDS IN ADJUDICATORY PROCEDURE AND LITIGATION REFORM

*Jeffrey W. Stempel**

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INTRODUCTION

Two perhaps overworked illustrations originating in Chinese folklore aptly describe the current juncture of civil litigation. The first, "May you live in interesting times," a Chinese blessing that repeatedly pokes its way into prime-time television, has been more than fulfilled for those who follow American litigation practice and policy. The past quarter-century has seen virtually non-stop efforts to alter disputing practice, spawning a growth industry of both alternative dispute resolution ("ADR") and seemingly perpetual amendment of the Federal Rules of Civil Procedure ("Federal Rules"), spiced further by frequent congressional forays into the field. The "interesting times" blessing seems decidedly a mixed one, at least for lawyers who place a high value on stability.

Another popularized Chinese legacy is the similarity of the characters representing the western words "crisis" and "oppor-

tunity." Only a slight alteration of the writer's stroke changes the meaning of the symbol. Lawyers undoubtedly have a similar appreciation of the fine line between reform and chaos. Trained to view "reform" as a good word and an even better activity,¹ lawyers are also acquainted with the law of unintended consequences and the general theory of the second-best. Any reform effort is viewed as holding the potential for making things worse rather than better.

This Article assesses the landscape of litigation reform activity and the current political tension between continuing commitment to open access to the courts and a desire for faster, less expensive dispute resolution. It will also examine the state of the reform process but refrain from evaluating specific proposals.² Part I describes major recent and current activities affecting American litigation. Part II then analyzes current debates about litigation by identifying the leading schools of thought on both litigation practice and litigation reform. It attempts to situate current litigation issues in a broader inquiry: whether the perceived post-1938 consensus attending adjudicatory procedure and civil litigation reform has merely come unglued (in whole or in part) or, rather, whether it has been supplanted by a new consensus, a "new paradigm," reflecting an altered vision of the litigation process. Finally, Part III proposes a more integrated and deliberate method to govern civil litigation reform as a means of thwarting troublesome recent tendencies.

I. THE CURRENT STATE OF ADJUDICATORY PROCEDURE AND LITIGATION REFORM: INSTITUTIONS, IDEOLOGY AND ACTIVITY

To some extent, summarizing social history is reductionist. The very activity of condensing events in a sufficiently coherent form necessitates some oversimplification, even in lengthy descriptions. Any narrative of litigation change tends to leave

¹ See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and its Values*, 59 BROOK. L. REV. 931 (1993).

² I admit, however, to having opinions about the merits of particular recent reforms. See, e.g., Jeffrey W. Stempel, *Cultural Literacy and the Adversary System*, 27 VAL. U. L. REV. 313 (1993) (criticizing proposed disclosure rules and presumptive limits on interrogatories and depositions).

out, gloss over or minimize discordant data or inconclusive phenomena. But without such simplification, communicating the "gist" of an area is virtually impossible in anything less than a semester-long course or, even, an academic career. Some detail and precision are lost in the interest of imposing some order upon and explanation of the material. Yet, there remains the constant danger of producing an overly simplistic or misleading explanation.³ Notwithstanding this difficulty, a review of the litigation landscape permits some general observations.

A. *The Increasing Politicization of Litigation Issues*

One aspect of a possible new era is the increasing ad hoc activity of various interest groups, including the bench and the organized bar, primarily pursued through official organizations such as the Judicial Conference, the Federal Judicial Center, the American Bar Association ("ABA"), and the American Law Institute. Traditionally, of course, judges and lawyers have lobbied Congress and state legislatures for litigation change, as demonstrated by the saga of the Rules Enabling Act ("Enabling Act" or "Act").⁴ But, the legal profession's more recent "political" activity regarding litigation reform differs from the traditional model in several ways.

First, the participation of both groups, particularly the judiciary, has been more institutionalized. During the Nineteenth Century and the time of debate over the Enabling Act, the federal judiciary lacked today's infrastructure of an organized Judicial Conference, an Administrative Office and staff

³ Like any summary, my synopsis of changes in civil litigation practice and thinking can be attacked as insufficiently sensitive to the subtleties of the topic. For example, I posit that we recently have seen a trend toward greater legislative involvement in matters of litigation procedure. However, in sketching this picture of developments, I do not mean to suggest that Congress was inert about litigation matters prior to 1970. Obviously, the changes of which I write are matters of degree. Nonetheless, acknowledging this "nonabsolutism" of historical phenomena, I conclude that adjudicatory procedure and litigation policymaking have changed significantly during the past 15-20 years and continue in flux, prompting me to question whether we have crossed the metaphorical Rubicon and seen a paradigm shift in these two areas.

⁴ See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (describing the 60-year process of reform efforts, including 30 years of debate and lobbying culminating in the Act).

and a "policy think-tank" arm such as the Federal Judicial Center.⁵ The modern, more institutionalized judiciary displays both greater capacity to generate litigation proposals and increased ability to react to the initiatives of others, although neither trait ensures that the judicial establishment will succeed in persuading other policymakers about its policy views.⁶

I use the term "judicial establishment" to denote something of a power structure in the administration of these organizations that represent the bench. Although there are now approximately 800 federal judges,⁷ their individual influence on policymaking varies widely. Many, or perhaps most, judges have no direct impact because of inexperience, preoccupation with demanding daily activities, indifference, political marginalization or other reasons.⁸ A relatively small number of "insider" judges, however, seem to exert great influence, through their appointment to important positions in the judicial establishment, but also because of prestigious reputations or sustained activity in litigation reform.

Often, the traits of influence are cumulative: a judge of high reputation is active in litigation reform and is appointed to an official policymaking position. For example, William Schwarzer, a well-regarded district judge (Northern District of

⁵ The Federal Judicial Center ("FJC") was created in 1967 as the "research, development and training arm of the federal judicial system." See THOMAS E. WILLING, *THE RULE 11 SANCTIONING PROCESS* (1988) (description of FJC on book cover). The Chief Justice chairs the FJC Board of eight persons, including the Director of the Administrative Office and six judges elected by the Judicial Conference. See 28 U.S.C. §§ 620-29 (1988 & Supp. IV 1992).

⁶ See *infra* note 93 and accompanying text (regarding the Civil Justice Reform Act of 1990).

⁷ See ADMINISTRATIVE OFFICE OF U.S. COURTS, *ANNUAL REPORT*, Appendix (1992) (at close of 1991, 167 authorized appellate judgeships and 649 authorized district judgeships).

⁸ Individually and collectively, however, "average" judges affect litigation policy indirectly because the policymaking establishment responds to their application of rules and statutes, and their administration of caseload. In my view, though, this impact is as attenuated as it is undeniable. A rank-and-file judge rendering opinions and presiding over cases is simply not a true "player" in litigation policy even if some of her decisions are sufficiently provocative to affect reform debates. Recently, a well-known district judge expressed this view in stronger terms. "There is little that is democratic within the Third Branch. The Chief Justice, the Judicial Conference, and even committees thereof, regularly inform Congress as to the 'views of the judiciary' often without seeking the yeas and nays." G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1945 (1993).

California) appointed in 1977, has written frequently about hot litigation topics such as complex antitrust cases, Rule 11, summary judgment and discovery,⁹ and in 1990 was appointed Director of the Federal Judicial Center ("FJC" or "Center"). In addition to administering the FJC, Judge Schwarzer has used the Center as something of a bully pulpit from which to continue advancing his proposals, including most recently a proposed amendment to Rule 68 which would permit partial shifting of liability for counsel fees.¹⁰ Although he is not a member of the Judicial Conference Advisory Committee on Civil Rules, the Committee directed the Reporter to embody Judge Schwarzer's Rule 68 proposal in draft rule language that was widely circulated for informal comment during early 1993.¹¹ Similarly, other respected Judges such as former Harvard Law School professor Robert Keeton (District of Massachusetts, Chair of the Standing Committee on Rules) and former Yale Law School professor, Judge Ralph Winter (Second Circuit, former member of the Civil Rules Advisory Committee and current Chair of the Evidence Rules Advisory Committee) are, to use Orwell's memorable phrase but without suggesting Orwellian implications, much "more equal than others"¹² with regard to the judicial role in litigation reform.

Because membership in either an Advisory Committee or the Standing Committee result from appointment by the Chief Justice, the Chief plays a major but often overlooked role in the formation of litigation policy. Chief Justice Rehnquist, although at times scathingly critical of perceived Orwellian political power and social control,¹³ would presumably acknowl-

⁹ See, e.g., William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?* JUDICATURE, Dec.-Jan. 1990, at 178; William W Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989); William W Schwarzer, *Sanctions Under Amended Rule 11: A Closer Look*, 104 F.R.D. 181 (1985); William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984).

¹⁰ See William W Schwarzer, *Fee Shifting Offers of Judgment—An Approach to Reducing Cost of Litigation*, JUDICATURE, Oct.-Nov. 1992, at 147.

¹¹ At its May 1993 meeting, the Advisory Committee placed the Rule 68 draft on an informal hold pending further research regarding settlement practices in litigation. A significant expected source of such information is the Federal Judicial Center directed by Judge Schwarzer.

¹² See GEORGE ORWELL, *ANIMAL FARM* 123 (1946).

¹³ See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 219-20 (1979)

edge that his appointment power is quite a political one and carries with it substantial power to shape the litigation reform agenda through controlling membership on important committees. Similarly, his power to appoint the FJC director enhances his ability to shape the landscape of litigation. The Chief Justice, however is not all-powerful even in this domain. The Judicial Conference membership is comprised of the Chief Justice, the Chief Judge of each Circuit Court and one other judge selected from each Circuit; membership is not subject to the Chief Justice's control.¹⁴ Because the chief judge positions result in part from seniority, the Judicial Conference may differ in view from the Chief Justice to the extent that age and seniority differences reflect the influence of different presidents and appointment criteria. Although recently there have appeared to be no great divergences between the Chief and the Judicial Conference, there is at least some possibility of such tension as Carter appointees become Circuit Court Chief Judges while Nixon/Reagan appointee Rehnquist is Chief Justice. But the possibility of ideological clash may also have been reduced in the most recent Court transmittal of proposed amendments to Rules 11 and 26 through 37 (discussed in greater detail below) as the Court appears to have adopted a deferential standard of review in judging Judicial Conference referrals.¹⁵

The second difference from the traditional political model is that the profession's participation includes a greater percentage of both bench and bar despite the paradoxical prominence of a small group of influential insider judges. And although

(Rehnquist, J., dissenting from majority opinion holding race-conscious affirmative action plan to violate Title VII and comparing majority result to the oppressive happenings in George Orwell's *1984*).

¹⁴ See 28 U.S.C. § 331 (1988). The Judicial Conference also includes the Chief Judge of the Court of International Trade.

¹⁵ But, of course, the Judicial Conference proposals are unlikely to clash with the Chief Justice's preferences so long as the Conference does not substantially alter the proposals of the Advisory Committees, whose members are hand-picked by the Chief Justice. In practice, the relationship between the Conference and the Committees has been a mix of deference and conflict. For example, the Judicial Conference recently declined to approve an Advisory Committee proposal to amend summary judgment (or "judgment as a matter of law") Rule 56 and revised a proposed amended Rule 11 to make sanctions discretionary ("may") rather than mandatory ("shall"), but otherwise did not disturb substantial Committee proposals to change Rule 11 and the discovery process.

insiders may have great influence in the modern judicial establishment, many more outsiders can participate easily as compared to earlier eras. In 1988, the Rules Enabling Act was amended to increase the openness of the process by mandating formal periods of public comment prior to the formal referral of Federal Rules amendments to the Supreme Court.¹⁶ The typical path of an amendment to the Federal Rules begins with a proposal, either from within or without the Advisory Committee, and is followed by consideration, solicitation of informal comments, further review, referral to the Standing Committee, publication of the Rule for formal comment, at least one hearing on the proposed rule, reconsideration by the Advisory Committee and Standing Committee and then referral to the Supreme Court if the Rule is provisionally approved. The Court considers the rule change and, if it agrees, adopts the amended rule and transmits it to Congress no later than May 1.¹⁷ If Congress does nothing, the Rule becomes effective on December 1.¹⁸ Congress can act to alter the proposed amendment or disapprove it entirely.¹⁹

Rules Advisory Committee hearings are open to the public unless the Committee specifically enters an executive session.²⁰ Upon request, the Judicial Conference routinely provides the names, addresses and phone numbers of Committee members, who can be contacted directly by persons wishing to make a case for or against change.²¹ Although participation by

¹⁶ 28 U.S.C. § 2073(c)(1) (1988).

¹⁷ *Id.* § 2074(a).

¹⁸ *Id.*

¹⁹ *Id.* ("Such rule shall take effect . . . unless otherwise provided by law.").

²⁰ *Id.* § 2073(c)(1). At least one legal scholar made a point of sitting in on and following the Advisory Committee meetings crucial to reformulation of Rule 11 and analyzed the Committee's resulting product in a legal periodical well before the proposed change was referred to the Supreme Court. See Carl Tobias, *Reconsidering Rule 11*, 466 U. MIAMI L. REV. 855 (1992).

²¹ To be sure, the Committee members are under no obligation to take calls or read letters outside the "official" record of comments on a proposal. My point remains, however: Committee membership is not secretive and there is no *per se* ban on *ex parte* contact with individual Committee members. In fact, it appears from informal statements made by Committee members that they gather a good deal of information and make determinations based in part on their conversations with academics, lawyers or litigants. Although this process is not necessarily neutral (the Committee members, like everybody else, tend to talk to their friends, who tend to share similar experiences and views), neither is it restrictive. Part III, *infra*, suggests changes to make the Committee's database more evenhanded.

the profession's nearly 800,000 lawyers is not widespread, neither is it restricted. By comparison, the original drafting of the Federal Rules during the 1930s was a much more closed affair. A handful of prominent white male lawyers drawn largely from the Northeastern states was selected and deliberated in relative anonymity before producing a fully developed code of civil procedure.²² Although this group may have produced a set of rules favoring openness in adjudication,²³ there is no avoiding the essential elitism of the process.²⁴

Furthermore, the individuals and organizations providing input into the law reform process have become more diverse. Federal judgeships are no longer the exclusive domain of men of Northern European lineage, extracted solely from the prosecutor's office or the downtown law firms. The increased politicization of the post-Warren Court era has also brought greater ideological and political diversity to the bench, which varies according to the nominating President and home state Senators of the Judge. Consequently, the federal bench is less cohesive today regarding litigation issues. The composition of today's practicing bar and legal academy reflect similar changes. In particular, the activists and leadership of organizations like the ABA as well as state and local bar associations are a less homogeneous bunch. Socially and professionally, they are less linked to the bench and more likely to differ in opinion. "Special interest" lawyer's groups such as the American Trial Lawyers Association ("ATLA"), comprised of plaintiff's lawyers, and Lawyers for Civil Justice, a defense bar organization, have formed or expanded as well, bringing their respective substantive agendas to the field of procedure.²⁵

²² See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 498 n.20 (1986) (listing Committee members); see also, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

²³ See Resnik, *supra* note 22, at 498-502.

²⁴ As Stephen Subrin notes in his article and emphasized at his presentation during this Symposium, see Stephen Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993), the process that produced the 1938 Federal Rules—where a group of elite white male lawyers met quietly, revised litigation substantially and enjoyed immediate acquiescence—could hardly be repeated today, whatever the merits of the product. Today's law and politics demand more openness and deliberation among a larger segment of the profession and polity.

²⁵ I realize that many, particularly nonlawyers, regard any bar association as a

Third, the profession has become more chronically active and more "political" in its activity. In part this results from the larger bar infrastructure and the "special interest" bar groups just discussed. The more developed general and special interest bar groups provide their members with tools that encourage and enhance their political activity: publications, newsletters, lobbyists, researchers, hot lines, form letters, fundraisers, PACS and other trappings of the institutionalized political participant.²⁶ Even without these more consistent and greater resources for participation, however, the bar's attempts to influence litigation policy would likely have grown over the course of the Twentieth Century. During this time, Legal Realism revolutionized the profession's thinking about law, making it virtually impossible for thoughtful lawyers to regard litigation procedure and policy as completely divorced from the politics of substantive outcomes. Increasingly, courts were regarded as another arena for resolving social disputes and questions of public policy. Consequently, lawyers were forced to pay greater attention to litigation reforms and their potential political impact and to become more involved before the Rules Committees and Congress.²⁷

In addition, clients as well as lawyers have increased and

special interest group and, perhaps, even see the legal profession as a cartel. Although there is at least a grain of truth in that position, one can meaningfully distinguish between a general organization of lawyers and particularized organizations with express or obvious goals designed to benefit their more narrow membership or clients, often at a cost to other lawyers and their clients. These latter groups are by any definition more partisan than the ABA or similar state and local organizations.

²⁶ The bar's organized activity, however, was quite formidable even before the 1930s' inauguration of what I call the "open courts" paradigm. See Burbank, *supra* note 4, at 1050-90; Subrin, *supra* note 22, at 948-55 (describing ABA efforts to achieve Enabling Act). However, the bar association infrastructure was no match for the force of an energetic insider like Yale Law School Dean Charles E. Clark. See Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115 (Peninah Petruck ed., 1991) (describing Clark's successful efforts to persuade Supreme Court to merge law and equity procedure despite significant bar opposition).

²⁷ See, e.g., Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model*, in THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992, 393 (Russell K. Osgood ed., 1993) (describing growing strength and activity of bar associations in Massachusetts' eventual adoption of Federal Rules model of state civil procedure).

institutionalized their participation in the litigation policy process. In particular, the past twenty years have seen increased efforts of the business community and other substantive law interest groups to shape legal change, both substantive and procedural, for their benefit. Across the spectrum of interests ranging from the American Tort Reform Association (a manufacturers group seeking more favorable product liability laws) to the Leadership Conference on Civil Rights (a liberal group seeking to protect or expand civil rights laws), America's political actors have increasingly become involved in matters of litigation procedure.²⁸

B. *The Alternative Dispute Resolution Movement*

Accompanying the increased politicization of litigation issues has been frustration with litigation and the rise of the ADR movement. ADR is not new *per se*. For example, arbitration, the leading form of ADR, has been practiced for centuries and enforcement of arbitration agreements became national policy with passage of the Federal Arbitration Act in 1926.²⁹ But prior to the 1970s, ADR clearly took a back seat to litigation in several significant ways. First, ADR was primarily arbitration. Mediation, summary jury trials and rent-a-judge forms of ADR were relatively unknown.³⁰ Second, arbitration

²⁸ See generally Karen O'Connor & Bryant S. McFall, *Conservative Interest Group Litigation in the Reagan Era and Beyond*, in MARK P. PEFRACCA, *THE POLITICS OF INTERESTS: INTEREST GROUPS TRANSFORMED* (1992); ALLIANCE FOR JUSTICE, *JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN* (1993) (describing activities by politically conservative groups); Bess Bezirgan, *Assessing the Damage: 12 Years of Reagan-Bush Anti-Consumerism*, PUB. CITIZEN, Jan.-Feb. 1993, at 10. Standard news reports reflect the degree to which law reform has ceased to be a drawing-room pastime of the intelligentsia and has become part of the milieu of down-and-dirty politics. See Kathy Barrett Carter, *Divorced Dad Groups Unite to Target Judges*, NEWARK STAR-LEDGER, Dec. 5 1993, at A1; Jay Romano, *New Effort To Restrict Civil Suits Is Started*, N.Y. TIMES, Dec. 5, 1993, at A1.

²⁹ See Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 269-77 (1990).

³⁰ Although arbitration has long been the most prominent type of ADR, mediation has grown rapidly in the past decade, sufficiently so that the venerable American Arbitration Association ("AAA") has been forced to add and nurture a mediation division in order to accommodate demand and retain business vis-a-vis its competing ADR organizations. See Ellen J. Pollock, *Arbitrators Hear the Arguments for Mediation*, WALL ST. J., Apr. 28, 1993, at B1; see also Ellen J. Pollock, *Food*

was restricted largely to commercial actors making contract claims involving sales of goods, commodities or securities. Many thought arbitration clauses did not apply to statutory claims.³¹ Third, arbitration was viewed by many as second-class justice,³² a kangaroo court stacked in favor of the party that had insisted on the clause³³ or a ploy for gaining tactical advantage.³⁴

Although arbitration remained controversial and disfavored by a substantial number of courts and attorneys until the 1960s, the tide began to turn over the next two decades. In 1960, the Supreme Court strongly endorsed labor arbitration in the well-known *Steelworker's Trilogy*.³⁵ Then, in

Concerns Opt to Mediate, Not Litigate, WALL ST. J., Feb. 11, 1993, at B1. For descriptions of arbitration, mediation and hybrids, see JOHN J. COUND ET AL., CIVIL PROCEDURE ch. 15 (5th ed. 1989); STEPHEN GOLDBERG ET AL., ALTERNATIVE DISPUTE RESOLUTION chs. 2-5 (1985); Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); see also Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (criticizing summary jury trial ADR device); Stempel, *supra* note 29, at 263-69 (discussing differences between arbitration and litigation).

³¹ See, e.g., *Wilko v. Swan*, 346 U.S. 427 (1953) (refusing to enforce arbitration agreement in the face of investor's claim under the Securities Act of 1933), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (finding arbitration agreement inapplicable to statutory antitrust claims); *Miller v. AAACon Auto Transp., Inc.*, 434 F. Supp. 40 (S.D. Fla. 1977) (finding arbitration clause in conflict with Interstate Commerce Commission policy), *aff'd mem.*, 614 F.2d 292 (5th Cir.), *cert. denied*, 449 U.S. 918 (1980); *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184, 186 (3d Cir. 1930) (refusing to compel arbitration in patent claims). See generally Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1392-1414 (1991); Stewart Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981); see also Constantine N. Katsoris, *Should McMahon Be Revisited?*, 59 BROOK. L. REV. 1113 (1993); Norman S. Poser, *When ADR Eclipses Litigation: The Brave New World of Securities Arbitration*, 59 BROOK. L. REV. 1095 (1993).

³² See, e.g., *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 663-64 (1965) (Black, J., dissenting); *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963); *Wilko*, 346 U.S. at 435 (comparing arbitration and litigation and finding arbitration inferior).

³³ See, e.g., *Moseley*, 374 U.S. at 167; *Gulf Interstate Eng. Co. v. Pecos Pipeline & Producing Co.*, 680 S.W.2d 879 (Tex. Ct. App. 1984).

³⁴ See, e.g., *AAACon Auto Transp., Inc. v. State Farm Mut. Auto Ins. Co.*, 537 F.2d 648 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977); *Hellenic Lines, Ltd. v. Louis Dreyfus Corp.*, 372 F.2d 753 (2d Cir. 1967).

³⁵ See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S.

1967, it looked favorably upon arbitration clauses in sales contracts by requiring defenses to the contract's formation to first be presented to the arbitrators.³⁶ Beginning in the 1970s, the Court refused to apply domestic exceptions to arbitrability in international disputes.³⁷ Finally, in the 1980s, the Court declared the Arbitration Act to be substantive federal law rather than mere federal procedure, thereby requiring state courts to apply federal law and give deference to arbitration clauses in disputes connected to interstate commerce.³⁸ The Court also reversed field by permitting arbitration of some previously nonarbitrable statutory claims.³⁹

Although during this same period the Court sent mixed messages of a sort by holding some claims inapt for arbitration,⁴⁰ the clear overall thrust of federal court holdings during the past three decades was an increased respect for and deference to arbitration and, implicitly, other forms of ADR as well. Although one well-known case held that a court may not compel litigants to participate in a summary jury trial,⁴¹ the bulk of cases have given trial judges substantial discretion and power to require that lawyers and litigants participate in settlement efforts of all types, including mini-trials.⁴² In addition,

574, 582-83 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

³⁶ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

³⁷ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

³⁸ See *Southland Corp. v. Keating*, 465 U.S. 1, 10-14 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

³⁹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (holding, upon tortured contract interpretation grounds, that employee's Age Discrimination Act claims were subject to arbitration); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (reversing exceptions to arbitrability in cases arising under 1933 and 1934 Securities Acts). See generally Katsoris, *supra* note 31; Poser, *supra* note 31.

⁴⁰ See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284, 292 (1984) (holding arbitration proceeding inadequate for § 1983 action); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (holding Fair Labor Standards Act overtime wages claim exempt from arbitration); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding Title VII claims exempt from arbitration clause).

⁴¹ See *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988).

⁴² See, e.g., *Cincinnati Gas and Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903 n.4 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989) (finding that federal district courts have the power to compel a party to participate in a summary jury

1980s changes in Rule 16 during the last decade have generally codified increased discretion and settlement activity by judges.⁴³ Close to one-third of the federal district courts now have some type of court-annexed arbitration program in which relatively small cases seeking only monetary relief are arbitrated, with dissatisfied litigants permitted to seek trial *de novo* before the court.⁴⁴ Many state courts either use similar court-annexed arbitration programs for smaller claims for money damages or have similar mediation programs, particularly for family court matters.⁴⁵ Indeed, the ABA has published an *ADR Handbook for Judges*.⁴⁶

If nothing else, the growth of ADR activity and infrastructure in the private sector is convincing testament to the overall growth of ADR and its increasing role in dispute resolution in conjunction with litigation. The largest arbitration organization, the American Arbitration Association ("AAA"), has seen its case load steadily increase since 1970 to the point where it administers 60,000 cases per year; a number of competing organizations have started and grown.⁴⁷ Although the AAA is known primarily for its commercial and construction arbitration services, it also arbitrates a significant number of securities claims by customers, as do the New York Stock Exchange and other securities organizations that operate their own arbitration departments in order to process an increasing

trial); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275 (W.D. Wis. 1985), *aff'd*, 871 F.2d 648 (7th Cir. 1989) (finding that district court had authority to require presence of parties with full authority to settle case at settlement conference).

⁴³ See *infra* notes 61-63 and accompanying text (discussing recent amendments to the Federal Rules).

⁴⁴ See 28 U.S.C. §§ 651, 658 (1988); Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983); Paul Nejelsky & Andrew Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983). For criticisms of these programs, see Eisele, *supra* note 8.

⁴⁵ See GOLBERG ET AL., *supra* note 30, chs. 6-9.

⁴⁶ See STANDING COMMITTEE ON DISPUTE RESOLUTION, AMERICAN BAR ASSOC., *ALTERNATIVE DISPUTE RESOLUTION: A HANDBOOK FOR JUDGES* (1991). In another example of the ascendance of ADR, the Standing Committee recently was given full status as an ABA Section. See Robert D. Raven, *Your ABA Alternative Dispute Resolution Effort Underway to Form Section to Address ADR Issues*, 78 A.B.A. J. 112 (1992).

⁴⁷ Examples include Endispute, Equilaw and Judicial Arbitration and Mediation Services. See, e.g., STEPHEN P. DOYLE & ROGER S. HAYDOCK, *WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION* (1991).

number of claims each year.⁴⁸ Moreover, the AAA established a program for processing "large, complex" cases.⁴⁹

Mediation has grown in favor as well, making the Judicial Arbitration and Mediation Services, Inc. mediation program a major force in dispute resolution and forcing the AAA to pay greater attention to mediation activities.⁵⁰ In addition, other "private judging" services, which offer clients private trial or mini-trial adjudication in lieu of litigation, have emerged. In fact, private for-hire firms have begun to market themselves as providing a full array of ADR services.⁵¹

Another popular form of ADR is Early Neutral Evaluation ("ENE"), in which a lawyer not involved with the case gives the parties a frank assessment of the matter, hoping that the detached assessment will prompt the litigants toward settlement. ENE is part of the local practice of several districts and has been extensively used in the Northern District of California.⁵² Finally, the advent of "managerial judging" can be characterized as a form of ADR in which judges attempt to preside over the negotiation and settlement of a case through efforts at moral suasion backed by the possible use of adjudicatory power.⁵³ Although the precise boundaries between negotiation, mediation, arbitration and mini-trials are hard to fix, all are clearly alternatives to litigation that were far less important to the national dispute resolution picture twenty years ago.

In addition to ADR, whole categories of cases have been shifted from standard litigation to what might be termed alter-

⁴⁸ See Mark Weibel, *Federal Securities Arbitration: Does It Provide Adequate Relief?*, ARB. J., Mar. 1993, at 54, 57.

⁴⁹ Mark A. Buckstein, *AAA's Large, Complex Case Dispute Resolution Program*, ARB. J., Mar. 1993, at 12.

⁵⁰ See Ellen J. Pollock, *Arbitrators Hear the Arguments For Mediation*, WALL ST. J., Apr. 28, 1993, at B1.

⁵¹ For example, Symposium panelist Kenneth R. Feinberg's recently formed law firm seeks to provide dispute resolution services as well as "basic" legal services to clients and is an outgrowth of Mr. Feinberg's fame stemming from his service as a special master in Agent Orange and asbestos litigation. For some time, private dispute resolution organizations have been rendering ADR for profit. See GOLDBERG ET AL., *supra* note 30, at 284-310.

⁵² See JOSHUA ROSENBERG ET AL., REPORT ON THE EARLY NEUTRAL EVALUATION PROGRAM FOR THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (1992).

⁵³ See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) for a review of the literature on managerial judging.

native compensation or adjudication schemes. This can occur through Congressional imposition of a statutory claims processing scheme. Two prominent examples are black lung benefits⁵⁴ and vaccine liability legislation.⁵⁵ Another prominent illustration of *de facto* alternative handling of litigation occurs through bankruptcy reorganization, in which the court's power to withhold claims and consolidate matters, combined with scarcity of resources, permits imposition of a *sui generis* administrative law mechanism for handling claims. In the *Johns-Manville* bankruptcy, the court established such a mechanism for some asbestos claims, and in the *A.H. Robbins* bankruptcy, the court established an ongoing alternative negotiation/adjudication scheme for Dalkon Shield claimants.⁵⁶ Many have urged that Congress institute similar mechanisms on a global scale as a means of resolving mass tort litigation.⁵⁷

C. Current Reform Efforts

1. Civil Rules Amendment

As Rick Marcus notes in this Symposium, one can make a case that the mere existence of a Civil Rules Advisory Commit-

⁵⁴ See Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-45 (1988) (providing federal funds to those totally disabled by pneumoconiosis and to their eligible survivors). For an analysis of the program, see Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665 (1989).

⁵⁵ See National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10 to 300aa-34 (1988 & Supp. III 1991). Although the program allows families to pursue a lawsuit, it establishes obstacles to discourage litigation and contain incentives to participate in the plan. For a description of administrative claims processing procedures, see Burke Shartel, *DPT Victim's Presence at Hearing Assists Vaccine Injury Case*, INSIDE LITIG., May 1990, at 1, 3. For an analysis of the Act, see Mary B. Neraas, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149 (1988).

⁵⁶ See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617 (1992) (describing Trust Fund claims processing). The claims mechanism has been criticized as creating too many roadblocks to full court adjudication of claims. See RICHARD B. SOBOL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (1991).

⁵⁷ See, e.g., Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 542 (1984); Richard A. Schmalz, *On the Financing of Compensation Systems*, 14 J. LEGAL STUD. 807, 812-18 (1985) (proposing no-fault compensation system for mass torts).

tee would prompt excessive amendment to the Rules.⁵⁸ Yet the Advisory Committee existed for nearly twenty years in relative silence,⁵⁹ taking only two major substantive actions: the 1966 amendment to Rule 23 on class actions and the 1970 amendments to the discovery Rules, primarily Rules 26 and 34.⁶⁰ In the 1980s, however, the pace of Advisory Committee activity seemed to quicken, not only through actual changes in the Rules but also through an almost constant consideration of possible changes. To many who follow the Advisory Committee, it appears as though there is always at least one draft of a substantial Rule change informally being circulated for discussion. For example, the recently implemented changes to Rule 11 and the discovery rules (discussed below), are the product of approximately four years of activity including committee discussion, solicitation of comments and the drafts and redrafts of Reporter's and Committee proposals. The Advisory Committee may soon issue for public comment an amended Draft Rule 23 that was first embodied in a discussion draft in 1989 and, if successful, would not become a new Rule 23 until at least December 1, 1996. In a sense, the process has become perpetual: the Advisory Committee completes work on one possible Rules change only to pick up on another.

Moreover, these activities have not been mere spinning of metaphorical wheels. In 1980, amendments to Rule 26 empowered the court to direct that attorneys attend a discovery conference designed to narrow discovery issues and lead to agreement on a discovery plan and timetable.⁶¹ In 1983, Amended Rule 11 took effect, requiring that an attorney signing papers submitted to the court make a reasonable inquiry that the contents of the submission were well-grounded in fact, war-

⁵⁸ See Marcus, *supra* note 53, at 765-66.

⁵⁹ The Civil Rules Advisory Committee was permanently established in 1958 when legislation required a Standing Committee on Rules of the Judicial Conference in 1962. See Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 466-68 (1993).

⁶⁰ See Marcus, *supra* note 53, at 807-10 for a description of these changes, both of which generally liberalized access to courts and information, to the benefit of claimants.

⁶¹ See FED. R. CIV. P. 26(f), promulgated by the Supreme Court at 446 U.S. 996, 1004 (1980). Justice Powell dissented from the proposed amendments, arguing that they were only ineffective tinkering that did too little to attack his perceived real problems of discovery abuse and excessive discovery. 446 U.S. at 999.

ranted by existing law or supported by a good faith argument for the extension, modification or reversal of existing law.⁶² Simply by filing the paper, the attorney certifies that this standard has been met. As virtually every lawyer now knows, a finding of a Rule 11 violation subjects the offender to mandatory sanctions, including a fine or possible payment of the opposition's counsel fees incurred in defending the paper in question.⁶³ Rule 11 was so controversial that the Advisory Committee in 1990 issued a Call for Comments on the Rule from the bar, held a public hearing on amending Rule 11, and revised the Rule, which, in turn was revised further by the Judicial Conference and promulgated by the Court, and took effect on December 1, 1993. This version of Rule 11, discussed below, seeks to reduce substantially the perceived excessive use and unfair effects of the 1983 version of Rule 11. In addition to strengthening Rule 11 in 1983, the Advisory Committee in 1983 and 1984 considered proposals to revise Rule 68 to modify the traditional American Rule that each side bear its own counsel fees and to shift more fees liability to losing litigants.⁶⁴ Strong opposition from the bar prompted the Committee to withdraw these proposals from further consideration, although a variant of this approach was recently circulated for informal comment by the Advisory Committee.

In 1991, Rule 15 was amended to overturn the Court's 1986 decision in *Schiavone v. Fortune*,⁶⁵ which held that a complaint amendment correcting a misnamed defendant did not relate back to the date of the original complaint and, thus, was barred by a short state statute of limitations for defamation actions. In this same package of amendments, the venerable Rule 50 phrases "directed verdict" and "judgment n.o.v." were changed to "judgment as a matter of law," and Rule 45 was amended to provide that litigants may subpoena documents from a nonparty without the necessity of conducting an oral deposition.⁶⁶

⁶² See FED. R. CIV. P. 11.

⁶³ See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985). This was subsequently changed in the 1993 amendments to Rule 11.

⁶⁴ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Drafts of Proposed Amendments*, 102 F.R.D. 407, 432-37 (1984) and 98 F.R.D. 337, 361-67 (1983).

⁶⁵ 477 U.S. 21 (1986).

⁶⁶ 111 S. Ct. 813 (1991); see COMMITTEE ON RULES OF PRACTICE AND PROCE-

Although the spate of Advisory Committee activity and rate of amendment during the 1980s may have suggested that civil litigation was in flux, the 1993 Amendments, particularly those to Rule 11⁶⁷ and Rules 26-37,⁶⁸ confirmed that the rulemaking process had emerged from any period of calm it might have once enjoyed. The turbulence reaches even the Justices of the Supreme Court. On April 22, 1993, the Court transmitted the proposed Rules Amendments to Congress over three dissents and a most unusual separate statement by Justice White. Even Chief Justice Rehnquist's normally blasé transmittal letter is pregnant with material for discussion. In adopting the amendments, he wrote: "While the Court is satisfied that the required procedures have been observed, this

DURE, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (Apr. 1989) (Daniel R. Coquillette Rptr.) [hereinafter LOCAL RULES PROJECT]. During the 1980s, the federal judiciary also witnessed a proliferation of local rules. A 1988 study found more than 5000 such rules, many of which were at least arguably inconsistent with the Federal Rules and, thus, in violation of FED. R. CIV. P. 83, which permits local rules so long as they are "not inconsistent" with the national rules.

⁶⁷ The Amended Rule 11 transmitted to Congress by the Court relaxes the current rule by making sanctions for violation discretionary rather than mandatory, altering sanctions language to discourage fee-shifting and providing a 21-day "safe harbor" during which a challenged lawyer or party can withdraw an assertion without penalty before a court addresses the alleged frivolousness of the assertion. In addition, new Rule 11 alters the operative language concerning the factual and legal quality of the claim and ushers in with the new Rule 11 an Advisory Committee interpretative Note that generally cautions against the perceived excesses of application under the 1983 Amendment. *Reprinted In* 113 S. Ct. (Preface) at 657.

⁶⁸ A central feature of these amendments, which involve discovery, is found in Rule 26. The disclosure mechanism of new Rule 26(a)(1) requires that each side provide to the opposition—without request—the names of persons and copies of documents "relevant to disputed facts alleged with particularity." In addition, opponents must disclose insurance information (already made discoverable under former Rule 26(b)(2)) and an explanation of the method of computation of any damages claimed, including the provision of evidentiary matter bearing on the nature and extent of damages. Expert witness reports must be disclosed as well. Other changes in the discovery package of recent Amendments establish presumptive limits of 25 interrogatories per party and 10 depositions per side absent leave of court. *See* FED. R. CIV. P. 26(a)(2), *reprinted in* 113 S. Ct. (Preface) at 682-84 (proposed amendment). By requiring that a claim be pleaded with particularity to trigger disclosure, the intent of the Advisory Committee was that courts applying the new rule would use the standard of particularity enunciated in cases interpreting current Federal Rule of Civil Procedure 9(b), which requires that claims of fraud be pleaded with particularity. *See* Proposed Amended Rules 30(a), 33(a). *Id.* at 722-24. The parties can avoid seeking court approval through written stipulation or informal agreement to permit more discovery.

transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."⁶⁹

The transmittal letter suggests a highly deferential standard of review for proposed amendments received from the Judicial Conference. Justice White elaborated in his separate statement, a concurrence that sent conflicting signals. He began by summarizing the Rules revision process and the Court's historical activity in the area, including the frequent dissents of Justices Black and Douglas, contending that many Rules effected substantive changes in violation of the Enabling Act or the Constitution, a perspective Justice White characterized as a clear minority view in the Court.⁷⁰ He conceded, however, that Justices Black and Douglas may have been correct in criticizing the Enabling Act for giving the Court a role in promulgating Rules that it would later construe, or even consider for their constitutionality.⁷¹ But in ascertaining its own role, Justice White continued, the Court had concluded that "Congress could not have intended [the Court] to provide another layer of review equivalent to that of the standing committee and the Judicial Conference."⁷²

Addressing the standard of review followed by the Court in this instance, however, Justice White described two different, contradictory standards. He first described a standard akin to the rational relationship test used in constitutional law equal protection jurisprudence,⁷³ stating that the Court "should not perform a *de novo* review and should defer to the Judicial Conference and its committees as long as they have some ra-

⁶⁹ Letter of April 22, 1993, from Chief Justice William H. Rehnquist to Hon. Thomas S. Foley, Speaker of the House of Representatives, *reprinted in* 113 S. Ct. (Preface) 475, 477 (1993).

⁷⁰ *Id.* at 576 n.2 (citing Black-Douglas dissents).

⁷¹ *Id.* at 577-78.

⁷² *Id.* at 578. Justice White reasoned that a more searching review would be unduly time consuming, distracting the Court from its principal tasks, and unwise to the extent that it substituted the judgment of the more isolated Justices for that of practicing attorneys and judges dealing with civil rules on a daily basis. *Id.*

⁷³ See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 14.3 (4th ed. 1991) (describing rational relationship, strict scrutiny and intermediate scrutiny tests in equal protection cases); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-1 to 16-3 (2d ed. 1988).

tional basis for their proposed amendments.”⁷⁴ One sentence later, however, Justice White suggested that the Court’s scrutiny was not at all directed to the merits of the proposed Rules changes but focused only on whether the rulemaking process was tainted with corruption, stating that “the Court’s role . . . is to transmit the Judicial Conference’s recommendations without change and without careful study as long as there is no suggestion that the committee system has not operated with integrity.”⁷⁵ Finding no such corruption, Justice White sided with the Court majority in transmitting the proposed Rules to Congress.⁷⁶

In light of the language of the Chief Justice’s transmittal letter, the most likely conclusion is that the Court majority applied a “quick check for corruption” standard of review that focused only on fairness of process rather than a “rational relationship” standard of review directed toward the actual merits of the proposed rules changes. Nonetheless, the imbedded contradiction of the White concurrence gives the legal community a right to wonder exactly what the Court does think to be its role in the rulemaking process.

By contrast, in a dissent joined by Justices Thomas and Souter in opposition to the discovery amendments and by Justice Thomas as to Rule 11, Justice Scalia quite clearly viewed

⁷⁴ 113 S. Ct. (Preface) at 578-79.

⁷⁵ *Id.* at 579.

⁷⁶ Justice White also provides an interesting glimpse into the Court’s relatively *ad hoc* approach to this policymaking function when he states that the “proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.” *Id.*

Clearly, Justice White meant what he said about not giving the proposed changes careful scrutiny: there was available to the Court a large public record of written comments to the Advisory Committee as well as records of two public hearings. Justice White need not have speculated about the nature of criticisms heard by the Advisory Committee because he could have read the record.

Perhaps more troubling, however, is Justice White’s admission that he received and read what appear to be described as extra record, *ex parte* submissions on the matter to which proponents of the Rules were accorded no opportunity to respond. Obviously, rulemaking differs from adjudication. Thus, adjudication concepts of limits on contact with the Court and fidelity to the notion of a defined record do not apply strictly to rulemaking. But the process of enacting civil rules is similarly important, perhaps more so in that it affects persons well beyond the instant adversaries. Consequently, it is disturbing to think that a Justice might be influenced by letters that cannot be answered by those having a different opinion regarding a Rules change.

the Court's role as one of assessing the merits of proposed Rules changes, probably under an intermediate standard of review. Justices Scalia and Thomas saw Proposed Amended Rule 11 as unwisely softening the bite of the current rule at a time when frivolous litigation assertions continue to comprise a systemic problem meriting more rather than less deterrence.⁷⁷ Justices Scalia, Thomas and Souter deemed the proposed amendments to discovery Rules 26, 30, 31, 33 and 37 "radical" and "potentially disastrous." In particular, they disliked the additional layer of discovery practice provided by required "disclosure" under new Rule 26. They also saw the disclosure mechanism as undermining the traditional adversary method of civil litigation to the extent that it required counsel to do work on behalf of their opponents.⁷⁸ Additionally, the dissenters saw the discovery changes as "premature" in light of the Civil Justice Reform Act of 1990 ("CJRA" or "Biden Bill"), which requires that each federal district court craft a Delay and Expense Reduction Plan, thus endorsing a period of experimentation with discovery that could be thwarted by nationwide changes in the Rules.⁷⁹ Although Justice Scalia did his best to paint the changes in Rules 11 and 26 as irrational, even the harsh critics of the practicing bar, by and large, have not been that strident in their views.

Like Justice White's concurrence, Justice Scalia's dissent contains imbedded inconsistency. When criticizing the proposed new Rule 11, the dissent makes light of the bar's strong support of the proposed softening of the Rule and decade-long criticism of the 1983 Amendment, suggesting that attorneys can be expected to oppose any rule which limits their license to assert frivolous positions for client gain and personal profit.⁸⁰ Two pages later, however, Justice Scalia professes to be greatly influenced by the bar's strong opposition to the discovery

⁷⁷ *Id.* at 582.

⁷⁸ *Id.*

⁷⁹ *Id.* at 585; see *infra* note 93. In a provision added relatively late in the process, however, the discovery rules transmitted to Congress provided that the most controversial aspect of the changes—the disclosure mechanism—may be exempted to or altered by local rule, reducing the force of this objection to the rules. See Ralph K. Winter, *Foreword: In Defense of Discovery Reform*, 58 BROOK. L. REV. 263 (1992). For a discussion of the Civil Justice Reform Act, see *infra* notes 93-102 and accompanying text.

⁸⁰ 113 S. Ct. (Preface) at 583.

amendments.⁸¹ But presumably, lawyers should be as protective of any perceived license to conduct excessive discovery or stonewall as they are of any purported license to make frivolous claims. Yet the dissent provides no clue as to how the selfish, narrow-minded lawyers supporting a new Rule 11 became the insightful lawyers wise in public policy when opposing disclosure.⁸²

After holding hearings before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration, the House passed a bill (H.R. 2814) that would have removed the disclosure provisions of Proposed Amended Rule 26 and also the changes in Proposed Amended Rule 30 designed to facilitate audiotape recording of depositions, the latter an objective of the court stenographers. Despite its ease of passage in the House, the bill was not voted upon in the Senate due to the objections of Senator Howard Metzenbaum (D-Ohio), who refused to let the bill be considered by unanimous consent prior to the holiday recess.⁸³ Consequently, the new civil rules took effect December 1, 1993, as promulgated by the Supreme Court.

This episode demonstrates convincingly the importance of presumptions and process in rulemaking. Various entities opposed to disclosure worked hard to defeat it and appear to have enjoyed congressional support that was broad but not

⁸¹ To be fair to Justice Scalia, the dissent correctly notes that in addition to the bar, judges, litigants, academics and public interest groups were opposed to the new disclosure system and other discovery changes. *Id.* at 586; see also Griffin B. Bell et al., *Automatic Disclosure in Discovery—the Rush to Reform*, 27 GA. L. REV. 1 (1992) (criticizing disclosure); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is it Again Time for Reform?*, 138 F.R.D. 155 (1991) (same).

⁸² The unusual saga of these proposed rules changes continued in Congress. Opponents of the changes, particularly the discovery changes, vowed opposition and lobbied in apparent earnest. See Randall Samborn, *Derailing the Rules: Unusual Coalition Tries Last-Ditch Effort to Halt Civil Discovery Reform*, NAT'L L.J., May 24, 1993, at 1, 33 (describing coalition of product liability defense lawyers, manufacturers, civil rights groups, and plaintiffs trial lawyers opposed to changes, particularly disclosure mechanism); Richard B. Schmitt, *Lawyers Unite Against Plan to Speed Suits*, WALL ST. J., June 8, 1993, at B1.

⁸³ See Randall Samborn, *New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3. Apparently, Senator Metzenbaum was prompted to object by members of the plaintiff's trial bar, who thought it unfair to delete disclosure while still establishing presumptive limits on the number of interrogatories and depositions and the duration of depositions.

deep. Congresspersons apparently were happy to vote against disclosure but did not care enough to make it a top priority during Fall 1993. The anti-disclosure bill thus was vulnerable to being thwarted by a single senator when the Senate attempted to decide matters via a "unanimous consent" calendar in the waning hours of the session. Because the Rules Enabling Act sets the Court's promulgated rules as the "default" option (and these result from the Advisory and Standing Committees), the discovery rules were amended even though it appears that most of the bar and Congress opposed the amendments.

Even as the Rule 11-Disclosure controversy proceeded toward heated but uncertain denouement, the Advisory Committee has been hard at work on two proposals with similar potential for controversy. One is a major revision of Rule 23 governing class actions.⁸⁴ The new Rule would abolish the Rule 23(b)(1), (b)(2), and (b)(3) categories of class actions by making current categorization criteria part of a slightly revamped and expanded list of considerations for the court to use in exercising its increased discretion regarding class certification of a case. Only "willing" parties could be named as class representatives, thus effectively eliminating defendant class actions. In addition, judges would have greater discretion regarding the form and use of notice to the class. The other proposal is a possible amended Rule 68 which would import a bit of the English Rule into American litigation. It would permit fee shifting against a party to the extent that its result at trial is less favorable than a spurned offer of judgment but with fee shifting liability capped by the size of the judgment and (oddly in my view) no fees liability for a party that loses completely at trial.⁸⁵ Both proposals have been circulated for informal comment and the proposed amended Rule 23 has been "on the wire" in some form since 1989. Should the Judicial Conference and the Court eventually bring the proposed new Rules 23 and 68 to Congress, the current controversy over Proposed Amended Rules 11 and 26 would look less like an isolated episode and

⁸⁴ Telephone Interview with Professor Edward Cooper, Reporter of the Advisory Committee on the Civil Rules (May 6, 1993).

⁸⁵ The proposed change in Rule 68 is something of a trial balloon or discussion draft based on a suggestion made by Judge William Schwarzer in a recent article. See Schwarzer, *supra* note 10.

more like part of an ongoing trend.

2. The Civil Justice Reform Act and Other Congressional Activity

Congress has not been a completely silent partner of the judiciary in the formulation of litigation policy. In fact, in the area of substantive law Congress has been quite active, by reversing or modifying Court decisions—particularly regarding civil rights statutes—thought to be insufficiently sensitive to statutory rights.⁸⁶ Congress similarly enacted comprehensive copyright legislation in response to perceived problems of copyright infringement unremedied through litigation.⁸⁷ But in the area of procedural law, Congress has ordinarily been less active, usually deferring to the judicially led rulemaking process or responding to judicially initiated calls for statutory reform. For example, in 1990, following in part the recommendation of the Federal Courts Study Committee,⁸⁸ Congress enacted a new provision of the Judicial Code permitting a form of “supplementary jurisdiction” akin to what was previously known as “pendent parties” jurisdiction.⁸⁹

Even before the current ferment, however, there were notable exceptions to my posited world of a judicially centered mechanism of court reform. In 1956, Congress rejected an Advisory Committee proposal and discharged the Committee (ironically only to revive it in 1958). In the 1970s, Congress

⁸⁶ See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) (reversing or modifying nine recent Supreme Court decisions); Jeffrey W. Stempel, *The Rehnquist Court, Inertial Burdens, and a Misleading Version of Democracy*, 22 U. TOL. L. REV. 583, 657-61 (1991) (listing examples of congressional activity to strengthen Title VII, Title IX and the Age Discrimination Act).

⁸⁷ See Copyright Act of 1976, 17 U.S.C. §§ 101-914 (1988); Susan Shoenfeld, *The Applicability of Eleventh Amendment Immunity Under the Copyright Acts of 1909 and 1976*, 36 AM. U. L. REV. 163 (1986).

⁸⁸ Established by the Federal Courts Study Act of 1988, Pub. L. No. 100-702, 102 Stat. 4644 (1990), the Federal Courts Study Committee was a 15-member committee appointed by the Chief Justice charged with examining a perceived contemporary “crisis” in the Federal Courts and making a report of suggestions to Congress for improving the situation. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (Apr. 2, 1990).

⁸⁹ See 28 U.S.C. § 1367 (1990), *overruling in part* *Finley v. United States*, 490 U.S. 545 (1989) (holding pendent party jurisdiction unavailable).

substantially changed much of the proposed Federal Rules of Evidence transmitted to it.⁹⁰ It later intervened to revise habeas corpus legislation and, in 1980, directly revised Rule 37 to permit discovery sanctions against the United States Government.⁹¹ Also, it occasionally intervened on procedural matters for idiosyncratic reasons.⁹²

In 1990, however, with passage of the CJRA,⁹³ Congress thrust itself into the field of litigation policy and procedure in a manner regarded as unprecedented⁹⁴ by many and as unconstitutional by at least one prominent commentator.⁹⁵ The CJRA mandated that each federal court adopt a Delay and Expense Reduction Plan, utilizing advisory groups comprised of local lawyers, law professors, litigants or others. Certain "pilot" and "early implementation" districts acting by December 31, 1991, could receive special funding to assist them in delay and expense reduction, and all courts were required to adopt plans by December 1993.⁹⁶

Although most observers (including me) do not regard the Biden Bill as an unconstitutional infringement upon judicial policymaking autonomy, it remains a more significant intrusion on the judicial domain than generally seen in the past.⁹⁷

⁹⁰ See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

⁹¹ See Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 31-36 (1991); Walker, *supra* note 59, at 460-65.

⁹² For example, it appears that Sen. Daniel K. Inouye (D-Ha.) successfully amended a technical revision of Rule 35 to provide that psychologists be placed in the same status as psychiatrists for purposes of the Rule's system governing adverse medical examinations. Senator Inouye's daughter-in-law, it appears, is a psychologist. See Paul D. Carrington, *The New Order in Judicial Rulemaking: Factional Politics is Jeopardizing the Federal Rulemaking Process*, 75 JUDICATURE 161 (1991).

⁹³ 28 U.S.C. §§ 471-82 (1988 & Supp. II 1990). The CJRA is also known as the "Biden Bill" after Senate Judiciary Committee Chair Joseph Biden (Democrat-Delaware), its principal sponsor.

⁹⁴ See Marcus, *supra* note 53, at 800 ("For loosing unforeseeable forces, the Civil Justice Reform Act may have no peer; surely it has been greeted in apocalyptic terms."); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

⁹⁵ See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 424-38 (1992).

⁹⁶ For a more complete description of the CJRA, see Marcus, *supra* note 53, at 800-05; Mullenix, *supra* note 95, at 376-80, 385-96; Tobias, *supra* note 94, at 1395-1400.

⁹⁷ See Marcus, *supra* note 53, at 802-03; Mullenix, *supra* note 95, at 407-38;

In addition, the CJRA weighs in on behalf of one side of a litigation debate, managerial judging (discussed at greater length below), in that the Act works "to promulgate a national, statutory policy in support of judicial case management more extensive than what the current federal rules require."⁹⁸ Perhaps more tellingly, the legislation was accompanied by and contributed to a period of particularly strained rhetoric and relations between Congress and the Judiciary. Senator Biden's former chief aide took to the pages of a law review to mock the traditional deference to judges in such matters and the "near mystical reverence of the rule making authority exercised by the Judicial Conference."⁹⁹ Others in Congress, even those generally regarded as friendly to the judiciary, have made similar remarks.¹⁰⁰ At a recent Circuit Judicial Conference attended by Senator Biden and televised on *C-Span*, the tension between the Judiciary Chair and many of the judges was palpable and verging on the nasty.¹⁰¹

The friction between the two branches should not seem too surprising. The CJRA has made a substantial incursion into judicial turf, created additional work for the bench without guarantees of added benefits and put in graphic form a congressional assertion that federal judges border on incompetency in their judicial administration. Judges are symmetric in their disdain for legislators. As one judge said to Professor Robel, "[b]eing told you're inefficient by Congress is like being told you're ugly by a toad."¹⁰² Regardless of the accuracy of

Tobias, *supra* note 94, at 1402-13. One example, which tends to support Professor Mullenix's point of alteration of the Enabling Act by the CJRA and constitutional defectiveness, is the CJRA Plan for the Eastern District of Texas, which provides that the Plan supersedes any inconsistent local rules or the Federal Rules of Civil Procedure. *See* Tobias, *supra* note 94, at 1417.

⁹⁸ Mullenix, *supra* note 95, at 392. The Act specifically mandates that Delay and Expense reduction plans consider use of mandatory ADR and case management, including greater controls on the discovery process.

⁹⁹ Jeffrey J. Peck, "Users United:" *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 177 (1992), *quoted in* Marcus, *supra* note 53, at 802.

¹⁰⁰ *See infra* note 181 (describing the Comments of former Judicial Administration Subcommittee Chair Robert Kastenmaier (D-Wis.)).

¹⁰¹ Professor Joel M. Gora, Remarks at The Brooklyn Law School Civil Procedure Symposium (May 7, 1993).

¹⁰² *See* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 883 n.2 (1993).

either criticism, the relatively recent increase in judicial-congressional tensions seem undeniable.

3. Other Forces and Movements

To be sure, not all of the recent activity has been in the arena of legislative-judicial relations and civil rules amendments. The Judicial Conference has continued to place faith in the Enabling Act rulemaking model by reconstituting the Advisory Committee on the Federal Rules of Evidence, which had been disbanded after the drafting of what became the current Evidence Rules. The reconstituted Advisory Committee quickly turned to work on a possible revision of Federal Rule of Evidence 412 concerning the admissibility of previous sexual conduct, in part to permit the judiciary to comment on an issue likely to be addressed by Congress as part of Senator Biden's proposed women's rights legislation.¹⁰³ In addition, other elements of the legal profession have entered the procedural arena in a more direct way. For example, at its 1993 Annual Meeting, the American Law Institute approved a final version of its *Complex Litigation Project* which suggests a procedural blueprint for management of multi-party, multi-jurisdiction actions.¹⁰⁴ Included in the project are controversial provisions for transfer and consolidation of cases between state and federal courts as well as a proposed federal code for choice of law in complex cases.¹⁰⁵

¹⁰³ See The Violence Against Women Act, S. 11, 103d Cong., 1st Sess. (1993). The bill was substantially incorporated into the Senate version of the 1993 "crime bill." As this Article was finalized, congressional staff expected House-Senate conference committee consideration of the bill in 1994.

¹⁰⁴ The Project defines a complex action as one with multiple parties affecting multiple jurisdictions rather than addressing substantive legal complexity. As Professor Resnik has noted, see *Civil Litigation in the Twenty-first Century: A Panel Discussion*, 59 BROOK. L. REV. 1200, 1223 (1993), this is a potentially misleading notion of complexity, suggesting that large or repetitious cases are somehow more important than the thousands of one-party, one-state cases, many of them quite complex, in which litigants ask our judicial system for the same degree of commitment accorded other litigants. In addition to meaning "big" or "difficult," complexity can be defined on a number of bases. See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 1992 DUKE L.J. 1, 3.

¹⁰⁵ See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT §§ 5.01-.05, 6.01-.05, Append. A, B, C (Proposed Final Draft Apr. 5, 1993); Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623 (1992) (criticizing proposed statute). At the 1993 Annual Meeting, dissenters mounted a

Another important upheaval on the court reform landscape was the August 1991 publication of the "Quayle Report" and its aftermath. The Report, officially titled *Agenda for Civil Justice Reform in America* and authored by the President's Council on Competitiveness,¹⁰⁶ which was chaired by former Vice-President Dan Quayle, quickly became associated with Quayle and his repeated attacks on the legal profession, most prominently made at the 1991 ABA Annual Meeting¹⁰⁷ and in nationally televised debate with his 1992 opponent, then-Senator Albert Gore, Jr.¹⁰⁸ The Report briefly (and, according to the consensus of scholarly opinion, inadequately and erroneously) outlined its thesis that America was in the midst of a litigation crisis requiring dramatic action.¹⁰⁹ It then made fifty recommendations for change, approximately a third of which merely summarized the status quo,¹¹⁰ while another third were largely non-controversial.¹¹¹ However, some of the Quayle Report suggestions were decidedly controversial. For example, it urged that America adopt the English Rule requiring losing

serious but clearly unsuccessful challenge to the proposed Project choice of law criteria, proposing a more discretionary approach.

¹⁰⁶ See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AN AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991).

¹⁰⁷ See Randall Samborn & Marianne Lavelle, *Subsidiaries, Dan Quayle Dominate*, NAT'L. L.J., Aug. 26, 1991, at 3.

¹⁰⁸ See Robin Toner, *Quayle and Gore Exchange Sharp Attacks in Debate*, N.Y. TIMES, Oct. 14, 1992, at A1.

¹⁰⁹ See, e.g., Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244 (1992) (summarizing and criticizing Report); Milo Geyelin, *Quayle's Data in Proposed Reform of Legal System Called Misleading*, WALL ST. J., Feb. 4, 1992, at B7 (summarizing criticisms of Professor Marc Galanter and others). Although the Quayle Report has its defenders in Republican politics and the private bar, see, e.g., Gregory B. Butler & Brian D. Miller, *Fiddling While Rome Burns: A Response to Dr. Hensler*, 75 JUDICATURE 251 (1992), as a document the Report and its most drastic recommendations have enjoyed little or no support among the aggregate organized bar or the legal academy.

¹¹⁰ See, e.g., PRESIDENT'S COUNCIL, *supra* note 106, at 22 (Recommendation No. 11) (providing that punitive damages be granted only where claimant shows wrongful behavior by "clear and convincing evidence"); *Id.* at 20 (Recommendation No. 8) (requiring that summary judgment be granted if evidence available in pre-trial record suggests a reasonable fact finder could not hold for claimant after trial).

¹¹¹ See, e.g., *id.* at 15, 22, 23 (Recommendation No. 13) (proposing that judges manage cases to some degree); *Id.* (Recommendation No. 1) (stating that parties consider ADR in lieu of litigation); *Id.* (Recommendation No. 26) (directing that judges bifurcate liability and punitive damages phases of trial).

litigants to reimburse the winner's counsel fees.¹¹² It also suggested that any award of punitive damages be limited to the amount of compensatory damages.¹¹³

Although Quayle is now a private citizen and the Council on Competitiveness was disbanded in one of the first official acts of the Clinton-Gore Administration,¹¹⁴ the Report was as popular in many quarters of society as it was unpopular with the bar and legal academics. Former President Bush entered an Executive Order, not revoked by the Clinton Administration, implementing some aspects of the Quayle Report (primarily non-controversial ones) for Executive Branch departments and agencies.¹¹⁵ In addition, several legislators, most prominently Senator Charles Grassley (Rep.-Iowa), who was also a member of the Federal Courts Study Committee, have introduced legislation to implement more of the Quayle Report, including the controversial provisions on fee-shifting and punitive damages. Although the election of Bill Clinton drained much of the fuel from the Quayle-led movement, the conservative effort remains energetic and potentially triumphant depending on electoral outcomes in the 1990s. In any event, in addition to the Legislative Branch's involvement in procedure detailed above, the Quayle Report and related events have introduced a good deal of Executive Branch action into the procedural arena of litigation policy.

II. ATTITUDES TOWARD ADJUDICATORY PROCEDURE AND LITIGATION REFORM: HAVE PARADIGMS SHIFTED?

A. *Reformers vs. Preservationists*

Many lawyers view much of the recent and proposed change in civil litigation as regression rather than progress.¹¹⁶ Just as fervently, many in the profession argue that

¹¹² See *id.* at 24 (Recommendation No. 16).

¹¹³ See *id.* at 22 (Recommendation No. 11).

¹¹⁴ See Martin Tolchin, *Settling In: Rewriting the Rules; Last-Minute Bush Proposals Rescinded*, N.Y. TIMES, Jan. 23, 1993, at 10.

¹¹⁵ See Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991).

¹¹⁶ Stephen B. Burbank, *The Chancellor's Boot*, 54 BROOK. L. REV. 31 (1988) [hereinafter Burbank, *Chancellor's Boot*]; Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REF. 425 (1986) [hereinafter

only dramatic changes can correct perceived injustices and inefficiencies of the system.¹¹⁷ I will characterize the former group as "preservationists"¹¹⁸ and the latter group as "reform-

Burbank, *Abandon Ship*]; George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5 (1991); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35 (1988); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1 (1988).

¹¹⁷ See, e.g., E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986); Harry H. Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-85).

Of course, characterization of a viewpoint is as much an art as it is a science. Although I regard Professor Schuck as essentially praising the handling of the Agent Orange case, which departed substantially from the traditional bipolar litigation model (see, e.g., the criticism of the Court's treatment of plaintiffs who opted out of the class in Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986)), Judge Weinstein, who presided over the matter, views Professor Schuck as a critic, at least in part, of activist judging. See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 483 n.54 (1993) (citing PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1986)).

Critics of the litigation status quo often focus on both procedure and substantive law. See, e.g., PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991) (criticizing perceived uninformed and overly emotional juror assessment of tort plaintiffs' causation claims); Peter W. Huber, *Junk Science in the Courtroom*, 26 VAL. U. L. REV. 723 (1992) [hereinafter Huber, *Junk Science*]; Peter W. Huber, *Safety and the Second-Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985) [hereinafter Huber, *Second Best*] (criticizing trends in substantive tort law permitting greater recovery against manufacturers and merchants based on theories of strict liability).

¹¹⁸ Perhaps the most prominent preservationists are Professors Resnik and Fiss. See, e.g., Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Resnik, *supra* note 22. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603 (1985); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Both have written eloquently and frequently in support of the adjudicatory mode of adversarially administered litigation presided over by independent and active judges, and have on occasion specifically criticized proposed alternative forums or revisions of traditional litigation.

Some commentators are not avowed preservationists, perhaps because they are not civil litigation specialists, but their analysis and ultimate conclusions suggest membership in the preservationist camp. For example, Professor Michael Saks has been an eloquent critic of those who rush to judgment about litigation and its faults. See, e.g., Michael J. Saks, *Do We Really Know Anything About the Behavior*

ers,"¹¹⁹ hoping that both camps view the terms as rhetorically neutral. Obviously, the issues are more than bipolar and the opinions of lawyers more variegated than my caricature of "reformers" vs. "preservationists" might imply. Nonetheless, members of the bench, the academy and the practicing bar, as

of the Tort Litigation System—And Why Not?, 140 U. PA. L. REV. 1147 (1992); Michael J. Saks, *Ignorance of Science Is No Excuse*, 10 TRIAL 11 (1974). Saks's assessment leads him to dispute those who call for drastic and immediate "tort reform" and to skewer the Supreme Court for almost flippantly deciding that a six-person jury is no different than a 12-person jury, results that in the aggregate aid the preservationist cause. The same can be said of venerable jury defenders Professors Kalven and Zeisel. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1971); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); Hans Zeisel, . . . *And Then There Were None: The Diminution of the Jury*, 38 U. CHI. L. REV. 710 (1971).

¹¹⁹ Identifying clear leaders of the reformist movement proves more difficult, in part because the reformist champions have not as regularly taken their case to the pages of law reviews, perhaps because reformers have had more powerful pulpits available. For example, former Chief Justice Warren E. Burger was a consistent proponent of streamlined trials and alternative dispute resolution. See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982). Current Chief Justice William H. Rehnquist and Justice Antonin Scalia have argued repeatedly for limiting federal court jurisdiction. See Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming its Role?*, 24 AKRON L. REV. 393 (1990); Joseph R. Typbor, *An Appeal for Court Overhaul*, CHI. TRIB., Feb. 17, 1987, at 4.

Several prominent jurists have carried the reformist flag into both the law reform effort and legal periodicals. See, e.g., Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1652 (1985) (judicial system cannot afford to "retain any procedure that could conceivably increase the likelihood of a fair result" due to inherent delays accruing from additional procedure, which makes other litigants "unfairly" wait for adjudication of their claims); Robert Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 267-77 (1985); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135 (1978); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978); Winter, *supra* note 79, at 263.

However, the bench is not uniformly in the reformist camp, at least not on all issues. See, e.g., Posner, *supra* note 30, at 366. For an illustration of the occasional sharpness of disagreements between judges, see the exchange between Judge Eisele and Judge Broderick: G. Thomas Eisele, *From the Bench: No to Mandatory Court-Annexed ADR*, LITIG., Fall 1991, at 3; Raymond J. Broderick, *From the Bench: Yes to Mandatory Court-Annexed ADR*, LITIG., Summer 1992, at 3.

well as interested politicians and policymakers, have tended to fall into one of the two categories, and this rough division provides a fairly accurate picture of the philosophical battle currently being waged over civil litigation.

Despite their differences, these broadly defined groups seem to agree that the current era is one of near-crisis in civil litigation, although advocates of change see it as one of opportunity as well. Reformers want substantial change in the litigation system, reduced litigation volume, a net shift in disputes from litigation to ADR, reduced disputing costs and damage awards and faster determination of disputes. Preservationists, while not strictly opposed to these objectives (for who can oppose lower costs and faster resolution in the abstract?), fear that the reformist agenda will either create more problems than it solves or achieve its objectives only at the cost of reducing the accuracy and justice of dispute resolution.¹²⁰

I am not attempting to characterize with subtlety the positions of the profession regarding *particular* reform proposals. Rather, I wish to make the point that the profession tends to divide broadly into those that are encouraged by the seeming explosion of multi-sourced interest in changing litigation and those who view the multiplicity of reform proposals with some suspicion and merely as evidence of fragmentation rather than progress.¹²¹ To the former group, the variety of activity directed toward changing litigation can be viewed benignly as a "new paradigm"¹²² in which the system responds to perceived need for change through a variety of sources outside the traditional hierarchy of rulemaking and policy proposals by the judiciary. To the latter group, current developments seem to reflect a "crumbling construct" as the edifice of basic agreement about the litigation system breaks down under the relentless chipping away by so many critical sculptors.

Another apt typology for assessing the profession's current

¹²⁰ I confess to being more of a preservationist than a reformer, a bias that I hope does not skew my description of the reformist agenda and activities.

¹²¹ This perspective is succinctly captured by the title of Professor Stephen Subrin's paper for this Symposium: *Teaching Civil Procedure While You Watch It Disintegrate*, *supra* note 24.

¹²² See *infra* notes 164-98 and accompanying text (concerning the concept of dominant paradigms of an intellectual discipline).

attitudes toward reform was provided by Professor Edward Brunet, who has spoken and written of an efficiency camp, a justice camp and a discretion camp.¹²³ The efficiency group, like the reformers generally, argues that dispute resolution has become perilously slow and expensive. It urges as a solution changes in substantive and procedural rules and party-attorney incentive structures to achieve greater efficiency, which it defines largely as the faster processing of more cases with no increase in overall expenditures on the court system.¹²⁴ While the efficiency group, like other camps, exhibits a range of viewpoints, it is largely comfortable with the Quayle Report and the Biden Bill. By contrast, the justice camp opposes much of the Quayle Report as well as the tone of "speed and cost uber alles" that animated much of the advocacy for the Biden Bill. Similar to, if not congruent with, the preservationist camp, Brunet's justice group urges caution in any reform efforts lest the traditional rights of litigants to a full airing of their claims, including broad discovery and jury consideration, be lost or diminished too greatly.¹²⁵ Finally, Brunet's suggested discretion camp is something of a coalition of liberals and moderates attracted to efficiency and members of the justice camp willing to make some changes in the "open courts" adjudication model. The uniting thread of discretion holds for them the promise of more efficient flexibility by judges without *per se* limitations on the open courts adjudicatory ideal.¹²⁶

Ultimately, Brunet predicted, the discretion camp would prevail, with the justice team finishing a distant third in the race to control modern litigation policy.¹²⁷ He may have been correct. But the intervening impact of the CJRA, just passed when he wrote, and other developments, particularly the continued tension in congressional-judicial relations, suggest that although retaining its allure as a method of compromising or deferring policy questions, discretion is held in less esteem

¹²³ See Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273 (1991) [hereinafter Brunet, *Triumph*]; Edward Brunet, Remarks at Association of American Law Schools Civil Procedure Section Meeting, Washington, D.C. (Jan. 3-6, 1991).

¹²⁴ See Brunet, *Triumph*, *supra* note 123, at 277-81.

¹²⁵ *Id.* at 281-85.

¹²⁶ *Id.* at 285-96.

¹²⁷ *Id.* at 306-08.

than before, at least when exercised by judges. Of course, most of the efficiency-driven reform suggestions of local CJRA Advisory Groups and others depend heavily on case management and judicial discretion to implement proposed efficiency reforms. Whatever one's favored typology, the single near indisputable conclusion is that the legal profession and legal policymakers are less united in their vision of the "good" litigation system than they were thirty years ago.

B. *Attitudes About Adjudicatory Procedure And Attitudes Toward the Litigation Reform Process*

The possibility that the norms of litigation policymaking are being splintered or changed is of course related to the view (accurate in my judgment) that policymakers and the legal profession not only have limited access to adjudication for a variety of reasons,¹²⁸ but have lost their "faith" in the capacity or competence of the traditional adjudicatory model of dispute resolution. Professor Judith Resnik's prominent article¹²⁹ analyzed this development thoroughly some seven years ago and ensuing events have largely continued the trend. I could not improve upon her assessment but I will try both to update it in part and examine this tendency from a slightly different perspective, that of the purported nature of scientific revolutions. In addition, I want to focus on another aspect of the changing litigation *Zeitgeist*: the method by which adjudicatory procedure and other aspects of litigation are altered—the "law reform" mechanism so to speak. Thus, while Professor Resnik's article focused on changing attitudes toward traditional adjudication, I am also attempting to focus on attitudes toward the process of litigation reform itself.

The two areas are related but distinct. Adjudicatory procedure is the means by which particular litigation is administered. Litigation reform is the means by which aspects of the litigation process, including adjudicatory procedure, are altered, marginalized, reduced in importance, bypassed, elimi-

¹²⁸ See Resnik, *supra* note 22. see also Risinger, *supra* note 116, at 35 (noting "emerging consensus that federal civil procedure is in the midst of a counterrevolution" but observing that nature and impact of revision movement remains a matter of debate); Tobias, *supra* note 116, at 287-96 (same).

¹²⁹ See Resnik, *supra* note 22.

nated or changed. I am not only positing, as did Resnik, that the prevailing attitude toward adjudicatory procedure has changed toward a more restrictive view, but also that a previous consensus supporting relatively centralized, nonpartisan, orderly, deliberate and structured litigation reform has eroded or fragmented. As discussed further below, the "revolution," if that is the proper term, is more complete regarding adjudicatory procedure. The formerly prevailing "open access" model is increasingly viewed as a luxury society can no longer afford.¹³⁰ The success of my posited change in the political system's views toward litigation reform is less certain. Recent years have seen significant steps away from the "judicially centralized-deliberative" model but the status quo appears yet to be something less than a revolution or new order. Whether "new thinking" in litigation reform represents a new consensus or merely the rejection or erosion of the old remains in debate. Some preservationists see disintegration while others view recent reform efforts as a new paradigm of litigation thinking, a paradigm they dislike nonetheless.

Political consequences often accompany changes in intellectual attitudes and, in my view, modern civil litigation debates are no exception. For example, the previous consensus on adjudicatory procedure was more friendly to less powerful socio-political interests than is current sentiment.¹³¹ It is con-

¹³⁰ See, e.g., Elliott, *supra* note 117, at 321 ("Nourishing the fiction that justice is a pearl beyond price has its own price," arguing that managerial judging techniques are an evolutionary response of the judicial system to defects of the "open access" model of adjudicatory procedure).

¹³¹ This view is widely held. See, e.g., Risinger, *supra* note 116, at 35 (new ethos in litigation is viewed by some as "cynical movement to restore to defendants, particularly powerful, establishment 'repeat player' defendants, traditional procedural advantages they lost by virtue of the Federal Rules' emphasis on full disclosure and decision on the merits . . . [w]hatever the conscious motivation, . . . burdens flowing from recent changes in the system have fallen more heavily upon plaintiffs than defendants"); Weinstein, *supra* note 116, at 470 n.6 ("[i]t can be argued that the growth of a powerful plaintiffs' bar together with post-New Deal legislation in the mid-twentieth century constituted a major swing of a pendulum toward consumers' rights after a swing toward producers in the mid-nineteenth century"); accord MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 253-66 (1977) [hereinafter HORWITZ, TRANSFORMATION II]; see also STUART M. SPEISER, LAWSUIT 120 (1980) (widespread right to jury trial in most civil cases and widespread use of contingent fees by "entrepreneur-lawyers" significantly expanded plaintiffs' recovery in

siderably less clear whether the status quo of litigation reform is more or less hospitable to society's have-nots than was the previous construct. For reasons developed later in this Article, I conclude that, on balance, the new order (or disorder) in litigation reform, like the new order in adjudicatory procedure, weighs more in favor of the socioeconomically advantaged than did its predecessor.

C. *Paradigms and Procedure: The Nature of Scientific Revolutions and Their Applicability to Legal Change*

"Paradigm" has been one of the buzzwords of intellectual discourse during the past thirty years, the result of Thomas Kuhn's influential book,¹³² first published in 1962. Kuhn persuasively argued that in even the supposedly objective "hard" sciences of mathematics, chemistry and physics, the controlling conventional wisdom resulted in large part from the collective consensus of the profession's leadership rather than from any

tort).

Many of the recent and proposed changes in litigation have had or would have the net effect of providing less information (recent changes in Rules 26-37), fewer jury trials (the ADR movement, including mass use of arbitration clauses in contracts), more judicial supervision of juries or alteration of jury verdicts (expanded use of judgment as a matter of law), less use of the class action device against defendant classes or where only injunctive relief is sought against institutions (changes in Rule 23) and greater risk to litigants who challenge existing law or press claims viewed as dubious by the power structure (Rule 11). These developments are discussed in more detail at *infra* notes 278-81 and accompanying text.

As to the importance of attorney fee arrangements in the scheme of things, some developments have introduced more scrutiny and control of fees, see Vincent R. Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOK. L. REV. 539 (1988); Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41 (1991), while at the same time attorneys have been permitted greater freedom to advertise and compete, see *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), as law practice has become more commercial, marked by more mammoth firms. See MARC GALANTER & THOMAS PALEY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991). However, despite the emergence of "superstar" plaintiffs lawyers (e.g., Gerry Spence, Philip Corboy, Stanley Chesley, Melvin Belli) and their well-heeled firms (or fiefdoms), most of the growth in law firm infrastructure has occurred in firms that primarily represent substantial corporations and wealthy individuals, providing more of this economy of scale to litigation's traditional defendants. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

¹³² See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

pure immutability of particular findings and conclusions. In framing this inquiry for law, I use the term "new paradigm" to describe a potential shift in the controlling axioms governing the dispute resolution activity in the United States. Talk of a new paradigm or "paradigm shift" (the displacement of the prevailing paradigm with a new paradigm) in any field is intended by its defenders to evoke the notion of a fresh approach, one unmoored from the constraints of a flawed preceding system. The term has become so much a part of the lexicon of the pretentious that academics regularly make excessive use of the term, such as referring to their own scholarship as "paradigm-shifting" or looking down on the efforts of others as insufficiently revolutionary.¹³³

This pop-culturalization of Kuhn, in which this Article is, perhaps, a witting participant, not only says a good deal about the academic politics of law, but also illuminates how law and litigation both resemble and differ from the sciences (both physical and social). As one commentator observed in a different context, in legal theory "a little fact goes a long way. From the recognition that law is transmitted through words springs the school of 'law and literature.' From the fact that legal disputes involve the allocation of costs comes 'law and economics.'"¹³⁴ In similar fashion, the legal profession (practitioners and judges as well as academics) has a more hair-triggered response to new data than do our counterparts in other fields. The types of scientific revolutions Kuhn surveyed usually were built over decades or generations, even if the actual shift in the prevailing paradigm occurred within a matter of a few years.¹³⁵ Despite Arthur Vanderbilt's aphorism that "judicial reform is no sport for the short-winded,"¹³⁶ law reform or

¹³³ I realize that I make this statement based on largely anecdotal evidence. Most documentation of the subject is probably located in confidential promotion and tenure files but there are exceptions. For example, Professor Farber describes receiving a letter of recommendation that described a job applicant as someone who "would do 'extremely intelligent conventional legal scholarship' but was 'unlikely to be a paradigm-shaker.'" Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 929 n.54 (1986).

¹³⁴ See David Cole, *Against Literalism*, 40 STAN. L. REV. 545 (1988) (reviewing JAMES B. WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* (1985)).

¹³⁵ See KUHN, *supra* note 132, at 52-91.

¹³⁶ Quoted in William H. Rehnquist, *Seen in a Glass Darkly: The Future of the*

jurisprudential movements can arise and gather critical mass quite rapidly.¹³⁷

Some of the difference in the "response time" of science and law is both understandable and justified. The science discussed by Kuhn primarily concerns itself with decoding the laws of nature. Law seeks to shape and control society at least as much as to reflect or explain it. Consequently, lawyers have more freedom to "invent" their worlds, although much of the impact of Kuhn's book resulted because he made a convincing case that scientists do a good deal more inventing than is commonly supposed. In addition, law is a political institution as well as a learned discipline. As such, law, like any political institution, is expected to be responsive to public concern about perceived problems,¹³⁸ while science is given more insulation from the current social environment.¹³⁹

Whatever lawyers may say about the conservatism of their business,¹⁴⁰ they are fickle compared to scientists. A scientist

Federal Courts, 1993 WIS. L. REV. 1, 11. Arthur Vanderbilt was Chief Justice of the New Jersey Supreme Court and an active participant in efforts to reform judicial procedures.

¹³⁷ For example, restrictions on the addition of "pendent parties" (who could otherwise not properly be in federal court) to a lawsuit anchored in federal jurisdiction seemed well-entrenched despite academic criticism. See *Finley v. United States*, 490 U.S. 595 (1989) (rejecting pendent parties claim under very compelling circumstances); *Hutto v. Finney*, 437 U.S. 678 (1978) (rejecting pendent parties argument but holding open possibility of future application). Then, with great speed and little fanfare, Congress in 1990 enacted 28 U.S.C. § 1367, codifying the permissibility of pendent parties jurisdiction in federal question cases under the rubric of "supplemental jurisdiction."

As another example, legal movements such as Critical Legal Studies, Law and Economics and Feminist Jurisprudence began as challenges, even strident objections, to the prevailing conventional wisdom. Yet they obtained substantial (even if not always dominant) acceptance within only a few years. By contrast, scientists proposing alternatives to prevailing scientific theory were severely ostracized (even academics must admit that burning at the stake is worse than being denied tenure or promotion) and did not enjoy significant support among other professionals until the paradigm shift was nearly complete. See KUHN, *supra* note 132, at 71-91.

¹³⁸ But, once again, the line between science and law is not as bright as commonly assumed. For example, Kuhn notes that social conditions, particularly pressures for calendar reform, gave important support to the successful "Copernican Revolution" in astronomy. See *id.* at 153.

¹³⁹ Again, however, the statement must be qualified. When certain scientific activity intersects with current social issues, scientists may be quickly drawn into the political fray, as has occurred in varying degrees regarding issues of the beginning of life, genetic engineering, the painfulness of various forms of killing, and the safety of certain chemicals or drugs.

¹⁴⁰ See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 123-24

typically shows greatest fear of a "Type I error" (the erroneous acceptance of a purported theory, fact or relationship) and is more willing to accept a "Type II error" (erroneous rejection of a purported theory, fact or relationship).¹⁴¹ This is so because other scientists, as well as society, do not rely on erroneous rejection as they might rely upon an erroneously accepted theory; scientists therefore generally demand strong "proof" of a fact, rule or theory before accepting it. They reason that the costs of wrongful acceptance outweigh the costs of wrongful rejection, which are likely to be cured in the future by newer, better information or theoretical refinements. The consequences of the respective types of error are also arguably different in law, or at least in civil litigation. For example, the Type I error of an erroneous liability verdict against a manufacturer (particularly one with good insurance coverage) does not forever send legal knowledge down the wrong fork in the road and may be spread over an entire profitable industry. But the Type II error of an erroneous defense verdict generates greater remorse by leaving a badly injured claimant wrongly uncompensated.¹⁴² Of course in criminal law, we have made a different value judgment—that convicting a single innocent defendant is worse than acquitting scores of the guilty—and we therefore require the "beyond a reasonable doubt" standard (which minimizes Type I error) rather than the "preponderance of the evidence" standard (which minimizes Type II error).¹⁴³

(1982) (arguing that law generally has—and should have—a "retentionist bias" for the status quo).

¹⁴¹ Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385, 410-12 (1985) (noting scientific tendency to lower risk of Type I error by requiring greater confidence in experimental results before accepting inferences from the experiment).

¹⁴² Obviously, Type I errors in civil litigation, if bad enough or frequent enough, may have consequences more akin to the scientific community's feared acceptance of schlock theories: withdrawal of a socially useful product from the market; inability of manufacturers to obtain any affordable insurance; and, bankruptcy of a useful firm. Notwithstanding this, my point remains: in most individual civil cases, a Type I error must be very egregious and of great magnitude even to begin to rival the consequences of Type I error in science.

¹⁴³ The legal profession is hardly uniform on this point, however. For example, judges have often required a claim to be probabilistically probative in order to permit recovery. See *Palmer v. Schultz*, 815 F.2d 84 (D.C. Cir. 1987); *In re Agent Orange Prods. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985) (claim of John Lilley); see also *In re Agent Orange Prods. Liab. Litig.*, 611 F. Supp. 1233, 1230, 1260 (E.D.N.Y. 1985). Prominent scholars have criticized this view. See Nesson,

The lawyer's conservatism, although strong, yields more readily than the scientist's to external demands and political considerations not strictly related to the "truth" or accuracy of a proposition.¹⁴⁴ Kuhn compares political and scientific revolutions, and suggests they are more alike than commonly supposed. But because the discipline of law is not entirely a science, Kuhn's overall thesis about scientific revolutions cannot be applied to legal change.¹⁴⁵ Nonetheless, Kuhn's analysis can provide an instructive analogy for assessing the current state of the profession's attitudes toward civil litigation. Kuhn described the period of a paradigm's dominance in a field as an era of "normal science"—the time between revolutions in the discipline. He posited several characteristics of the normal science of a controlling paradigm:

- 1) It attracts an "enduring group of adherents away from competing modes" of thought in the area;
- 2) It is sufficiently "open-ended to leave problems to solve;" and
- 3) Students of the discipline study the dominant paradigm in order to become members of the scientific community.¹⁴⁶

In addition, Kuhn posited that the prevailing paradigm theory must be perceived by the community as "better than its com-

supra note 117 (criticizing *Agent Orange* decision); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Accountability of Verdicts*, 98 HARV. L. REV. 1357 (1985); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971) (trial outcomes involve social values in addition to and more important than strict accuracy); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988) (criticizing *Palmer*, 815 F.2d at 84.).

¹⁴⁴ In fairness to my chosen field, I again emphasize that these differences are matters of degree. Scientists of course respond at some point to social forces and may be chronically "politicized" in some ways because of the importance of obtaining grants, gaining fame, preserving status or making money. See, e.g., Ron Wislow, *Conflicting Amoxicillin Studies Set Up Bitter Dispute*, WALL ST. J., Dec. 24, 1991, at B2.

¹⁴⁵ See KUHN, *supra* note 132, at 160-91, discussing the nature of a scientific community, particularly natural science communities and the impact of that structure on the discipline's potential for "progress." Kuhn posits that the seemingly more linear advances of the natural sciences stem in significant part from their relative isolation from real world pressures; e.g., social scientists (and presumably legal scholars) feel a need to study important or controversial phenomena while hard scientists study what they find interesting or the logical "next step" in a problematic area.

¹⁴⁶ *Id.* at 10.

petitors."¹⁴⁷ Further, in times of normal science, practitioners of the discipline gain stature in the profession through success in solving the acute problems in the interstices of the prevailing paradigm.¹⁴⁸

According to Kuhn, the essence of professional activity during a period of paradigm hegemony is the application of the controlling paradigm to new problems and facts. In particular, Kuhn saw normal science as engaging in three distinct sorts of factual investigations:

1) The determination of significant facts—important data for better understanding of the paradigm and its application. Significant fact research attempts to increase the scope and accuracy of factual knowledge considered well-revealed by the existing paradigm;

2) The matching of facts with theory—testing the paradigm against the world (or the world against the paradigm). Matching research gathers information to determine the extent to which facts are consistent with theory; and

3) Articulation of theory—the interpolating or extrapolating of the prevailing paradigm to encompass more of the discipline's world. Articulation research seeks to refine the dominant paradigm by resolving ambiguities or using it to solve additional problems in the field.¹⁴⁹

Traditional legal scholarship prior to the mid-1970s fit the Kuhn model in many respects: it assessed case law and doctrine, identifying more precisely the degree to which legal outcomes support or diverged from theory. It also attempted to square particular subfields or lines of case law with the prevailing theory. And, like Kuhn's natural normal science, it eventually may have undermined the prevailing paradigm by suggesting it failed to solve problems, diverged from reality, or created undesirable side effects (both social as well as intellectual in law).

Law is more receptive to paradigm shifts in that its different mission, mixed social and intellectual role and different approaches to error costs make law a tinderbox for new ideas,

¹⁴⁷ *Id.* at 17.

¹⁴⁸ *Id.* at 23.

¹⁴⁹ *Id.* at 27, 34.

which spread rapidly and make significant inroads into at least some influential quarters where the environment is supportive. The acknowledged absence of objective, rock-solid "truth" in law makes it more tolerant of other voices. New schools of thought need not eradicate their predecessors to succeed. A substantial amount of co-existence over a long period is not only possible but normal.¹⁵⁰ At the same time, this chronic fragmentation¹⁵¹ of the legal profession makes it harder for a new paradigm to obtain dominance. If nothing else, it is harder to determine whether a paradigm shift has occurred and when it took place.¹⁵² More important, the paradigm shifts in law generally will be less complete than those of the sciences. For example, in this Article, I posit that the profession has shifted to the verge of displacing the "open access" paradigm of adjudicatory procedure with a restricted view. Even if this is true and the restrictive paradigm continues to climb, it will never have the complete success of a Copernican Revolution or the shift from Newtonian physics to Einstein's relative physics.

Within narrower areas of law, however, it seems possible

¹⁵⁰ Scientific paradigms can compete for long periods, *see id.* at 136-59, but I think it wrong to consider these battles, no matter how gentle, as co-existence. For example, a physicist in good standing during the early Nineteenth Century could not believe that light was both made of waves and made of particles. A Twentieth Century lawyer can endorse both feminist and CLS views or may apply economic analysis and formal legal doctrine to a civil rights dispute. As the discussion below suggests, much of the current debate in litigation and other areas of law derives from long-standing differences between formalism and realism, both of which have continued to have legitimate status in the mainstream legal community.

¹⁵¹ As one author has noted, the mainstream of law is so wide that both Robert Bork and Ronald Dworkin are considered to be within it. *See* Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 766 (1987). Although there are of course professional differences in the more scientific fields, it is hard to imagine a similar range, as though the medical profession had prestigious camps of practitioners who advocated faith healing irreconcilable with the views of other doctors.

¹⁵² *See* KUHN, *supra* note 132, at 150-60. He posits that paradigm shifts occur both from generational changes (younger scholars more receptive to the new paradigm ascend while stalwarts of the old paradigm die out), and from convincing opinion leaders of the community to switch allegiances.

The role of power and opinion leadership is probably more formidable in law because the indeterminacy of the discipline makes it more difficult to refute completely the opinions of the profession's leadership. *See* Subrin, *supra* note 24, at 1156-58 (positing that 1976 Pound Conference marked beginning of sea change in civil procedure).

to speak accurately of revolutions in the world view of the lawyer-specialists who dominate the respective area. For example, Brainerd Currie's writing on the conflict of laws¹⁵³ dramatically shifted the intellectual establishment's focus away from physical contacts formalism, particularly *lex loci delicti*, and placed government interest analysis at the center of modern conflicts analysis (at least by scholars if not all courts). Passage of the Civil War era constitutional amendments can be viewed not only as a major redrafting of the Constitution, but also as a complete shift in thinking about federalism and individual rights, or at least they became so in the hands of the post-New Deal Supreme Court. The advent of strict liability or the fall of the citadel of privity¹⁵⁴ can be seen as mini or micro paradigm shifts in tort law.

In much the same way, changes in litigation practice can be deemed paradigm shifts by those inclined to see such shifts. However, in my attempted analogy to Kuhn, I suggest that lawyers be careful not to dilute overly his concept. Before declaring a revolution or counter-revolution, we should "hold out" for evidence of a major change more like the Copernican Revolution and less like a change in the doctrine of official immunity for judges. Of course, in attempting to apply Kuhn's thesis to litigation, strict comparability is impossible. Certainly, my posited new orders in adjudication procedure and, perhaps, in litigation policymaking do not appear to meet the dictionary definition of a paradigm as "an outstandingly clear or typical example or archetype."¹⁵⁵ It may, come closer, however, to Kuhn's notion of a paradigm as a central bundle of axioms establishing the operation of a field of inquiry. Although many observers view current eclectic efforts to revise civil litigation as indicating only confusion and not the emergence of a new central organizing principle.

Kuhn's thesis is often cited as an example of our inspira-

¹⁵³ See BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

¹⁵⁴ See, e.g., HARRY W. JONES ET AL., LEGAL METHOD 132 (1980); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 96 (5th ed. 1984). Compare *Thomas and Wife v. Winchester*, 6 N.Y. 396 (1852) with *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916) (court moves away from imposing privity as a basis for liability and instead determines liability based on a theory of negligence).

¹⁵⁵ See WEBSTER'S NEW COLLEGIATE DICTIONARY 823 (1981).

tion for critical or post-modern thought,¹⁵⁶ including modern legal pragmatism.¹⁵⁷ Too often, in my view, Kuhn is cited for the proposition that science or knowledge is whatever a critical mass (no pun intended) thinks at the moment.¹⁵⁸ Although Kuhn's book is influential precisely because it rejected the view that knowledge was divinely decreed, his picture of scientific and social change strikes me as considerably constrained, albeit socially constructed. Kuhn identified himself as traditional in large part by stating that "[o]bservation and experience can and must drastically restrict the range of admissible scientific belief." However, "[a]n apparently arbitrary element, compounded of personal and historical accident, is always a formative ingredient of the beliefs espoused by a given scientific

¹⁵⁶ See, e.g., Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 275, 307 (1992) (describing Kuhn as postmodern in approach). Quite to the contrary of this view, my colleague Gary Minda views Kuhn as essentially modern rather than postmodern in his thought because, despite his recognition of the importance of social context to the emergence of "truth," Kuhn paints epistemology as an essentially linear path of progression to more accurate or sophisticated paradigms that enjoy widespread support among professionals and society at large. In contrast, postmodern thought generally sees less cohesion in this regard. See Gary Minda, *Jurisprudence at Century's End*, 43 J. LEGAL EDUC. 27 (1993) [hereinafter Minda, *Jurisprudence*]; Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COL. L. REV. 599 (1991).

¹⁵⁷ See, e.g., Peter C. Schanck, *Understanding Postmodern Thought and its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2539 n.132 (1992) (describing Kuhn's book as "monumentally important work" and suggesting it was a "strong influence" on neopragmatist thinking of Professor Stanley Fish, who in essence concludes that meaning assigned to text (literary, statutory, judicial, etc.) is not immutably provided by language itself but by the meaning attributed to language by the relevant community of reader-critics). See generally STANLEY E. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989); STANLEY E. FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) [hereinafter FISH, *IS THERE A TEXT IN THIS CLASS?*]. For variants and criticisms of the Fish viewpoint, see Peter Brooks, *Bouillabaisse*, 99 YALE L.J. 1147 (1990) (reviewing STANLEY E. FISH, *DOING WHAT COMES NATURALLY*); Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

¹⁵⁸ The tendency both to oversimplify Kuhn (in ways other than I am oversimplifying him) and identify him with a raging, standardless relativism is akin to the tendency of some conservative commentators to caricature current liberal initiatives in order to debunk the straw man they have erected. See, e.g., ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991); CHARLES J. SYKES, *PROF SCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION* (1988).

community at a given time.”¹⁵⁹ Once hegemonic, the prevailing paradigm sets the parameters of inquiry in a particular discipline, in part because professional education is “both rigorous and rigid.”¹⁶⁰ Under this regime, what Kuhn called normal science goes forward.

Although it has long been unfashionable to label law a science, as did Langdell and other practitioners of “mechanical jurisprudence,” the similarities between the legal and scientific¹⁶¹ professions and the potential applicability of Kuhn’s thesis to law reform bears examination. Law, like virtually any other professional or social activity, goes through times of “normalcy” and times of ferment or eruption. Law is organized as a profession, with fixed educational requirements which, at the risk of being pompous, we might even call rigorous. To become a lawyer, one must receive three years of professional inculcation and successfully pass a bar examination that provides some assurance that the new lawyer’s thinking falls within the mainstream of professional thought. In addition, many states now have mandatory continuing legal education “CLE” requirements, which force lawyers to become further exposed to mainstream legal thought and practice. The very activity of lawyering requires the lawyer to obtain the approval of others in the profession. This tendency is most pronounced in litigation, where the advocate seeks favorable rulings from a judge.

But the scientific revolutions discussed by Kuhn, like most political revolutions, tend to be lead by a comparative elite. For natural sciences, Kuhn estimated that this smaller scientific community of opinion leaders in a given specialty would often be but “perhaps one hundred members, occasionally significantly fewer.”¹⁶² Because law is generally more open and its community norms and hierarchy less structured,¹⁶³ the compa-

¹⁵⁹ KUHN, *supra* note 132, at 4.

¹⁶⁰ *Id.* at 5.

¹⁶¹ Kuhn, trained as a physicist, focused on the so-called “hard” sciences of astronomy, chemistry and physics. Thus, his assessment had even greater weight than if he had merely “debunked” the conventional mythology of the “soft” sciences of economics, philosophy, sociology, psychology, and political science, which have historically been viewed as less rigorous, more subjective and more vulnerable to “non-scientific” influences.

¹⁶² KUHN, *supra* note 132, at 178.

¹⁶³ Kuhn defines the opinion-making scientific community as one united by read-

rable "paradigm keeping" community is ordinarily much larger than that posited by Kuhn in the natural sciences—but the differences are uncomfortably slim, at least if one is a populist. Consider Federal Rules revision: although thousands may theoretically participate, at least at the periphery, the major shapers of change and participants in extended dialogue are few in number, probably less than the 100 natural scientists from Kuhn's field.

D. *The Seeming Paradigm Shift in Adjudicatory Procedure and the Possible Revolution in Litigation Reform*

1. Historical Background

The early American paradigm of adjudicatory procedure stressed common law development and imposed rigid pleading requirements designed to narrow issues prior to decision by the fact finder. The prevailing litigation reform paradigm is harder to discern but appears to have been one of comprehensive legislative dominance. The well-known Judiciary Act of 1789 was comprehensive and evidences an early legislative attempt to impose order and control on the newly created federal judicial power. It appears that state legislatures also were active in lawmaking that affected litigation, so much so that

ing the same journals, membership in the same elite-learned societies, communication with one another, and employment of the same experimental techniques. *See id.* at 177-78. Law is both different and similar. Lawyers share a basic methodology of case-driven knowledge but scholars differ widely in research approaches and even in fundamental views. The communication among opinion leaders is largely closed to others but surfaces indirectly through panel discussions, symposia and the like. Although some lawyers' societies are more restrictive than others (ALI; American College of Trial Lawyers as compared to the ABA), legal organizations appear to assert less control over legal activity than do scientific or medical societies over their activities. Regarding key journals, of course, law differs quite remarkably from other fields because there are so many such journals (the salvation of junior faculty), and they are student-edited, which is a mixed blessing. On one hand, the student editors arguably lack the expertise to assess the true merit of submissions and may be unduly influenced by name recognition and other prestige factors unrelated to merit. On the other hand, the prevailing paradigm of legal thought is less closely guarded in the journals by anonymous faculty referees committed to maintaining the old paradigm. Whatever the overall merits of legal literature, leading law reviews are widely but not universally read and an article in one of the 300 or so non-elite periodicals may be influential. In the sciences, a few journals command the field.

the Framers included constitutional provisions barring bills of attainder, *ex post facto* laws and confiscation of property without just compensation as a check on the activist state legislatures.¹⁶⁴ Indeed, when the federal judiciary upheld a creditor's claim against a state¹⁶⁵ a mere half-dozen years into the Republic Congress and the states responded with breakneck speed to enact the eleventh amendment.¹⁶⁶

In the first half of the Nineteenth Century, there appears to have been a paradigm adjustment if not a full-scale paradigm shift toward greater judicial control of litigation policy and relatively little legislative interference.¹⁶⁷ The Civil War, of course, changed many things, including the activity of Congress. Although the most famous congressional activity on this front involved altering the Supreme Court's composition in retaliation to or anticipation of judicial rulings¹⁶⁸ and the enactment of the Civil Rights Acts,¹⁶⁹ Congress generally became more active in the last half of the century, passing a number of

¹⁶⁴ See LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); HORWITZ, TRANSFORMATION I, *supra* note 131; William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

¹⁶⁵ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (holding that citizens have a right to sue a state in federal court and that the state of Georgia must honor contractual obligations incurred to lender during Revolutionary War).

¹⁶⁶ See JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987). Of course, Congress currently can be found frequently overruling or modifying Supreme Court decisions, especially those with a pronounced impact on litigation. The Civil Rights Act of 1991 serves as a dramatic recent example as do other statutes more specifically focused on court procedure, which are discussed in Part II, *infra*. My point in terms of roughly characterizing the changing sentiment about litigation reform is that both the current and early American eras appear to be times of unusually high legislative activity.

¹⁶⁷ See FRIEDMAN, *supra* note 164, at 265-92; HORWITZ, TRANSFORMATION I, *supra* note 131. However, this also appears to be a time in which the adjudicatory procedure paradigm of strict pleading requirements continued to hold sway and, perhaps, even strengthened as courts became increasingly formal and increasingly important to the emerging merchant community and property claims accelerated with the nation's westward movement.

¹⁶⁸ See ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 3.2-3 (1989); CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 10 (4th ed. 1983) (discussing Congress' alteration of Supreme Court size and jurisdiction as means of attempting to affect Court decisions).

¹⁶⁹ See 42 U.S.C. §§ 1981-88 (1988) (largely providing private rights of action as a means of implementing or strengthening policies underlying the thirteenth, fourteenth, and fifteenth amendments).

substantive and regulatory laws with at least indirect effect on the judicial system.¹⁷⁰ More particular to civil litigation, Congress in 1875 established the federal district courts which conduct federal litigation¹⁷¹ and established a structure of appellate courts for reviewing district court decisions.¹⁷²

At the same time, western states were being added to the nation, providing newly empaneled state legislatures with the opportunity to enact comprehensive provisions governing courts and litigation. Throughout the country, the legislatures were increasingly making forays into civil litigation legislation, principally through the enactment of codes of procedure or codification of the law. In 1848, the noted New York attorney (and brother of Supreme Court Justice Stephen J. Field) David Dudley Field was successful in having New York enact his Field Code of civil procedure, which abolished the state's separate court of chancery and "paved the way for the merger of law and equity." The Field Code sought

to abolish the distinction among the forms of action [by] creat[ing] the civil action in which the parties were to plead the fact constituting the accuse of action or defense. [It] was intended to make available *all* the appropriate remedies in [one] action [and] sought to liberalize the provisions for joinder of causes and parties.¹⁷³

However, after these spurts of legislative activity to enact reforming codes of procedure or establish new courts or jurisdiction, Congress and the state legislatures appear to have lacked sustained interest in litigation reform.¹⁷⁴

¹⁷⁰ See, e.g., Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1988)); Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C.); Anti-Immunity Act, ch. 3920, 34 Stat. 798 (current version at 49 U.S.C. § 48 (1988)); Income Tax Act of 1894, ch. 349, 28 Stat. 509, which established the first federal personal income tax and was struck down by the Supreme Court in *Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895), prompting eventual passage of the XVI Amendment to ensure the legality of a subsequently enacted income tax.

¹⁷¹ See WRIGHT, *supra* note 168, § 1.

¹⁷² *Id.*

¹⁷³ See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 1.6, at 18 (4th ed. 1992); see also CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 21-31 (2d ed. 1947); CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING (1897); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).

¹⁷⁴ Regarding adjudicatory procedure, however, the era may have contained two

Thus, despite the increasing hegemony of the legislature in national policymaking for both litigation and substantive law, I hesitate to label the late Nineteenth and early Twentieth Centuries as part of a particular controlling paradigm of litigation reform. Rather, it seems as though two roughly defined reform constructs—comprehensive enactments by the legislature versus incremental implementation through the judiciary—vied unconsciously for supremacy, with both schools of thought achieving incomplete or sporadic success. Yet neither appears to have established its pre-eminence sufficiently to be deemed “paradigmatic,” as least as Kuhn uses the term. In large part, this may be the result of the absence of self-conscious thinking on the subject. Advocates of either reform methodology probably were unlikely to realize when they had triumphed or even that they carried the standard for a particular litigation paradigm (or what someone writing 100 years later would describe as a paradigm).

2. Modern Litigation Reform: The Enabling Act and Professional Dominance

By the early twentieth century, the legal profession and political elites were quite consciously focused on the matter of how litigation reform should proceed.¹⁷⁵ The American Bar

paradigm shifts. In reaction to the first half-century's limits on adjudication (a paradigm of restrictive adjudicatory procedure), the Field Code and its progeny sought to simplify civil litigation and to open the courts, evidencing at least an attempted shift to a paradigm of open adjudication. By the late Nineteenth Century, however, it appears that both bench and bar, through narrow construction of the civil procedure codes, provided advantage to social forces with greater legal sophistication and created a shift back toward the more restrictive adjudicatory paradigm, a development paralleled in the contemporaneous substantive law. See FRIEDMAN, *supra* note 164, at 323-58; HORWITZ, TRANSFORMATION I, *supra* note 131. For example, the Supreme Court of the era provided the status of “personhood” to corporations (*Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1898)), established the *Lochner* doctrine drastically limiting government regulation of business (*Lochner v. New York*, 198 U.S. 45 (1905)), held that manufacturing was not “interstate commerce” admitting of federal regulation (*United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)), and delayed imposition of a federal personal income tax (*Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895)).

¹⁷⁵ Burbank, *supra* note 4, at 1035-50 (describing litigation reform views and efforts prior to passage of Enabling Act). As Professor Burbank's article notes, the Enabling Act has some of its genesis (to mix paternity as well as fracturing a metaphor) in reformist activity of the preceding century. I do not ignore these

Association and strong local bar groups like the Association of the Bar of the City of New York became increasingly organized and active. For example, the ABA promulgated its Canons of Ethics in 1908¹⁷⁶ and its commercial law section was instrumental in achieving passage of the Federal Arbitration Act in 1926.¹⁷⁷

Most important, however, was the bar's support of the judiciary in promoting the Enabling Act.¹⁷⁸ During the early Twentieth Century, political decisionmakers and the legal profession debated whether litigation reform should be run by the courts or the legislature.¹⁷⁹ Having more faith in the competence of courts, many judges and lawyers argued that the judiciary (or at least organizations of the legal profession) should take the lead. Evidence authority and legal giant Dean John Henry Wigmore went so far as to argue that, based on separation of powers concerns, legislating rules of procedure was unconstitutional, not merely imprudent.¹⁸⁰ Other authorities, however, particularly those in politics, regarded this as anti-democratic heresy and questioned whether legislatures should defer even slightly to the claims of expertise and authority put forth by lawyers and judges.¹⁸¹ The debate proceed-

events in framing my interpretation but view the "critical mass" of debate over litigation reform as occurring in the early Twentieth Century and, thus, constituting a shift away from the preceding status quo.

¹⁷⁶ See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 1992 GEO. J. LEGAL ETHICS 241, 246.

¹⁷⁷ See Stempel, *supra* note 29, at 277.

¹⁷⁸ See Burbank, *supra* note 4, at 1043-65.

¹⁷⁹ See, e.g., *id.* at 1045-97.

¹⁸⁰ See John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928). Wigmore, long-time dean of Northwestern Law School, is of course best known for his multi-volume treatise on evidence, which was first published in 1904. JOHN H. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (3d ed. 1940). On Dean Wigmore's philosophy, see, e.g., E. Donald Elliot, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985) (discussing Wigmore's views on natural selection and law and how his writings were influential).

¹⁸¹ See Burbank, *supra* note 4, at 1074-83. Modern debates over civil litigation reform often mirror the "legislature versus judiciary" arguments of the early Twentieth Century. Compare Robert W. Kastenmeier & Michael J. Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 54, 56 (Robert A. Katzmann ed., 1988) ("from the birth of our nation the issue of court reform has been a public policy question, not one reserved to judges and lawyers") with Mullenix, *supra* note 95, at 424-36 (arguing that Civil Justice Reform Act of 1990 intrudes so greatly upon autonomy

ed in earnest virtually until the first Franklin Roosevelt Administration, at which time fortuitous political developments placed key proponents of the Enabling Act in positions of power from where they could finalize enactment of the proposed legislation, which had been gaining support as a compromise between the competing legislative and judicial camps.¹⁸²

The Enabling Act was both an ingenious resolution of the litigation reform controversy as well as a major paradigm shift. Although litigation policy entails more than procedural rules, the rules remain at the heart of a lawsuit and essentially set the parameters within which litigation is practiced. The Act gave the judiciary and, to a lesser extent, the legal profession¹⁸³ substantial license to set the agenda and shape these important aspects of litigation. Under the Act, Advisory Committees for respective sets of Rules operate under the auspices of the Judicial Conference of United States.¹⁸⁴ Committee Members are appointed by the Chief Justice and serve three-year terms.¹⁸⁵ The Advisory Committees consider new rules or

of judiciary as to be unconstitutional). *See also infra* notes 257-77 and accompanying text (discussing modern debate over litigation reform).

¹⁸² *See* Burbank, *supra* note 4, at 1094-98.

¹⁸³ As discussed in note 190 *infra*, the Chief Justice exerts primary control over the selection of Advisory Committee members charged with designing new Civil Rules. In the modern era, the majority of the Advisory Committee has been comprised of judges, with a judge as chair. A typical Advisory Committee also includes law professors and practitioners, usually from larger, more prestigious firms or the U.S. Justice Department. The Reporter, charged with drafting proposals sought by the Committee, is usually a law professor.

The original Advisory Committee appointed by Chief Justice Charles Evans Hughes in 1935, however, was comprised of "fourteen lawyers and law teachers." Its chair was former Attorney General William D. Mitchell, with Yale Law Dean Charles E. Clark serving as Reporter. *See* JAMES, JR. ET AL., *supra* note 173, § 1.7 at 21. Even then, however, I think it fair to describe the process as a judicially centered paradigm of litigation reform since the Supreme Court held final power to report proposals to Congress. The shift from a lawyer-centered Advisory Committee to one dominated by judges, however, figures in the ensuing drift away from the judicial reform paradigm. *See supra* notes 13-17 and accompanying text.

¹⁸⁴ Currently, the Judicial Conference of the United States maintains advisory committees dealing with civil rules, criminal rules, appellate rules, bankruptcy and evidence.

¹⁸⁵ *See* 28 U.S.C. § 331 (1988). Second Circuit Judge Ralph Winter, a recent member of the Civil Rules Advisory Committee and current Chair of the recently reconstituted Evidence Rules Advisory Committee, has suggested that terms of membership should be increased to four years to take realistic account for the time required to oversee a proposed rule change from gestation through discussion, public comment, reference to the Supreme Court and ultimately congressional re-

amendments and draft recommended changes,¹⁸⁶ which are then subject to a period of public comment.¹⁸⁷ After reconsidering the proposed new rules, the Advisory Committee then forwards them to the Judicial Conference.¹⁸⁸ The Conference may reject a Committee proposal or may forward it to the Supreme Court in total or in revised form. The Court ordinarily receives a proposed change from the Judicial Conference during the fall of a Term. The Court considers the proposal and accepts, rejects or modifies the proposed change. If the Court acts by May 1 of the ensuing year and reports a Rule change to Congress, the legislature has seven months to act by modifying or rejecting the proposal. If Congress fails to act by

sponse. See *infra* notes 278-85 and accompanying text (discussing the process for adopting rules under the Enabling Act).

¹⁸⁵ The process by which a proposed new or amended rule reaches an Advisory Committee agenda is relatively unstructured. Frequently, the Committee responds to Supreme Court decisions that either explicitly invite re-examination of the Rules or have been subject to substantial criticism. For example, after the Court's decision in *Schiavone v. Fortune*, 477 U.S. 21 (1986), which took a restrictive view of Federal Rule of Civil Procedure 15(c) and directed dismissal of a case on statute of limitations grounds due to plaintiff's misnaming of a defendant, the Civil Rules Advisory Committee quickly began work on revisions to reverse the *Schiavone* decision, resulting in a revised rule by December 1991. See Joseph P. Bauer, *Schiavone: An Un-Fortune-Ate Illustration of Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988); Harold S. Lewis, *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987).

In other instances, the Advisory Committee responded to suggestions. For example, as of Spring 1993, the Civil Rules Committee was considering a revised Rule 68 based upon the suggestions of Federal Judicial Center Director Judge William Schwarzer. See Schwarzer, *supra* note 10.

¹⁸⁷ The Judicial Improvements Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988), took several steps designed to improve public participation in the rulemaking process. For example, the meetings of the Advisory Committees are expressly open to the public and a period of public comment on a proposed new rule (which is to be widely disseminated), including a public hearing to receive testimony, is required. However, the meetings are not well-publicized and are infrequently attended by outsiders, and there is no provision for further public input after the revision of a rule that has already been the subject of comment. Although the process is still not optimally open, the 1988 changes incorporate some of the changes suggested by leading commentators. See Jack E. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975); Howard Lesnick, *The Federal Rule-Making Process: A Time of Re-examination*, 61 A.B.A. J. 579 (1975).

¹⁸⁸ The Judicial Conference of the United States is established by law as an official policy-setting body of the federal courts, see 28 U.S.C. § 331 (1988), and is comprised of the Chief Judge or designated representative of each Circuit Court of Appeals and a district court judge from each Circuit.

December 1, the proposed rule change takes effect.¹⁸⁹

Thus, the paradigm of litigation reform for the Rules in the middle third of the Twentieth Century was one of compromise weighted toward judicial authority. Although Congress retained ultimate authority over the Rules, the controlling oar was held by the judiciary because, ordinarily, it set priorities, acquired information, shaped proposals and directed the focus of rulemaking, which in normal times is the main means of altering litigation policy.¹⁹⁰ By contrast, during this period Congress generally was inclined to defer to the judiciary's views in the matter, despite operating under a committee system of specialization designed to assist members in acquiring expertise and focusing on discreet areas of public business. This is particularly true so long as Congress (or the relevant congresspersons influential in judicial policy) are not besieged by interest group pressures at odds with the judiciary's objective, and so long as Congress respects the judiciary enough to defer to it and the Enabling Act process. For the most part, it appears that this set of circumstances prevailed during the 1934-1974 period, enabling civil rules revision to be revised largely by the bench.¹⁹¹

Rules creation and amendment are not, of course, the sum of the universe of litigation reform policy, and it appears that the judiciary also enjoyed extraordinary influence over non-rules matters. Changes in procedural law or civil litigation policy were often initiated by or came at the behest of the bench or organized bar groups.¹⁹² For example, federal judges

¹⁸⁹ See 28 U.S.C. § 2074 (1954).

¹⁹⁰ An implicit assumption underlying the Enabling Act is that Advisory Committee membership represents a cross-section of the federal bench and legal profession. However, many observers question this benign assumption. The Committee composition could easily reflect the perspective of the Chief Justice and his allies rather than the bench as a whole. Indeed, it has been suggested that the conservative cast of proposed and enacted new rules during the past decade (as contrasted with the more liberal tone of amendments during the 1960s and 1970s) reflects the efforts of Chief Justices Burger and Rehnquist more than the changing shape of the federal bench or changing viewpoints in the legal profession. For example, Chief Justice Burger so desired the Committee to promulgate an expanded version of Rule 68 permitting fee shifting (proposed and most hotly debated during the 1983-85 period) that he personally lobbied the Committee at one of its meetings.

¹⁹¹ See Walker, *supra* note 59, at 464-69.

¹⁹² Although it vacillated on the issue for decades, the ultimate support of the American Bar Association for the Enabling Act was of great importance to its

frequently took the lead in lobbying for legislation to expand the size of the bench or reshape court jurisdiction. Perhaps the most famous example is the so-called "judges' bill," which provided the Supreme Court with substantially increased discretion and control of its docket through a reduction in appellate jurisdiction and greater reliance on *certiorari* for selection of cases for review.¹⁹³

Although the attitudes toward reform of bench and bar were largely congruent or co-created,¹⁹⁴ there have been notable exceptions. For example, as noted earlier, the commercial law section of the ABA was a vigorous proponent of the Federal Arbitration Act, legislation that ran counter to some judicial preferences in that it was designed to overcome adverse common law and require courts to enforce arbitration agreements.¹⁹⁵ For the most part, however, conflicts of this sort were avoided. Usually, judges and prosecutors wanted essentially the same things from Congress as did judges and top-flight commercial lawyers or lawyers seeking greater ability to sue nonresidents. Indeed, the rise of more formal interaction between different parts of the profession may have increased the relative amount of co-created bench-bar policy. For example, the American Law Institute ("ALI"),¹⁹⁶ created in

passage. See Burbank, *supra* note 4, at 1043-95.

¹⁹³ See CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3504 (1992).

¹⁹⁴ In my lexicon, bench and bar opinions on a matter are "congruent" when they match but were arrived at independently or developed in parallel. Bench-bar views are "co-created" where there has occurred intertwined dialogue and activity resulting in a legal profession "position" on a matter of policy.

¹⁹⁵ See Jeffrey W. Stempel, *Reconsidering The Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL., 259, 259-63; Stempel, *supra* note 29, at 263-78 (discussing traditional judicial hostility toward arbitration and legislative history of Arbitration Act). Today, however, most every federal judge would regard the bar's support of the Arbitration Act as a favor to the bench in that it serves to eliminate some cases from the federal docket.

¹⁹⁶ ALI is an organization of judges, practicing lawyers, law professors and others in the profession (e.g., government policymakers, corporate counsel) elected to the organization, which is limited to a maximum size currently set at 3000. As such, it is something of an elite but diverse and integrated organization. Unlike the ABA and similar local organizations, which are dominated by practitioners in private firms and the Judicial Conference (which is, of course, dominated by judges), influence within ALI seems more diffuse but if anything appears slightly weighted in favor of the academy. The current Executive Director and his predecessor (who enjoyed a 25-year tenure) were prestigious law professors and this

1923,¹⁹⁷ did substantial and influential work during the 1923-1974 period.¹⁹⁸ During this same time, the ABA grew rapidly in wealth, organization and influence. Although practitioner-dominated, the ABA normally seeks and responds to judicial opinion, thus strengthening the paradigm of judicial authority.

3. The "Open Courts" Paradigm of Adjudicatory Procedure And Its Hegemony: 1938-1980

The first major project under the "new paradigm" Enabling Act resulted in a new paradigm of adjudicatory procedure. The Federal Rules of Civil Procedure, adopted in 1938, provided for an open model of adjudicatory procedure stressing simplicity, liberal pleading, broad discovery, and a preference for substance over form; the primary mission was the just resolution of disputes.¹⁹⁹ Commentators generally have praised the Rules,²⁰⁰ which have been essentially adopted by half the states.²⁰¹

I find the establishment and demise of the "open" 1938 Rules paradigm of adjudicatory process easier to identify and explain than the history and possible demise of the litigation

position is the managerial core of ALI. The Reporters for ALI's Restatements of the Law, some of its most important work, are usually law professors. However, professors can not set ALI policy by sheer force of numbers.

¹⁹⁷ See HERBERT F. GOODRICH & PAUL A. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961*, at 7 (1961).

¹⁹⁸ This is not to suggest that ALI has reduced its output or that recent projects have had impact. I argue only that ALI "arrived" and continued to hold a strong position as a major shaper of substantive law and litigation policy during this time period.

¹⁹⁹ According to leading commentators, the "principal features" of the Rules are:

- the union ("or merger") of law and equity, with retention of jury trial in actions formerly "at law";
- simplicity and liberal amendment in pleading and motion practice;
- liberal provisions for joinder of claims and parties, with devices of counter-claim, cross-claim, third-party claim, and intervention to permit additional claims and parties to be joined;
- comprehensive discovery procedures, permitting examination of witnesses and compulsory production of evidence in the possession of an opposing party;
- simple provisions for appeal.

See JAMES, JR. ET AL., *supra* note 173, § 1.8, at 22.

²⁰⁰ See, e.g., *id.* § 1.8, at 21-22 (although "not perfect" the "experience with [the Rules] has on the whole been most satisfactory"); WRIGHT, *supra* note 168, § 62; WRIGHT, *supra* note 193, § 1008.

²⁰¹ See WRIGHT, *supra* note 168, § 62.

reform paradigm that also took firm hold in the 1930s.²⁰² Perhaps my view (whether accurate or in error) stems from the fact that leading scholars have chronicled both the emergence of the "Charles Clark era" and the more recent developments that have undermined the open courts paradigm so well.²⁰³ Because I tend to agree with those who have observed and criticized these developments, I probably am also quicker to see a definite shift in views.²⁰⁴ In a nutshell, I see the open courts paradigm dominating the litigation landscape from 1938 (perhaps a bit later because of some lag between promulgation of the Rules and their acceptance and actual application on the front lines of litigation) until 1980 or so.²⁰⁵ Perhaps, the party

²⁰² One might argue persuasively, however, the open access regime of adjudicatory process did not truly become dominant until sometime after 1938, when rear guard actions resisting the new order were finally quashed. When Charles Clark, Committee Reporter and principal author of the Rules, became a Second Circuit Judge, he labored for some time against narrow or grudging construction of his project through continued scholarly writings and judicial opinions reversing lower court decisions that crabbled the reach of the Rules. *See, e.g., Dioguardi v. Durning*, 151 F.2d 501 (2d Cir.), *cert. denied*, 326 U.S. 698 (1946). However, one could view the triumph of the new paradigm as incomplete until the Supreme Court's endorsement of broad "notice pleading" in *Conley v. Gibson*, 355 U.S. 41 (1957). But taking this view—that the new order has not triumphed until the last pocket of resistance is wiped out—is too grudging. By this standard, Charles Darwin's theory of evolution has perhaps fallen short of paradigm status because some fundamentalist religions, with considerable political power in some locales, reject the theory.

²⁰³ *See, e.g., Abraham Chayes, The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Abraham Chayes, *The Supreme Court 1981 Term, Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Richard L. Marcus, *The Revival of Fact Pleading in Civil Procedure*, 86 COLUM. L. REV. 433 (1986); Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some Chilling Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Resnik, *supra* note 22; Risinger, *supra* note 116; David M. Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 CORNELL L. REV. 390 (1980); Tobias, *supra* note 116.

²⁰⁴ *See* Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 257-68 (1991) (criticizing application of Rule 11 and some of the forces giving rise to 1983 amendment of the Rule); Stempel, *supra* note 116, at 159-93 (criticizing Supreme Court's 1986 summary judgment trilogy for, among other things, failure to adhere to open adjudicatory procedure paradigm).

²⁰⁵ One can make a colorable case that the open courts era actually ended sometime during the 1970s with increasing Republican appointees to the federal bench (from the 1968-76 Nixon and Ford Administrations), the emergence of a higher profile ADR movement, criticism of excess litigation (*see, e.g., Robert H. Bork, Dealing With the Overload in Article III Courts*, 70 F.R.D. 231, 233 (1974))

was most clearly over by 1983 when amended Rule 11 took effect.²⁰⁶

During the open courts "era," the Rules were not only liberal but were read liberally by most federal judges and their state counterparts.²⁰⁷ When the Rules were amended, it was only for technical reasons or to liberalize them further. For example, the 1966 amendment to Rule 23 broadened the utility of the class action while the 1970 amendments to the discovery rules allowed broader discovery less subject to court restriction or dependent upon court permission. Congress generally ignored or responded favorably to the open courts paradigm. For example, the 1964 Civil Rights Act made counsel fees available for successful job discrimination claimants,²⁰⁸ as did the 1976

and the Supreme Court's decisions limiting the use of class action lawsuits (see Arthur A. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 678-79 (1979)). Also important was the mid-1970s congressional response to the Proposed Federal Rules of Evidence, which also bears upon the shift in litigation reform consensus and is discussed *supra* notes 102-03 and accompanying text. In this Symposium, Professor Subrin finds the 1976 Pound Conference to be the watershed point of demarcation. See Subrin, *supra* note 24, at 1156-58. I realize that I have previously suggested that the mid-1970s may have marked the paradigm shift (see Stempel, *supra* note 204, at 262 n.24) and that I am either inconsistent or maturing, depending on one's view.

On balance, however, I view the 1970s as the beginnings of successful attacks upon the prevailing paradigm rather than the displacement of the paradigm through accepted new theories or practices. For example, no rule or statute from the 1970s enshrined the "restrictive adjudicatory procedure" paradigm. The Nixon and Ford judicial appointments, although more conservative than those of Presidents Kennedy and Johnson, were hardly radical reversals of field. By the 1980s, however, there were minor restrictions on discovery, the immensely important new Rule 11, serious proposals to revise Rule 68 to create a variant of the English Rule on fee-shifting, judicially imposed restrictions on claimants' fee-shifting pursuant to statutes such as the Attorney's Fees Civil Rights Act of 1976, a more aggressive approach to taking cases from the jury via summary judgment, significant proposed restrictions on discovery and a majority of federal judges appointed by Presidents Reagan and Bush, whose selection criteria included an effort to build a bench opposed in large part to the old paradigm.

²⁰⁶ See Stempel, *supra* note 204, at 262-67; see also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1932-33 (1989); Nelken, *supra* note 203, at 1315-20. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987) (responses to perceived litigation explosion, "including the amendment of rule 11, reflect a widely held view that increased use of the courts is a negative development").

²⁰⁷ Resnik, *supra* note 22, at 498-526; Risinger, *supra* note 116, at 35-43.

²⁰⁸ Pub. L. No. 88-352, 78 Stat. 241 (1964).

Civil Rights Attorney's Fees Awards Act for non-employment civil rights claimants.²⁰⁹ Moreover, the size of the bench expanded, as did the judge's staff and budget support. The Justice Department experienced similar growth and was supported in access-related activities like voting rights and desegregation litigation by both the Congress and the Judicial Branch.²¹⁰ Furthermore, there appeared to be an ideological consensus in support of the open adjudicatory model that was widely shared among influential decisionmakers.²¹¹

4. The Open Courts Model Under Attack

Like Kuhn's scientific paradigms (e.g., the earth-centered solar system, linear Newtonian physics), the open courts system came to face external events that it could not completely explain or neutralize: increasing caseload; perceived longer delays between case filing and termination; jury verdicts increasingly regarded by many as erratic and often extravagant; excessively strategic discovery and motion practice;²¹² and dramatically increased lawyer's fees and expenses.²¹³ There was also a continued need for access to the courts, despite the pre-

²⁰⁹ 42 U.S.C. § 1988 (1988).

²¹⁰ See JACK BASS, *UNLIKELY HEROES* (1981); VICTOR S. NAVASKY, *KENNEDY JUSTICE* (1977).

²¹¹ See Resnik, *supra* note 22, at 498-526.

²¹² Bryant Garth views the hyper-aggressive litigation tactics of the 1970s as setting the stage for anti-lawyer initiatives of the 1980s and 1990s. See Garth, *supra* note 1, at 932.

²¹³ Although normally one does not think of the practice of law as technology-driven like the hard sciences, medicine, engineering, or manufacturing, there exists at least a partial analogy. In medicine, for example, one view holds that increasing technological expertise permits doctors to save lives that previously could not have been saved, prompting greatly increased expenditures incurred in expanding the life-saving frontier. Law is perhaps less dramatically but perhaps equally vulnerable to a sort of Parkinson's Law: legal services expand to the limits of delivery systems so long as the client can pay and does not actively resist. Computerized legal research is expensive (\$200 per hour or so), but once available must be used (on top of the attorney's hourly rate) lest something be missed; once they are available, only state-of-the-art word processing, printing, communications, mailing and delivery services will do. Even conventional law library materials multiply in variety and expense as specialty services grow to keep counsel informed about various sectors of litigation. Supersonic transport exists so perhaps a key partner can fly to Europe for one meeting and return to New York for another in the same day. These developments undoubtedly add up and are nontrivial, but they are not the primary spurs to increased litigation costs.

vious half-century of open adjudicatory procedures; that is, instead of reducing social pressure like a slightly opened steam valve,²¹⁴ the open adjudication model seemed only to invite more disputes. In short, many looking at the state of litigation (or more properly, the perceived state of litigation as empirical data was often scanty or subject to conflicting interpretation) viewed it as reflecting deterioration because of—or at least in spite of—the open adjudication paradigm. Many were favorably inclined toward the notion that a restricted adjudicatory procedure would reduce some of the problems of delay, cost, inconsistency and litigation growth—or at least it could not hurt.

Of course, upon closer examination, the analogy to Kuhn's scientific revolutions begins to break down. Unlike the physical or social sciences in the academy, the judicial system cannot be studied in isolation. Nonetheless, the legal and political actors, as usual, had less caution than physical scientists. When faced with shortcomings attributed to the open adjudication paradigm, they were quicker to consider a shift of paradigms rather than to engage in rigorous testing of the new, allegedly more efficient, restrictive procedural paradigm.²¹⁵

More than in the sciences,²¹⁶ moreover, the paradigm shift in procedure was affected in large part by the sociology and politics of the American judicial system. Despite its origin in elite efforts to pacify the masses, the open procedural paradigm became hugely unpopular with the business community, which saw itself victimized by bogus or marginal claims that consumed legal resources and actually could succeed at the hands of lay jurors, who elites thought inflated the value of legitimate claims.²¹⁷ Almost from the outset of the 1938 Rules,

²¹⁴ It appears that one factor animating the original Civil Rules Advisory Committee was fear of popular dissatisfaction with the legal system and a desire to encourage support among the general public by providing the public with reduced barriers to participation in the litigation system. Transcripts of Advisory Committee meetings even contain references to the Bolsheviks and the possibility of political upheaval in America should the public feel alienated or oppressed by the legal system. See Subrin, *supra* note 22, at 973-75.

²¹⁵ To be fair, I should note that support earlier in the century for the open procedural model was not based on rigorous hypothesis testing, either, but gained hegemony as a result of more political argumentation.

²¹⁶ For ease of reference, I use "sciences" as a term including scholarly disciplines such as philosophy and the social sciences, which initially may not be thought of as sciences for some readers.

²¹⁷ See, e.g., Huber, *Junk Science*, *supra* note 117; Huber, *Second-Best*, *supra*

business groups worked against the paradigm by arguing for narrow application of the Rules. Gradually, efforts focused more on obtaining broad-based changes in policy, an effort that gained intellectual currency from the rise of the Law and Economics movement and its theories of litigant and business behavior.²¹⁸ The force of this sustained criticism, supported by corporate budgets, cannot be underestimated.²¹⁹ The catalyst for the counter-revolution, however, was the Republican ascendancy and dominance of presidential politics during the 1968-1992 period. When Republicans held the White House, particularly during the Reagan and Bush years, the restrictive procedural paradigm and the reformers supporting it had a vital ally. Presidents appoint Supreme Court Justices, Circuit and District Judges, and key Justice Department officials (including the ninety-four United States Attorneys across the country), all important in shaping the governing paradigms of adjudicatory procedure and litigation reform. For example, the appointments of Chief Justices Burger in 1969 and

note 117.

²¹⁸ Law and Economics thinking focuses on aggregate social wealth and whether a set of affairs is efficient according to the "Kaldor-Hicks" criteria (where a transaction is assessed according to the net gains or losses produced in aggregate wealth). See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13-16, 25 (4th ed. 1992); Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 452-59 (1974) (reviewing Posner's first edition and noting major impact of Law and Economics in legal circles is heightened attention to the overall costs of a rule, decision or system).

Much Law and Economics writing has also focused on the means by which various actors calculate and respond to incentive structures. See, e.g., POSNER, *supra*; George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987). Thus, even though data on the judicial system show that punitive damages awards are comparatively rare, as are medical malpractice plaintiffs' verdicts, and that the average jury award seems modest in relation to claims, the business community and its allies have argued with some force that potential defendants are nonetheless deterred from socially useful activity and forced to spend excessive amounts on legal defense and prevention because of the unpredictability of the legal status quo.

²¹⁹ Although I find the shift in partisan power from Democratic to Republican to have had much to do with the shift in thinking about litigation procedure, the psychological gains of the counter-revolution were evident across the political spectrum. For example, the Carter Administration championed deregulation and embarked upon a method of judicial selection much more favorable to the "out-party" than was previously the case. The entire legal tone of the Carter years was different than that of the Kennedy and Johnson administrations. For example, no one would confuse Carter's Attorney General Griffin Bell with 1960s Attorneys General Ramsey Clark or Robert Kennedy.

Rehnquist in 1986 meant that conservative jurists frequently critical of the open procedural paradigm could spend more than two decades placing kindred spirits in positions of influence. Despite the growing pressure upon and dissatisfaction with the open courts model, it might well have survived if instead Justice Brennan had become Chief Justice in 1969, to be replaced by, for example, Judge A. Leon Higginbotham of the Third Circuit or Judge Abner Mikva of the District of Columbia Circuit.

In addition, the executive and judicial power structure has influence (both directly and through ripple effect) over the activities of legal analysts in both governmental and non-governmental policy organizations such as the Federal Judicial Center, the Administrative Office of the United States Courts, the National Center for the Study of State Courts and even non-governmental entities such as the American Judicature Society, the ALI, the ABA, the Rand Corporation and the Brookings Institution. For example, as noted previously, the Bush Administration's Council on Competitiveness, chaired by former Vice-President Quayle, strongly took up the reformer's cudgel on behalf of the restrictive paradigm.²²⁰

5. The Open Courts Model in Retreat: Impoverishing the Judiciary

I do not mean to overstate the argument that politics shapes law or suggest that law is "pure politics."²²¹ Many judges with impeccable "liberal" credentials have accepted at least some tenets of the emerging restrictive paradigm. For example, Judge Jack B. Weinstein has in his decisions and his writings made a case for aggregate processing of mass tort claims with accompanying restrictions on or modifications of the individual open adjudicatory model.²²² District of Columbia

²²⁰ See *supra* notes 106-15 and accompanying text.

²²¹ See generally Minda, *Jurisprudence*, *supra* note 156, at 39-44 (discussing critical legal studies and describing apt slogan for the movement as "law is politics" as contrasted with Law and Economics slogan that "law is efficient" or should be made so); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990).

²²² See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d. Cir.) (reversing aspects of district court's consolidation orders reported at 129 B.R. 710 (Bankr. S.D.N.Y. 1991)), *cert. denied*, 484 U.S. 1004 (1992); *In re Agent Orange*

Circuit Judge Patricia Wald has defended the post-*Chevron* ideal of great judicial deference to administrative agencies,²²³ an approach seen by many as part of the Reagan-Bush-Quayle conservative agenda.²²⁴ Her colleague Abner Mikva has encouraged lawyers to seek legal and litigation change from legislatures rather than courts,²²⁵ a perspective that reflects the shift in thinking in both adjudicatory procedure and litigation reform. Judges Robert Merhige, the late Robert Peckham and the late Alvin Rubin are not commonly (or credibly) characterized as conservatives as they were appointed by Democrats, but they have been prominent proponents of managerial judging, which, regardless of its virtues or vices, runs counter to the open courts paradigm.²²⁶

Prod. Liab. Litig., 818 F.2d 179 (2d Cir. 1987) (approving district court's brokering of settlement and affirming *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985)); Weinstein, *supra* note 117, at 485 (sometimes individual litigation prerogatives must yield to overall needs of public policy or to achieve fairness for group as a whole).

Several prominent commentators share this view. See, e.g., Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992); Vairo, *supra* note 56. Others have observed the trend without comment or seen it as a potentially damaging development. See, e.g., Resnik, *supra* note 91 (noting trend but reserving judgment); Nesson, *supra* note 117 (criticizing Judge Weinstein's grant of summary judgment against an opt-out plaintiff who did not participate in class settlement of Agent Orange matter).

²²³ See Patricia Wald, *The New Administrative Law—With the Same Old Judges in It?*, 1991 DUKE L.J. 647.

²²⁴ See Sanford Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757 (1991); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (doctrine of greater deference to administrative agency determinations set forth in *National Resources Defense Council v. Chevron Oil Co.*, 467 U.S. 837 (1984), combined with other legal developments of 1980s represents substantial shift of power from Congress and judiciary to executive); accord William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165 (1992). However, others have found the *Chevron* decision in practice not to have brought about the feared increase in Republican agency power. See E. Donald Elliot & Peter H. Schuck, *To The Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (finding that judicial reversals of agency determinations actually increased after *Chevron*).

²²⁵ Hon. Abner Mikva, Chief Judge of the D.C. Circuit, Remarks at Association of American Law Schools Workshop on Law and Social Science (April 12, 1990).

²²⁶ See, e.g., HUBERT L. WILL ET AL., *THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS* (1983); Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery, Planning and Alternative Dis-*

In addition to the shift in intellectual perspective and the more overtly ideological or partisan political changes, the shift in the procedural paradigm has been abetted by strong, virtually nonpartisan "background" political factors sewn throughout the political culture. Perhaps most prominent among these is the executive-legislative unwillingness to fund the federal courts at the level required if they are to manage their caseload well according to imperatives of the open adjudication paradigm. Indeed, as the Symposium reported in this issue of the *Brooklyn Law Review* took place, federal courts were on the verge of ceasing jury trials because they had run out of money to pay civil jurors.²²⁷ This type of episode, relatively common in recent years, speaks volumes about the state of American litigation.²²⁸ Although some have accused the federal judiciary of "crying wolf" and employing grandstand tactics to lobby for increased funding,²²⁹ most informed opinion has concluded that the federal bench's budgetary problems are quite real.²³⁰

When looking for the "something else" more expendable than civil jury trials, federal judges and administrators must feel perplexed. By law, criminal matters must be heard within seventy days of the time charges are brought, but no sooner

pute Resolution, 37 RUTGERS L. REV. 253 (1985).

²²⁷ See Stephen Labaton, *Federal Judges Blame Money Woes for Slowdown*, N.Y. TIMES, Apr. 9, 1993, at B16 (Judicial Conference indicates that civil jury trials may be suspended for lack of funds starting May 12, 1993). Judge Weinstein stated that he expects to continue to hold civil trials by providing vouchers to jurors on the assumption that Congress will eventually appropriate funds as it has done in the past. *Id.* ("I will tell the jurors they'll have to wait to get paid . . . I don't imagine that it will be a big problem.").

²²⁸ Although the current matter involves federal courts, similar events have been a feature of relations between state courts and their executive and legislative funding masters, particularly since the late 1980s when recession combined with a shift from federal to state funding of state activities exacerbated the situation. For example, former New York Court of Appeals Chief Judge Sol Wachtler sued the state, contending that the level of funding provided to state courts was so inadequate as to be unconstitutional. The litigation was eventually dismissed as part of a political compromise.

²²⁹ See Labaton, *supra* note 227.

²³⁰ See, e.g., ABA Special Committee on Funding the Justice System, *The Justice System Funding Crisis: What We Can Do About It*, JUDGES' J., Winter 1993, at 6; Brent Stinski, *Why Lady Justice is Wearing Rags: Budgets Cutbacks Hit the Courts*, JUDGES' J., Winter 1993, at 12; see Labaton, *supra* note 227 (FJC Director Judge Schwarzer states that federal courts have "worked very hard to reduce the costs" of operation).

than thirty days absent a defendant's consent.²³¹ Since jury trials are mandatory unless the defendant waives this right,²³² excess juror fees are unlikely to be found. The most courts can do is encourage either more plea bargains, thereby risking further criticism that there is too much plea bargaining in the system, or bench trials, a largely forlorn hope as most rational criminal defendants correctly conclude they have better odds with a jury. One federal judge recently suggested in jest that perhaps the bench should force the issue by giving civil trials parity with criminal matters, even if this results in dismissal of indictments for failing to meet Speedy Trial Act deadlines, a result sure to catch the attention of the Justice Department and Congress.²³³ Bankruptcy filings are also on the rise, as are discovery disputes, making it hard to trim resources from the non-Article III portion of the courts. Judicial staffs are not large and are not especially well-paid. Salary or benefit freezes may save some money but are likely to encourage personnel defections and attendant costs from turnover and training of new, and possibly, less-qualified employees.²³⁴ Much federal court equipment is at least a generation behind the technology of the private sector, which not only adds to efficiency problems but also counsels that the judiciary receive upgraded equipment sooner rather than later. Perhaps each federal judge's chambers does not need the extensive library of case reporters one usually finds, but in my experience there are clear efficiency gains as law clerks and judges are enabled to make better, faster decisions. Furthermore, although many federal courthouses sit on prime real estate and perhaps have more size than necessary, selling off judicial buildings or subletting the courthouse basement are not realis-

²³¹ See The Speedy Trial Act, Pub. L. No. 93-619, 88 Stat. 2076 (1974) (current version at 18 U.S.C. §§ 3152-56, 3161-74; 28 U.S.C. § 604 (1988)).

²³² See U.S. CONST. amend. VI.

²³³ Hon. Thomas Griesa, Chief Judge of the Southern District of New York, Remarks before the Committee on Federal Courts of the Association of the Bar of the City of New York (April 19, 1993).

²³⁴ Most law clerks, of course, serve only one or two-year stints as federal judicial employees. Therefore significant turnover is built into the system. But law clerk services are essentially a steal for the government which, due to the prestige of clerking, obtains the services (often well over the standard 40-hours per week) of an inexperienced but capable and ambitious new lawyer for a salary well below what he or she could earn from other employers.

tic options.

In short, courts probably need substantially more money and other logistical support than they have received in recent years. However, no one seems very interested in giving it to them, at least not without strings attached.²³⁵ The current annual budget for the federal courts is approximately \$2.5 billion, a sizeable amount even for jaded policy analysts.²³⁶ It constitutes far less than one percent of the total federal budget, however, leaving the other ninety-nine percent to the other two branches. In return for its \$2.5 billion, the nation receives both criminal and civil dispute resolution of approximately 150,000 matters per year,²³⁷ federal rules revision, study of the courts, and judicial efforts at law reform.²³⁸ The importance of adjudication to the national economy and society is obvious and not subject to displacement—at least not complete displacement—by ADR.²³⁹ At the risk of using too homely an analogy, good courts can be compared to good roads, bridges, airports, rail lines, waste treatment, schools and other important public goods. Although recorded as expenditures, when well-administered they function as capital investment from which society reaps more than it has contributed through taxes.

Yet at the same time that talk of infrastructure and “re-building America” abounds, the body politic shows little inter-

²³⁵ See *infra* notes 265-66 and accompanying text, discussing funds available under Civil Justice Reform Act for districts implementing “Delay and Expense Reduction Plans.”

²³⁶ “Nearly \$2 billion of the budget is for the salaries and expenses of staff and judges. The budget also includes \$68.8 million to pay for jurors and \$215.1 million for lawyers’ services.” Labaton, *supra* note 227, at 1316.

²³⁷ This includes resolution of popular prosecutions such as those of drug dealers. Many of these cases are quite complex and require substantial judicial time and resources. The prosecutor’s salaries and other expenses of the Justice Department are not included in the judicial budget figures.

²³⁸ See TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 8-15 (1990).

²³⁹ See Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1398 (1992) (although room for improvement obviously exists, “[c]ourts are not obsolete—they serve in areas and ways that no other entity can”). An important part of that service is setting of substantive legal parameters within which ADR, settlement and other important activity (e.g., decisions not to sue, to contract, to refrain, to sell, to pay taxes, etc.) takes place. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979).

est in giving courts the resources for optimal performance—at least not optimal performance under the open courts adjudicatory procedural paradigm. This of course presents a classic “chicken-or-egg” debate: did inadequate funding play a major role in the shift from the open paradigm to the restrictive model or did the shift toward the restrictive paradigm erode political support for adequately funding the increasingly disfavored open courts adjudication paradigm? As in so many chicken-or-egg debates, the cosmically correct answer is probably “both.” On balance, however, it seems that the resources problem is cause far more than it is effect. Because of it, the open paradigm never has had a sufficient “fighting chance” to fend off the assault of the restrictive model. Additional legislative activity such as the creation of new federal jurisdiction²⁴⁰ suggests that inadequate judicial resources have more to do with misplaced frugality and political clout (e.g., there are more voting medicare recipients than voting judicial employees) than a considered decision to feed the new paradigm and starve the old.

Whatever the reasons for the contradictory underfunding of the courts during a time of growth in federal litigation, the effects are obvious: more delay, additional costs to litigants and

²⁴⁰ See, Robert A. Katzmann, *The Underlying Concerns*, in JUDGES AND LEGISLATORS, *supra* note 181, at 7:

In the waning days of the 1986 legislative session, Congress tacked on to a childhood vaccine protection law a provision that could greatly increase the judicial work load, but did not provide federal courts with the necessary additional resources. Judges were charged with determining whether claimants are eligible for compensation due to illness or death resulting from vaccination. [citing 100 Stat. 3743, 3755-3784] One official of the court system estimated that the judiciary would have to hire and train 300 to 400 special masters to handle these cases. Courts would still have to decide the flood of expected appeals, running perhaps in the thousands. In spite of the obvious impact on the courts, Congress did not consult with the judiciary when it considered the legislation. A year of considerable uncertainty passed before the district courts secured relief from the legislature.

See also *id.* at 8 (describing Speedy Trial Act, Bankruptcy Administration and Federal Judgeships Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 and Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 as enacted “without sustained communication with the very branch charged with implementing those changes” (footnote omitted)).

Since Katzmann wrote, the Congress and the President have launched a “war on drugs” requiring adjudication of increased prosecution and considered similar expansion of federal jurisdiction for gun-related offenses or gender-related offenses.

a pronounced demoralization of the judiciary.²⁴¹ This last effect is particularly insidious in relation to the relative dominance of the competing paradigms of adjudicatory procedure. If judges feel drastically overworked, behind and "swamped," but see no realistic prospect of relief through additional resources, they are likely to be drawn closer to the restrictive procedural paradigm. Whether intended or not, Congress may have starved the bench into support for the restrictive approach.²⁴²

Regardless of funding, of course, a number of judges will favor the restrictive paradigm when faced with the large caseload. Many judges believe that the federal bench should not exceed a certain size or should have a more narrowly defined adjudicatory mission regardless of the availability of resources. This was the express view of the Federal Courts Study Committee, which recommended eliminating of some forms of federal jurisdiction, including diversity.²⁴³ A respected federal judge recently wrote that the maximum effective size of the federal bench was 1000 in light of his concept of its mission.²⁴⁴ However, a conscious limitation on the size of the federal bench does not require simultaneous underfunding of the intended elite judiciary. To the contrary, one would expect that to function adequately, a constrained federal bench would be accorded top-of-the line facilities, equipment, staff and other support.²⁴⁵ Nonetheless, judicial salaries and benefits are a

²⁴¹ See Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3 (finding based on survey research that federal judges are disheartened by growing caseload pressures and feel unfairly overworked).

²⁴² Of course, if my thesis is correct, many judges needed no prompting to prefer the restrictive model.

²⁴³ See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 38-53 (1990).

²⁴⁴ See Jon O. Newman, *1,000 Judges—the Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1993) (arguing that more than this number of judges would reduce federal courts to mere government bureaucracy with less quality control of political appointments, less collegiality and cohesiveness of particular courts, and less consistency in federal law, rather than elite and specialized corps of jurists).

²⁴⁵ If overall efficiency is sought, the government may wish to provide federal judges and their law clerks (under either the small size or large size models) home use of computers, computerized legal research, fax machines and the like. I do not hold my breath waiting for these items to become standard issue for the Third Branch. Federal judges, who in the wake of the mail-bomb assassination of Judge Robert Vance (11th Cir.), broached the possibility of greater security, were largely rebuffed. For example, when some judges asked about remote control car starters (in case explosives were planted in the car), executive and congressional

substantial portion of the judiciary's budget. The "small bench" model thus will likely gain many adherents based on purported cost savings rather than an intellectual commitment to limited federal jurisdiction.

During the 1970s and 1980s, economics, politics, and sociology combined with Kuhn-like considerations of dissatisfaction with aspects of the open courts model to bring litigation almost joltingly into a more restrictive mode of adjudicatory procedure. Unlike the scientific revolutions Kuhn discussed, however, the paradigm shift in adjudicatory procedure is an incomplete one. The continuing battle between preservationists and reformers attests to the incompleteness of the procedure revolution.²⁴⁶ Many lawyers would even dispute my contention that a shift has in fact occurred.

6. Continued Tenacity of a Wounded Adjudicatory Model

Although many lawyers, even preservationists, concede that the open courts paradigm has lost support—indeed, that is why they have taken up the preservationist cause—one can argue that the basic infrastructure of the open era remains intact: the federal civil rules look roughly the same as originally written; there appears to be no shortage of litigants and lawyers willing to press their causes;²⁴⁷ many judges continue to preach and practice the open courts paradigm;²⁴⁸

response seemed to indicate that the \$300-per-car cost was too expensive and the issue has faded, at least until the next judge is murdered.

²⁴⁶ See *supra* notes 116-22 and accompanying text.

²⁴⁷ This is not to minimize the effect of the procedural paradigm shift on the legal profession. I know a number of lawyers who have greatly reduced or eliminated their practices in certain areas such as employment discrimination or civil rights litigation due to bad experiences as targets of aggressive (and in the instances of which I am aware, misplaced) application of Rule 11. I am not at all certain that prospective litigants in these sorts of cases have the same opportunity to obtain legal representation for their claims as existed 10 years ago.

²⁴⁸ See Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827 (1993). Although, in my view, the average Reagan or Bush judicial appointee leans decidedly toward the restrictive paradigm, many of the post-1980 appointees have shouldered their task with neutrality and been unwilling to push the emergence of the restrictive paradigm beyond what legitimate policymakers have decreed. For example, the Supreme Court's 1986 summary judgment trilogy, see Stempel, *supra* note 116, made summary judgment more available. While many district judges pushed the trilogy beyond its limits to grant summary judgment, circuit courts for the most part, have done an admirable

policymakers have been willing to revise or recalibrate when it appears that they have moved too far toward the restrictive paradigm;²⁴⁹ standard filing fees are low;²⁵⁰ and losing litigants are not as a matter of course required to reimburse the opposing party's costs.²⁵¹ These observations are correct in themselves. Nonetheless, when one backs away to take in the mosa-

job of quality control in correcting these errors. I reach this conclusion on the primitive empirical basis of having at least skimmed most circuit decisions on summary judgment since the trilogy was announced. At the same time, however, I also believe that a number of summary judgment injustices have gone unredressed in a manner that would not have occurred before 1986: the procedural revolution in this area may be less radical than I feared but nonetheless is palpable. *But see* Joe S. Cecil, *Summary Judgment Practice in Three District Courts*, FJC DIRECTIONS, Nov. 1991, at 1 (suggesting that major upsurge in summary judgment grants began in early 1980s and was only mildly stimulated by Court's 1986 trilogy).

²⁴⁹ For example, the Civil Rules Advisory Committee responded favorably to the legal profession's complaints about Rule 11 and referred a Proposed Amended Rule 11 to the Supreme Court, which promulgated the change. *See supra* notes 19, 64 and accompanying text. If successful, the new, "new" Rule 11 would be the culmination of a three-year process of systematic rethinking of Rule 11 which involved solicitation of public comment, a hearing, and numerous trial drafts. The Committee's successful revision of Rule 15(c) in response to the *Schiavone* decision, *see supra* note 186 & *infra* note 278, can be viewed in the same light.

²⁵⁰ The current fee for filing a federal court action is \$200, a reasonable amount for access to substantial judicial machinery. *See* A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 227 (1985) (estimating that use of federal courts costs government approximately \$600 per hour). In addition, very poor litigants may be relieved of these obligations by obtaining *in forma pauperis* status. *See* 28 U.S.C. § 1915 (1959). Of course, poor and middle-class litigants have difficulty affording litigation commensurate with the merits of their claims. However, it is almost universally agreed that this results from the high costs of representation rather than government fees.

²⁵¹ In addition, certain litigants benefit from the virtually one-way fee shifting accorded to successful claimant under Title VII (42 U.S.C. § 2000e-5(k) & § 1988), with victorious defendants able to obtain fees only when the unsuccessful claim was "frivolous." *See* *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978). However, aggressive use of Rule 11, 28 U.S.C. § 1927 and the court's inherent sanctioning power, *see e.g.*, *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), has blunted this advantage for these plaintiffs. *See* John Papachristos, Comment, *Inherent Power Found, Rule 11 Lost: Taking a Shortcut to Impose Sanctions in Chambers v. NASCO*, 59 BROOK. L. REV. 1225 (1993). In addition, Rule 68 has been construed to eliminate the advantage when the claimant has refused a settlement worth more than the judgment obtained. *See* *Marek v. Chesney*, 473 U.S. 1 (1985). Defendants also may condition settlement offers on the waiver of statutory counsel fees. *See* *Evans v. Jeff D.*, 475 U.S. 717 (1986). In addition, Rule 68 has been the recurring subject of proposed revision that would bring federal courts closer to the "English Rule" of fee-shifting. *See* *Burbank, Abandon Ship*, *supra* note 116; *Schwarzer*, *supra* note 10.

ic of the various successful, mixed and thwarted attacks on the old Charles Clark model of procedure, the picture looks quite different than it did in the 1960s.²⁵² Absent demonstrative gains by the preservationists through changes in rules, statutes or policy, the emerging restrictive paradigm seems destined to consolidate its hegemony in the near future.

Yet as measured by one criterion deemed important by Kuhn, the open access adjudicatory procedure paradigm remains quite vibrant. Kuhn describes scientific textbooks as the chroniclers of scientific revolutions: when the new paradigm displaces the old one in the texts used to train succeeding generations, the revolution is complete.²⁵³ By this standard, one well might argue not only that the procedural battle is unresolved but also that the open courts model continues to enjoy great dominance. Most current Civil Procedure casebooks and treatises are still organized around the Federal Rules and the adjudicatory model.²⁵⁴ To be sure, all reflect the modern trends at least in part. For example, all have added sections on ADR that were essentially absent in earlier editions. Yet the new ADR sections are usually comparatively short or placed near the end of the book.²⁵⁵ Similarly, despite the many changes in the technicalities of pretrial practice, particularly

²⁵² See Subrin, *supra* note 24, at 1158.

²⁵³ See KUHN, *supra* note 132, at 163-91.

²⁵⁴ For examples of this in the leading course casebooks, see COUNDE ET AL., *supra* note 30; RICHARD H. FIELD ET AL., MATERIALS ON CIVIL PROCEDURE (6th ed. 1990); RICHARD MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH (1989); MAURICE ROSENBERG ET AL., ELEMENTS OF CIVIL PROCEDURE (5th ed. 1990); STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE (3d ed. 1992). *But see* ROBERT M. COVER ET AL., PROCEDURE (1988).

Treatises are particularly structured around the Federal Rules and tend to be quite steadfast in promoting the Clarkian ideal. *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE (1985); JAMES W. MOORE, FEDERAL PRACTICE (various dates according to volume; supplemented annually); CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE (same). One arguable exception is JAMES JR. ET AL., *supra* note 173, which is organized more along historical, topical, and structural lines. But this treatise, like the others, tends to be supportive of the open access model.

²⁵⁵ *See, e.g.*, COUNDE ET AL., *supra* note 30, ch. 15, at 1230-86; DAVID CRUMP ET AL., CASES & MATERIALS ON CIVIL PROCEDURE ch. 15, at 1077-1135 (2d ed. 1992); FIELD, *supra* note 254, at 350-53; A. LEO LEVIN ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 542-59 (2d ed. 1992); DAVID W. LOUISELL ET AL., CIVIL PROCEDURE 1255-80 (6th ed. 1989); MARCUS ET AL., *supra* note 254, at 96-108; ROSENBERG, *supra* note 254, ch. 18., at 1111-36; YEAZELL ET AL., *supra* note 254, at 668-84.

for conferencing and discovery, the major textbooks generally give little space to these issues and present discovery issues as though the counter-revolution had never occurred.²⁵⁶ These presentations may be criticized as inaccurate, of course, but they do have virtue for the preservationists in that they tend to place a figurative finger in the dike of the old paradigm as it faces the rising tide of the restrictive model. Unfortunately, because legal textbooks do not carry the pre-emptive weight of those in the sciences, this probably will not be sufficient to stem the reformist tide.

E. *The Embattled Litigation Reform Paradigm*

A similar but different pattern emerges when examining the previously dominant law reform paradigm and fissures within it. Although less settled than in the past, by Kuhnesque standards, litigation reform has not seen a sufficient upheaval to qualify as a revolution. As yet, in fact, no opposing paradigm has been sufficiently articulated and promoted to serve as a replacement. Although a new structure may emerge or the previous consensus may reassert itself, litigation reform may also devolve into a fragmented regime of controlled chaos rather than the emergence of a new paradigm.

As noted above, I have posited that during the 1934-1980 period, the system governing the manner in which litigation policy was made, as differentiated from the way in which cases are actually adjudicated, was generally one that was judge/legal profession-centered at the top, with a preference for deliberation, uniformity, and neutrality. Recent developments, however, particularly the CJRA have aroused concern that a new policymaking paradigm is in place. The CJRA has been

²⁵⁶ See, e.g., COUND ET AL., *supra* note 30, at 801 (devoting one paragraph to 1980 amendments to Rule 26(f) providing for discovery conference and 1983 amendments to Rule 16 encouraging district courts to schedule early pretrial conferences); COVER ET AL., *supra* note 254, at 938-41 (discussing "A New Emphases on Sanctions"); CRUMP ET AL., *supra* note 255, at 661-63 (considering various proposals, including local rules, to limit the scope and cost of discovery).

See, e.g., JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 761-854 (6th ed. 1993); RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 549-92 (6th ed. 1990); DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE 901-69 (6th ed. 1989) (giving some hint of the political battle surrounding discovery, *id.* at 967-69).

harshly criticized as "balkanizing" civil procedure.²⁵⁷ It also has been characterized as a "counter-reformation" in litigation policymaking that not only drastically and unwisely alters the traditional roles of courts and Congress, but violates separation of powers norms as well.²⁵⁸ Although I agree for the most part with criticisms of the CJRA²⁵⁹ and other trends which erode the litigation reform model, such as proliferating local rules and standing orders,²⁶⁰ it is far too early to announce a new paradigm of reform policy. The existing but shaky paradigm retains many attractions and can be shored up to continue, even if it must preside over a different model of adjudicatory procedure. I attempt a blueprint for an amended litigation reform model in Part III.

Although the judge/lawyer-centered characterization weakens when one confronts other litigation changes, many of which are congressionally generated, the emerging picture is one of the judge/lawyer-centered, uniform, deliberative model of change, heavily accenting the dominance of the bench. Yet since 1970, fissures abound in this model. Uniformity has been undermined by more and more detailed local rules²⁶¹ and standing orders, scholarly criticism of trans-substantivity²⁶² and increasing geographic and political differentiation of the bench.²⁶³ Indeed, the contribution of the legal profession has

²⁵⁷ See Tobias, *supra* note 94; *supra* notes 94-102 and accompanying text.

²⁵⁸ See Mullenix, *supra* note 95.

²⁵⁹ As much as I find the CJRA unwise and wasteful, and as much as I am appalled by the manner in which it passed as something of an "end run" around the judiciary, I think that even thoughtful commentators like Professors Tobias and Mullenix have not emphasized sufficiently the potential silver lining that exists if the required district-by-district experimentation of the CJRA were properly harnessed through observation. We might be able to learn a good deal from this massive field experiment. Unfortunately, erratic implementation of local Delay and Expense Reduction Plans, insufficient monitoring and the possibility that other reform forces, such as the recent Amendments to Rules 26-37, will overwhelm the potential incremental learning offered by the CJRA.

²⁶⁰ See Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding, and Narrow Perspective*, 27 VAL. U. L. REV. 313 (1993).

²⁶¹ In 1988, there were more than 5000 local rules, many of them arguably inconsistent with the Federal Rules, and, thus in violation of Federal Rule of Civil Procedure 83. See LOCAL RULES PROJECT, *supra* note 66.

²⁶² See, e.g., Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

²⁶³ Geographic variance has always characterized the federal bench. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). This occurs both

generally diminished as judges have exerted greater control over both rulemaking and policymaking.

But whether the bench may rule with greater force, it presides over a diminishing kingdom as Congress has intervened more frequently to change policies affecting litigation,²⁶⁴ most prominently with the CJRA. For the most part, the CJRA is unwise, ill-thought, shoot-from-the-hip congressional meddling in judicial administration by those who know little about it. However, the CJRA does not micro-manage litigation in a way that so overwhelms the bench as to constitute a separation of powers violation—but it is uncomfortably close. For example, in addition to directing a significant aspect of the internal operations of the courts, the CJRA offers additional funding to “pilot” districts and “early implementation districts,” provided that these districts take certain action implementing the CJRA by certain deadlines.²⁶⁵ At a time when the bench is literally starved for funds,²⁶⁶ congressional use of funding as a “carrot” for the courts in a manner similar to the national legislature’s nudging of state and local governments is uncomfortably disquieting. Although states have the constitutional rights of federalism, historically these rights have not been given the same force²⁶⁷ as have separation of

because lawyers in Alabama often have a different world view than those in New York and because U.S. Senators historically had great influence in judicial selection; not surprisingly, the judicial nominees sponsored by liberal Democratic Senators differ from those promoted by conservative Republicans. Until 1981, however, lowered ideological concern over judicial appointments muted these tendencies. Personal friendships and nonpartisan standing in the local bar were then more important to judicial selection. *See generally* HAROLD W. CHASE, *FEDERAL JUDGES: THE APPOINTING PROCESS* (1970). Since the Reagan inauguration, however, the effects of ideology, partisanship and geography have been more pronounced because of the Reagan-Bush efforts to police the politics of appointees rather closely. Despite Administration efforts, however, some local bars and Senators resisted politization more successfully than did others, thus widening the range between new judges. *See generally* Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298 (1993).

²⁶⁴ *See* Stempel, *supra* note 86, at 655-58 (reviewing earlier congressional reversals of restrictive Supreme Court decisions on Title VII, ADEA, and Title IX).

²⁶⁵ *See* Pub. L. 101-650, § 106, 104 Stat. 5089 (1990).

²⁶⁶ *See supra* notes 227-34 and accompanying text.

²⁶⁷ *See, e.g.,* *Garcia v. San Antonio Metro. Transit Author.*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), which took a stronger view of the Ninth Amendment’s codification of federalism principles). During the Burger and Rehnquist Courts, however, there has existed a good deal of more subtle but strong regard for federalism in that the Court has frequently

powers principles.²⁶⁸ Consequently, national dominance over the states is something to which we are all accustomed, at least since *Brown v. Board of Education*.²⁶⁹ The ramrodding of the courts by a co-equal federal branch, on the other hand, comes as a jolt more reminiscent of the Civil War era. The CJRA may not be unconstitutional, but it does underscore the degree to which the courts have become Rodney Dangerfield in the eyes of Congress.

Yet, notwithstanding its flaws, the CJRA has a significant virtue: it has ordered the courts to engage in policymaking that includes persons other than judges. The Advisory Groups that have met to plan, draft and oversee the Delay and Expense Reduction Plans have usually included local practitioners and scholars and have acted in the first instance without the bench.²⁷⁰ Although local courts have not been obliged to follow every suggestion and have retained final control over the process, the CJRA must be regarded as at least a substantial expansion of the official channels of judicial communication. Nonetheless, only a mistaken optimist would characterize the CJRA as a dramatic democratization of judicial policymaking. A frequent complaint voiced by practitioners serving on Advisory Groups is the unreceptiveness of the bench to their ideas. On balance, it appears that neither the CJRA nor its Advisory Group mechanism represents a workable long-term model for enlarging participation in litigation policymaking.²⁷¹

permitted federalism concerns to shape its view of the scope and meaning of federal statutes. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

²⁶⁸ See *INS v. Chadha*, 462 U.S. 919 (1983) (one-house veto provision intrudes too greatly on executive prerogatives); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (presidential seizure of steel mills during wartime unconstitutional when inconsistent with congressional legislation governing emergency handling of labor disputes). But see *Morrison v. Olsen*, 487 U.S. 654 (1988) (special prosecutor appointed by Congress to investigate executive officials does not violate separation of powers); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (executive branch permitted to abrogate certain judicial claims as part of Iran hostage settlement).

²⁶⁹ 347 U.S. 483 (1954).

²⁷⁰ See *Robel*, *supra* note 102, at 881-85.

²⁷¹ Even the best attempts at expansion can come to naught. For example, the Northern District of California Advisory Group included a representative of Nolo Press, which publishes books designed to assist laypersons in avoiding lawyers. However, the Nolo representative quickly became frustrated with the lawyer-dominated Advisory Group and ceased coming to meetings. See Wayne D. Brazil, Re-

The CJRA is not a sure sign of a paradigm shift in litigation reform. As noted above, the dominant judge-centered model is under strain and the CJRA amply illustrates the size of some fissures in the edifice of the old paradigm. Without more, however, it is too early to call the old model dead or a new model ascendent. Of course, my confidence in vital signs of the old paradigm stems largely from the failure of its implicit critics to articulate exactly what is supposed to constitute the new paradigm. This results, in part, because the forces changing the litigation reform landscape have been far more interested in, and successful in obtaining, specific changes rather than seeking to sketch a new order in litigation reform. If they²⁷² did, however, they could enunciate two and, perhaps, three characterizations of alternatives to the open courts model.

One effort at congealing the rash of recent litigation policy change into a model for the future would suggest that local autonomy, experimentation and eclectic litigation policymaking now come from a variety of sources. In essence, we²⁷³ would be asked to replace the old order of litigation policymaking with the capitalist's version of "let a hundred flowers bloom."²⁷⁴ I find this too diffuse to qualify as a paradigm, at least by the Kuhn standard. Although in some circumstances decentralization can count as a paradigm (e.g., decentralized government or decentralized management), decentralization in such contexts is at least consistent. In the decentralized government paradigm, for example, the local burghers always have complete control over their bridge tolls, closing hours for merchants, police practices and the like. Recent litigation developments lack the same steadiness. Courts are allowed to

marks at the Annual Meeting of the Association of American Law Schools (Jan. 7, 1993).

²⁷² By "they," I mean the groups that have attempted to alter litigation procedure through direct pleas to Congress or specific judges rather than through attempts to follow the Enabling Act model or to build judicial and legal profession support for legislation.

²⁷³ By "we," I mean the legal profession and society at large, assuming for the sake of argument that "we" are relatively united in adhering to or recently having adhered to the "old paradigm."

²⁷⁴ Chairman Mao Zedong, *in* Remarks of Judge Cabranes, District Judge of the United States District Court of the District of Connecticut, Proceedings of the Fifty-First Judicial Conference of the District of Columbia Circuit on Criminal Procedure and Rules Governing Section 2255 (May 21, 1990) (voicing "cautious optimism" regarding ADR and Biden Bill).

run quite far afield by local rule only to be required by the federal government to adopt Delay and Expense Reduction Plans that often alter or countermand local rules.²⁷⁵ Courts are ordered to develop Delay and Expense Reduction Plans only to have them possibly mooted by new Amendments to the Civil Rules, unless they act to opt out by local rule.

A second, more coherent effort to classify recent events as a reform revolution would argue that Congress has now supplanted the judiciary and that the Rules Enabling Act's model (perhaps the Act itself) faces numbered days. The reaction of Congress to newly promulgated Rules changes concerning the controversial Rule 11, discovery and disclosure amendments indicate that this type of paradigm is possible but not yet able to displace the old model. Congress was heavily involved in almost revising or stopping the proposed amendments, suggesting that the old paradigm is wounded and on the run, and that a possible long-term shift to Congress may be in progress.²⁷⁶ But, ultimately, the controversial rules changes went into effect. Congress threatened but did not alter the Court's promulgations. This suggests that the old paradigm retains considerable vitality under "normal" circumstances, even in periods of controversy.

My own impression is that a return to normalcy in litigation policy is likely. The judicial branch and the legal profession at large will regain some of the ground lost during the past decade for a number of reasons. Most prominently, Congress is busy. As the enactment of the rules amendments shows, the crowded congressional agenda empowers the judiciary in some circumstances. Congress probably lacks the interest in dominating litigation policymaking on a consistent basis over the long term. So long as things appear to be functioning normally, Congress will be attracted only to isolated efforts to correct perceived particular problems. Congress, of course, occasionally responds to interest group pressures with particular alacrity and absence of deliberation. Should interest

²⁷⁵ See Tobias, *supra* note 94, at 1399-1413 (noting that in 1988 Congress urged courts to reduce local variance but in 1990 encouraged it with CJRA).

²⁷⁶ See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (criticizing efforts of elements of the bar to go "over the heads" of Court and Advisory Committee to affect rulemaking policy).

groups backing litigation reform gather sufficient sustained force to continue to pressure Congress, chronic congressional litigation reform remains a possibility. However, this grim scenario is unlikely because interest groups usually reach a state of "almost equipoise" in which they are unable to win sufficiently preclusive legislative victories on a consistent basis. Although some groups, generally those aligned with the more powerful socioeconomic interests, may habitually hold the upper hand, they cannot regularly convert that advantage to tangible changes in policy. Occasionally, there will be setbacks as well. Congress historically has tired of devoting too much time to attempted resolution of such quagmires and delegated much of the policymaking task. With the bench and legal profession so open to assuming the litigation policy role, over the long haul Congress will tend to delegate and defer here just as some observers contend they do when delegating certain vexing issues to administrative agencies.²⁷⁷

If, however, the executive branch were to align itself with a particular coalition for litigation change, this could well provide the impetus for dominance that would permit regular congressional action. If, for example, President Bush had been re-elected, the Quayle Council on Competitiveness assault on some aspects of litigation policy such as punitive damages, the American Rule and non-economic damages may well have allowed a dominant executive and congressional coalition to impose either permanent new policies or a permanent new policymaking mechanism on civil litigation. However, the Clinton election, the new Justice Department and the abolition of the Competitiveness Council have punctured this possibility until at least 1997. Depending on future developments in Republican politics, it is too early to predict whether subsequent GOP candidates will have the conservative litigation procedure and policy agenda held by the Reagan and Bush Administrations. If they do and are victorious, a new litigation reform policymaking structure becomes far more likely. If not, the traditional centrism of the executive branch in these matters will make the old paradigm harder to dislodge.

²⁷⁷ See WILLIAM N. ESKRIDGE, JR. & PHILIP K. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 45-65 (1988) (Congress "ducks" certain issues by referring them to agency for decision).

A third possible way to articulate recent developments as a new paradigm of litigation reform would posit that we have moved from a court-centered system of litigation and litigation reform to one of privatized dispute resolution with a market-based means of "DR" reform; nothing is "alternative" anymore. Thus, although the Enabling Act model of Rules revision might well continue to hold sway, it would become increasingly irrelevant except in criminal matters. The judicial system would be but another option for disputants rather than the preeminent option from which other options are derived. Although this model may well be the most accurate in predicting what has or may be happening, like the "hundred flowers" characterization, it seems a little short of paradigmatic since it does not establish a particular system or process for revising the means by which dispute resolution is practiced. This characterization, however, does square with what appears to be the shifting paradigm of adjudicatory procedure as we move from the "open access adjudication and decision" model of the 1938 Federal Rules to the current regime of "bureaucratic structured case resolution" emphasizing ADR, managerial judging, negotiation, settlement and non-trial disposition generally. However advanced this shift in adjudicatory procedure, the situation in litigation policymaking itself remains fluid, with the trend, such as it is, tilting toward retaining the old paradigm of litigation reform, however worse for wear, while moving toward a more restrictive model of adjudicatory procedure within that system.

III. RETHINKING THE LITIGATION REFORM MECHANISM

A. *The Perspective of Paradigm Shifts*

In my view, Kuhn's thesis about scientific revolutions should be useful for more than mere intellectual enjoyment worrying about the degree to which law differs from or resembles science. If, for example, one endorses the path of progress seen in the natural sciences, one presumably would endorse legal (and litigation) policymaking mechanisms that replicate those of the sciences. Conversely, if one finds the hard sciences too closed to dissent and innovation, slow to change and insufficiently considerate of human values, one would presumably

want a law reform mechanism less rigid than that of the scientific academy. I favor something of a middle path not drastically different from the paradigm of litigation reform that has dominated most of the Twentieth Century. Law is inherently a substantially political and social enterprise. Consequently, it can never be successful if too widely separated from political and social concerns. Legal coherence, rigor, and consistency will never equal that of the natural sciences. Litigation policymaking should never have the same rigid funneling of opinion and proof that characterizes natural science. The variety of viewpoints in law is both refreshing and vital to its mission, right down to the perceived oversupply of student-edited journals. Nonetheless, social needs and political reality should not become an excuse for resisting constructive borrowing from the organization of other disciplines.

Thus, Kuhn's observations provide lessons that law might profitably borrow from the sciences. To begin with, despite its imperfect analogy to law, the Kuhn model of scientific revolutions can provide us with some indication of the degree to which the legal profession and the body politic are operating "business as usual," degenerating into chaos or making a dramatic transition to a new order. Despite the possible subjectivity of my possibly strained adaptation of Kuhn, I think self-conscious assessment of the state of legal change can provide a valuable tool for gauging our progress or lack of it. For example, the episodes of contraction in the open model of adjudicatory procedure are no secret to lawyers. Neither is the overall trend toward adding additional procedural requirements. However, most lawyers, even those in policymaking roles, probably do not frequently stop to ask whether the cumulative weight of these changes has wrought a shift in the governing paradigm.

It is a question worth asking. To a far greater degree than the natural sciences, law is socially constructed and its paradigm shifts can be controlled: there are no immutable facts like the speed of light or the position of the stars that require a paradigm shift. For example, the legal profession may have supported some constriction of the open adjudication model but be unwilling to support a complete shift to the more restrictive bureaucratic structured case resolution. By attempting to gauge such imminent shifts, perhaps we can better find the point in litigation reform that satisfies the profession and soci-

ety as a whole, avoiding the mistakes occasionally generated by excessive reform, overly abrupt reform or attempting to administer aspects of the system designed for a paradigm that no longer holds sway.

Perhaps more important to structuring future litigation reform efforts, however, is Kuhn's theory of the impact of the scientific community on change and paradigm shifts. In it are some distinct lessons for law. Recall that Kuhn described the meaningful scientific community of change as small, (usually no more than 100 persons), uniform in training (through the "sacred text" style of textbooks), cohesive (except when divided during times of inter-paradigm battles), communicative (through correspondence, select journals) and very conservative in its attitude toward change. Although, I would never want litigation reform power to be as concentrated as that in the sciences, some traits of the natural sciences infrastructure described by Kuhn are perhaps worth importing in modified form into legal policymaking.

The litigation reform community is alternately much broader and as narrow as its natural sciences counterpart. All of the nation's three-quarters of a million lawyers belong, but perhaps as few as twenty-five persons are really important to some changes of Rules or statutes. On other occasions, several thousand lawyers and politicians may be credibly regarded as important to a litigation policy debate. In addition, litigation reform discussions lack the cohesion of scientific debates. The wide variety of potentially interested parties pursuing preferred agendas virtually guarantees that many elements of the litigation reform community will be on different pages from one another regarding the reform agenda. Since law cannot and probably should not emulate the tight cohesiveness of Kuhn's core scientific community, it could profit from institutionalizing coordinated analysis and dialogue among the diverse elements of the national legal community.

B. *A Possible Compromise for the Future*

In particular, the litigation reform mechanism should attempt to capture the concept of a structured community of dialogue and reflective, sustained examination of the subject matter. Specifically, Congress should enact legislation along

the lines of an expanded Rules Enabling Act model and provide that changes in litigation procedure and other litigation reform initiatives be scrutinized by a broadly defined legal profession. Similarly, congressional procedures for policymaking or bypassing the rulemaking process should change to force more contemplative behavior by all involved.

1. Invigorating the Enabling Act

The Enabling Act, which was opened more to the public in 1988, should be opened further and amended in other ways. Currently, Rules amendments tend to emerge almost by an erratic osmosis: a particular case or doctrine arouses professional clamor for change;²⁷⁸ certain quarters of the profession come to see an area of law as unsatisfactory;²⁷⁹ an influential person thinks a particular Rules change will improve the sys-

²⁷⁸ Two recent amendments are particularly embarrassing examples of perceived "acute" problems with procedural rules. In *Schiavone v. Fortune*, 477 U.S. 21 (1986), the Supreme Court, with Justice Stevens joined by Chief Justice Rehnquist and Justice White, dissenting, took what many regarded as a hyper-literal interpretation of Rule 15(c)'s provisions for determining the "relation back" of a claim when a defendant was misnamed, dismissing a libel suit that missed a one year statute of limitations by days. Professional and scholarly opinion quickly aligned with Justice Stevens' position on the matter, resulting in an amended Rule 15(c) which took effect in 1991. See, e.g., Bauer, *supra* note 186, at 720; see also Karen N. Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039 (1993) (arguing persuasively that Court engages in too much crabbed, *Schiavone*-like interpretation of the Federal Rules and that more apt interpretative approach would focus on intent and purpose underlying Rules and appreciate Court's role as co-creator of Rules as well as interpreter of them). The saga of Rule 15 is embarrassing to both the Court, which applied a nitpickingly literal textual view to the Rule, and to the rulemaking process, which thought it had "fixed" this problem of Rule 15(c) serving as a trap for the unwary in its 1966 amendments to the Rules. Instead, the resulting Rule 15(c) in effect from 1966 to 1991 was all too susceptible to such construction.

The adoption and subsequent modification of Rule 11 also reveals a shoot-from-the-hip rulemaking process in which insiders quietly but quickly decided to "do something" about a perceived problem with frivolous litigation and then saw their handiwork made perhaps even worse by the Court's opinions construing the Rule in decisions that did not provide much meaningful guidance for lower courts and litigators. In reaction to widespread dissatisfaction, Rule 11 was amended substantially 10 years after its enactment but the resulting current Rule 11 still leaves much of the legal community unhappy.

²⁷⁹ The 1983 amendment to Rule 11 did not result from Court interpretation but nonetheless proved highly unpopular with the bar, which lobbied hard for change throughout the 1980s, culminating in the Amended Rule 11 which took effect on December 1, 1993. See *supra* note 64 and accompanying text.

tem,²⁸⁰ or the criticism or suggestions of scholarly writings take hold among the Advisory Committee.²⁸¹ Well before law mirrors the rigidity of the natural sciences, we can and should demand a bit more proof of a need for change before the rulemaking process clicks into gear.

New legislation should require that, as a prerequisite for amending the rules, the Advisory Committee draft and circulate for comment a Memorandum of Notice of Possible Amendment which examines the Rule and area at issue and makes the case for a serious consideration of a possible amendment. The Act should provide for a wide required circulation of this Memorandum, any Discussion Drafts of possible amendments and, finally, any officially Proposed Amended Rules. This new "early" public comment period would be in addition to the existing period of public comment available once the Advisory Committee has embraced a proposed amendment. After comments on the Memorandum are evaluated, the Advisory Committee should be required to hold public hearings if it desires to go forward with a planned amendment. The Committee also would have the option and government financial support for holding such hearings at the outset to aid it in determining whether to continue with the Memorandum and to assist it in the writing of the Memorandum and any subsequent draft Proposed Amended Rules.

Currently, there is no requirement of a Memorandum making the case for change, although the Reporter's Note often

²⁸⁰ The 1992 consideration of revising Rule 56 (disapproved by the Judicial Conference late in the process) and circulation of a possible draft Rule 68 due to the interest of Judge William Schwarzer provide recent illustration. Chief Justice Burger's activity relating to service of process and Rule 68 fee-shifting during the early 1980s are also examples. See *supra* notes 9-11 and accompanying text.

²⁸¹ Ironically, the unpopular 1983 amendment to Rule 11 was spurred by sharp criticism of its toothless predecessor. See D. Michael Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-35 (1976) (finding old Rule 11 used in only 23 reported cases in nearly 40 years); see also COUND ET AL., *supra* note 30, at 545 (attributing 1983 change to rare use of pre-1983 version of Rule 11). Obviously, the general dissatisfaction with perceived excessive litigation of the late 1970s and 1980s, see *supra* notes 109-12 and accompanying text, made Professor Risinger's criticisms more salient. A historical example is the 1966 amendment to class action Rule 23, spurred in part by scholarly criticism of the former class action structure and terminology. See COUND ET AL., *supra* note 30, at 656-58; Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

assumes this role. Moreover, there is no requirement that "unofficial" drafts be circulated for comment to anyone outside the official rulemaking process except to the extent that the Judicial Conference or the Advisory Committee so desire. Hearings and widespread notification that something is in the offing occur only after the Advisory Committee has already coalesced around a Proposed Amended Rule. I find this troublesome. Those outside the rulemaking process are not invited to brainstorm with the rulemakers but only to react to their product, often after an official proposal already supported by the Advisory Committee has gathered momentum. A certain "leave it to us" tone surrounds today's rulemaking process notwithstanding all of the superficial openness Congress mandated in 1988. For example, when former Civil Rules Advisory Committee Reporter Paul Carrington proposed increased professional participation in the rulemaking process, he suggested the formation of a group to lobby Congress on behalf of proposed Rules, a group that as a "primary function" would "organize and orchestrate efforts to protect the rules in Congress and to provide a constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act."²⁸² In effect, Professor Carrington proposed a legal "cheerleading corps" for the Advisory Committee. Conspicuously absent from his proposed "reform," though, is any suggestion that the legal profession and society at large should be more involved in formulating the products he wants "sold" to Congress.

Instead of asking lawyers to make the stark choice of being either a rubber stamp or a howling mob in opposition to change, the litigation reform process should begin treating them as a source of information, ideas and assessment throughout the process. This model of litigation reform would retain the judge-centered deliberative mode of the Enabling Act while incorporating some aspects of the legislative process at its most open. For example, Congress often holds hearings on an issue before debating and drafting legislation on the matter. So, too, should the Advisory Committee. Regrettably, both the modern Congress and the modern Committees now too often draft first and ask questions later. In the case of Congress, however, this may occur in large part because the

²⁸² See Carrington, *supra* note 92, at 166.

electorate seems to demand it.

Although it may seem more efficient to focus discussion on a draft and move forward with a proposal rather than merely talking about it, this method extracts a price. Within the inner sanctum of Congress or the rulemaking process, only a comparative few have access to the drafters and sponsors of new laws and rules. Although these insiders often are public spirited, they are nonetheless insiders: their ability to set the agenda and frame the debate holds troubling potential to anyone who finds the public choice literature even slightly persuasive.²⁸³ Obviously, of course, the Advisory Committee will not explore an issue—under my proposed model or any other—unless inclined to see the matter as potentially ripe for change. Nonetheless, the process would be improved by attempting to keep Rules reform as close to “zero-based” alteration as possible.

At all junctures, there should be required opportunity for participation by the legal profession at large. In addition to notifying the practicing bar, the law school community should be notified as well, probably through correspondence with the Deans of ABA-accredited schools. Also part of the legal profession are the Justice Department and government lawyers. Furthermore, the Executive Branch *qua* Executive Branch should be consulted, probably through the Office of White House Counsel. Hearings, the Memorandum and informal drafts should be as widely publicized as possible. Any hearings should be announced well in advance in the major case reporters and legal periodicals as well as general circulation newspapers in the city in which a hearing is held. A Memorandum of Possible Amendment should be published widely, more widely than the drafts for public comment that are now circulated. Any “informal” drafts should be provided to the major bar and law reform organizations such as the ABA, ALI and the bar associations of each state and major cities such as New York, Chicago, Los Angeles and so on.

In addition, meaningful consultation with the profession requires a more restrained pace of evaluation. The period of comment on either a Memorandum or an informally circulated

²⁸³ See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (summarizing and analyzing public choice theories of undue interest group influence on legislation and public policy).

Rule draft should be at least six months. Actual Proposed Amended Rules could also be circulated much as they are today. Despite the air of urgency that often grips those lobbying for change, few aspects of litigation structure are likely to be so defective as to require immediate systematic change; I challenge readers to name one. Acting in an atmosphere of crisis will almost certainly diminish the resulting product. Instead, the emphasis should be preservation of the status quo and more thorough analysis; change would be appropriate only after an almost unquestionably persuasive case has been made and the proposed change is widely supported, well-drafted and, perhaps, even tested so that, unlike Rule 11, it is likely to wear well under daily pressure. Congress should provide sufficient funds to support field study, case study and other empirical research on problematic areas and possible amendments to the Rules. Although I would stop short of requiring such studies to be part of each Memorandum of Possible Amendment, any proposal for change backed without such study should bear a presumption against it.

Much of my suggested change in rulemaking involves mandating a regularized effort to expand the number of persons who have a realistic opportunity to comment on possible changes. I realize that much of the legal literature of the past decade has been awash in analysis of interpretative communities.²⁸⁴ However, advocacy of the legal interpretative community as a solution to perceived problems of indeterminacy of meaning and legitimacy when enforcing arguably ambiguous laws has suffered from a relatively cloudy vision of just who constitutes the authoritative interpretative community, how it is constituted and why it deserves authoritative status.²⁸⁵ Per-

²⁸⁴ An interpretative community is the group of readers making reference to a particular text used by them in carrying out a collective function. For example, newspaper readers can be viewed as an interpretative community, although the term connotes a more narrow and specialized group with some sphere of authority to act upon the consequences of their interpretation. Federal judges responding to the Constitution are perhaps a classic illustration of an interpretative community. See, e.g., RONALD M. DWORKIN, *LAW'S EMPIRE* (1986); FISH, *IS THERE A TEXT IN THIS CLASS?*, *supra* note 157; Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

²⁸⁵ See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 13-14 (1988); Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661 (1985) (observing that the act of interpreting legal texts is "inevitably affected by the interpreter's experiences and

haps by fiat, my proposal avoids these pitfalls through legislating the parameters—wide parameters—of the community. In addition, my proposal does not deal with interpretation, at least not textual interpretation but rather with policymaking. It seeks to define with some precision the membership and authority of the litigation policymaking community.

In addition, the Supreme Court must return to a more active role in which the Justices in fact function to some degree as a substantive screen upon the product of the Judicial Conference. Although there are substantial costs to this because of the demands on the Court's time, the costs of ill-thought rulemaking are also substantial. Despite Justice White's misgivings about tinkering with trial court rules from the high perch of the Court, the Justices—should they resume a role of closely studying the proposed rules—could provide a valuable layer of additional scrutiny: all are lawyers of some accomplishment; all are trained to assimilate occasionally vast records like those already generated by the current public comment provisions of the Enabling Act; and the members of Court are selected over a period of many years which is likely to reduce the chances that the Justices will fall victim to the occasional groupthink that can grip a study commission or an action committee. Even where rules are forwarded to Congress, dissenting Justices can raise and frame important issues for future consideration.

2. Improving Congressional Litigation Reform Activity

The same expansion I propose for rulemaking should be brought to the legislative arena. Although Congress is unlikely to restrict members from ever introducing legislation in advance of analysis, my ideal litigation reform system would lean in that direction by requiring that legislation affecting the courts be referred to the bench and bar, as well as Executive Branch entities, for comment as a prerequisite for holding

interests," which prompts inquiries into counter-majoritarian aspects of our judicial system). *But see* Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203 (1987) (decreasing authoritative meaning of legal texts is act of power rather than pure literary interpretation; obscuring this fact can lead to inequitable raw exercises of power hidden in the more benign sheepskin of community interpretation).

hearings on the proposed bill. Operationalizing this referral to the bench would be relatively easy. Comments could be required from the Judicial Conference and the Federal Judicial Center. Notification of the legislation should be sent and an opportunity to comment provided to all federal judges and all state high courts. Moreover, while mailing to the entire bar is impractical, mailing to the bar associations who receive notice of informal drafts of Proposed Amended Rules would not be difficult. As with Rules revision, Deans of all ABA-accredited law schools should receive the legislation and notice of opportunity to comment.

The comments should be docketed in Congress and provided to all members of the relevant Congressional Committee. Presumably, Congress will not trigger my suggested pre-hearing comment process unless the bill is important, the member intent on pressing it or the legislation has a serious possibility of at least receiving a hearing. If a hearing is held on proposed legislation affecting courts, the Committee should ensure adequate representation by bench, bar and the academy. Much current Congressional assembly of witnesses for a legislative hearing seems to proceed on the basis of assembling big wheels (the official spokespersons of affected institutions) and squeaky wheels (representatives of groups known to favor or oppose the suggested change, often for partisan reasons),²⁸⁶ with the occa-

²⁸⁶ Although to some extent, government by squeaky wheels is part and parcel of a democracy, too much of this sort of responsiveness to the most rabidly interested parties may make for bad public policy. Interested legal partisans (e.g., defense lawyers, plaintiffs' lawyers, manufacturers, insurers) obviously may be promoting their own self-interested agenda rather than the commonwealth. Behaving like Washington insiders, they are likely to monitor developments closely on a regular basis and to have established contacts in Congress and the Executive agencies. If Congress quickly accommodates these groups' requests to dominate hearing testimony, this shrinks or eliminates the available openings for more neutral persons or organizations whose very neutrality and detachment makes them less likely to be the first to call Congress to seek an audience on litigation matters.

For example, the House in 1993 responded quickly to the Supreme Court's April 22 transmittal of proposed Federal Rules amendments (*see supra* notes 67-68 and accompanying text, describing the amendments), scheduling a day of hearings in mid-June. By the time the Association of the Bar of the City of New York requested participation in the hearing, the list of witnesses was virtually complete. It was comprised of proponents of the Rules changes from the judiciary faced by opponents from interest groups of lawyers (e.g., the defense-oriented Lawyers for Civil Justice and the liberal civil rights group Public Citizen); only one slot initial-

sional star or human interest witness testifying as well.²⁸⁷ Too often, representatives of the neutral mainstream seem to be absent. Yet, legislating openness and representation into fixed criteria for selecting witnesses is problematic. At the very least, however, Congress should attempt to hear from the legal profession at large by contacting representatives of bench and bar through their umbrella organizations rather than allowing congressional information to be dominated by "special interests" within the profession.

If legislation is viewed favorably after hearing and reported out of committee, there should be a required "Judicial Impact Statement" compiled by the Federal Judicial Center, the Judicial Conference or the relevant congressional committee, provided that the judiciary receives fair opportunity to review and criticize the statement. This change has long been advocated by prominent jurists and supported by the ABA. It has been introduced as legislation, but to no avail.²⁸⁸ The proposed Judicial Impact Statement probably should be renamed and should not be analogized too closely to the environmental impact statements required by much environmental legislation. Environmental statements have acquired a reputation as much work, often for little payoff, with much attendant delay. Without entering into the pro-con fray over environmental statements, I stress that the Judicial Impact Statement envisioned by the proposed legislation and the bench is a less cumbersome document that could be satisfied by sufficient reflection and a minimum of field research. It is not intended to thwart or unduly delay change but rather to force legislators to consider seriously the effect of their proposals.

ly was allotted to a bar association representative. The House subcommittee staff's inclination to view testimony by one bar group (the ABA Litigation Section) as sufficient, precludes testimony by other bar associations.

²⁸⁷ For example, congressional hearings on law reform issues often call as witnesses litigants who have suffered harm under the *status quo* system which is likely to change as a result of proposed legislation. For example, when Congress considered civil rights legislation to overrule the Court's narrow interpretation of 42 U.S.C. § 1981 in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), unsuccessful plaintiff Brenda Patterson was a witness.

Another common type of witness is the proponent or opponent with fame or media star status. For example, actor Robert Redford has testified on behalf of environmental legislation and singers John Mellencamp and Willie Nelson testified on behalf of bills designed to aid farmers.

²⁸⁸ See, e.g., S. 1569, 102d Cong., 2d Sess. § 602 (1992).

Although requiring these statements would of course add another layer to legislating, the potential policy gain probably exceeds the modest procedural cost in that such statements would put Congress on notice of the ramifications of seemingly benign change and mute the legislative tendency to add burdens to the court system at the same time that it criticizes the courts for being slow and expensive.

All of these increased efforts to gather professional input into the generation, drafting and revision of legislation will undoubtedly require more time. In general, each stage of the process should allow a minimum of six months for notified parties to respond. Although critics may view this as excessive, I think this is the minimally adequate period for commentary if this system is to work. By definition, some of the lawyers with the most interesting observations will be some of the busiest and, therefore, will require a decent interval to frame a thoughtful response. To the extent that responding to a proposed Rule requires substantial legal research or empirical investigation, time pressures are increased. Consequently, broad circulation of materials but short deadlines for response are no solution as they do not effectively expand the profession's opportunity for access. In addition, short time periods add to the atmosphere of false urgency that seems unnecessarily to surround litigation reform.

3. The Almost Apt Administrative Law Model

After this Symposium had taken place, an important article appeared about rulemaking reform in which Professor Laurens Walker advanced criticisms of the process similar to my own²⁸⁹ and also advanced a somewhat different and more specific solution. Professor Walker decries the excessively unbridled discretion of the rulemakers and the ad hoc "incrementalism" of the continuous trickle of rules reform.²⁹⁰

²⁸⁹ See Walker, *supra* note 59, at 459 (Advisory Committee amends rules "chiefly on the basis of personal experience, opinion, and intuition").

²⁹⁰ *Id.* at 461-64, 475-77. Professor Walker describes Colin Diver's characterization of the incremental model of rulemaking as having the distinctive features of (1) piecemeal policymaking "tightly restricted in scope;" (2) a dynamic and remedial process; and (3) decentralization, finding that the current litigation rulemaking system largely fits this model. *Id.* at 475-77 (citing Colin S. Diver, *Policymaking*

In its place, he would prefer a "comprehensive rationality" model of rulemaking,²⁹¹ in which the Supreme Court enters a rulemaking order similar to Executive Order No. 12,291,²⁹² which sets forth similar criteria for agency rulemaking and for the monitoring and enforcement of agencies by the Office of Management and Budget. Professor Walker's proposed Court order would provide that the Advisory Committee must:

- (1) make rules based on adequate information;
- (2) refrain from rulemaking unless the "potential benefits to society outweigh the potential costs;"
- (3) "pursue objectives chosen to maximize the net benefits to society;"
- (4) "choose the alternative involving the least cost to society;" and
- (5) attempt to maximize net social benefit in its rules policy.²⁹³

Although I am attracted to a more aspiringly rational, forward-looking and less *ad hoc* rulemaking process, I am both troubled by the express deification of cost-benefit analysis in Professor Walker's proposal and the fear that by wrapping itself in the robes of rationality, the rulemaking process might well continue to operate as the same nonempirical insiders game played with more force and more success. The language of administrative law may sound more rigorous and scientific, but the events of the past two decades do not suggest that the administrative law rulemaking system has been functioning any better than the litigation reform system,²⁹⁴ which has

Paradigms in Administrative Law, 95 HARV. L. REV. 393, 399 (1981)). There's that word "paradigm" again!

²⁹¹ This classification is also Professor Diver's, by which he means that the decisionmaker (1) specifies her goal; (2) identifies "all possible methods of reaching" the objective; (3) evaluates the effectiveness of each method; and (4) selects the alternative that "will make the greatest progress toward the desired outcome." Walker, *supra* note 59, at 475-76 (citing Diver, *supra* note 290, at 396-99, 409-28).

²⁹² 46 Fed. Reg. 13,193 (1982), reprinted in 5 U.S.C. § 601 (1988).

²⁹³ Walker, *supra* note 59, at 464.

²⁹⁴ See WILLIAM N. ESKRIDGE, JR. & PHILIP K. FRICKEY, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 493-95 (1988) (describing "*l'affaire Gorsuch*," regarding possibly poor EPA performance thwarting objective of legislation and executive hostility toward cooperation with Congress); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1681-88 (1975) (agency co-optation a problem under any model of decisionmaking due to interest group influence and other public choice factors).

been dominated by the comprehensive rationality model,²⁹⁵ at least in theory.

In particular, cost-benefit analysis always poses the danger of becoming a mere Kaldor-Hicks efficiency yardstick by which litigation policy is measured. Recall that under the prevailing economists' definition of efficiency, a transaction is efficient if those benefitting gain enough to retain some of the gain and yet have the capacity to compensate those disfavored by the change.²⁹⁶ Unfortunately, the point of much of the legal system is to enhance justice and stability even if that enhancement occurs at the expense of efficiency. In addition, the whole point of much litigation is to assign blame and penalty. Consequently, it might be a very good rule of civil litigation to impose small costs (although large in the aggregate) on many persons in order to grant moderate benefits with accuracy or to impose moderate penalties upon certain litigants. Although, strictly speaking, I am probably applying cost-benefit analysis in labeling this hypothetical rule "good" because I value accuracy and desert more than the additional processing costs, many observers would simply say that I am willing to impose a cost on the many for the benefit of the comparative few.

In real life, I seldom expect to defend such awkward positions. For example, permitting discovery in civil litigation raises costs for many but it undoubtedly benefits many as well, even though a large number of litigants do not benefit at all from its availability. No matter how the numbers are crunched today or in the mythical future when we possess better field research, I expect that no case could be made for abolishing or sharply curtailing discovery. However, if ninety-nine percent of the litigants saw no benefit from its availability, I would be on thin ice as a discovery defender unless the one percent of beneficiaries gained momentarily or were far more deserving than those who shouldered discovery costs without benefit.

In addition, the expressly venerated cost-benefit construct may lead policymakers to overemphasize the more easily quantified costs and benefits—such as faster resolution or fewer

²⁹⁵ See Walker, *supra* note 59, at 475 (citing Diver, *supra* note 290, at 396-99, 407-28). According to Diver, the comprehensive rationality or "synoptic paradigm" now prevails in administrative law.

²⁹⁶ See POSNER, *supra* note 218, at 13-14.

expenditures on court personnel—rather than matters equally important but less amenable to numeric valuation, such as litigant satisfaction, accurate results, just deserts for the parties or reduced unethical lawyering.²⁹⁷ Unless very rigorously applied, such self-conscious cost-benefit analysis may simply become intuitive decisionmaking in which the rulemakers assign variable but not necessarily accurate weights to the many competing issues that animate rules reform debate. Given that lawyers and judges are seen so frequently as empirically inept and drawn toward positions more by experience, ideology and intuition (a criticism Professor Walker himself makes),²⁹⁸ I have little cause for optimism that the comprehensive rationality model would be rigorously and wisely applied rather than becoming a scientific-sounding justification of the preconceived notions of the rulemaking elite.

In addition, Professor Walker adopts the comprehensive rationality or “synoptic” model of administrative rulemaking without any apparent consideration of other models of rulemaking. Specifically, administrative law scholars, although acknowledging the traditional dominance of the synoptic model, have also recognized a “pluralist” model and a more recent “civic republican” model of rulemaking. Under the pluralist model, rules are made less by resort to seemingly objective technical cost-benefit analysis and more by political decisionmaking as various groups with divergent interests fight to prevail in the rulemaking process.²⁹⁹ In contrast to the pluralist model in which groups bring their pre-existing preferences to the political arena and either succeed, compromise or fail, under the civic republican model, the political community engages in deliberation in which the citizenry attempts to arrive at a shared conception of the “common good”

²⁹⁷ To his credit, Professor Walker appreciates this criticism although he rejects it. See Walker, *supra* note 59, at 480-81 (citing Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, REG., Jan.-Feb. 1981, at 33 (making criticisms similar to mine) and James V. Delong, *Defending Cost-Benefit Analysis: Replies to Steven Kelman*, REG., Mar.-Apr. 1981, at 39 (supporting cost-benefit analysis concept as does Professor Walker)).

²⁹⁸ See Walker, *supra* note 59, at 487-88 nn.249-50 (citing Maurice Rosenberg, *The Impact of Procedure-Impact Studies on the Administration of Justice*, 51 LAW & CONTEMP. PROBS. 13, 25-27 (1988)).

²⁹⁹ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

and to make administrative rules designed to foster that common good.³⁰⁰

The synoptic model of seemingly objective, noncontroversial, technical problem-solving can work well and seems perfectly apt so long as there is widespread consensus on the goals of rulemaking and the relative weighing of various costs and benefits. Where this exists, the body politic will not only tolerate but may insist upon a "scientific" approach to rulemaking or other public policy issues. Where society is divided on goals, assumptions or valuation, the synoptic model will be subjective and distributional in effect. In such cases, society might well be better off to spurn or modify the synoptic model for a pluralist approach that tackles divisive political issues head-on or a civic republican approach that openly attempts to find common ground among diverse factions.

Because differing values, goals, opinions and ideology permeate both the legal profession and society's view of litigation, adopting a completely synoptic model of civil rulemaking seems inappropriate. The system must openly acknowledge this and avoid the potential "blue smoke and mirrors" of adopting a more cerebral-sounding litigation reform process. By the same token, however, civil rulemaking should not be transformed into a completely political or partisan enterprise. Instead, the reform process should expand and institutionalize widespread participation and criticism of proposed changes, work toward nonpartisan attitudes in rulemaking, and insist on more solid research about and testing of reform proposals without attaching to them arbitrary numeric values. In essence, I am advocating something of a civic republican rulemaking process in which opinion is widely sampled to achieve consensus where possible, make candid political choices where necessary, and implement those decisions in a deliberative and rational manner.

³⁰⁰ See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542-58 (1988); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). Although not every observer would agree with this classification of current models of rulemaking, the tripartite division and characterization is based on scholarly writings in the field even though the authors themselves have not used this terminology. See Jonathan Poisner, *Environmental Values and Judicial Review after Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 ECOLOGY L.Q. 335 (1991) (developing classification).

By guaranteeing that rulemaking not become too much of an insider's game and seeking cross-representation of the profession, the reform process can achieve *de facto* cost-benefit analysis and thorough examination of particular proposals. Consequently, one method that Professor Walker suggests borrowing from administrative law is particularly promising: OMB-like record-keeping and disclosure procedures in which drafts of new rules and correspondence with committee members are available to interested parties, with logs maintained of communications involving the rulemakers.³⁰¹ Likewise, Professor Walker is right to urge rulemakers to consider all options—so long as the rulemakers realize that restraint is one option always worth considering. In addition, the notion of a long-term, comprehensive agenda and routinized data-gathering implicit in the comprehensive rationality model could well improve the litigation reform process. However, in light of the unwillingness of the other two branches to fund the judiciary adequately, one must seriously fear insufficient funds to implement and maintain adequately a well-functioning version of Professor Walker's model within the existing judge-centered litigation reform paradigm of the Enabling Act.³⁰²

Perhaps Professor Walker's administrative law would improve upon the *status quo*. But perhaps, as I fear, it would be an overcorrection. Out of caution alone, however, I view such an overhaul as premature. Despite the recent changes in adjudicatory procedure and litigation reform, the rulemaking process does not appear to require radical surgery. As a first step, more modest reforms seem worth attempting. I prefer to work within the existing framework, traditions, lawyer traits and incremental model³⁰³ first before making more far-reaching changes.

In addition to holding some normal suspicions of sudden change, I also argue that preferred solutions are those that refrain from making modern lawmaking any more complex

³⁰¹ Walker, *supra* note 59, at 483; see also Margaret Gilhooley, *Executive Oversight of Administrative Rulemaking: Disclosing the Impact*, 25 IND. L. REV. 299, 314-18 (1991) (describing current OMB disclosure practices).

³⁰² See *supra* notes 227-30 and accompanying text.

³⁰³ See Walker, *supra* note 59, at 476 (citing Diver, *supra* note 290, at 428-34) (neither incremental or comprehensive model is inherently superior; proper choice depends on context of policymaking).

than it has already become. In his thoughtful article on the subject, Peter Schuck identified our legal system as complex according to criteria of density, technicality, differentiation and indeterminacy.³⁰⁴ According to Professor Schuck, "[d]ensity and technicality are chiefly aspects of the system's rules. *Dense* rules are numerous and encompassing *Technical* rules require special sophistication or expertise on the part of those who wish to understand and apply them."³⁰⁵ A system is institutionally differentiated when there are several different sources of legitimacy, decision processes and so on.³⁰⁶ Indeterminacy of course, is uncertainty.³⁰⁷ A new administrative law model of litigation reform would certainly make the reform process more technical and, thus, more complex, especially if imposed upon the existing judge-centered model of personnel and operation. In my view, it would also make the reform process more dense as new rules or methods for implementing the new system arise. Because cost-benefit analysis is so malleable, it is not even clear that Professor Walker's proposal would make rulemaking outcomes and objectives any less uncertain than they are today. The comprehensive rationality model would not make rulemaking or litigation reform less institutionally differentiated unless Congress was so impressed with the results that it returned to a mode of virtual deference to the judge-centered rulemaking apparatus. In short, the administrative law model seems certain to increase the complexity of litigation reform more greatly, a result generally to be avoided unless one is quite confident of enjoying posited potential gains.³⁰⁸

C. *Too Important to be Left to the Generals—Entirely*

Recently, Chief Justice Rehnquist reiterated Clemenceau's famous dictum that "war is too important to be left to the generals" and added that

the shape of the federal court system is too important to be left to

³⁰⁴ See Schuck, *supra* note 104, at 3.

³⁰⁵ *Id.* at 3-4.

³⁰⁶ *Id.* at 4.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 18-25, 39-51.

the judges. The [Judicial Conference Long-Range Planning] Committee must develop its vision of the future and shape of the federal judiciary in part by listening to all those who have an interest in the work of the federal courts.³⁰⁹

Although the Chief Justice's admonition related strictly to the Judicial Conference's Long-Range Planning Committee, his praiseworthy sentiment applies to law reform in general. However, I would modify slightly Clemenceau's statement: litigation reform is too important to be left to the judiciary or the bar—entirely.³¹⁰ In addition, the judiciary must do more than give mere lip service to a policy of inclusion. The Long-Range Planning Committee so glowingly invoked by Chief Justice Rehnquist itself held meetings in 1993 and 1994 that are among the least publicized in the Western world. Many lawyers might have something to say to the Committee, if only they knew about the Committee, its meetings and the procedure for participating.

I stress that the "experts" in civil litigation should be defined to include not only the bench but the bar as well. Among many in the profession, the conventional wisdom posits that judges are far more able than members of the bar to manage the business of litigation reform: by definition they are "in court" more than other lawyers; they are detached from concerns of client representation; and they lack the economic incentive that can warp one's analysis. Although these observations are partially if not predominantly true, I nonetheless feel strongly that judges should be only slightly more equal than other lawyers in their impact on litigation reform. Under the current system—or nonsystem for those who see chaos rather than a shift in paradigms—we face the odd incoherence of a litigation reform apparatus in which a small group of judges is far more influential than lawyers or even judges at large, but where the judiciary is simultaneously far less powerful than a

³⁰⁹ See Rehnquist, *supra* note 136, at 4 (quoting Georges Clemenceau, Premier of France during World War I).

³¹⁰ This revised version of the Clemenceau creed probably applies to war, or virtually anything else, in cautioning society never to abdicate supervision completely to the relevant specialists for fear the specialists' views may diverge too greatly from the needs or preferences of society. Society should not abdicate to the specialists but neither should it reject the knowledge of the experts out of a misbegotten populism.

small number of elected or appointed officials. Some reallocation of power and communication is in order to remedy both aspects of this inconsistency.

At present, the current institutionalized channels by which the legal profession may seek reform are almost entirely judge-dominated. In particular, the federal rulemaking apparatus is operated by the Supreme Court and the Judicial Conference. While a few non-judges are members of the Civil Rules Advisory Committee, the Committee is dominated by judges, both in absolute numbers and by the reality that the Committee and a few judicial members have historically dominated the Committee's agenda and determined its product.³¹¹ The attorney members of the Committee, on the other hand, have appeared less visible. Furthermore, practitioner-members historically have worked for the federal government or large law firms, leaving large segments of the practicing bar relatively "unrepresented."³¹²

Law professor Committee members may be more influential, particularly because a law professor is usually the Committee's Reporter, who thus has the opportunity to shape outcomes at the margin through having greatest impact on the actual drafting of a proposed amendment. In addition, the Reporter has in recent years acted as something of an advance scout measuring bar sentiment.³¹³ Nonetheless, the Report is to a substantial extent a conduit, drafting possible amendments in response to Committee requests, and possesses no

³¹¹ See *supra* notes 11-12 and accompanying text.

³¹² To be sure, the practicing bar is not strictly "frozen out" of rules revision. It may still respond with public comment on proposed amendments. However, individual lawyers or bar organizations are not guaranteed the right to appear at public hearings and are not automatically granted a chance for "input" prior to the release for public comment of a draft amendment. By this time, of course, the Committee may be quite committed to a position (e.g., disclosure) and, thus, be relatively difficult to dissuade, making the bar's participation less meaningful. See also *supra* note 286 and accompanying text.

³¹³ For example, both former Reporter Professor Paul Carrington of Duke and Professor Edward Cooper of Michigan have routinely circulated "unofficial" discussion drafts of possible proposed amendments to bar associations, other scholars or individual prominent lawyers in order to obtain reactions. Presumably, the Reporter's assessment of the reaction as communicated to the Committee is important for determining the fate of a possible amended rule. However, the process of circulation for "informal comment," while not really secretive, appears to be quite *ad hoc* and does not appear to represent a systematic attempt to survey early bar or public reaction to a proposal.

veto power over the operation.³¹⁴

Nonetheless, the bench largely controls the Committee's work product, perhaps more today than ever. A comparison of the original Advisory Committee membership with that of recent Committees emphasizes the point. The inaugural Committee was chaired by former Attorney General William Mitchell and relied heavily on its Reporter, Dean Charles Clark of Yale, as well as influential Michigan Professor Edson Sunderland, who historians view as the primary figure in drafting the discovery rules. Other prominent practitioners on the Committee included Edgar Tolman, a prominent Chicago lawyer and special assistant to the Attorney General and editor of the *ABA Journal*, George Wharton Pepper, a former U.S. Senator and prominent Philadelphia lawyer, and ALI President George Wickersham.³¹⁵ The modern Committees have been chaired by judges and dominated by judges. Practitioners have clearly faded away from the inner circle of the Civil Rules Advisory Committee at the same time that the profession has been officially entitled to outside participation through the public comment and hearing process. As anyone familiar with politics and public policy will attest, insiders are more influential than outsiders.

The current Advisory Committee structure may have left procedural rules reform too much in the hands of law's "generals"—the judiciary—at the expense of its lieutenants, sergeants and front-line soldiers—the practicing bar, other legal actors (e.g., court personnel, paralegals, law enforcement officers) and clients. A significant but easily remedied part of the problem is the excessive power of the Chief Justice in selecting rules committee members. Although the Chief is scrutinized in many ways during the confirmation process, this inquiry historically has ignored the Chief's views on rulemaking and court procedure. There simply is no basis for believing that the Chief

³¹⁴ For example, current Reporter Professor Edward Cooper recently circulated a discussion draft of a possible revised Rule 68 for which the Committee apparently decided to "test the waters," because the advocate of the proposal was influential Judge William Schwarzer, Director of the Federal Judicial Center. Whether the Reporter endorsed this proposal is unknown and irrelevant—the Reporter was required to draft and circulate it. The Reporter is, however, free to suggest and advocate particular amendments.

³¹⁵ See Resnik, *supra* note 22, at 498-500 & nn.19 & 24.

exercises the appointment power in any way consistent with the views of the bench, bar or society at large. In the hands of a Chief with a hidden agenda, the appointment power can be used to subvert a representative rulemaking process. New legislation should provide for rules committee appointments through other means,³¹⁶ including requiring expanded representation of practitioners in the Advisory Committee process and should provide a means of tapping for service lawyers beyond those employed by the largest elite commercial firms or the government.

Simultaneously, we have seen quite of bit of participation and influence by "nonexperts" in litigation through congressional activity. Although most Senators and Representatives are lawyers, they can hardly be termed litigation experts. Although nonexperts, particularly clients, must have a voice in litigation reform, in most cases, it should be a diminished voice as compared to that of the legal profession.³¹⁷ Still missing from my purported Nirvana of cautious and participatory litigation reform is a complete answer to the problems of lay participation. When either Congress or federal rulemakers speak of lay participation, they tend to mean participation by the elite or a massively aggregated laity represented by professional lobbyists. Although there remains nothing inherently wrong with lobbyist feedback as a surrogate for that of "real people," most real folks are not represented by lobbyists except in the most attenuated way.³¹⁸ The mythical average person whose only contact with litigation is through an insurer-selected defense lawyer or a contingency fee personal injury lawyer may

³¹⁶ One possibility would have the Chief Justice appoint a fourth of a committee's membership, with the Judicial Conference, Congress and a rotating group of major bar associations also each appointing a fourth of each Committee. I am relatively unconcerned with the exact formula for decentralization so long as greater decentralization of the appointment power occurs.

³¹⁷ I also urge a prominent role for legal scholars as well. Although some will accuse us of being impractical while others will trot out the old myth of academics being unduly left-wing, in my view the correct assessment is that law professors, despite lacking a complete appreciation of the nuances of practice, on the whole are credible sources for litigation reform decisions because of their detachment and concentrated expertise.

³¹⁸ For example, my parents have the American Association of Retired Persons ("AARP"); I have the Teachers Insurance Annuity Association ("TIAA"); my wife has the Catholic Church, which misrepresents her on several issues; my kids have the Children's Defense Fund and Hockey USA.

have meaningful information for litigation policymakers but it remains hard to tap. Until a better idea emerges, I am forced to hope merely that my institutionalized expansion of expert consultation raises the profile of these issues sufficiently to increase lay participation.

CONCLUSION

Current developments in litigation reform and adjudicatory procedure have elements of both a new paradigm and a crumbling construct. The legal profession's relative consensus which fueled passage of the Rules Enabling Act in 1934 and enactment of the Federal Rules of Civil Procedure in 1938 has fragmented. Litigation reform now involves a more active Congress and special interest groups. The multi-sourced reform movement will probably not recede to a more integrated model in the near future. But although multi-pronged efforts at litigation change are part of the new status quo, they have yet to emerge as a full-fledged new paradigm. Perhaps, however, this is merely the legal profession's version of normal science as the conventional wisdom is tested at the margin through application to new situations.

Although the ebb-and-flow of policy activism probably will allow the judiciary to hold the inside track in litigation reform, the process as a whole has been both expanded and politicized. Just as "tax reform" seems to be a recurring feature on the political landscape,³¹⁹ litigation reform has become prominent on the landscape of law as judges, legislators, scholars, think tanks, business groups and various elements of practicing bar all seek to show their continued commitment for improving the world of dispute resolution, at least for their respective constituencies. But like anything else, eclectic variety can prove too much of a good thing. National policymakers should begin to seek more rather than less integration of bench, bar, Congress and the executive in the process of governing America's civil

³¹⁹ See Daniel Shavero, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990) (combination of highly motivated interest groups and politicians' desire to be seen as doing something about tax reform leads to frequent revisiting of tax policy despite economists' consensus that such frequent shifts in the law are highly inefficient).

cases while simultaneously institutionalizing expanded opportunities for broad-based participation by rank-and-file lawyers and litigants.