

# WHO WILL WRITE YOUR RULES?

YOUR STATE  
COURT OR  
THE FEDERAL  
JUDICIARY?

24<sup>TH</sup> ANNUAL FORUM  
FOR STATE APPELLATE  
COURT JUDGES



**POUND  
CIVIL JUSTICE  
INSTITUTE**

FORUM ENDOWED BY  
HABUSH HABUSH & ROTTIER S.C.





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We are all citizens, and should be equal under the law. So there should not be separate sets of rules for Walmart and for individuals.

—A judge attending the 2016 Forum

Predictability should not be espoused at the expense of fairness.

—A judge attending the 2016 Forum

I don't think there is a counterrevolution against litigation. There is a counterrevolution against *trials*.

—A judge attending the 2016 Forum



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# FOREWORD

The Pound Civil Justice Institute’s twenty-fourth Forum for State Appellate Court Judges was held on July 23, 2016, in Los Angeles, California. As with all of our past forums, it was both enjoyable and thought provoking. In the Forum setting, judges, practicing attorneys, and legal scholars were able to consider the crucial issue of transparency in judicial proceedings, and the impact on the rule of law of the increasing instances of non-public dispute resolution.

The Pound Civil Justice Institute recognizes that the state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue in which judges, academics, and practitioners can have a brief, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is always fruitful. Our attendees always bring with them different points of view, and we make additional efforts to include panelists with outlooks that differ from those of most of the Institute’s Fellows. That diversity of viewpoints always emerges in our Forum reports.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court funding crisis, to the decline of jury trial, to separation of powers, forced arbitration, and judicial transparency. We are proud of our Forums, and are gratified by the increasing attendance we have experienced since their inception, as well as by the very positive comments we have received from judges who have attended in the past. A full listing of the prior Forums and their content is provided in an appendix to this report, and their reports and papers—along with most of our other publications—are available for free download at our website: [www.poundinstitute.org](http://www.poundinstitute.org).

The Pound Institute is indebted to many people for the success of the 2016 Forum for State Appellate Court Judges:

- Professors Steve Burbank, Sean Farhang, Steve Subrin, and Thom Main, who wrote the papers that started our discussions;
- our lunch speaker, Professor Arthur R. Miller of New York University School of Law, for a fascinating discussion of federal rulemaking over the years;
- our panelists—Jennie Lee Anderson, Hon. Elizabeth Gleicher, Hon. Henry Kantor, John Kuppens, Donna Melby, Professor Patricia W. Hatamyar Moore, Elizabeth Stein, and Dean Michael Wolfe;
- the moderators of our small-group discussions—Linda Atkinson, Leslie Brueckner, Mark Chalos, Kathryn Clarke, Annika Martin, Shawn McCann, Andre Mura, Valerie Nannery, Wayne Parsons, Gale Pearson, Jim Rooks, and John Vail;
- and the Pound Civil Justice Institute’s dedicated and talented staff—Mary Collishaw, our executive director, and Jim Rooks, our consultant and Forum reporter—for their diligence and professionalism in organizing and administering the 2016 Judges Forum.

It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other. We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your consideration of matters relating to court rulemaking, the rule of law, and trial by jury.

A handwritten signature in blue ink that reads "Kathleen Flynn Peterson". The signature is fluid and cursive, with the first name being the most prominent.

Kathleen Flynn Peterson

President, Pound Civil Justice Institute, 2015-16

# INTRODUCTION

On July 23, 2016 in Los Angeles, California, 105 judges, representing 38 states and the District of Columbia, took part in the Pound Civil Justice Institute’s twenty-fourth annual Forum for State Appellate Court Judges.

The judges examined the topic, “Who Will Write Your Rules—Your State Court or the Federal Judiciary?” The inquiry was prompted by the U.S. federal courts’ 2015 amendment to Rule 26(b)(1) of the Federal Rules of Civil Procedure, which changed the previous description of what is discoverable in civil litigation:

## **Rule 26. Duty to Disclose; General Provisions Governing Discovery**

\* \* \*

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable. ~~including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

The judges’ deliberations were based on original papers written for the Forum by Professors Stephen B. Burbank and Sean Farhang (“Rulemaking and the Counterrevolution Against Federal Litigation: Discovery”), and Professors Stephen N. Subrin and Thomas O. Main (“Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?”). The papers were distributed to participants in advance of the meeting, and the authors also made oral presentations of their papers to the judges during the plenary sessions. The paper presentations were followed by discussion by panels of distinguished commentators: Jennie Lee Anderson, San Francisco, California; the Honorable Elizabeth L. Gleicher, Second District Court of Appeals of Michigan; the Honorable Henry Kantor, Multnomah County Circuit Court, Oregon; John F. Kuppens, First Vice President of DRI—The Voice of the Defense Bar; Donna M. Melby, Los Angeles, California; Professor Patricia W. Hatamyar Moore, St. Thomas University School of Law, Miami, Florida; Elisabeth M. Stein, Policy Counsel at the Constitutional Accountability Center in Washington, D.C.; and Michael A. Wolff, Dean of St. Louis University School of Law and a former member of the Supreme Court of Missouri. All provided incisive comments on the issues based on a wealth of diverse experience in the law.



The judges also heard a lunch address by Professor Arthur R. Miller of New York University School of Law.

After each plenary session, the judges separated into small groups to discuss the issues, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and respond to questions. The discussions were recorded electronically and transcribed by court reporters. Under ground rules set in advance of the discussions, comments by the judges were not made for attribution in this report of the Forum. A representative selection of the judges' comments appears in this report.

At the concluding plenary session, the Forum Reporter, James E. Rooks, Jr., summarized points of apparent agreement among the judges, and all participants in the Forum had a final opportunity to make comments and ask questions.

This report is based on the papers written and presented by Professors Burbank, Farhang, Subrin, and Main, and on transcripts of the Forum's plenary sessions and group discussions.

A handwritten signature in black ink that reads "James E. Rooks, Jr." in a cursive style.

James E. Rooks, Jr.  
Forum Reporter

# MORNING PAPER, ORAL REMARKS, AND COMMENTS

## Rulemaking and the Counterrevolution Against Federal Litigation: Discovery

Stephen B. Burbank, University of Pennsylvania Law School<sup>†</sup>

Sean Farhang, University of California, Berkeley, School of Law<sup>††</sup>

### EXECUTIVE SUMMARY

*In Part I, Professors Burbank and Farhang introduce their topic: the part played by rulemaking in what they term the “counterrevolution” against litigation in the federal courts. Drawing on the original empirical research for their forthcoming book, they argue that this counterrevolution is a continuing response to the “rights revolution” of the 1960s and 1970s. It has resulted in reduced incentives for private enforcement of rights, both Constitutional and statutory. An integral part of the rights revolution, and thus of the counterrevolution, is the discovery mechanism and the capability it provides to parties to obtain, legitimately, information to support their claims. The retrenchment of discovery through the rulemaking process has therefore been integral to the counterrevolution.*

*In Part II (“A Brief History of Discovery Retrenchment”), Burbank and Farhang first outline the creation of the Federal Rules of Civil Procedure and the evolution of the process of rulemaking. It is now carried out by the federal judiciary through committees of judges and practitioners appointed by the Chief Justice, with assistance from academic specialists and a permanent support staff at the Administrative Office of the U.S. Courts. They then describe the first moves toward retrenchment, with Chief Justice Burger’s 1976 Pound Conference serving as an organizing platform for those seeking to use rulemaking to solve purported litigation problems of abuse, delay, and high cost. There followed several rulemaking cycles in which amendments were considered that would modify the original open discovery concept and add limitations and qualifications—including, importantly, a change in the scope of discovery from information relevant to the subject matter of the litigation to information relevant only to a stated claim or defense. Cost and delay were cited as justifications for change, but little empirical data supported the changes.*

*In Part III (“The 2015 Amendments”), Professors Burbank and Farhang trace the development of the latest limitations, through the imposition of a “proportionality” qualification on the scope of discovery, which they say is “cause for concern—and should not be emulated” by state courts. They give four reasons: (1) the amendments are premature, coming too soon after the last adjustments in the discovery rules, and are overkill, in that they may prevent parties from obtaining information that is crucial to their cases; (2) they do not reflect the social benefits of discovery, and of litigation overall, in the enforcement of important rights; (3) because of the trans-substantive application of the federal rules, the amendments will be applied to (and higher costs will be imposed on) cases that are not affected by the problems at which the amendments were said to be directed; and (4) the amendments appear to parallel closely the political ideologies of the rulemakers themselves, who come disproportionately from the business bar and from politically conservative backgrounds.*

*In their conclusion (Part IV), Burbank and Farhang sum up their concerns about the proportionality requirement: that lack of proportionality may be a problem in some high-stakes cases among business litigants, but there are costs to making proportionality part of the basic scope of discovery. It will, they believe, encourage additional objections to discovery requests made by plaintiffs, and so will inevitably impose higher expenses on individual litigants and their lawyers, who can least afford them. The problem will be especially difficult for the private enforcement of Constitutional and statutory rights, where there often is “asymmetric information,” with defendants controlling access to the facts needed to establish a claim. The changed discovery regime thus can readily become an integral part of the “long-running and sustained campaign against litigation.”*

## I. INTRODUCTION

In our forthcoming book, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation*,<sup>1</sup> we contribute to an emerging literature that examines responses to the rights revolution of the 1960s and 1970s. We use original archival evidence to identify the origins of the counterrevolution against private enforcement of federal law in the first Reagan Administration. We present original data that permit us systematically to measure the counterrevolution’s trajectory over decades in the elected branches, court rulemaking, and the Supreme Court, and to

**Since the early 1970s the Supreme Court—increasingly conservative and influenced by ideology—has been more effective than either Congress or those responsible for amending the Federal Rules of Civil Procedure in changing legal rules so as to reduce opportunities and incentives for private enforcement of federal statutory and constitutional rights.**

evaluate its success in changing the law in those different lawmaking sites. We identify a number of institutional differences that may help to understand why, as our data demonstrate, since the early 1970s the Supreme Court—increasingly conservative and influenced by ideology—has been more effective than either Congress or those responsible for amending the Federal Rules of Civil Procedure in changing legal rules so as to reduce opportunities and incentives for private enforcement of federal statutory and constitutional rights.

Among the institutional differences we identify is the fact that, “[a]lthough significant legislative or rulemaking reform proposals . . . often present stark alternatives that trigger powerful interest group mobilization, the case-by-case, less visible, more evolutionary process of legal change via court decisions on seemingly technical and legalistic issues is far less likely to do so. It is therefore less likely to be obstructed.”<sup>2</sup> As a result, “a large transformation in law governing or influencing private enforcement resulted from a succession of hundreds of decisions, distributed over decades, few of which may have appeared monumental in isolation.”<sup>3</sup>

We believe that an institutional perspective is also useful when considering the long path of discovery retrenchment that started in the 1970s and most recently yielded the 2015 amendments to the Federal Rules of Civil Procedure (“federal rules”). Moreover, the value of such a perspective extends to those states that follow the federal model by entrusting prospective procedural law to rulemaking under the auspices of the judiciary, in many of which rulemakers tend also to follow particular federal rulemaking initiatives.



Discovery retrenchment under the federal rules is a saga long dominated by interest group persistence in the face of frustration, and by unrepresentative surveys masquerading as systematic data. Yet, although only episodically and modestly successful until recently, discovery retrenchment may have overcome the barriers that reforms to the federal rulemaking process in the 1980s erected to consequential changes in the status quo, which still at that time was decidedly favorable to private enforcement. If so, it is difficult not to attribute the result, at least in part, to institutional dynamics that have facilitated the triumph of the ideological preferences of those who favor discovery retrenchment.

Those dynamics include the indirect leadership of a series of chief justices through appointments to the Advisory Committee on Civil Rules, which has primary responsibility for proposing amendments to the federal rules. The Chief Justice appoints all members of the committee. Our data demonstrate that, since 1970, a succession of chief justices appointed by Republican presidents have disproportionately favored Article III federal judges (over practitioners and academics) in making appointments, that those judge members were themselves disproportionately appointed by Republican presidents,<sup>4</sup> and that practitioner members have disproportionately represented corporate/business clients.<sup>5</sup>

The relevant institutional dynamics also include the direct leadership of Chief Justice Roberts. The (more than 2,300) comments on the proposed amendments to the discovery rules that became effective in 2015 show that, notwithstanding repeated characterization of the proposals as “modest” or “measured” by some rulemakers and interest groups, they in fact triggered powerful interest group mobilization on both sides. That may be because opponents feared, and proponents expected, a large transformation in discovery resulting from a succession of individual federal rules amendments. Alternatively or in addition, it may be because some individuals on both sides regarded the characterizations as naïve or disingenuous: sheep’s clothing for a wolf. It is difficult not to entertain the latter possibility knowing that the Advisory Committee’s Associate Reporter identified the concept behind some of the proposals to change the scope of discovery—proportionality—as one of two “breakthrough ideas” in rulemaking concerning discovery over the last four decades.<sup>6</sup> Moreover, as we note in *Rights and Retrenchment*:

[W]hatever doubt there may be about the significance of the 2015 discovery amendments, the Chief Justice has made his hopes clear. Having prodded the Advisory Committee to [move forward with discovery retrenchment], after the amendments went into effect Chief Justice Roberts added his voice to the effort to ensure that they would not be ignored, and to influence their interpretation. Devoting his entire year-end report for 2015 to the amendments, Roberts emphasized their potential importance. Thus, he observed, although “[m]any rules amendments are modest and technical, even persnickety . . . the 2015 amendments to the Federal Rules of Civil Procedure are different.” That is because “[t]hey mark significant change, for both lawyers and judges, in the future conduct of civil trials,” with the result that, although they “may not look like a big deal at first glance . . . they are.”<sup>7</sup>

In this paper, adopting an institutional perspective, we first survey the history of discovery retrenchment. We then turn to four related reasons why the 2015 amendments to Rule 26 were improvident and should not be used as a model in the States.

**Notwithstanding repeated characterization of the [discovery] proposals as “modest” or “measured” by some rulemakers and interest groups, they in fact triggered powerful interest group mobilization on both sides.**

## II. A BRIEF HISTORY OF DISCOVERY RETRENCHMENT

### A. Origins through 1970

The original Federal Rules of Civil Procedure became effective in 1938, four years after the successful conclusion of a decades-long campaign that culminated in the Rules Enabling Act of 1934.<sup>8</sup> The system that the Supreme Court devised to exercise the power that Congress delegated in the Enabling Act remained essentially the same until 1956. An Advisory Committee appointed by the Court prepared draft federal rules and amendments, with some (albeit, by modern standards, limited) input from the bench and bar, for consideration by the Court and, if acceptable, reporting to Congress. Once so reported proposed rules went into effect if not vetoed by Congress in legislation signed by the president within a specified period.<sup>9</sup>

Following the discharge of the Advisory Committee in 1956, the judiciary sought, and in 1958 Congress enacted, legislation revamping the rulemaking process. The 1958 legislation directed the Judicial Conference of the United States, through which the federal judiciary formulates and supervises the implementation of institutional policy, to “carry on a continuous study of the operation and effect of” the various rules of practice and procedure promulgated under the Enabling Act. It further directed the Conference to recommend to the Court “[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”<sup>10</sup> The Judicial Conference promptly decided to exercise its statutory duties through a system of advisory committees reporting to a single Standing Committee, which in turn reported to the Conference.<sup>11</sup>

The 1938 federal rules were litigation-friendly.

The 1938 federal rules were litigation-friendly. In this, they reflected the jurisprudential and social commitments of the individuals who were responsible for drafting them. The way that those individuals approached pleading and discovery in the 1938 federal rules made these procedural features critical pillars of the regime they created, and it is thus not surprising that they have been important sites of contestation.

The architects of the 1938 federal rules constructed a broad highway for litigation that was free of some of the imposing roadblocks found in prior systems. The work of a very active committee in the 1960s, which included the 1970 discovery amendments, added lanes and cleared other roadblocks. The “highway effect” was not, however, evident for many years. A small federal judiciary managed to dispose of its caseload without evident strain for more than twenty years after the federal rules went into effect. By the mid to late 1960s, however, leaders of the federal judiciary were voicing serious concern about increasing caseloads.

### B. The Retrenchment Effort in the 1970s: A Decade of Frustration

In *Rights and Retrenchment*, we show that, although Chief Justice Burger had the goal of major litigation retrenchment when he reconstituted the Advisory Committee in 1971, the committee frustrated that goal by spending most of its time over six years studying class action reform, a project they abandoned once the Justice Department caused legislation to be introduced that would have repealed and replaced Rule 23(b)(3), the provision that governs most damages class actions.

Not easily thwarted, however, in 1976 Burger stimulated and presided at the Pound Conference, which was a showcase for those seeking retrenchment through rulemaking. Billed as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice—after Pound’s famous 1906 address to the ABA—the Pound Conference sought to address the problem of growing caseloads through procedural reform. In his keynote address, Burger noted “widespread complaints that [pretrial procedures] are being abused and overused,” and that “the cure is in our hands,”<sup>12</sup> making clear that he meant a cure by rulemaking under the Rules Enabling Act. Prominent critics took aim at notice pleading and discovery—the cornerstones of modern, litigation-friendly federal procedure—as well as at the recently amended class action rule.<sup>13</sup> Some scholars have “characterized the Burger-organized Pound Conference in 1976 as the most important event in the counteroffensive against notice pleading and broad discovery.”<sup>14</sup>

Elements of the organized bar, supported by the business community, have sought to restrict the scope of discovery for decades. Following the 1976 Pound Conference, the ABA, working through a Special Committee for the Study of Discovery Abuse of its Section of Litigation, succeeded in setting the agenda for discovery reform. The Preliminary Draft of Proposed Amendments that the Advisory Committee circulated for comment in March 1978 “was in major part the response of the Advisory Committee to a study of the discovery rules that had been undertaken by the [ABA Special Committee].”<sup>15</sup> After two rounds of notice and comment and two days of public hearings, the Advisory Committee decided not to propose changing the scope of discovery, rejecting the ABA Special Committee’s recommendation. Its Chair observed that “we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit.”<sup>16</sup>

In addition to rejecting the ABA Special Committee’s proposed scope change, the Advisory Committee also rejected its proposal “to amend Rule 33(a) by limiting the number of questions that could be asked by written interrogatories to a party to thirty (30) unless the court permitted a larger number.”<sup>17</sup> Explaining the reasons for that decision, the Advisory Committee Chair observed:

The constantly-echoed criticism was that a limitation on the number of questions was arbitrary, unreasonable and unnecessary. Many commentators stated that interrogatories are the only form of discovery available to ordinary litigants and to the poor. It was frequently stated that limitation of the number of questions would lead to routine requests for court orders enlarging the number.<sup>18</sup>

In 1980 Justice Powell, joined by two colleagues, dissented from the promulgation of the proposed discovery amendments that emerged from this process, deriding them as “tinkering changes” that would “delay for years the adoption of genuinely effective reforms.”<sup>19</sup> In this, Justice Powell, who had been President of the ABA, was echoing the reasoning of the ABA Special Committee, which had urged the Advisory Committee not to transmit its proposals, “[m]indful that the rules which are ultimately adopted will likely govern discovery proceedings for the next decade.”<sup>20</sup> Even though Chief Justice Burger’s role in the Rules Enabling Act process probably prevented him from joining Justice Powell’s dissenting statement, he cannot have been pleased. Moreover, his disposition cannot have been improved by Powell’s use of the term of disparagement—“tinkering”—that Burger himself, channeling Roscoe Pound, had used in his call to action at the 1976 Pound Conference.

**Elements of the organized bar, supported by the business community, have sought to restrict the scope of discovery for decades.**



## C. Proportionality is Born

Whether or not the 1983 amendments to the federal rules were “genuinely effective reforms,” they certainly were not long delayed. Moreover, primarily because of their emphasis on sanctions, particularly in the amendments to Rule 11, they were intensely controversial and only barely escaped legislative override. Again rejecting the ABA’s recommendation to eliminate discovery relevant to the subject matter of the action (as opposed to the claims or defenses asserted),<sup>21</sup> the Advisory Committee proposed replacing language in Rule 26(a) that seemed to invite unlimited discovery (in the absence of a protective order) with (1) language in Rule 26(b) imposing a duty on the court to limit discovery if it determined that any of three conditions was satisfied, including if the discovery sought was “unduly burdensome or expensive,” and (2) a new provision, Rule 26(g), imposing a duty on attorneys and unrepresented parties to certify that, among other things, requests for and responses to discovery were not “unreasonable or unduly burdensome or expensive,” backed up by sanctions. Thus was the concept of proportionality in discovery born.

Following an interval during years when the Advisory Committee was preoccupied by controversies arising from proposals to amend Rule 68<sup>22</sup> and the 1983 amendments to Rule 11, which fueled 1988 legislation amending the Rules Enabling Act,<sup>23</sup> discovery reform returned to center stage in the 1993 amendments. Again, however, the Advisory Committee eschewed change to the scope of discovery in favor of other measures, chiefly required disclosures and presumptive limits on depositions and interrogatories. Unfortunately, having confirmed the value of systematic empirical data in crafting proposed amendments designed to get Rule 11 right,<sup>24</sup> the Advisory Committee reverted to bad habits in its proposed amendments to Rule 26 on required disclosures.

Again, there was little relevant empirical evidence and, indeed, the Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under local rules. Having once abandoned ship, the Committee was apparently persuaded to reboard by the view that it “had a duty to provide leadership in light of its study and hearings,” by expressed doubt that ongoing experimentation would yield any useful empirical data and by the argument that a national rule would be necessary to effect “the cultural change the Committee sought.”<sup>25</sup>

The Advisory Committee linked presumptive limits on interrogatories (but not those on depositions) to the disclosures required by proposed Rule 26(a)(1)-(3): “Because Rule 26(a)(1)-(3) requires disclosures of much of the information previously obtained by this form of discovery, there should be less occasion to use it.”<sup>26</sup> The Committee did not revisit the subject when it reduced the scope of required disclosures in 2000.<sup>27</sup>

The discovery/disclosure proposals (and the Rule 11 proposals) encountered resistance at the Supreme Court, with Chief Justice Rehnquist indicating that Court promulgation did not mean that “the Court itself would have proposed these amendments,”<sup>28</sup> and with “four other Justices indicat[ing] their agnosticism about, lack of competence to evaluate or disagreement with, one or more of the amendments.”<sup>29</sup> As in 1983, the proposed amendments barely escaped legislative override.

## D. Retrenchment and Advisory Committee Leadership

Much of the Advisory Committee's work during the 1990s was devoted to class action reform and to attempts to reach out to and reflect the concerns of the practicing bar. The former bore fruit in a 1998 amendment adding Rule 23(f), which has proved more consequential than many imagined at the time by facilitating the development of appellate class action jurisprudence.<sup>30</sup> The latter were largely unsuccessful, as proposed amendments on jury size were squelched by the Judicial Conference, and the Chief Justice did not extend the term of or reappoint the Chair. It is interesting that in the last year of his three-year term, Judge Higginbotham observed:

Congress has elected to use the private suit, private attorneys-general as an enforcement mechanism for the anti-trust laws, the securities laws, environmental law, civil rights, and more. In the main, the plaintiff in these suits must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.<sup>31</sup>

**“Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.”**

—Judge Patrick Higginbotham,  
5th Circuit.

Nonetheless, under the leadership of a new Chair, who had different preferences, the Committee decided to return to discovery. Having resisted calls to reduce the scope of discovery for more than twenty years, in the late 1990s it proposed amendments to Rule 26 that would shrink the scope of discovery from material relevant to the subject

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matter of the action, to material relevant to a claim or defense. As we have noted, the Advisory Committee had rejected this change to the scope of discovery when fashioning the proposals that became the 1980 discovery amendments, on the ground that there was insufficient empirical evidence to support it. The 1990s proposed amendments also included a cost-shifting provision that in some circumstances would have required the information-requesting party to bear some or all of the costs of the responding party. Such a rule could have been particularly disadvantageous to parties of modest means, including, in particular, plaintiffs seeking information in the voluminous records of corporate and government defendants.

In a remarkable display of candor, Judge Niemeyer, the new Advisory Committee Chair, acknowledged both the lack of empirical evidence for the position being urged on the Advisory Committee and the influence of repeated calls for limitations on discovery. He explained:

Indeed, in August 1991, the President's Council on Competitiveness issued a report claiming that “over 80 percent of the time and cost of a typical lawsuit involves pre-trial examination of facts through discovery.” While I am not aware of any empirical data to support this claim, the fact that the claim was made and is often repeated by others, many of whom are users of the discovery rules, raises a question of whether the system pays too high a price for the policy of full disclosure in civil litigation.<sup>32</sup>

Anticipating the change in the Advisory Committee's position, Judge Niemeyer here invoked persistent pressure for litigation retrenchment from elite elements of the bar and a report from President Bush's Council on

Competitiveness that had been issued in 1991. The Council, chaired by Vice President Quayle, advocated a variety of anti-litigation proposals, including damages caps, a loser pays rule, and a moratorium on federal statutory one-way fee shifting provisions. The Vice President explained that the Council’s proposals were “geared toward reducing excessive and unnecessary litigation and decreasing the costs and time associated with resolving disputes.”<sup>33</sup> More candidly, the Council’s charge concerned reducing costs imposed on business by government regulation. Some of the Council’s litigation reform proposals were subsequently incorporated into the Republicans’ 1994 Contract with America, with Newt Gingrich as their public champion.

The Advisory Committee’s note explaining its action, which made subject matter discovery available only on a showing of good cause, sounded similar themes:

Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the “subject matter” language. Nearly one third [*sic*] of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of reducing litigation expense without interfering with fair case resolutions . . . The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the “subject matter” involved in the action.<sup>34</sup>

**Methodologically sound empirical data concerning discovery have been remarkably consistent in debunking claims of ubiquitous abuse or excess made by bar organizations and the business community over the last forty years.**

For those favoring retrenchment, the timing was right. The political climate favored the counterrevolution, and, given the post-1994 locus of partisan control of Congress, there was no risk of congressional override.<sup>35</sup> In a memorandum to his colleagues on the American College of Trial Lawyers’ Federal Civil Procedure Committee describing a conversation with Judge Niemeyer, Robert Campbell reported that Niemeyer had delivered the “extremely good news” that the Judicial Conference had approved the proposed discovery scope amendment. The College is an organization of primarily defense lawyers, and it is a long-time advocate of litigation retrenchment. Observing that members of the College had spent “thousands of hours” working for the amendment, Campbell also noted that credit was due to a member of the College, Francis Fox, who “played a major role” on the Advisory Committee when it was considering the proposal.<sup>36</sup>

Even so, the Judicial Conference rejected one of the Committee’s proposed discovery amendments (on cost-shifting), and the scope amendment passed that body by a vote of thirteen to twelve.<sup>37</sup> This was an important reminder that the multi-tiered process that was first put in place to exercise the Judicial Conference’s responsibilities under the 1958 legislation, and that was subsequently solidified by the 1988 legislation, contributes to the stickiness of the court rulemaking status quo.<sup>38</sup>

Methodologically sound empirical data concerning discovery have been remarkably consistent in debunking claims of ubiquitous abuse or excess made by bar organizations and the business community over the last forty years.<sup>39</sup> From the perspective of putative abuse, in other words, the discovery landscape did not appear meaningfully



different in the run-up to the 2000 amendments than it had in 1980. Nor, alas, did the claims of those seeking to curtail discovery. An abiding lack of reliable empirical evidence to support their position did not cause them to change their tune, a strategy of blinkered persistence (or, in social science parlance, “availability cascades”) that finally paid off with a different group of rulemakers.

Although the 2000 discovery scope amendment was a retrenchment victory, its significance was questioned at the time, with many deeming the change unlikely to have much practical, as opposed to symbolic, effect. On that view, the episode illustrates that retrenchment of even modest ambition by rulemaking under the 1980s process reforms will elicit controversy and may have difficulty successfully navigating that process.

With the advent and rapid spread of e-discovery, however, even a hard-hearted empiricist aware of the studies in question had reason to wonder whether the landscape had changed or would soon change. The Advisory Committee’s work in this area, culminating in the 2006 amendments, is a model of careful and inclusive rulemaking designed to identify incipient problems and nip them in the bud. The FJC’s 2009 study, which was stimulated in large part because of concerns that e-discovery was a game changer, does not give reason for serious general concern.<sup>40</sup>

### III. THE 2015 AMENDMENTS

In *Rights and Retrenchment*, we suggest that one reason for the Advisory Committee’s mixed record in the 1990s—why it did not attempt more and bolder retrenchment—had to do with the very different qualities and priorities of its leadership over the decade, contrasting the process by which the Advisory Committee considered class action reform with its consideration of discovery reform. The qualities and priorities of the Committee’s leadership also help to understand why rulemaking in the first decade of the new millennium was restrained. On a number of occasions, the Advisory Committee prevented anti-private enforcement proposals from going forward. Moreover, prominent rulemakers celebrated these examples of restraint as evidence that the Rules Enabling Act process works.<sup>41</sup> From this perspective, restraint reflected the benefits of an open process and greater commitment to empirical study, as well as of taking seriously the Enabling Act’s prohibition against abridging, enlarging or modifying substantive rights. We also note that some proponents of the Enabling Act process reforms of the 1980s sought to increase the stickiness of the rulemaking status quo, in part by increasing the burdens of evidence needed to justify changes, in precisely this way.

**We believe that the 2015 discovery amendments, in particular the amendment adding proportionality to the basic scope of discovery, are cause for concern—and should not be emulated.**

An important question as federal court rulemaking entered the current decade was whether the relative restraint evident in the immediately preceding period would continue. Our interpretation of rulemaking’s vacillation between restraint and episodic retrenchment efforts is that there are contending perspectives among rulemakers, even those who support retrenchment. For some influential rulemakers, the important lessons of the 1980s concerned the threat that empirical deficits of proposed reforms, or overreaching the Rules Enabling Act’s charter by abridging substantive rights, pose to the perceived legitimacy of the process. Rulemaking’s perceived legitimacy serves the judiciary’s institutional interest in control of procedure; it helps the judiciary resist legislatively imposed procedure. For others, the key lessons focused attention on what retrenchment could actually be accomplished given the preferences of bodies

with veto power, in particular Congress. They recognized that if power is to be exercised effectively, it must be exercised strategically, with attention to potential responses of other institutional actors.

Against this historical and institutional background, we believe that the 2015 discovery amendments, in particular the amendment adding proportionality to the basic scope of discovery, are cause for concern—and should not be emulated—for four reasons.

## A. Prematurity or Overkill

*First*, these amendments represent the seventh set of (non-stylistic) discovery reforms since 1980. The major change in the landscape during that period—electronic discovery—had been the focus of relatively recent reforms, the effects of which had yet to be thoroughly evaluated, while a 2009 study of e-discovery did not support the retrenchment narrative. For those reasons, and because the amendments came on the heels of Supreme Court decisions that sought to address the same putative discovery problems through judicial amendment of the pleading rules,<sup>42</sup> they were at best premature and at worst overkill.

Consideration of discovery reform in historical perspective reveals repeated amendments to the discovery rules starting in 1980, with the brass ring—scope reduction—repeatedly sought by influential members of the organized bar and the business community, which tended to dismiss other reforms as, in the words of Justice Powell, “tinkering changes.” Having for twenty years resisted scope reduction on the ground that there was insufficient evidence to warrant it, but with no qualitatively different evidence before it, in 2000 the Advisory Committee essentially acknowledged that it was yielding to the insistent claims of elite elements of the organized bar—as if long-term repetition could fill the empirical vacuum—while also admitting that less than one third of lawyers surveyed by the FJC supported the change.

Because the only major change in the discovery landscape since 2000 is the growth of e-discovery, because the Advisory Committee addressed the special problems of e-discovery in the 2006 amendments, and because there is no reliable evidence that those amendments have been ineffective,<sup>43</sup> further discovery amendments (other than those that address special problems, as in 2006 and 2010) were at best premature.

At worst they were (and are) overkill. In presenting a preliminary draft of proposed amendments to Rule 56 for public comment in 2008, the Advisory Committee referred to summary judgment as “the third leg of the notice-pleading, discovery, summary-judgment stool.” Both the Supreme Court’s 2007 *Twombly* decision and its 2009 *Iqbal* decision, which judicially amended the pleading rules, were predicated on supposed (albeit quite different) costs of discovery and on the inability of federal district court judges to manage discovery in such a way as to keep those costs under control. After what has happened to summary judgment and notice-pleading, one can only wonder whether, following the 2015 amendments, the stool is still serviceable for the purposes for which it was intended.

The elimination of subject matter discovery (on a demonstration of good cause) can only seem “modest” or “moderate” if one neglects the history recounted above and uses as the basis of comparison the post-2000 language of Rule 26. To be sure, we do not know whether its wholesale elimination will have substantial effects. The interest groups treating subject matter discovery like a piñata since the 1970s obviously hope so. In that regard, to eliminate other language in Rule 26, which had previously survived in the face of *Twombly*-like claims of managerial deficits, could only further encourage courts to see in these amendments a major change of course. More important, that view now has the blessing of the Chief Justice.

A more likely cause of such a change of course, however, is the amendment that transforms proportionality from a limitation on the discovery of relevant evidence to be raised by a party objecting to discovery or by the court itself—its status since 1983—into an integral part of the scope definition.

We do not infer from Professor Arthur Miller’s testimony on the proposed proportionality amendments<sup>44</sup> that the Advisory Committee he served as Reporter in 1983 intended to bury a bomb—sold as a firecracker—that could be detonated decades later after having been unearthed. But the fact that the limitation has existed since 1983 and has been given greater prominence because of concern that judges were not properly managing discovery<sup>45</sup> again lends surface plausibility to the “modest” or “measured” label. Apparently, that was also the intent of those who argued that the change would not, as claimed by critics, shift the burden in discovery disputes, pointing to Rule 26(g). The specific argument is fallacious. More important, the Chief Justice’s 2015 Year-End Report again suggests that the label was a smokescreen.

**The most worrisome potential effect of the scope change is . . . that, either in prospect or in fact, . . . transaction costs will prevent a party from securing discovery that is central to its claims or defenses, imposing costs of a very different order.**

It is true that those seeking discovery under prior law were required to make the certification prescribed by Rule 26(g). It is not true, however, that they had the burden of persuasion when another party made a motion for sanctions:

To guard against misuse of the rule, including the use of hindsight, the courts presume the validity under Rule 26(g) of discovery requests, responses and objections and of Rule 26(a)(1) and (3) disclosures. As under Rule 11 . . . this is not a formal evidentiary presumption. Rather, it is a reflection of the fact that *the burden is on the opposing party to demonstrate the inadequacy of any challenged paper*. It represents an approach under which all doubts are resolved in favor of the signer, and sanctions are imposed only if it is patently clear that they are appropriate.<sup>46</sup>

Having denied a shift of burden during the comment process, the Advisory Committee ultimately acknowledged that in some cases the burden would indeed be on the party seeking discovery.<sup>47</sup>

The most worrisome potential effect of the scope change is not the prospect of substantially increased transaction costs if proportionality replaces burdensomeness as the preferred objection of those who have something to hide or for whom discovery is an opportunity to inflict financial pain on opponents (which, as discussed below, is worrisome enough). It is rather that, either in prospect or in fact, such transaction costs will prevent a party from securing discovery that is central to its claims or defenses, imposing costs of a very different order.

## **B. The Neglected Social Benefits of Discovery**

*Second*, the 2015 discovery amendments in question proceed from an impoverished view of litigation and discovery that minimizes or ignores the social benefits of both.<sup>48</sup> Put otherwise, the amendments do not reflect serious or sustained consideration of the fact that limiting discovery may entail substantial costs for the enforcement of the substantive law, including law that Congress, legislating against the background of the federal rules, intended to be enforced through private litigation.

The primary architect of the federal rules on discovery, Edson Sunderland, was both a Legal Realist and, more important for these purposes, a Progressive.<sup>49</sup> The Progressives gained prominence in the early 20<sup>th</sup> Century, reacting to the excesses of the Industrial Revolution through a campaign for what they called “legibility”—we would now say transparency. They contended that effective regulation was impossible without access to the facts concerning the regulated enterprise.<sup>50</sup> Sunderland wrote in 1925:

**The amendments do not reflect serious or sustained consideration of the fact that limiting discovery may entail substantial costs for the enforcement of the substantive law [that is] intended to be enforced through private litigation.**

The spirit of the times calls for disclosure, not concealment, in every field—in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush.<sup>51</sup>

Shortly following the 1980 discovery amendments, in an article that was sharply critical of the retrenchment effort (particularly as evidenced by Justice Powell’s dissent), Jack Friedenthal pointed out that discovery enables parties in civil litigation to secure not

only evidence that is necessary to establish their claims and defenses, but also, on occasion, evidence that reveals the inadequacy of existing substantive law.<sup>52</sup> Moreover, the 1996 reminder by the then Chair of the Advisory Committee that “[c]alibration of discovery is calibration of the level of enforcement of the social policy set by Congress,” was echoed at the same symposium by a recent Reporter:

We should keep clearly in mind that discovery is the American alternative to the administrative state . . . every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accomplished by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish disincentives for lawless behavior across a wide spectrum of forbidden conduct.<sup>53</sup>

More recently, research by political scientists has demonstrated that the substantial increase in federal litigation in the late 1960s and 1970s is closely correlated with purposeful decisions by Congress to provide incentives for private enforcement of federal statutes, and that in doing so instead of relying exclusively on administrative (or other public) enforcement, Congress was often seeking to insulate the majority’s preferences from subversion by agencies under the control of an ideologically distant executive.<sup>54</sup> This and other work makes clear that Americans rely on decentralized litigation—for a variety of cultural, institutional, financial, and political reasons—to do what in many other advanced democracies is done by social insurance or a central bureaucracy.<sup>55</sup> It also makes clear that private enforcement regimes are complex, polycentric designs and that they rely on—may stand or fall because of—the procedural infrastructure.<sup>56</sup>

**The substantial increase in federal litigation in the late 1960s and 1970s is closely correlated with purposeful decisions by Congress to provide incentives for private enforcement of federal statutes.**



Knowing these things, it is disconcerting to see how little attention the Advisory Committee gave to the social benefits of litigation and discovery. Access to court, which receives an occasional passing nod in the materials from this process that we have read, is important in its own right.<sup>57</sup> But we live in a society where the same influences that prompt reliance on private enforcement of public law render it difficult to make up for capacity that is lost in that realm, an insight that may have contributed to the Reagan Administration’s decision to pursue deregulation through litigation retrenchment.<sup>58</sup> In the case of the long campaign for discovery retrenchment, success may lead to *no enforcement*, an insight that suggests why some in the business community and those who do their bidding are willing to invest in what we describe above as “a strategy of blinkered persistence.”

**Americans rely on decentralized litigation—for a variety of cultural, institutional, financial, and political reasons—to do what in many other advanced democracies is done by social insurance or a central bureaucracy.**

Inattention to the social benefits of litigation and discovery (or the costs of discovery retrenchment) is especially disconcerting when one recalls that any power the rules committees exercise (as agents of the Supreme Court)

**The rulemaking process has come to look very much like the administrative process. One need not believe that formal cost-benefit analysis is appropriate for federal court rulemaking to conclude that the rulemakers should openly acknowledge and reckon with what is at stake.**

under the Rules Enabling Act is delegated legislative power. It is not an accident that, through institutional dialogue in the shadow of proposed legislation and ultimately the 1988 amendments to the Enabling Act, the rulemaking process has come to look very much like the administrative process.<sup>59</sup> One need not believe that formal cost-benefit analysis is appropriate for federal court rulemaking<sup>60</sup> to conclude that the rulemakers should openly acknowledge and reckon with what is at stake. Instead of ignoring such soft variables, the Advisory Committee should take them into account. In connection with the 2015 amendments, it could have done so by self-consciously determining the strength of the evidence that is needed to justify discovery retrenchment, recognizing the risk it poses of destabilizing the infrastructure on which Congress can be assumed to have relied in the 1960s and (particularly) 1970s, when it passed scores of statutes with private enforcement regimes.

Doing so would have rendered it more difficult to ignore or dismiss the fragility of the empirical basis underlying the amendments in question. It would also have made clear that, if the Advisory Committee proceeded for what some interest groups, lacking sound empirical support, began calling “normative reasons,” it would signal intent, in Judge Higginbotham’s words, to “calibrat[e] . . . the level of enforcement of the social policy set by Congress.”

## C. The Transaction Costs of Trans-Substantive Procedure

*Third*, even if the 2015 amendments are responsive to discovery problems that occur in a relatively small slice of federal litigation, they will predictably generate additional transaction costs in the great majority of cases that lack such problems, disadvantaging litigants with fewer resources, including plaintiffs seeking remedies under federal statutes that include private enforcement regimes.

**The 2015 amendments are responsive to discovery problems that occur in a relatively small slice of federal litigation, [but] they will predictably generate additional transaction costs in the great majority of cases that lack such problems.**

Jack Friedenthal's objections to the 1980 discovery amendments included the criticism that they responded to problems arising chiefly or exclusively in complex cases.<sup>61</sup> As the senior author of this paper pointed out a few years later:

But if there has been distortion, complex litigation may not be the culprit. Rather, the problem may be that today's reformers remain transfixed by the vision of uniform, trans-substantive procedure that animated the [1938] Federal Rules of Civil Procedure. Whatever the cause, *the fact that complex litigation has brought to light serious problems may make us less critical than we ought to be about the effects of proposed reforms in other types of cases.*<sup>62</sup>

In the intervening decades, we have witnessed dramatic evidence of the dilemma that this vision can pose for procedural reform, with the Court's pleading decisions a recent but particularly vivid example.<sup>63</sup> Of course, it is a welcome dilemma for those who seek to leverage isolated problems into wholesale retrenchment.

We have also witnessed less obvious effects of turning the Federal Rules of Civil Procedure into the Federal Rules of Complex Litigation. Since the senior author of this paper started teaching Civil Procedure around the time of the 1980 amendments, it appears that all federal civil litigation has become more complex and expensive. Part of the responsibility must lie with the rulemakers and with federal judges who faithfully seek to implement their reforms. The sheer number of discovery changes since 1980—prominently including a new layer of disclosures, expert reports and multiple requirements to confer—gives pause in that regard, as does the creeping substitution of motion practice for trial practice. Also consequential, we suspect, has been the relentless push toward judicial management, which is a necessity in some types of cases under a system of “general rules” that must go easy on determinative content and provide substantial room for judicial discretion. That which is a necessity in high-stakes, complex cases, however, can be a curse in simpler cases of modest stakes.<sup>64</sup>

In 1993 the Advisory Committee suggested that, as a result of the required expert reports it introduced, “the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition.”<sup>65</sup> Such a suggestion reflects inattention to the incentives that drive litigation behavior and the effect that those incentives have on transaction costs. Some of the 2015 amendments appear to reflect similar inattention.

Thus, for instance, once one recognizes that making proportionality part of the scope definition rather than a defense to a request for relevant evidence in fact shifts the burden to the party seeking discovery on some issues, one cannot avoid the possibility—some would say the likelihood—that, as we observed above, “proportionality [will replace] burdensomeness as the preferred objection of those who have something to hide or for whom discovery is regarded as an opportunity to inflict financial pain on opponents.”

**Since . . . the time of the 1980 amendments, it appears that all federal civil litigation has become more complex and expensive.**

Nor would these costs—expense and delay—be confined to the parties. Others have commented about the difficulty of assessing proportionality under the 2015 amendments and the risk that the multi-factor analysis they prescribe will lead to subjective and inconsistent judgments that are effectively unreviewable.<sup>66</sup> As Judge Easterbrook observed in a 1989 article on what he called “impositional discovery,” “[m]ulti-factor standards cut down on loopholes—the bane of rules—but at great cost.”<sup>67</sup> Whatever one thinks of the Supreme Court’s reliance on Judge Easterbrook’s 1989 article, *Discovery as Abuse*, in its *Twombly* decision—the Court did not so much as mention the numerous post-1989 discovery amendments<sup>68</sup>—his description of the dilemma that a judge faces when seeking to identify abuse in a regime of proportionality still seems apt in the altered landscape of plausibility pleading:

One cannot avoid the possibility . . . that . . . proportionality will replace burdensomeness as the preferred objection of those who have something to hide or for whom discovery is regarded as an opportunity to inflict financial pain on opponents.

Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves. The timing is all wrong. . . . The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find . . . Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests . . . The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define “abusive” discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label a request as abusive . . . [Judicial officers] have no way to evaluate the costs and benefits of discovery *ex ante*. . . .<sup>69</sup>

At that, Judge Easterbrook’s concept of impositional discovery does not attend to social benefits.

## D. Discovery Retrenchment as Politics and the Legitimacy of Court Rulemaking

*Fourth*, in light of the long history of discovery retrenchment sought by powerful and persistent interest groups and the abiding paucity of sound empirical data supporting their claims, the 2015 amendments suggest that rulemaking is destined for controversies, professional and political, akin to those that led to the 1988 amendments to the Rules Enabling Act and attended the 1993 amendments—controversies that the Advisory Committee worked hard to put behind them in the first decade of the new millennium.

In *Rights and Retrenchment*, we provide an institutional account of federal court rulemaking that traces its travails in the 1980s, in large part, to the perceived insularity and lack of openness of the rulemakers and the rulemaking process, and inattention to both empirical data and the limits on rulemaking imposed by the Rules Enabling Act. We attribute the relative lack of controversy in the 2000s to “the deeper epistemic foundation that results from an open process and from greater commitment to empirical study” and to “the rulemakers’ commitment to take the Rules Enabling Act’s limitations seriously.”<sup>70</sup> We also suggest that changing institutional dynamics may have played a part:

[W]hen rulemakers are judges, and when justification for rule changes must be publicly articulated in light of a public evidentiary record, in addition to (and potentially contradicting) judicial experience and common sense, they may be reluctant to become involved in controversies in which their decisions can be tarred with a political label. This is especially true when the decision-makers' monopoly of expertise is in question, in part because the effect of potential procedural choices on substantive rights is plain for all to see. The possibility that the ostensibly procedural will be revealed as manifestly substantive is made more likely by public hearings, a public record, and the virtual certainty that advocates for those opposing a rulemaking proposal will articulate an impending injury to substantive rights.<sup>71</sup>

The 2015 amendments suggest that it may be time to reconsider that process. The reduced threat of statutory override since 1995 appears to have influenced some leaders who favored the goals of the counterrevolution (including Chief Justice Roberts). Even if sharing the concern about the legitimacy and effectiveness of the Rules Enabling Act process that contributed to rulemaking's restraint throughout much of the period since the 1980s process reforms, these leaders evidently believed that it was a concern that could safely be subordinated to the desire to exercise power. Nor is this surprising since threats to a proposed amendment that the Court promulgates and to the Rules Enabling Act itself have a common source: Congress.

Particularly if this is true, but in any event, the serious imbalances that we find in the composition of the Advisory Committee suggest that a change in the locus of power to make appointments should be considered as one

**We expect ideological differences about the content of federal rules to surface precisely in that part of the landscape of litigation procedure where ideological and political influence has been inescapable since the birth of the counterrevolution in the first Reagan administration—private enforcement of federal law.**

option.<sup>72</sup> To be sure, we do not believe that such imbalances make a difference in the great majority of the committee's work. As we discuss in *Rights and Retrenchment*, however, we expect ideological differences about the content of federal rules to surface precisely in that part of the landscape of litigation procedure where ideological and political influence has been inescapable since the birth of the counterrevolution in the first Reagan administration—private enforcement of federal law—and in the terrain with which it merged not long thereafter, the project of tort reform.<sup>73</sup>

In addition, it is difficult to escape the possible influence on the current Chief Justice's appointments to the Advisory Committee (as well as the Standing Committee) of the personal ideological preferences that animated his role in the birth of the counterrevolution. As we show, that role included advocating for an attorney's fee bill that others in the administration regarded as politically dangerous, and initiating legislative proposals to dilute enforcement of Section 1983, one of the most important civil rights statutes, and one that can only be enforced by private plaintiffs.<sup>74</sup> Our data revealing Chief Justice Roberts as the most anti-private enforcement justice in over fifty years in cases with at least one dissent,<sup>75</sup> do not suggest that his preferences have changed. Nor, of course, do his encouragement to move ahead with rulemaking in an area of intense controversy or, once amendments in that area became effective, his decision to use the Chief Justice's entire 2015 Year-End Report on the Federal Judiciary to emphasize his view of their importance and to support training of judges designed to make sure they are effective.



## IV. CONCLUSION

It is ironic, but in context entirely appropriate, that the Chief Justice begins and ends his 2015 Year-End Report with stories about dueling, which was, of course, an activity (usually) confined to adversaries of a certain, and the same, socio-economic class. Continuing a trend that goes back decades, the 2015 amendments take a problem that

**Continuing a trend that goes back decades, the 2015 amendments take a problem that arises chiefly in complex, high-stakes litigation between corporations and devise solutions that necessarily apply to all federal litigation.**

arises chiefly in complex, high-stakes litigation between corporations and devise solutions that necessarily apply to all federal litigation. As a result, the layers of additional expense that active judicial management can impose make litigation costlier for litigants less able to afford it, including, most importantly, individuals.

Making proportionality part of the basic scope of discovery will encourage more objections by litigants who understand the strategic value of increasing the expense of their adversaries, particularly when opposing counsel is serving on a contingency-fee basis. In many such cases, there will be a problem of asymmetric information, as when a Title VII plaintiff seeks the evidence necessary to establish her claim and that evidence is buried in the files of her employer.

When there is disagreement, the amendments to Rule 26 require decisions about a matter critical to effective access to court and to private enforcement of public law. Those decisions will be made according to a multi-factored analysis that is necessarily subjective and likely to cause judges to privilege the private costs over the public benefits of discovery. It does so at a time when there has been a long-running and sustained campaign against litigation in all federal lawmaking sites—a campaign that *Rights and Retrenchment* shows has been most successful in the federal courts.

While celebrating and seeking to ensure the effectiveness of the discovery amendments, the Chief Justice observes that the “success of the 2015 civil rules amendments will require more than organized educational efforts. It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share.”<sup>76</sup> As we observe in *Rights and Retrenchment*, however, “[i]f the data on decisions interpreting federal rules that we present in Chapter 4 tell us anything, it is that, when those rules have obvious implications for private enforcement, shared values have become increasingly hard to find.”<sup>77</sup>

**Making proportionality part of the basic scope of discovery will encourage more objections by litigants who understand the strategic value of increasing the expense of their adversaries, particularly when opposing counsel is serving on a contingency-fee basis.**

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## Notes

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<sup>1</sup> STEPHEN B. BURBANK & SEAN FARHANG, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (forthcoming 2016-17).

<sup>2</sup> *Id.*, ch. 6 (“Rights, Retrenchment, and Democratic Governance”).

<sup>3</sup> *Id.*

<sup>4</sup> Republican-appointed judges have held a majority of Article III judge seats on the committee in every year but two from 1971 to 2014 (they were in parity in 1984, and in the minority in 2004). On average, across the full period, they held 70% of Article III judge seats. Thus . . . controlling for the composition of the federal bench, Republican-appointed judges had more than double the estimated probability of serving on the Committee during the period of interest, and in absolute terms, they were a majority of Article III judges in 41 of 43 years.

*Id.*, ch. 3 (“The Rulemaking Counterrevolution: Birth, Reaction, and Struggle”).

This imbalance is particularly striking in appointments to the important position of chair. Eleven of twelve chairs of the Advisory Committee since 1970 have been appointed by Republican presidents.

<sup>5</sup> *See id.*, ch. 3.

<sup>6</sup> Richard Marcus, “Looking Backward” to 1938, 162 U. PA. L. REV. 1691, 1709 (2014).

<sup>7</sup> BURBANK & FARHANG, *supra* note 1, ch. 3, (quoting 2015 Year-End Report on the Federal Judiciary, at 4, 5, available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>).

<sup>8</sup> This 1934 statute, now codified at 28 U.S.C. § 2072 et seq. (2012), delegated legislative power to the Supreme Court to promulgate “general rules” of procedure to govern civil actions in the federal trial courts.

<sup>9</sup> For the order appointing the original Advisory Committee, see 295 U.S. 774 (1935). Note that the statutory arrangements governing the Enabling Act’s “report and wait” system changed in 1950. *See* Act of May 10, 1950, ch.174, § 2, 64 Stat. 158; Burbank 1982: 1077 n.268. They changed again in 1988.

<sup>10</sup> Act of July 11, 1958, Pub. L. No. 85-313, 72 Stat. 356.

<sup>11</sup> Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States, Sept. 1958, at 6-7, available at <http://www.uscourts.gov/about-federal-courts/reports-proceedings-1950s>.

<sup>12</sup> Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 23, 35 (A. Leo Levin & Russell R. Wheeler eds., 1979).

<sup>13</sup> *See* Stephen N. Subrin & Thomas Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1864-65 (2014).

<sup>14</sup> Mike Tonsing, *An Introduction to Symposium on Proposed Changes to Federal Rules of Civil Procedure*, 51 *FED. LAW.* 22, 25 (2004).

<sup>15</sup> Memorandum from Judge Walter R. Mansfield, Chair of the Advisory Committee on Civil Rules, to Judge Roszel C. Thomsen, Chair of the Stranding Committee 2 (June 14, 1979) (available from authors).

<sup>16</sup> *Id.* at 8.

<sup>17</sup> *Id.* at 9-10.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> 446 U.S. 997, 1000 (1980) (dissenting statement of Powell, J., joined by Stewart and Rehnquist, J.J.).

<sup>20</sup> Mansfield memorandum, *supra* note 15, at 8 (quoting ABA Special Committee’s Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure).

<sup>21</sup> *See* Advisory Committee on Civil Rules, Analysis of Comments to Rules 26(a) and (b) 1 (Dec. 21, 1981) (“The ABA believes the proposal does not go far enough in restricting discovery and urges that we submit our 1979 version, which would eliminate the ‘subject matter’ relevancy standard of 26(b) in favor of ‘claims or defenses.’”) (available from authors). This memorandum carries the initials of the Chair and Reporter of the Advisory Committee.

<sup>22</sup> *See* Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship?*, 19 U. MICH. J.L. REFORM 425 (1986).

<sup>23</sup> *See* BURBANK & FARHANG, *supra* note 1, ch. 3 (discussing 1980s rulemaking process reforms and noting how they had the effect, and for some proponents the purpose, of making change to the status quo more difficult).

<sup>24</sup> Before the Advisory Committee had access to reliable empirical data on the operation of the 1983 amendments to Rule 11, it had regarded “the criticism [a]s impressionistic.” Advisory Committee on Civil Rules, Committee Minutes 53-54 (April 27-29, 1989) (available from author). Even so, it recognized that “the anger level in the bar is high.” Moreover, a member “urged that the Committee should strive to be sufficiently receptive to the concerns of others that people will not generally think it necessary or desirable to go to Congress for help.” *Id.*

<sup>25</sup> Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 *BROOKLYN L. REV.* 841, 845 (1993). Some may view the 2015 amendments favorably because the rulemakers have resumed reform leadership following implicit rebukes in the Supreme Court’s pleading decisions. *See infra* text accompanying note 42. If so, they should consider what a perceived “duty to provide leadership” wrought in (and after) 1993.

<sup>26</sup> *FED. R. CIV. P.* 33 advisory committee note (1993).

- <sup>27</sup> See Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 239 (1999).
- <sup>28</sup> H.R. Doc. No. 74, 103d Cong., 1<sup>st</sup> Sess. 1 (1993), reprinted in 113 S. Ct. (Preface) 477 (1993).
- <sup>29</sup> Burbank, *supra* note 25, at 842.
- <sup>30</sup> Ironically, however, Rule 23 amendments that seemed modest at the time have facilitated major change in class action jurisprudence through court decisions. The most obvious and important example is the 1998 amendment adding Rule 23(f). Facially neutral as between plaintiffs and defendants, this amendment permits courts of appeals in their discretion to entertain immediate appeals from class certification decisions. It has enabled and highlighted another path to retrenchment of private enforcement by substantially expanding the opportunities for conservative federal appellate courts, including the Supreme Court, to control the course of class action jurisprudence. This suggests that, even in the domain of rulemaking, some consequential reforms can fly under the radar screen. In Chapters 4 and 5 we argue that this phenomenon has been an important reason for the Supreme Court’s success in furthering the goals of the counterrevolution through decisions on issues salient to private enforcement.
- BURBANK & FARHANG, *supra* note 1, ch. 3.
- <sup>31</sup> Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997). See also Patrick E. Higginbotham, *Iron Man of the Rules*, 46 U. MICH. J.L. REFORM 627, 627-30 (2013).
- <sup>32</sup> Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 518 (1998). See *id.* at 520 (observing that “it is the persistence of complaints and questions about the merit of broad discovery and its expense that, at bottom, has caused the Committee to take another look”).
- <sup>33</sup> Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 561 (1992).
- <sup>34</sup> FED. R. CIV. P. 26 (b)(1) advisory committee note (2000).
- <sup>35</sup> For a detailed account of the 2000 amendments, many aspects of which are confirmed by our systematic longitudinal data, see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001). As we suggest more generally concerning the 1990s, Professor Stempel observes that the “Committee seems to have been operating under both a preference for scientific inquiry and the gravitational pull of the venerable myth of discovery abuse” *Id.* at 555; see also *id.* at 613-14 (“What has changed, of course, are the pressure points of political power, particularly the Advisory Committee’s receptiveness to certain arguments preferred by certain groups. Although the Committee and the other Rulemakers continue to strive for nonpartisan fairness, the composition of the Rulemakers has become distinctly more conservative in both ideology and social background.”).
- <sup>36</sup> Memorandum from Robert S. Campbell, Jr., Comm. Chair, to Members, Fed. Civil Procedure Comm., American College of Trial Lawyers (Sept. 16, 1999) (available from authors).
- <sup>37</sup> See Stempel, *supra* note 35, at 619, 621.
- <sup>38</sup> Under the 1988 legislation, the Conference is permitted but not required to authorize the appointment of advisory committees, but without them the statutorily required Standing Committee would have primary responsibility for all rulemaking (i.e., civil, criminal, appellate, evidence and bankruptcy) under the Rules Enabling Act, which would be untenable. See 28 U.S.C. § 2073 (2012).
- <sup>39</sup> See, e.g., EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); Danya Shocair Reda, *The Cost and Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1103-11 (2012) (discussing 2009 FJC study); *id.* at 1111 (“Nearly every effort to quantify litigation costs and to understand discovery practice over the last four decades has reached results similar to the 2009 FJC study.”).
- <sup>40</sup> See *id.* at 1103-11. Professor Reda here discusses both the FJC 2009 study and a 2010 FJC study reporting the results of multivariate analysis of the factors associated with litigation costs. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (2010).
- <sup>41</sup> See Mark R. Kravitz, David F. Levi, Lee H. Rosenthal, and Anthony J. Scirica, *They Were Meant for Each Other: Professor Edward Cooper and The Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495 (2013):
- <sup>42</sup> See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- <sup>43</sup> See Frank H. Easterbrook & Thomas E. Baker, *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 699 (1995) (“[T]he Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.”).
- <sup>44</sup> See Advisory Committee on Civil Rules, Transcript of Proceedings 36-45 (Jan. 9, 2014) (testimony of Arthur R. Miller), available at [www.uscourts.gov/file/9446/download](http://www.uscourts.gov/file/9446/download).
- <sup>45</sup> The kinship of this reasoning with the Court’s reasoning in *Twombly* and *Iqbal* suggests that it is a common trope of litigation retrenchment. Whatever the institutional mode of retrenchment, one should not accept the concerns at face value. Thus, the Advisory Committee’s Associate Reporter chronicled increasing attention to proportionality under the pre-existing rule. See 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2008.1, at 159 (2010) (“Judges relatively frequently limit or forbid discovery when the cost and burden seem to outweigh the likely benefit in producing evidence.”).
- <sup>46</sup> GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 642 (5<sup>th</sup> ed. 2013) (emphasis added).
- <sup>47</sup> “The change does not place on the party seeking discovery the burden of addressing all proportionality considerations.” FED. R. CIV. P. 26(b)(1) advisory committee note (2014) (emphasis added), available at <http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014>.
- <sup>48</sup> See Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647 (2015). See also Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 Ga. L. Rev. \_\_\_\_ (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2551520](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551520)
- <sup>49</sup> See BURBANK & FARHANG, *supra* note 1, ch. 3.

- <sup>50</sup> See Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 *STUD. AM. POL. DEVELOP.* 61 (2002).
- <sup>51</sup> Edson R. Sunderland, *An Appraisal of English Procedure*, 24 *MICH. L. REV.* 109, 116 (1925). *See id.* at 129 (“The legal profession alone halts and hesitates. If it is to retain the esteem and confidence of a progressive age, it must itself become progressive.”).
- <sup>52</sup> See Jack Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 *CALIF. L. REV.* 806 (1981).
- <sup>53</sup> Paul D. Carrington, *Renovating Discovery*, 49 *ALA. L. REV.* 51, 54 (1997).
- <sup>54</sup> *See, e.g.*, SEAN FARHANG, *THE LITIGATION STATE* (2010).
- <sup>55</sup> *See id.*; ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001). Thus, if “it behooves us to look to places like the U.K. and Germany to see how you can have an effective court system which does not function the way ours does,” Advisory Committee on Civil Rules, Transcript of Proceedings 125 (Nov. 7, 2013) (testimony of Dan Troy), it also behooves us to consider the broader regulatory environment—which might dampen the zeal of those who make such partial comparisons.
- <sup>56</sup> *See, e.g.*, Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 *LEWIS & CLARK L. REV.* 637 (2013).
- <sup>57</sup> Proponents of these amendments sometimes sought to sell them in terms of access, leading the Chair of the Advisory Committee to suggest at the first public hearing that “concern about access to justice is pushing on both sides of this.” Transcript, *supra* note 55, at 62 (Nov. 7, 2013). Those who are concerned about access to justice for the parties in high-stakes, complex cases should find a solution to discovery problems in such cases that does not come at the price of access for the poor and the middle class.
- <sup>58</sup> *See* BURBANK & FARHANG, *supra* note 1, ch. 2 (“The Legislative Counterrevolution: Emergence, Growth, and Disappointment”).
- <sup>59</sup> *See id.*, ch. 3.
- <sup>60</sup> *Cf.* Administrative Conference of the United States, Benefit-Cost Analysis at Independent Regulatory Agencies (Recommendation 2013-2) (June 13, 2013), available at [http://www.acus.gov/sites/default/files/documents/Recommendation%202013-2%20%28Benefit-Cost%20Analysis%29\\_0.pdf](http://www.acus.gov/sites/default/files/documents/Recommendation%202013-2%20%28Benefit-Cost%20Analysis%29_0.pdf).
- <sup>61</sup> *See* Friedenthal, *supra* note 50, at 813.
- <sup>62</sup> Stephen B. Burbank, *The Costs of Complexity* (Book Review), 85 *MICH. L. REV.* 1463, 1465 (1987) (emphasis added).
- <sup>63</sup> *See* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 *JUDICATURE* 109 (2009).
- <sup>64</sup> *See* Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 *JUDICATURE* 163 (2008).
- <sup>65</sup> *FED. R. CIV. P.* 26(a)(2)(B) advisory committee note (1993).
- <sup>66</sup> *See* Gelbach & Kobayashi, *supra* note 48.
- <sup>67</sup> Frank H. Easterbrook, *Discovery as Abuse*, 69 *B.U. L. REV.* 635, 641 (1989). The quest for proportionality is not the problem. The means chosen are. For a different vision of proportionality, one that relies on relatively hard-and-fast limits on discovery, but only in a separate track for simple cases (defined to exclude cases brought under statutes containing private enforcement regimes), see Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 *HARV. C.R.-C.L. L. REV.* 399, 409-12 (2011).
- <sup>68</sup> *See Twombly*, 550 U.S. at 560.
- <sup>69</sup> Easterbrook, *supra* note 67, at 638-39. “The portions of the Rules of Civil Procedure” cited by Judge Easterbrook were Rules 26(g) and 26(c). *See id.* at 638 n. 14. Note that the informational problems he describes are less serious if questions of proportionality are raised late in the discovery process, which seems more likely under the former regime.
- <sup>70</sup> BURBANK & FARHANG, *supra* note 1, ch. 3.
- <sup>71</sup> *Id.*
- <sup>72</sup> In *Rights and Retrenchment*, we also discuss the option of prescribing membership criteria by statute. *See id.*, ch. 6.
- <sup>73</sup> *See id.*, ch. 3.
- <sup>74</sup> *See id.*, ch. 2.
- <sup>75</sup> *See id.*, ch. 4 (“The Counterrevolution on the Supreme Court: Succeeding Through Interpretation”), Figure 4.4 (showing that Chief Justice Roberts voted against plaintiffs on private enforcement issues at a 91% rate).
- <sup>76</sup> 2015 Year-End Report, *supra* note 7, at 10.
- <sup>77</sup> BURBANK & FARHANG, *supra* note 1, ch. 3.



# Oral Remarks of Professor Farhang

(presenting for himself and for co-author Stephen Burbank)

Thanks very much for the opportunity to be here. The paper presented is with Steve Burbank. He recently had an operation. He's doing well, he's on the mend, but unfortunately he was not able to make it. And truth be told, in this particular paper, he was more of the author of the paper than I was. So I wish he could be here, and he does, too.

The paper is framed by, and uses material from, a forthcoming book we've just concluded. It's called *Rights and Retrenchment: The Counterrevolution Against Federal Litigation*.

Obviously, if there is a counterrevolution, it's "counter" to something, so I want to take a few minutes at the beginning of this presentation to talk about the historical background. What was the revolution to which there was a counterrevolution? As I'm going to say in a minute, the counterrevolution had as its main object to restrict opportunities and access for plaintiffs to prosecute lawsuits. The paper here specifically focuses on rulemaking. There's a chapter in the book on rulemaking, and we draw on a lot of material from that chapter in examining rulemaking in the paper.

So what's the revolution? Or what is the counterrevolution? I'll start with the counterrevolution, and what the revolution is will become obvious.

The counterrevolution is something that, we say, emerged in the first Reagan administration. It was a political movement that emerged primarily within the Republican Party and the associated conservative legal movement to limit opportunities and access for plaintiffs to enforce rights through lawsuits.

It was a response to growing litigation. They were concerned about what they regarded as excessive litigation. And the growing litigation that concerned them emerged out of what we frequently refer to as the "rights revolution" in the United States in the 1960s and 1970s. Importantly, I think, it arose not just out of the rights revolution, but more specifically, out of the statutory mobilization of private lawsuits, which was done on purpose by Congress. During the 1960s and 1970s, Congress increasingly wrote civil rights laws, environmental laws, consumer laws, and various kinds of economic regulation laws, in which they relied heavily upon private rights of action, with economic incentives for attorneys to use those private rights of action on behalf of plaintiffs. Most importantly, they used fee-shifting provisions that favored plaintiffs. So, beginning with the Civil Rights Act of 1964, there was a growing reliance by Democratic Congresses on enacting regulatory laws which relied heavily upon litigation.

To understand what's going on, what's at stake, in these debates about litigation, it's critical to understand that it wasn't an accident. It was a self-conscious choice of policy design to enforce through private litigation. They had policy reasons, and I'll just give you two to give you a flavor for it.

**The counterrevolution . . .  
was a political movement  
. . . to limit opportunities  
and access for plaintiffs  
to enforce rights through  
lawsuits.**

## Divided Government and Externalized Costs

One very important policy reason was the phenomenon of divided government. Predominantly Democratic Congresses, starting with the Nixon administration, facing predominantly Republican Presidents, became increasingly skeptical of bureaucracy as an adequate mechanism to enforce legislative mandates. Therefore, they started enacting incentives for private attorneys to do what they felt they couldn't get the executive branch to do. That's one explanation, and that explanation has been well documented.

**Congresses . . . became increasingly skeptical of bureaucracy as an adequate mechanism to enforce legislative mandates.**

Another explanation is that these Congresses were increasingly concerned with fiscal constraints, and they preferred externalizing costs—mobilizing private attorneys to prosecute, rather than funding bureaucracy to prosecute. So these sorts of policy reasons led to the self-conscious legislative design that led to growth in litigation.

**The federal rules were the infrastructure and the foundation on which the legislative decisions to rely upon private enforcement were built.**

In the first Reagan administration, there was a counter-mobilization. A group of individuals, including John Roberts, a Department of Justice lawyer who is now the Chief Justice of the United States, brainstormed about how they could respond to the increase in litigation. They sought to reduce, or retrench, the opportunities and incentives for private litigation to get the problem, as they saw it, under control.

What does this have to do with the federal rules? The federal rules were the infrastructure and the foundation on which the legislative decisions to rely upon private enforcement were built. It was only because of notice pleading and liberal discovery rules that Congress felt that it could leverage private litigation in federal court as a way to enforce rights. The Federal Rules of Civil Procedure, the class action rule, notice pleading, and broad discovery were the infrastructure on which Congress built what I've elsewhere called the "Litigation State."

**The counterrevolution [has] been fought out in courts, through pressing courts for various kinds of statutory, constitutional, and rule interpretations. And it was fought out in the rulemaking domain.**

## Counterrevolution

It worked. There was a lot of litigation, and the counterrevolution ensued. The goals of the counterrevolution, as I've said, are to reduce opportunities and incentives for private enforcement because of perceived problems of overregulation and the imposition of excessive cost, delay, et cetera.

What is the locus of the counterrevolution? In the book we trace three places where it was fought out. It's been fought out in Congress, through legislation. It's been fought out in courts, through pressing courts for various kinds of statutory, constitutional, and rule interpretations. And it was fought out in the rulemaking domain.

Discovery has been the single most frequent issue that has been fought out in the rulemaking domain. That's why it's relevant to this conference. To put it a little bit differently, I would say the battles over discovery are battles over the role of private litigation in the American regulatory state. There is absolutely no question about it. That's not to

say who's right or wrong. Either side could be right or wrong, but that's what's at stake, and that's what's really being fought about.

In the paper, we trace the history of efforts to limit discovery, from the 1970s up to the present—up to the 2015 amendments, which are just the latest in a long line of efforts to restrict and limit discovery that have come out of the rulemaking committees. So I'm not going to talk about the details, but I'm just going to say that. Then we suggest in the paper that the states should not emulate the federal rules on discovery, and we suggest some reasons why.

So to give you a flavor for the reasons we suggest, we express concerns about individuals being able to obtain information in litigation against institutions, and concerns about what limiting discovery will do to that. We suggest that the rulemakers didn't attend sufficiently to the social benefits of litigation and of broad discovery. We suggest that the rules are unnecessary because they target a small segment of claims that are the real problem, et cetera.

## Politically Skewed Rulemaking

And then we suggest one last thing that I'm going to talk about: we suggest that politically skewed rulemaking is a reason that states shouldn't follow the federal rules without thinking very carefully about what they're doing in the process that produces the rules.

**We suggest that politically skewed rulemaking is a reason that states shouldn't follow the federal rules without thinking very carefully about what they're doing in the process that produces the rules.**

I read the excellent paper by Professors Subrin and Main, and I see significant overlap in their treatment of those ideas, and because they were so much more lucid, elegant in exposition, and trenchant in analysis, I decided to not compete with them, just to focus on one issue for the remainder of my time: the politicization of the rulemaking committee as a reason that states might want to think about it.

What do I mean by the politicization of the Rulemaking Committee? Well, we investigate it in a number of different ways, and I just want to show you some data. The data are referred to in the paper, but we don't discuss them. After I read the Subrin and Main paper I felt really embarrassed, so I decided to show you some of our data.

When we started to investigate the politicization of rulemaking, we looked at the political party of the President who appointed the federal judges who serve on the Rulemaking Committee. And essentially what social scientists would say is our null hypothesis is if there was no influence of ideology going on, we would expect the partisan composition of the Rulemaking Committee to roughly reflect the partisan composition of the federal judiciary.

## Makeup of Rulemaking Committees

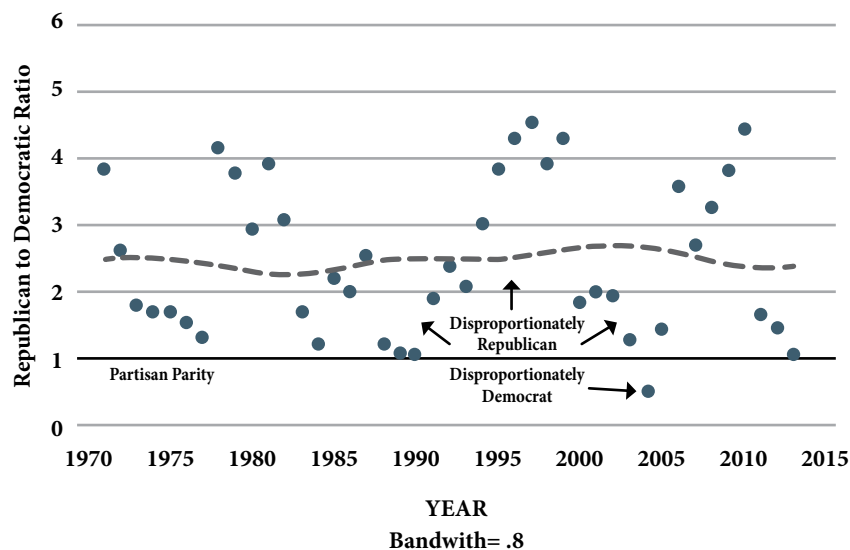
Over the period for which we have data, we collected data on every judge and practitioner who served on the rulemaking committee. The judge data is from 1971 to 2014. During that period, we observed that the federal judiciary was 55 percent Republican and 45 percent Democrat, whereas we observed that the rule committee was 70 percent Republican and 30 percent Democrat.

That could be unrepresentative if there were one chief justice who was kind of crazy and highly political and skewed the data, so we wanted to look at it over time. What we looked at over time was the population-adjusted ratio of Republican-appointed judges appointed to the committee, *versus* Democratic-appointed judges appointed to the committee.

The population-adjusted ratio, the value of one would mean one Republican to one Democrat, population-adjusted, with no politics in appointments. Values greater than one mean that there is an overrepresentation of Republicans and values less than one means there's an overrepresentation of Democrats.

So the dotted line reflects the estimates that we get. The straight solid line represents partisan parity. The dots above the line, all of them except one, are the years in which there was overrepresentation of Republicans. And 2004 was a great year for Democrats on the Rules Committee because that was the one year during this period in which Democrats were overrepresented on the committee.

### Partisan Composition of Rulemaking Committees, 1971-2014 (Lowess Estimates)



Source: Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation* (Cambridge University Press, 2017), Chap. 3.

We also thought about the committee chairs, because people who are knowledgeable about rulemaking, like Steve Burbank (and I bet Steve Subrin would back it up), have suggested that chairs have disproportionate influence in helping to set the agenda of the committee. And so we looked at the party of the appointing President of chairs, and we found that Republican-appointed judges had a seventeen times greater likelihood of being appointed to be chair

of the committee. I could put that in simpler terms. Eleven of the twelve people to serve as chair from 1971 to 2014 were Republican appointees, and that was 41 of 43 service years.

**We . . . found disproportionate overrepresentation of corporate attorneys relative to individuals, and more recently, defense attorneys relative to plaintiffs.**

We investigated this, considering the possibility that the Chief Justice of the United States might have policy preferences in mind when making appointments to the committee. There have been three Chief Justices during the period that I've been describing, all of them Republicans. And so we infer from the

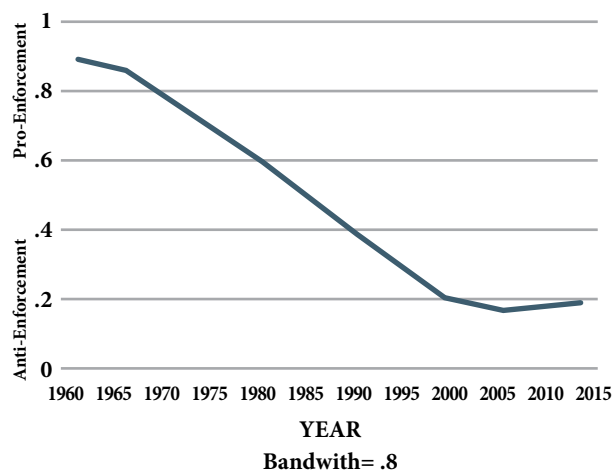
data that the Chief Justice, who solely makes these appointments, perceives the office to be an office regarding which ideology and politics are a relevant variable, especially if you're going to be chair.



## DEFENSE VERSUS PLAINTIFF ATTORNEYS

We also found disproportionate overrepresentation of corporate attorneys relative to individuals, and more recently, defense attorneys relative to plaintiffs. We shouldn't infer that corporate attorneys, or defense attorneys, or Republican judges will be less attentive to the needs of plaintiffs. That would be crude and unfair. So we decided to investigate it, and we wanted to see what was happening with rulemaking proposals over time, so we collected data. We reviewed every rule proposal of the committee from 1960 to 2014. There were 260-something of them. We identified 44 that were salient to private enforcement, and we coded them as either pro-private enforcement or anti-private enforcement. The downward slope of the line reflects the declining probability of a pro-private enforcement proposal.

**Rulemaking Proposals, 1960-2014 (Lowess Estimates)**



Source: Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment: The Counterrevolution Against Federal Litigation* (Cambridge University Press, 2017), Chap. 3.

We observed that in about the first 5 years of the 1960s, there was over an 80 percent chance of a *pro*-private enforcement proposal. After a long decline, in the last 5 years there has been about an 80 percent chance of an *anti*-private enforcement proposal. So the decades during which the committee has become highly politicized through the appointment process, it's become increasingly anti-plaintiff. There's no question about that.

We allude at the end of the paper to the possibility that some reforms are in order. It may not be a good idea, if you think that civil rulemaking is an important public policymaking function, to have a period of 45 years in which the appointments to that committee are made by three humans all from the same political party. When we think about public policymaking in the administrative state, that would be regarded as incomprehensible and unimaginable, and we suggest that maybe we should be willing to consider reforms to the process of appointing people to the committee: party balancing, practitioner-type balancing, those types of criteria that are used in other administrative lawmaking contexts.

Maybe we should be willing to consider reforms to the process of appointing people to the committee: party balancing, practitioner-type balancing, those types of criteria that are used in other administrative lawmaking contexts.

I'm very interested in debates over litigation in America and American public policy. They're frequently characterized by a lot of heated rhetoric on both sides, from plaintiffs and defendants equally, and they're often not attended by sufficiently serious, careful empirical research. The rhetoric often could be best characterized as just the expression of opposing views about the best way to balance competing values. That's what's going on in a lot of debates about litigation.

## NEED FOR EMPIRICAL RESEARCH

So I want to emphasize the need for careful empirical research. I want to suggest that our data objectively demonstrates systematic overrepresentation, in the chief body responsible for making civil rules, of Republicans relative to Democrats, of corporate and business attorneys relative to attorneys who represent individuals, individually or in classes, and, in recent years, of defense versus plaintiffs' attorneys. It objectively demonstrates that systematic overrepresentation of these groups has been associated with increasingly anti-plaintiff rule proposals coming out of the committee. The most frequent area of these rule proposals is discovery.

And so Steve Burbank and I want to suggest to you that the context of the politicization of the process, which underrepresents input in the policymaking process by certain groups, may be something that you want to think seriously about before you emulate federal rules.

**The politicization of the process, which underrepresents input in the policymaking process by certain groups, may be something that you want to think seriously about before you emulate federal rules.**

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## Comments by Panelists

### PROFESSOR PATRICIA W. HATAMYAR MOORE

**Before state rulemakers make more changes in procedure, they should stop and evaluate the effect of what has already occurred.**

Good morning. I want to build on Professor Farhang's important work by imagining some key questions that you might ask if you are pressed to adopt the recent federal amendments in your state.

#### **Effect of Tort "Reforms"**

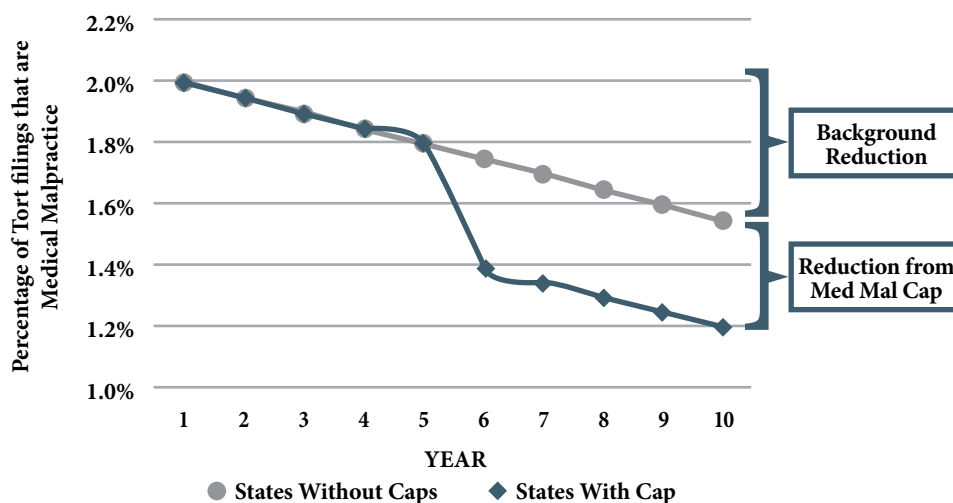
The first question that I would suggest is, **"What changes to the procedural rules has this state already adopted, and how have those changes affected litigants?"**

Professor Burbank and Farhang suggest that the recent federal amendments were premature in light of previous procedural changes that negatively impacted plaintiffs. The retrenchment of discovery that the authors describe affects not just federal rights, but also state common law rights, such as contract and tort. Before state rulemakers make more changes in procedure, they should stop and evaluate the effect of what has already occurred.

The first example of earlier changes to evaluate would be so-called tort reform. Many states have changed their procedural rules to restrain the filing of medical malpractice and other tort cases. Numerous studies have found that the adoption of these measures significantly decreases the number of tort case filings. A study published in 2014, which is one of many, showed a drop in malpractice filings of over 20 percent after damages caps are instituted.<sup>1</sup>

### Effect of Medical Malpractice Damages Cap: Court Data From 15 States Between 1992 and 2006

(DeVito & Jurs, 118 Penn. St. L. Rev. 543 (2014))



The second example that I would suggest, of evaluating a past change before plowing on to the next, is a change in the pleading standard. The Supreme Court has heightened the pleading standard for federal courts in its *Twombly* and *Iqbal* decisions.<sup>2</sup> In a recent study, also one of many, Professor Alex Reinert found that the rate of courts granting motions to dismiss after *Iqbal* increased 15 percent in cases where the plaintiff was represented by counsel, and 11 percent in cases where the plaintiff was pro se—and it was only 11 percent because the rate was already so high when the plaintiff was pro se. Professor Reinert concluded that plaintiffs do worse at nearly every stage after *Iqbal*.<sup>3</sup>

### *Twombly* and *Iqbal*'s Effect on Motions to Dismiss in 5,000 Federal Civil Cases

(Alex Reinert, 101 Virginia Law Review 2117 (2015))

#### Outcome in COUNSELED Cases

Outcome	2006	2010	Change in Grant Rate	p-value
Denied	1,048 (63%)	1,048 (48%)		
Granted	624 (37%)	1,121 (52%)	+15%	<0.001
<b>Total</b>	<b>1,672</b>	<b>2,169</b>		

#### Outcome in PRO SE Cases

Outcome	2006	2010	Change in Grant Rate	p-value
Denied	124 (25%)	104 (14%)		
Granted	372 (75%)	623 (86%)	+11%	<0.001
<b>Total</b>	<b>496</b>	<b>727</b>		

So let's say your state has adopted the plausibility standard and a plaintiff somehow beats these odds and survives a motion to dismiss. I would suggest that such a plaintiff has a greater entitlement to discovery, not a lesser one.

## Mix of Civil Cases

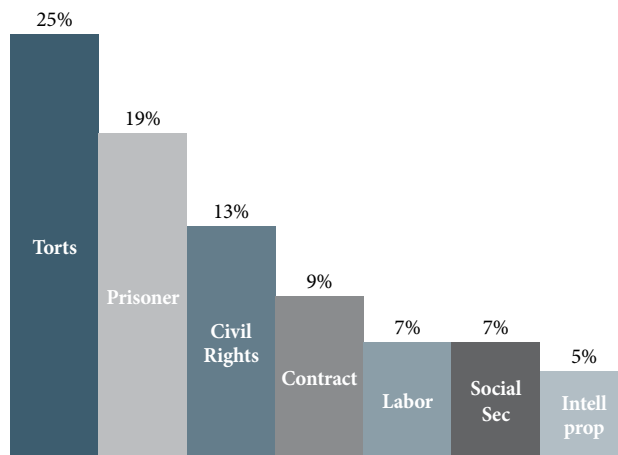
The second question that I would ask is, “**What is the mix of civil cases in the trial courts in my state?**” This point anticipates the afternoon session, so I'll be very brief. The typical case in federal court is vastly different from the typical case in state court.

Of the largest seven types of cases in federal district courts, five of them (apart from torts and contracts) are nonexistent or negligible in state court: prisoner petitions, civil rights, social security, labor, and intellectual property. Torts account for 25 percent of federal court business, and contracts for nine percent. Moreover, in federal court, most plaintiffs are individuals, what we would call “people,” and most defendants are institutions—either a business or a governmental entity.

In state court, in contrast, 64 percent of civil cases are contract cases, and only 7 percent are torts, and of those contract cases, 83 percent are debt collection, landlord/tenant, or foreclosure. That suggests that, unlike in federal court, the majority of defendants in state court are individuals, not institutions.

Let's say your state has adopted the plausibility standard and a plaintiff somehow beats these odds and survives a motion to dismiss. I would suggest that such a plaintiff has a greater entitlement to discovery, not a lesser one.

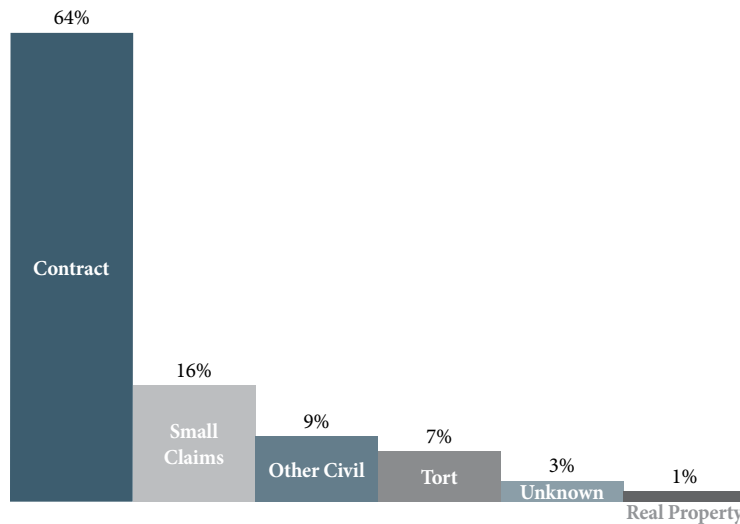
**Largest Federal Civil Case Categories in 2015**



Source: U.S. Courts, Judicial Business 2015 Tables, Table C-2A (U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2011 Through 2015), <http://www.uscourts.gov/statistics/table/c-2a/judicial-business/2015/09/30>



### State Court Civil Case Categories in 2012-2013 (est.)



Source: National Center for State Courts, *The Landscape of Civil Litigation in State Courts 17* (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

And looking more closely at the tort cases, there is another huge difference between federal court and state court: that is, most tort cases in federal court are products liability cases concentrated into multidistrict litigation. In fact, almost 40 percent of all pending cases in federal district court are consolidated into MDL proceedings.

State courts have far fewer products liability cases, and they're far less likely to be consolidated into these massive proceedings. So if your state rules, like the federal rules, are trans-substantive (in other words, they apply to all kinds of cases), then the effect of a rules change should be evaluated on all the types of cases that are heard in your courts. In state courts, of contract cases, approximately 37% are debt collection, 29% are landlord tenant, and 17% are foreclosures. Of tort cases, 40% are automobile, 20% are other personal injury or property damage, 3% are medical malpractice, and 2% are products liability.<sup>4</sup>

## What is the Problem to Address Through Rulemaking?

The third question that I would suggest asking is, “**What is the alleged problem that the rule change is supposed to address? And is there any evidence that shows that these changes will actually solve the problem?**”

The recent federal amendments supposedly address the problem of “cost and delay” of litigation, but there was nothing in front of the Advisory Committee that actually showed that the discovery restrictions would reduce the so-called cost and delay. To the contrary, there is evidence to suggest that restricting discovery does not reduce either the cost or length of litigation.

Some state courts impose stricter discovery limits than do even the federal courts. And IAALS, **the Institute for the Advancement of the American Legal System**, has studied these courts and has concluded

**There was nothing in front of the Advisory Committee that actually showed that the discovery restrictions would reduce the so-called cost and delay.**

that, as to Arizona, Oregon, and Colorado, the studies did not show majority agreement that the limits reduced total litigation time or cost.

Secondly, the Federal Judicial Center recently concluded a study of the seven districts that moved their cases the fastest, and the seven that are slowest.<sup>5</sup> The main reasons given by the judges in the slowest districts for the delay in their cases were:

- Most commonly delayed cases were: prisoner petitions, employment civil rights, ERISA, insurance, and “other” contract cases. (5)
- Heavy criminal caseload (4)
- Deferential treatment of pro se litigants
- Specialized litigation (patent, financial, medical, contracts)
- Long-term judgeship vacancies (3)
- No/few senior judges
- Not enough staff and other personnel/employee problems
- Lax granting of continuances

So with the seven slow districts, not a single reason was given that even mentioned discovery. In the seven fastest districts, the primary reasons given for their expeditious case processing were:

- Sufficient judicial resources
  - Few vacant judgeships
  - Senior judges with significant caseload
  - Extensive use of magistrates
  - Early judicial involvement/Keep to the schedule
- Good law clerks
- Experimentation by different districts:
  - One district gives most cases four months to complete discovery AND prohibits summary judgment motions without a pre-filing conference with the judge
  - One district restricts the filing of discovery motions
  - One district requires judges to rule on motions within 30 days

So look closely to see if there is any reliable evidence—evidence that you, as a judge, would admit under *Daubert* or whatever your state standard is for expert testimony, showing that restricting discovery will actually reduce cost and delay.

## Impact on State Court Workloads

The fourth question that I would ask is, “**Will these proposed rules increase the workload of our state trial court judges?**”

The Duke Judicial Center is tracking cases that are coming out of the federal courts relating to proportionality. As of June 20, 2016, they had counted 137 cases regarding proportionality. Out of those 137 opinions, 76 percent were written by magistrate judges. And the last time I checked, state court judges cannot shunt their discovery motions onto magistrates.

**A proposed proportionality matrix [has been] put forth by a federal magistrate judge. It provides 24 boxes to fill out to decide whether a particular discovery request is proportional to the needs of the case. Query whether your judges are going to do that.**

I'm also especially tickled by some of the complicated advice to judges that's being disseminated about how to apply proportionality that makes it seem like it's as complicated as quantum mechanics. For example, the Duke Judicial Center has put out controversial guidelines on proportionality that try to impart mathematical precision to the business of limiting discovery sought by plaintiffs. In the commentary to their first guideline,<sup>6</sup> they say proportionality is the factors, proportionality is the criteria, proportionality is the process, and proportionality is the goal. Now, maybe it's because I'm Catholic, but this is disturbingly Trinitarian to me: "God the Father, God the Son, God the Holy Spirit." This is a new orthodoxy; it's a new religion.

Another example of busywork that's coming out is a proposed proportionality matrix put forth by a federal magistrate judge.<sup>7</sup> It provides 24 boxes to fill out to decide whether a particular discovery request is proportional to the needs of the case. So query whether your judges are going to do that.

## Origins and Effects of Rulemaking

The fifth question that I would ask is, **"Who is proposing these changes? And will the decisionmakers ensure that changes affect litigants impartially?"**

There has been a campaign of disinformation flowing from many sources, including Chief Justice Roberts, to attempt to create the impression that the recent federal amendments emerged from a consensus across the spectrum. The public record shows this to be false. These discovery restrictions were advocated by defense interests. Plaintiffs' attorneys almost unanimously opposed them.

The sixth and final question I would ask is, **"What is my vision of the civil justice system?"** Federal Rule 1 advocates the "just, speedy, and inexpensive" resolution of civil lawsuits. The paper written by Professors Burbank and Farhang shows that the federal rulemaking committees have, for a long time, been obsessed with the "speedy and inexpensive" part and have given short shrift to the "just" part. The state rulemakers, in my rule, should not emulate this misguided view.

**There has been a campaign of disinformation . . . to create the impression that the recent federal amendments emerged from a consensus across the spectrum. The public record shows this to be false. These discovery restrictions were advocated by defense interests. Plaintiffs' attorneys almost unanimously opposed them.**

## HONORABLE ELIZABETH L. GLEICHER

Good morning. As a state court appellate judge, I have appreciated the opportunity to dig deeply into the Federal Rules of Civil Procedure that I otherwise would have been totally uninterested in, because they really don't matter in the state court appellate world. But I think that the papers that we've had the opportunity to read, and the presentations that we're listening to today, provide us, as state court judges, with some very important reminders about discovery that we otherwise might lose sight of in our appellate worlds.

**The scope of discovery, as defined by a court rule, not only may determine the fate of an individual case, but . . . also strongly influences whether or not the substantive rights . . . will actually be vindicated.**

First, and obviously—or at least it becomes obvious when we read these papers and think deeply about the issues that they raise—the scope of discovery, as defined by a court rule, not only may determine the fate of an individual case, but the scope of discovery also strongly influences whether or not the substantive rights that our legislature has defined and determined to be worthy of safeguarding or worthy of special protection by our courts will actually be vindicated.

I have found that reminder to be very important in going about not only my business as an appellate court judge, but also my activities on the Rules Committee of the Michigan Court of Appeals, of which I serve as the chair. (By the way, I was appointed by a Democrat and have maintained the role throughout my tenure on the Court of Appeals even under Republican administrations—I think primarily because no one else wants the job!) So I think that’s why. Once you get appointed and said “Yes,” you’re stuck with the rulemaking function for life, I think.

## **Pay Attention to Rulemaking**

I think all judges, especially having the benefit of these papers and the insights that they provide to us, will agree that it’s very important that we, as judges, whether we’re on rules committees or not, pay close and careful attention to the rulemaking process, bearing in mind that sometimes things we do that are very well intentioned can put barriers in the paths of litigants who are ill-equipped to overcome the barriers that the rules create.

Now, as a rulemaker on our court, I think it is really indisputable that it is a good thing, it is a valuable thing, for rulemakers on courts to try to lower litigation costs. I don’t think anybody could say that’s a bad choice or a bad goal. I think it’s a good thing for us, as rulemakers, to fashion rules that ameliorate delays if we can do that. I think it’s a good thing to fashion rules that can enhance judicial productivity if we can do that. I also know that when you sit at a conference table and argue with your colleagues about, “Do we have an ‘and’ here?” “Do we do an ‘or’ here?” “Do we attach a sanction to this rule? And if so, what’s the limit of the sanction?” we lose sight of what the authors of the papers are reminding us of in this meeting—that rulemaking is power.

Rulemaking is power over the lives of the litigants who come to our court. Even the smallest rule, the one we think is the least important, can close the door to litigants or have an unintended effect of actually raising the costs of litigation or delaying litigation when we thought we were putting just the opposite type of a regime in place.

The professors who have presented to us contend that the ostensible theory motivating the amended rule of discovery that the federal courts have adopted is that, by tightening the borders of what’s discoverable, the rule actually will save the parties time and money without damaging the truth-seeking process. That’s how they claim Rule 26 was sold. The authors point out—and I think the empirical data is pretty impressive—that this hypothesis is actually unsupported and likely motivated by reasons other than the stated reasons.

**Rulemaking is power over the lives of the litigants who come to our court.**



## The *Daubert* Example

So how can we, as state court judges, test whether or not they're right? Let me suggest that I think we, as state court judges, have already bought into one federal model that's been marketed to us, that was marketed to us as a tool to purify the litigation process, and, in fact, has had exactly the opposite effect. That's *Daubert*.

The *Daubert* doctrine was first adopted by the United States Supreme Court,<sup>8</sup> as you know, and it's been adopted since then by many, many state courts, if not a vast majority, as a method for purging our courts of the scourge of “junk science” and by ridding the courtroom of scientifically dubious cases, thereby cutting litigation costs and enhancing the ability of meritorious cases to make it to trial.

I would suggest that, viewed through the lens of Professors Burbank and Farhang, *Daubert* is a good example of a pretrial procedure that actually has generated substantial transaction costs and has not speeded up the litigation process. In fact, when I looked at the list of proportionality factors in Rule 26, that the feds are now supposed to be enforcing, the first thing that came to my mind was this looks to me like the *Daubert* factors—the multifactor test in *Daubert* that we, in Michigan, and probably you, in other courts, are now supposed to be enforcing. Again, it's a structured list of relevant factors that we've been told we have to enforce.

Both Rule 26 and *Daubert* posit that these checklists that we are to use should ultimately determine whether a litigant has her day in court. But I would propose that what we have found with *Daubert* is that we have many trials. They consume days. When I get a case in my court that's gone through a *Daubert* hearing, I often find that the transcript of the *Daubert* hearing is far longer than the transcript of the actual trial—assuming that the case goes to trial—and the effort that's required to review the *Daubert* hearing is far more than for that for reviewing the actual trial.

And I would remind you that in *Daubert*, as here with these discovery rules, our review is only for an abuse of discretion. So what we've done in *Daubert*, and I fear what could happen if these discovery rules make it into the state courts, is that we've opened the door for trial judges to apply highly subjective decisionmaking criteria that are then essentially insulated from meaningful appellate review.

## Which Cases Will Benefit From a Proportionality Regime?

So what do we do about this? What do we do about not having the state courts “Daubertized” in terms of discovery? I would suggest that there are cases in which a proportionality approach is not necessarily a bad thing. My own view is that contingency fee cases are usually not such cases, for the simple reason that proportionality is *baked into* those cases. Plaintiffs lawyers, handling a small case, managing a small case, generally are not going to reach deeply into their pocketbooks in order to pull out a big wad of money to spend on discovery because the case just doesn't warrant it. Big cases do warrant extensive discovery efforts, and in my experience in Michigan, the larger cases usually involve corporate and commercial litigation.

In Michigan, frankly, as an appellate court judge, I don't see discovery abuse. Maybe you receive appeals that involve discovery issues. For me, they're very few and far between in my court. We just don't see it, so that if there's a problem of discovery abuse, it's pretty well hidden. But we have developed a system of specialized courts. We

**Big cases do warrant extensive discovery efforts, and in my experience . . . the larger cases usually involve corporate and commercial litigation.**

have business courts, for example, where these high-dollar, very complex, very discovery-intense cases are handled, that could potentially involve discovery abuse. And in those locations, and in those venues, judges have adapted to the potential of discovery abuse by using discovery facilitators, with costs passed along to the parties, or perhaps volunteers, or having special discovery rules and agreements that are entered into by the parties, that curtail any chance of discovery abuse.

So I'm grateful for the eye-opening that these papers have brought to us today. And I very much look forward to hearing all of your thoughts about whether these problems exist in your courts and what methods can be used to solve them.

## JOHN F. KUPPENS

I'm from South Carolina. I love South Carolina. I'm proud to be from South Carolina. South Carolina is not always a state that gains national attention for positive things.

If you were here at this event last year, you heard our former chief justice, Jean Toal, talk about the efforts to remove the Confederate flag from the State House grounds in the wake of the Charleston shootings, and after 40 years of trying, I'm proud that that happened. It took way too long, but I'm still proud to be from South Carolina.

There are I think three justices from South Carolina in the room: Justice Don Beatty, Justice James Lockemy, and Justice John Few. As a point of personal privilege, I recognize my friend John Few. Twenty years ago, he and I were associates on the opposite sides of cases, and he reminds me that he usually won those fights, but I'm very proud to see him, my friend, on the South Carolina Supreme Court. All of these folks give me great hope for the future of South Carolina.

One of the things that I'm most proud of that my law firm has done is that we represented 39 poor rural school districts on a pro bono basis in a lawsuit against the South Carolina State Legislature, asking that they change the way that they fund the school districts. In a nutshell, funding was based a lot on what the tax base in the counties was, and, of course, poor rural counties who can't educate their citizens are not attractive to investment from outside, and so their tax base doesn't go up, and so they don't get funding, and so they don't educate their populace, and it's a vicious circle that continues on and on.

The lawsuit was filed in 1993. Ten years later, there was a trial that lasted 101 days, and my partners Carl Epps and Steve Morrison tried that case for the school districts. Eleven years later, *21 years after the case was filed*, the South Carolina Supreme Court recognized that the education funding system was fundamentally flawed.

Unfortunately, my partner Steve Morrison died in 2013, and he never got to see that decision. He was the greatest lawyer I've ever known, but if he were here today, he would say the battle continues. In his closing argument in that case, Steve told an African parable which I find relevant to our discussion here today. The story goes that once there was a small village on the edge of a river, and one summer the people of the village gathered for a picnic. As they shared food and conversation, someone looked over into the river and saw that there was a baby floating in the river struggling and crying and it was clear that the baby was going to drown. One of the people rushed into the river and managed to grab the baby and save the baby. And there was a momentary relief until they noticed that there was another baby coming down the river. And someone reached in and pulled that baby out.

Soon there were more babies coming down the river and drowning. And the townspeople were pulling them out as fast as they could. It was overwhelming. They were becoming desperate. They tried to organize to try and figure out a way to deal with the problem. And as everyone was busy in their rescue efforts, two of the villagers walked along the banks of the river away from the group. And they yelled at them, “What are you doing? We need your help here to rescue these babies.” And they looked back over their shoulder and they shouted, “We’re going upstream to stop whoever is throwing these babies in the river.”

## Attacking Root Causes of Problems

Of course, the point of the story is that we can’t continue to put Band-Aids on our problems. If we want to make a real difference, we have to go to the root cause. And, ladies and gentlemen, change is upon us whether we like it or not. We live in disruptive times. This is something we know, but yet we have to be reminded from time to time.

Can anyone deny that we’re living in interesting times? There is social unrest, there is racial discord, there is an undercurrent of anger. There seems to be an attack or a brawl almost daily. Those who were adults in 1968 say it hasn’t been like this since back then. Donald Trump and Bernie Sanders have a message that seems to resonate with voters in a way that has many traditionalists completely caught by surprise: “Change is upon us.”

It’s been said that in many ways our great country rests on two pillars: the ballot box and the jury box. I’ve talked about the ballot box. It illustrates the point that sometimes we don’t see the forces of change until it’s too late. We’re often slow to realize it. And really, many lawyers of certain generations, and judges in particular, are resistant to change. But the forces of change are at work on the legal system, and among the many innovations that are happening are that non-lawyers can be certified to perform tasks that only lawyers have traditionally been allowed to do. IBM has developed “ROSS,” a computer robot that can do legal research.<sup>9</sup>

**We can't continue to put Band-Aids on our problems. If we want to make a real difference, we have to go to the root cause.**

Companies like eBay use software to resolve hundreds of thousands of disputes without human intervention, let alone a lawyer. There’s a push to allow non-lawyers to own law firms. And third parties fund lawsuits for their own financial gain or, even as we’ve learned recently, to satisfy a grudge. So change is upon us. And these changes are being advanced for many reasons, including to increase access to justice and to decrease the cost of dispute resolution.

## Failure of the Current System

But if we’re going to be honest, we have to admit to ourselves that one of the reasons that these changes are happening is because the current system is not meeting the needs of our citizens. They turn to our state courts when their lives are in crisis, but after years of underfunding, many state courts are unable to timely deliver justice. Similarly, the business community relies on a functioning court system to efficiently resolve their disputes, but budget cuts in many states have required courts to lay off staff, to reduce court hours, to close or consolidate courts in many instances, and to give their priority to the criminal cases, where speedy trials are required. This has all resulted in significant delays in resolving civil cases in jurisdictions where court funding has been cut.

And that brings us to the other pillar I mentioned: the jury box. This critically important voice is fading, along with the disappearing jury trial. And while court funding is one important reason for this, the spiraling costs of discovery in the electronic age is another. And I approach this from a practitioner's perspective. Let's not skip over what

**The current system is not meeting the needs of our citizens. They turn to our state courts when their lives are in crisis, but after years of underfunding, many state courts are unable to timely deliver justice.**

a game-changer the discovery of electronically stored information has become. It has spawned a cottage industry of lawyers and vendors. It's very expensive, and it's so expensive that litigants cannot afford to take a case to trial in many instances. When the cost of discovery exceeds the amount in dispute in a lawsuit, something is wrong. Parties are essentially being coerced into settling cases because of these economic realities. That's not what we want, or at least it shouldn't be.

My point is that there is a problem here that needs fixing, and if we want to preserve our treasured jury trials as the preferred method of dispute resolution, we need to get our heads out of the sand and stop denying these problems, and we need to stop applying Band-Aids. We need to adapt to these changing times. Change is upon us, so maybe the bench and bar should open their minds to the possibility that the changes to the federal rules regarding proportionality are an attempt to make our rules keep up with the digital age.

The theme of all these recent changes is that to keep up with the digital age, our rules need to acknowledge the need for proportionality, cooperation, and active case management. As Rule 1 of the federal rules now makes clear, this is a shared responsibility for the court and the parties. Considering innovative concepts like proportionality, cost allocation, and inappropriate circumstances, in my view, simply just gives the court another tool in its toolbox, which it may or may not choose to use. Also, from a lawyer's perspective, there is some value in having similarity in state and federal rules.

So change is upon us. How will we respond? Will we adapt and survive or ignore it and become obsolete? I hope we'll walk up the river and stop whoever is throwing babies in it.

## JENNIE LEE ANDERSON

I am an attorney in San Francisco, California. I represent plaintiffs exclusively in contingency fee litigation. I have a three-attorney law firm, and we regularly sue the largest corporations in the world on behalf of workers and consumers.

About 75 percent of my practice is class action and 25 percent is individual litigation, so I guess that makes me the target of the counterrevolution discussed in the paper. And it's been a very tough fight on behalf of plaintiffs in recent years, particularly in federal court, and particularly with the attack on the plaintiffs' bar via the federal rules.

**In my view, this proposed change threatened to narrow the scope of discovery without justification and to shift the burden away from defendants to show that relevant discovery posed an undue burden.**

I testified before the Advisory Committee in 2014, in particular, against the proposed changes to Rule 26, which are the primary issue here: the proportionality changes. In my view, this proposed change threatened to narrow the



scope of discovery without justification and to shift the burden away from defendants to show that relevant discovery posed an undue burden onto plaintiffs now to affirmatively demonstrate that the discovery sought was proportionate.

I explained to the committee that in my cases, corporate defendants already controlled the vast majority of information, including information regarding the location, volume, and importance of the information, and also information regarding the cost and burden of responding to discovery. I had none of that information. As indicated in the paper, perhaps the most disturbing aspect of the process, reflecting back, was the lack of evidence supporting any need for the change in the rules.

I testified that in my cases, in my experience, the number one factor that increased the cost of discovery was stonewalling from defendants, leading to months of delay and motion practice, sometimes even to compel disclosure of basic information, including information relating to the location, volume, or format of the data being sought. In my experience, delay is the number-one civil defense tactic used in large-scale complex litigation.

In preparing for my testimony, the only data I could identify was the Federal Judicial Center's own survey that was referenced in the Burbank-Farhang paper, which demonstrated, consistent with my experience, that discovery disputes were the most common source of discovery woes. In fact, the survey of attorneys, which was a survey of both plaintiff and defense attorneys, yielded conclusions that generally the right amount, or even too little, information was produced in discovery, and that discovery costs were generally in line with the amount at stake in the litigation.

## The Comments on the Proposed Rule Changes

After the proposed amendments were published, more than 2,300 comments were submitted. The vast majority of those were from the plaintiffs' bar, uniformly opposing the proposed amendments to Rule 26(b) and providing additional anecdotal data to demonstrate that the proposed narrowing of the scope of discovery was unwarranted and potentially threatening access to justice. Regardless, defendants and the defense bar continued their mantra that discovery costs were raging out of control, as if repeating this mantra enough times would somehow make it true. We see that tactic in politics all the time, we're seeing it today, but it was really disheartening to see that marketing tactic work in a room of judges and practitioners, because the committee adopted the narrowing rule with a few changes, but virtually as proposed without any statistical evidence to support its decision to do so.

**After the proposed amendments were published, more than 2,300 comments were submitted. The vast majority of those were from the plaintiffs' bar, uniformly opposing the proposed amendments.**

The Chief Justice's recent report and reaction to the changes from the defense bar boasting that these will be the most sweeping changes in decades indicate that the amendments are indeed designed to significantly narrow discovery in civil cases.

Oddly, while taking the plunge to largely adopt the proposed changes to Rule 26, the Advisory Committee at the same time almost steps back from the edge and softens its position in its comments. It's almost a mea culpa, in my mind. The comments at times seem to argue that opponents of the changes should not be concerned, because the rule changes won't really change practice at all. They aren't meant to significantly change the way things are done at all. I've heard some practitioners say that the comments giveth what the rules taketh away. But, of course, it is the rule and not

the comments that are binding, and it remains to be seen how the comments will impact interpretation of the rule itself. The rule has been in effect less than a year, so we're still waiting to see how the interpretation by the lower courts will play out and whether the comments will have an impact.

And so I think it's worth taking a look at some of the comments, because they have a conflicting message, which questions again why the amendments were even necessary without the factual foundation that would be required for making such a large shift.

In their comments, for example, the Committee says that the rule changes do not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the parties seeking discovery the burden of addressing all proportionality considerations. It goes on to say, "nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that the discovery request is not proportional."<sup>10</sup>

The comments go on to acknowledge the exact dilemma that plaintiffs face, as testified to by myself and many other plaintiffs practitioners at the hearings. The comment says, "A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues, as understood by the requesting party."

**"Some cases involve what often is called 'information asymmetry.' One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve."**

*— Advisory Committee  
Comment*

"Some cases," the comments go on, "involve what often is called 'information asymmetry.' One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve."

But the comments provide no solution. Instead, they merely suggest that these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court. This is exactly the scenario that many in the plaintiffs' bar warned of: that the amended rule merely adds additional grounds for objections, delay, and expense, and now may require the parties to engage in discovery and motion practice to even establish what is proportional in any given case.

As far as whether electronic discovery should mandate this kind of shift in the rules, I say it should not. I believe that electronic discovery should be instrumental in reducing the cost of discovery. But, again, I spend months negotiating ESI protocols, begging my opponents to merely tell me about their systems. I say to them, "Let's have a discussion about where the documents are and how to most efficiently get to them and come to a reasonable conclusion." This often ends with months of meeting and conferring and ultimately motion practice over what the ESI protocol should even be, what search terms would be applied, and preservation details.

I think it's a bit of a crutch to say that electronic discovery now requires a protocol where plaintiffs may be denied the evidence they need to prove their case. In my personal experience, electronic discovery can be used to reduce those costs. So while it remains to be seen how the comments may impact the interpretation of the rules, at bottom, I believe they will invite increased litigation and delay—which, as I mentioned, is, in my opinion, a primary strategy used by large corporate defendants. And I would encourage the state courts to rely on evidence and fact-gathering to come to a fairer conclusion than that now embraced by the federal rules.

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## Response by Professor Farhang

I'm just going to say a couple things very quickly.

One is numerous speakers mentioned the Chief Justice's Year-End Report,<sup>11</sup> and it is worth just highlighting a little bit more about that—what an interesting example it is of two things: one, the politics of rulemaking; and, two, taking a long view of the struggle over regulation in the United States. And in a certain sense, I think you can only really appreciate the poetry of the story of the year-end report if you go back to 1981.

### Origins of the Counterrevolution

In 1981, the early '80s, here's a young brilliant young attorney who's in the Reagan administration and is there as one of the architects of the initial design of what we call the counterrevolution, advocating for a piece of legislation that then would have amended over 100 federal statutes simultaneously, to dramatically limit attorneys' fees but also limit § 1983 quite dramatically, to limit opportunities and incentives to enforce § 1983.

Those advocates discovered that the legislative terrain was terrible for their project. They failed. They couldn't even get a Republican, a member of their own party, to introduce the fee bill in Congress. He then got elevated to the United States Supreme Court, and on the Court, he continued to show distinct interest in these issues, and in a body of cases that Steve Burbank and I examine in our book. All of the cases addressed five issues, which we think kind of exemplify opportunities and incentives for private enforcement, like fees, standing, and the like. And in looking at the voting, the rate of voting in an anti-private enforcement direction of all judges to serve on the United States Supreme Court since 1960, Chief Justice John Roberts has the number one anti-private enforcement voting record in cases with at least one dissent where there was a real issue presented. So he cares a lot about this issue. He cared about it in the Reagan administration. He's cared about it as a judge.

And when the Advisory Committee initially elected not to proceed, not to propose any rules after the Duke conference, the Chief Justice personally prodded the chair of the Advisory Committee to revisit the issue and consider making rules in response. In response to that prodding, the Advisory Committee did make the rules that became the 2015 amendments. When that process was moving along, those amendments were characterized by rulemakers as modest, minor, and stylistic, and the implication was that plaintiffs' advocates should put out the fire on their head, quit running around with their hair on fire as if the sky is falling: "These are modest, minor, and stylistic changes."

Interestingly, then, they became the chief subject of the Chief Justice's Year-End Report, in which he said sometimes these things are technical and minor. Not this one. This is major. I'm going to quote him, he said it's a "big deal," it's a "significant change."<sup>12</sup> So there's something in the story that is sort of interesting, it's revealing about

Some things that could not be achieved through the legislature . . . have been achieved more effectively through Supreme Court decisionmaking and rulemaking.

how American politics works and how these same issues play out differently across institutional sites. Some things that could not be achieved through the legislature when Chief Justice Roberts was in the Justice Department have been achieved more effectively through Supreme Court decisionmaking and rulemaking.

And I'll just note that many people here have said that the rulemakers acted without sufficient study. I was a plaintiff's attorney before I became an academic. I notice that in these gatherings people talk about how the rulemakers don't have evidence—they're making these anti-plaintiff rules, and they don't have evidence. I don't know

whether advocates of plaintiffs in general limit themselves to advocating for policies only after they've conducted a rigorous study. My observation is they don't seem to. I don't think that conservatives *versus* liberals are more or less likely to act only upon having a study. I don't want to diminish the importance of empirical evidence to make decisions. It's really important, and I don't want to diminish it.

At the same time, I think sometimes focusing on that as much as people do suggests we're engaged in a kind of scientific enterprise. And that's part of our enterprise, but part of our enterprise is also that private litigation, enforcing statutes, involves core questions about how aggressive and assertive and interventionist the American regulatory state is going to be. That's what it's a question about. And that's been one of the central sites of political struggle in the history of our Republic, and in general, advocates haven't limited themselves to try to move policy only when they conduct scientific studies. So I want to throw that out there as a provocation.

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## Questions and Comments From the Floor

### HONORABLE JUDY CATES, FIFTH DISTRICT APPELLATE COURT, ILLINOIS.

I have a question for Mr. Kuppens. You indicated that there was value in making state rules and federal rules similar, but you didn't give an example.

Prior to becoming a justice on the appellate court in Illinois, I was a trial lawyer, and the common objection in our state courts, as well as in our federal courts, in my practice was "overly broad and unduly burdensome." And now, as an appellate court justice, when interrogatories are attached to the record, I see the same thing. I might get interrogatories that are 30 in length, with the same objection made to every interrogatory. And my question is, how many times is the defendant actually required to show the court that it is truly unduly burdensome to raise that issue? And doesn't the proportionality rule protect you even further from having to do that?

**JOHN KUPPENS.** Thank you for your question, Your Honor. First of all, my comment about the value in similarity in the rules from a practitioner's perspective was a minor one, and that is that when you're practicing in multiple courts, it's just easier if the rules aren't dramatically different to practice law. It was a very small point.

I don't think that conservatives versus liberals are more or less likely to act only upon having a study.



I think that the proportionality element in the six months since the rules have been amended has not been shown to be some drastic “sky is falling” type of a situation. Cases that have addressed situations since that time seem to be handling it fine. I mean, it’s just particularly relevant when you’re talking about discovery of electronically stored information, because the cost of producing that is so expensive a lot of times compared to the value that it might deliver.

I’m not here to speak on behalf of all defendants, and I certainly don’t think that objections should be made when they’re not well founded, and I think that the courts should continue to hold both sides’ feet to the fire to make sure that they fulfill their responsibilities to the court to cooperate and to keep the case moving. But I see this as just a response to a need.

**HONORABLE ROBERT MILLER, APPELLATE DIVISION SECOND DEPARTMENT OF NEW YORK STATE.** Mr. Kuppens indicated that the cost of discovery frequently is greater than the value of the case. Notwithstanding Professor Farhang’s statement that statistics and research doesn’t matter, apparently in contravention with everything you said earlier, is there any statistical support, any study, that shows that the value of the case is overwhelmed by the cost of discovery? Because I haven’t seen it. I was just curious if you brought any of that with you.

**JOHN KUPPENS.** I’m speaking from my own personal experience. You know, things have changed a lot during the 27 years that I’ve practiced law. One of my partners used to say a lawsuit is about a ham sandwich, and then it’s gotten further and further away from the core issues of what’s being sued about. They criminalize the conduct of the lawyers. They criminalize the discovery conduct of the parties on seemingly vastly unrelated issues.

So, no, I don’t have statistics to present to you. I’ve got my own experience in which I’ve seen cases where, if you have to do the searches of your electronically stored information that is required to respond to discovery, that requires a lengthy and expensive process of identifying custodians, retrieving information, and reviewing that information, that oftentimes is a significant factor in the parties’ decision whether they can proceed to trial with a case.

**PROFESSOR FARHANG.** I would distinguish between the importance of data and evidence when you’re making claims about reality and the importance of data and evidence when you’re advocating for change. People, like judges observing what happens in their courtroom, might learn about things where they would advocate for a change in procedure without conducting a study. So I likewise think that plaintiffs’ lawyers or defense lawyers, from their practice, might advocate change without conducting a study, but that’s different from making a claim about reality.

**HONORABLE COLLEEN O’TOOLE, ELEVENTH DISTRICT COURT OF APPEALS OF OHIO.** In your discussions, how much of this has to do with the technological proficiency of both the judiciary, as well as the practitioners, in determining cost and proportionality? I can’t imagine that a lot of the folks that were appointed federally to a lot of these committees understood platforms, understand metadata, etc. And, Mr. Kuppens, I think you’re absolutely correct, this thing is changing, and it’s changing because of the access to computers, metadata,

I would distinguish between the importance of data and evidence when you're making claims about reality and the importance of data and evidence when you're advocating for change.

and all the other things that could potentially prove a case. So was any of this looked at? How we authenticate a source, for instance, was that looked at? Maybe that's not the proportionality issue as much as the underlying basis upon which we store, gather, and identify data and evidence. Was that discussed at all in the rules or anything that you guys have seen, or is that too far afield?

**JENNIE ANDERSON.** I can comment. I think that judges are recognizing the need to educate themselves on the common technology used in large-scale litigation—especially the magistrate judges who deal with a lot of the discovery issues, for instance, in federal court, and the trial judges in state court. They are very open to learning about the platforms. They need to understand how electronically stored information is managed in litigation so that they can make informed decisions on motions to compel and help the parties forge a protocol in discovery that makes sense. So I think that is definitely changing. I think that judicial education on this issue is critical to assist the parties. And, again, I believe that technology should be used to reduce the cost of discovery, not pose another barrier to cause additional delay and narrow the scope of discovery. I don't see why the two must be mutually exclusive.

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## Notes

<sup>1</sup> Scott DeVito et al., “Doubling-Down” for Defendants: the Pernicious Effects of Tort Reform, 118 Penn. St. L. Rev. 543 (2014).

<sup>2</sup> Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

<sup>3</sup> Alexander A. Reinert, Measuring the Impact of Plausibility Pleading, 101 Va. L. Rev. 2117 (2015).

<sup>4</sup> National Center for State Courts, The Landscape of Civil Litigation in State Courts (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CiviJusticeReport-2015.ashx>.

<sup>5</sup> Donna Stienstra, A Study of Civil Case Disposition Time in U.S. District Courts (Federal Judicial Center 2016), [http://www.fjc.gov/public/pdf.nsf/lookup/MCC-Final.pdf/\\$file/MCC-Final.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/MCC-Final.pdf/$file/MCC-Final.pdf).

<sup>6</sup> Duke Judicial Center, Commentary to Guideline 1, Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality, 99 Judicature (No. 3, Winter 2015), Since this talk was given in July 2016, the Duke Guidelines have been revised. See <https://law.duke.edu/judicialstudies/conferences/publications/>. The original version provided:

As used in Rule 26(b)(1), proportionality describes:

- a) the six **factors** to be considered in allowing or limiting discovery to make it reasonable in relationship to a particular case;
- b) the **criteria** for identifying when the discovery meets that goal;
- c) the **analytical process** of identifying the limits, including what information is needed to decide what discovery to allow and what discovery to defer or deny; and
- d) the **goal itself**.

<sup>7</sup> Elizabeth D. Laporte et al., *A Practical Guide To Achieving Proportionality Under New Federal Rule Of Civil Procedure 26*, 9 Fed. Cts. L. Rev. 19, 50-51 (2015).

<sup>8</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

<sup>9</sup> See <http://www.rossintelligence.com/>.

<sup>10</sup> See Committee Notes on Rules—2015 Amendment, available at [https://www.law.cornell.edu/rules/frcp/rule\\_26#](https://www.law.cornell.edu/rules/frcp/rule_26#).

<sup>11</sup> 2015 Year-End Report on the Federal Judiciary, available at <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

<sup>12</sup> Id. At 5.

# LUNCHEON ADDRESS

## The Federal Rules of Civil Procedure: Where Have They Gone?

Arthur Miller, New York University School of Law

It is nice to be back at the Pound Institute.

This morning, we heard words like “revolution,” “counterrevolution,” and “proportionality.” In visiting the discussion groups, it became clear to me that those words create a great deal of ambiguity in a number of you. I thought I would try to put it in perspective, which means I am going to take you back to some history.

I have been working on this subject over 50 years on the federal side. I believe in Federal Rule 1,<sup>1</sup> and many of you come from state systems that have Federal Rule 1 or some equivalent. Rule 1 seeks to provide “just, speedy and inexpensive determination” of causes. The people who wrote those rules believed in citizen access to the courts. They believed in resolving disputes on their merits, not by tricks or traps or obfuscation. They put together a relatively plainly worded, simple system that basically said, “Let’s just get it on. Let’s push past the pleadings, forget

The people who wrote the Federal Rules of Civil Procedure believed in citizen access to the courts.

Trying to get it right, after an adversarial contest on a level litigation field, always seemed very American to me.

about that motion to dismiss and maybe a summary judgment, but let’s go for the gold standard. Let’s go for the American gold standard: trial, often before a jury.”

That had a profound effect on me, both as a student and as a young academic. Trying to get it right, after an adversarial contest on a level litigation field, always seemed very American to me. It fit in quite nicely with apple pie and baseball and the flag—but that

was 1938. We all know what has happened since. We all know that, in the 70 years since those rules became effective, our society has gone through the most extraordinary set of changes—technological, economic, communications, etc.

On the federal side, there was a period, let’s call it “Kennedy-Johnson,” even Nixon and Carter contributed, that was the most exciting and transformative law-making era in American history. Statutes we never could have conceived of were enacted: ERISA, RICO. We had a civil rights revolution. We developed class and mass actions, product safety litigation, consumer protection, environmental litigation, safety in pharmaceuticals. With that transformation, the federal courts became more and more masters of large, complex mass litigation.

In 1938, when those rules came in (and, curiously, this is a sense I had really this morning for the first time), the decision to create uniform national rules after three quarters of a century in which the federal courts followed state practice was premised in part on an osmosis theory: create nationwide rules, and the concepts will osmose into state practice, most of which was still rooted in the old code system. It was Machiavellian by the rulemakers, and it was brilliant, and it worked. In many states the absorption of the federal rules was either complete, or almost complete, or damn near complete.

But as time has moved along (and I think this is something those of you who are involved in state rulemaking have to keep in mind), the two sets of litigation practices—state and federal—diverged. So as we look at most states in 2016, the nature of the workload, state and federal, is far, far different from what it was in 1938. One size does not fit all. It just does not.

**The decision to create uniform national rules . . . was premised in part on an osmosis theory: create nationwide rules, and the concepts will osmose into state practice.**

A couple of things have happened in this period that are worth keeping in mind. The first is that, along with the great social revolutions of the '60s, '70s and '80s, we have developed a bar that really did not exist in 1938. Some people call it the “public interest” bar. It is the bar composed of people who are willing to litigate and move the law to enforce public policy. We have it in the field of securities law. We have it in anti-trust. We now have it, really, across the substantive universe. A new bar has been created to do that. That bar has made the concept of the private attorney general a reality. That is a significant social and professional change in our litigation fabric.

In addition to that, and probably as a result of that, there has been a tremendous backlash against the plaintiff’s bar. You heard a little about it this morning. Corporate America has mobilized in a way it never was mobilized previously, to demonize the plaintiff’s bar, to affect judicial elections (in those states where judicial elections are held), and to claim that America pays a “litigation tax.” Urban legends are created. And since the corporate bar has much greater suasion with the media then does the plaintiff’s bar, something like the McDonald’s coffee case becomes a cosmic anecdote—repeated, repeated, repeated, but never described accurately. It is a hard search to get the actual facts of the McDonald’s case.

**We have developed a bar that really did not exist in 1938. Some people call it the “public interest” bar. It is the bar composed of people who are willing to litigate and move the law to enforce public policy. . . . That is a significant social and professional change in our litigation fabric.**

Now part of what we might call “class warfare” between corporate America and the plaintiff’s bar, the public interest bar, the private attorney general concept, involves what is a substantive revolution, yes. But we have also had a procedural revolution, and it has gone very differently.

Let me catalog it for you, because “proportionality” in discovery is the new kid on the block. You cannot understand the agitation and aggravation about proportionality unless you roll your mind back to 1986. In 1986 the Supreme Court decided three summary judgment cases.<sup>2</sup> This was a court that had previously said, “You cannot use summary judgment in any complicated or difficult case.” Suddenly they said, “If it is not plausible, kill it.” What a signal! Blood was in the water. What a surprise! The defense bar, behaving like Pavlov’s dog at the sound of the dinner bell, started making summary judgment motions at a scale never before seen.

Seven years later, now we are at 1993, and *Daubert*<sup>3</sup> was decided, to screen expert testimony. The Supreme Court said, “We cannot have these crazy scientists testifying. Let’s have a motion. Let’s have a hearing, and then we can disqualify them and generate an appellate issue.” Now who does *Daubert* work against—the defense or the plaintiff’s bar?

Next, for the last 20-25 years, there has been an attack on the class action. The class action in its modern form came in 1966. Let’s celebrate the 50<sup>th</sup> year of the ‘66 revision. It is near and dear to my heart, because I was assisting the then-reporter to the Advisory Committee, and I wrote a piece of that sacred text. But it has gotten harder and harder and harder and harder to certify a class. You know the Supreme Court has decided *Amchem*, *Ortiz*, and *Walmart*.<sup>4</sup> “Plaintiff’s bar, your class action is too big and it will fail.”

One of the consequences of this massive attack on the class action has been the extraordinary proliferation of paper: motions, hearings, appeals. The litigants treat it as Armageddon at the class certification stage.

There has been a little ray of sunshine lately, ironically coming out of the Seventh Circuit. I can understand Chief Judge Diane Wood being part of this shift.<sup>5</sup> She was born in this century, and understands the need for aggregate litigation. But even Judge Posner has now come to realize that we live in a world of mass phenomena. Either you aggregate or you completely deny access. That is what that fight is all about.

You all know what the ultimate stake in the heart has been on class actions. In 2006, the Congress of the United States, in one of those rare moments in modern times in which it decides to do something, enacted the Class Action Fairness Act, so that none of you state judges have jurisdiction over any class actions of consequence. It has all been taken away from you. This is the party of Lincoln. Two hundred years of federalism, and trust in state judges to do their jobs, cast aside. Thank you, Chamber of Commerce.

**In 2006, the Congress of the United States enacted the Class Action Fairness Act, so that none of you state judges have jurisdiction over any class actions of consequence.**

Another thing you heard referred to this morning is pleading. We now reach 2007 and 2009, and the Supreme Court throws away about 60 years of jurisprudence about notice pleading. Being a court of limited vocabulary, they say, “No, no, judge. On a 12(b)(6) motion, if it is not plausible, kill it.” That is the same word they used for summary judgment.

What has happened to my gold standard, trial before a jury? Now, we can kill cases at summary judgment; we can kill cases on *Daubert* motions or motions for class certification; we can

kill on the 12(b)(6) motion to dismiss. And all the while, those lawyers who are billing by the hour are running the contingency-fee lawyer into the ground.

You’d think they would be satisfied with these obstacles, but a couple of years ago the Supreme Court said, “There is something that happens *before* pleading, namely jurisdiction.” We can create another one with this *Nicastro* case,<sup>6</sup> in which you get this incredible split, 4-2-3. Now, you baseball fans know that is a hell of a double-play combination.

**“Proportionality” in discovery is the new kid on the block. You cannot understand the agitation and aggravation about proportionality unless you roll your mind back to [the summary judgment decisions of] 1986.**



I can understand a 4-3-2 double play, but not 4-2-3. And the plurality says, “It is not enough that this damn huge British machine took off the plaintiff’s arm in New Jersey. You have to show that the English company that produced it *targeted* New Jersey—*targeted* Governor Christie. You have to show it was *intended* to go there when you sent it to Ohio to the distributor. You have to show the defendants submitted to the sovereignty of New Jersey—that the defendant effectively consented to jurisdiction.” What defendant in the last millennium has ever consented to jurisdiction? I am saying to myself, “This is the sovereignty concept from *Pennoyer v. Neff*.<sup>7</sup> Now I can stop my procedure course after a week—just teach them *Pennoyer v. Neff* and quit! Nothing else matters! We have moved from my gold standard to dismissals based on personal jurisdiction.

And what about this arbitration stuff? “Defendants rejoice. Now, we have them. We do not even have to let them into court. Just put it in the contract.” True, it will not work for torts, but it will work for contracts. True, the Federal

**How many of you signed up for the wi-fi service in the hotel? How many of you read the terms and conditions? Do any of you know whether there was an arbitration clause in there?**

Arbitration Act<sup>8</sup> was enacted in the 1920s to deal with corporate-to-corporate confrontation. It was not built for consumers. But suddenly the Supreme Court is treating the Act as Holy Scripture. It does not matter that you can demonstrate that, economically, it is impossible to go to arbitration individually—that you have to go by way of mass tort litigation or by a class action. As Judge Posner said, “Only a fanatic or a lunatic will sue for \$30.” What insight! Just put arbitration in the contract. We know consumers will not invoke it.

How many of you signed up for the wi-fi service in the hotel? Here we have more than 100 of the best, the brightest, the most educated judges in the United States. How many of you read the terms and conditions? Do any of you know whether there was an arbitration clause in there? To hell with reality—the complete absence of bargaining equality and awareness of the clause’s effect. I find this distressing.

After you look at this string of events, the new proportionality requirement is the tail on the dog. Let’s put proportionality into context. Since 1980 there have been seven amendments to the discovery rules. Each and every one of them, at some level, has ratcheted back discovery with little “steplets,” or paper cuts, here and there.

Here I must do a mea culpa. Where did that word “proportionality” come from? I apologize. I was the reporter to the Advisory Committee from 1978 to 1985. “Proportionality” came from me. In the 1983 amendments to the rules, we put in a harmless, miniscule little provision that just told judges what some of them had not appreciated they could do since 1938: if something is redundant, irrelevant, disproportionate, you have the freedom to stop it. We did not do what this new rule does: make proportionality a condition of getting discovery. There is an “and” in the key sentence in the rule: “relevant *and* proportionate.” Seven times the rules have been amended, heightening the imbalance in access to relevant information. I find it very sad.

**After you look at this string of events, the new proportionality requirement is the tail on the dog. . . . Since 1980 there have been seven amendments to the discovery rules. Each and every one of them, at some level, has ratcheted back discovery with little “steplets,” or paper cuts.**

I think what has happened in these years has substantially undercut our ability to enforce public policies through the private bar. Who helped stop tobacco? Who helped stop asbestos? Who fought cigarettes? Who took Vioxx and

Actos off the shelf? Who ventilated the problem of concussions?  
The private bar. We are losing that capacity.

We are also losing the capacity, which I think is embedded in Rule 1, that people get a meaningful day in court. Maybe you will not make it to trial. Maybe you will not get a jury. But we have always bragged that the 5<sup>th</sup> and 14<sup>th</sup> amendments of the Constitution provide us with a meaningful day in court—not a day in court where a plaintiff is terminated at the courthouse door, but a meaningful day in court. I think we are losing that. I am sad.

**I think what has happened in these years has substantially undercut our ability to enforce public policies through the private bar.**

For 50 years, I always thought it was a no-brainer that everybody should follow the federal rules. I still think, as a general proposition, that everyone should follow the federal rules, but something I heard this morning really shook

**We are losing the capacity, which I think is embedded in Rule 1, to give people a meaningful day in court.**

me up. Somebody said that the problem was not just the rules, but the absorption, the osmosis by state courts the federal *interpretation* of the rules. That is what led to *Twombly* and *Iqbal*.<sup>9</sup> It is the court's interpretation of Federal Rule 8 (a "short and plain statement showing that the plaintiff is entitled to relief"). The motion to dismiss is the classic demurrer. In today's procedural system, is there a legal basis for the case or isn't there? If there is, move on. It is not a fact inquiry

motion. It is not a weighing. How does plausibility have anything to do with whether there is a "dirty look" tort or not in the governing substantive law?

After 50-odd years, I cannot say to you with anything approximating a straight face that you should follow either the linguistics of the rules or today's interpretations of the federal rules. The courts of each state, knowing what goes on in that state, have to make its own policy judgments based on what is good for Arizona or New Mexico or South Carolina. The federal rules provide a good guidance, yes. Some of the drafting is rather good. I did some myself, so how can I knock it?

When it comes to proportionality, it is going to take three to five years before even the feds figure it out. There is a timeframe before practice under a new rule works itself out, before the scattergram of decisions becomes a picture. Don't rush. I love the State of Arizona, but in its history in the days of the late John Frank, it was too quick in adopting the federal rules. Have a little patience about following the federal rule.

**After 50-odd years, I cannot say to you with anything approximating a straight face that you should follow either the linguistics of the rules or today's interpretations of the federal rules.**

I am sad. God knows what crazy thoughts come into my head, I cannot get this grotesque thought out of my head as a metaphor and an analogy. When Mussolini brought fascism to the great country of Italy, he was always complimented about one thing in particular. They said "He made the trains run on time." Wonderful. The questions then should be, "Do your citizens have a seat on the train? Can your citizens pay the fare to be on the train? Do your citizens believe the train is going anywhere they want to go?"

Thank you.

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## Notes

<sup>1</sup> F. R. Civ. P. 1: “These rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”

<sup>2</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>3</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

<sup>4</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

<sup>5</sup> *See Lewis v. Epic Systems Corporation*, 823 F.3d 1147 (7th Cir. 2016).

<sup>6</sup> *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011)

<sup>7</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1877).

<sup>8</sup> 9 U.S.C. § 1 et seq.

<sup>9</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

# AFTERNOON PAPER, ORAL REMARKS, AND COMMENTS

## Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?

Stephen N. Subrin, Northeastern University School of Law<sup>1</sup>

Thomas O. Main, William S. Boyd School of Law, University of Nevada, Las Vegas<sup>2</sup>

### EXECUTIVE SUMMARY

*In Part I, Professors Subrin and Main describe the scope of their research and their conclusions: that it would be a mistake for state court systems to adopt either the formal amendments to the Federal Rules of Civil Procedure that have been adopted since the 1980s or the procedural changes ordered by the United States Supreme Court during the same period. They review the arguments made in the past in support of state replication of federal procedure (including the quality of the federal rulemaking process, the careful deliberations of Supreme Court justices, and the notion that the federal rules foster uniformity), and find each of them insufficient as justification for state courts to change their existing practices.*

*Part II examines the uniformity issue in depth. The authors identify four types of uniformity that rulemakers have historically sought to achieve: (1) inter-district uniformity (among all federal district courts); (2) trans-substantive uniformity (among different legal subject matters, e.g. contract, tort, antitrust); (3) intra-state uniformity (across both state and federal court systems within individual states); and (4) inter-state uniformity (among the different states). In Exhibit A they illustrate the responses of the state courts to amendments to seven of the federal rules. For a number of reasons, they argue, the separate processes of federal rulemaking and of attempted state replication of the federal rules have led not to the uniformity and predictability rulemakers seek, but rather to practices and outcomes that are fluid and indeterminate, in which judicial interpretation plays a major role.*

*In Part III, Subrin and Main consider five reasons (in addition to the documented failure to achieve uniformity) why they believe the state courts should not replicate the federal rules: (1) a lack of neutrality on the part of the federal rulemakers and their overemphasis on complex, high-stakes litigation, especially in the area of discovery; (2) the vast difference between the caseloads of the federal and state court systems, with the state courts handling many more cases in which less money is at stake; (3) the major changes brought about during the “Fourth Era” of federal civil procedure, with added layers of disclosures, motions, conferences, and pressures to settle; (4) the huge disparity between the federal and state courts in terms of the resources available to judges; and (5) the success state courts have already had in experimenting with new rules and methods of litigating.*

*Finally, Part IV addresses two other important implications of the rulemaking debate. Professors Subrin and Main urge the state judiciary to consider seriously the role litigation plays in American democracy, which uses private lawyers*

“to define and enforce public norms and social policy,” and airs and decides grievances in open courts with public records. They also invite state court judges to consider what role they wish to play in the American legal system: should they join the bureaucracy and become judicial case managers, as is required of federal judges, or should they “return to their historic roles as judges”?

## I. INTRODUCTION

We have been convinced for many years that states would be mistaken to adopt the amendments to the Federal Rules of Civil Procedure since the 1980s, or to adopt the procedural changes made by United States Supreme

States would be mistaken to adopt the amendments to the Federal Rules of Civil Procedure since the 1980s, or to adopt the procedural changes made by United States Supreme Court decisions during the same period.

Court decisions during the same period. The Pound Civil Justice Institute has invited us to share these views. A group of distinguished state judges is the perfect audience, and we are grateful for the opportunity to initiate a conversation.

This opportunity has forced us to consider the best way to convince state judges that our conclusion is correct. Let us start by discussing what factors would lead to the opposite conclusion, the conclusion that federal procedural changes, by Rule adoption or judicial decision, should generally be replicated by the states.

The argument for replication might exalt the quality of the federal amendment process. To be sure, federal procedural amendments go through a lengthy process that includes review by the Advisory Committee on Civil Rules, the Committee on Rules of Practice and Procedure (the “Standing Committee”), the Judicial Conference of the United States, the United States Supreme Court, and finally, the United States Congress.<sup>3</sup> These processes include not only public hearings, but also periods during which the public is encouraged to submit comments and to offer testimony.<sup>4</sup> Such a lengthy and costly process—one that would be difficult for states to duplicate—might fairly be assumed to result in high quality amendments that states should, in turn, replicate. Similarly, Supreme Court opinions are the product of deliberate and solemn processes. Procedural and other matters that are resolved by the Supreme Court have already been litigated at trial and appellate courts, and Supreme Court cases are typically briefed and argued by expert advocates. Allowing interest groups to file amicus briefs further ensures a breadth and depth of judicial perspective.<sup>5</sup>

### Quality of Rule- and Decision-Making

Yet the quality of the federal rulemaking and decision-making processes is not a persuasive justification for states to replicate the federal model. The supposed superiority of these federal processes is, in fact, suspect.<sup>6</sup> Twenty years ago the process of federal rulemaking was under such intense criticism that the Standing Committee itself commissioned a self-study of the rulemaking process.<sup>7</sup> Recently Professor Richard Freer chronicled the persistence of many of those same criticisms, and identified new critiques, in his article, *The Continuing Gloom About Federal Judicial Rulemaking*.<sup>8</sup> Observers are “gloomy” for different and even apparently contradictory reasons: the rules committee acts in haste and is too slow; the committee fails to lead and innovate on things that matter, and engages in irresponsible experiments; the committee is obsessed with trivial wordsmithing and is dangerously politicized.<sup>9</sup> Unfortunately, these oppositional



pairs of criticism do not cancel each other out; instead, both halves are accurate, depending on the year and the specific reform at issue. In Part III we rebut any perception or presumption that any product of the federal rulemaking process is necessarily enlightened and prudent. We also address the failings of the amendments.

Interpretations of procedural changes effected by Supreme Court decisions are also suspect. Although recent empirical scholarship advises skepticism about the role of ideology at the trial court level, there are demonstrated political effects in Supreme Court decision-making.<sup>10</sup> Accordingly, a state cannot replicate the Court's changes to procedural law for its own jurisprudence without also endorsing the ideology that may be embedded in the reform. Of course a state might share the ideology and might desire the reform's effect, but replication would not be because of the superior quality of the decision-making by the Supreme

Court. Replication would require a policy choice, and therefore, hopefully, a policy debate.

**Interpretations of procedural changes effected by Supreme Court decisions are also suspect.**

Even if the rigor and wisdom of the amendment process is an insufficient reason for states to replicate their federal counterpart, one might fairly suggest that uniformity—for its own sake—is reason enough. Yet again we would disagree. To be

sure, the idea of procedural uniformity is seductive. Indeed, the idea is so deeply embedded in our thoughts that many who advocate for uniformity find it difficult or unnecessary to explain why it is thought to be good—as if it were some excellence in itself.<sup>11</sup>

Whether because of the lure of simplicity, the appearance of neutrality, the likeness to science, the feel of efficiency, the imprimatur of professionalism or some combination of these, the norm of procedural uniformity enjoys virtually universal approval. Thus, it should come as no surprise that the rhetoric of uniformity is both pervasive and predominant in the discourse of procedural reform.<sup>12</sup>

For example, procedural uniformity was a central theme of the reform that led ultimately to the promulgation of the original Federal Rules of Civil Procedure.<sup>13</sup>

## Focus on Uniformity

Part of the drafters' promise of uniformity was the contemplated adoption by states of the federal model. The federal rules were, after all, "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law."<sup>14</sup> Further,

[t]hat state which tries to live unto itself will suffer, if it does not perish.... [W]e are all for one and one for all.... [A] simple, scientific, correlated system of rules, such as would be prepared and promulgated by the Supreme Court of the United States would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states.<sup>15</sup>

**The quality of the federal rulemaking and decision-making processes is not a persuasive justification for states to replicate the federal model. The supposed superiority of these federal processes is, in fact, suspect.**

Replication by states of the federal rules would streamline both the teaching and the practice of procedure. By mastering one set of procedural rules nascent lawyers would be prepared to practice in federal and state courts.<sup>16</sup> But most states did not replicate the federal rules. And as we explore more fully in Part II, even those states that replicated the original federal rules have not kept pace with all of the amendments.

**Most states did not replicate the federal rules.**

In Part II we also explore other dimensions of uniformity. Another supposed virtue of the Federal Rules of Civil Procedure was both inter-district and trans-substantive uniformity: the same procedural rules would apply in all federal courts and to all types of substantive actions. But as so often happens in life, when dreams or reforms confront reality, the outcome falls short of the expectation.

**Procedural uniformity under the federal rules regime has unraveled at every level, not least because the generality of the rules ensured . . . that there would be uniformity in only “the most trivial sense.”**

Procedural uniformity under the federal rules regime has unraveled at every level, not least because the generality of the rules ensured, in Professor Burbank’s apt description of trans-substantive procedure, that there would be uniformity in only “the most trivial sense.”<sup>17</sup> Specifically, judicial discretion and attorney latitude reigned, undermining any meaningful role for the federal rules in a quest for uniformity.<sup>18</sup> Under these circumstances it would be ironic—even paradoxical—for a state to replicate the federal rules *for the sake of uniformity* when the adopted text is so fluid and indeterminate that it cannot maintain uniformity even with itself.

Of course the federal rules and their amendments could be the product of a flawed rulemaking process, fail to deliver on the promise of uniformity, and yet still be compelling content that is suitable for adoption by the states. But it turns out that proponents of replication at the state level would have to make a lot of assumptions that turn out not to be true, namely that:

- the number, the substantive mix, and the stakes of federal and state caseloads,
- respectively, are the same;
- the state courts have the judicial resources that federal procedure pre-supposes;
- the litigants in state courts can afford federal practice;
- the federal procedural amendments, whether by actual amendment or judicial decree, are working well for most cases;
- the drastic diminution of trials and juries in federal courts are salutary for our
- democracy; and
- state court procedural experimentation should be discouraged.

**Specifically, judicial discretion and attorney latitude reigned, undermining any meaningful role for the federal rules in a quest for uniformity.**

Part III shows the misguided nature of these assumptions. We will give examples of the mismatch of the federal Amendments for the state court caseload.

We end in Part IV with a question for our audience of state court judges. Simply put, what do you want your role as judges to be? The federal judiciary has become a huge bureaucracy (judges represent only a small percentage of the personnel) which has essentially given up on the major role of adjudication.<sup>19</sup> They spend little time in the court room at all, and, on average, preside over a civil trial about once every three months.<sup>20</sup> They, and in large measure the lawyers who appear before them, have had little experience with trials or with juries. They dispose of cases on dispositive motions and urge settlement or alternative modes of dispute resolution.<sup>21</sup> The American jury is disappearing, and to have a trial is thought to be a judicial failure.<sup>22</sup> This is not hyperbole. We hope that state judges avoid replicating this, and instead offer alternative models.

## II. THE LACK OF UNIFORMITY

The drafters of the Federal Rules of Civil Procedure promised four species of uniformity. Inter-district uniformity and trans-substantive uniformity were to be realized from the moment of adoption. Intra-state uniformity and then inter-state uniformity were to follow in due course. Yet uniformity, whatever its rhetorical allure and supposed virtue, has been elusive as a matter of fact.

### A. Inter-District and Trans-Substantive Uniformity

With the promulgation of the Federal Rules of Civil Procedure in 1938, one set of procedural rule applied in all federal district courts across the country. This is inter-district uniformity. This uniform set of procedural rules replaced prior regimes of federal Process Acts and Conformity Acts that had required federal courts, in cases at law, to conform to the procedure of the state in which the federal court sat.<sup>23</sup> Under the old regimes, one federal court was applying the common law procedure of its host state, while a federal court in another state was applying the procedural codes of its host. Such divergence was inconsistent with the emerging notion of a system of federal courts, and reforms to make a uniform procedure for the federal courts found traction. Notice, however, that this reform replaced one form of procedural uniformity (i.e., a uniform procedure within the state and federal courts of a state) with the pursuit of another, to wit, inter-district uniformity.

A second feature of these new, uniform Federal Rules of Civil Procedure was trans-substantive uniformity—all types of substantive actions were subject to the same procedural mandate.<sup>24</sup> In other words, no matter whether the case was a simple slip-and-fall case or a complex antitrust action, federal judges would apply one and the same textual rule.<sup>25</sup> This, too, was a departure from prior regimes that tailored the procedural mandates so that they were substance-specific.<sup>26</sup> The drafters urged trans-substantive rules for the purposes of “uniformity and simplicity.”<sup>27</sup>

The pursuit of trans-substantive uniformity—and, to some extent, also the pursuit of inter-district uniformity—led the drafters to craft rules that were elastic enough to apply in a broad range of circumstances and settings. “‘Tight will tear; wide will wear’ was the sartorial wisdom applied by the draftsmen.”<sup>28</sup> A related aspiration of the federal rules was to vest judges with broad discretion; in a nutshell, the drafters wanted to let the judges judge.<sup>29</sup> But this lack of restraint, whatever its merits, means that there is *ad hoc* decision-making which, in turn, necessarily creates substantial disuniformity in practice.

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Even a cursory review of the federal rules reveals the extent to which the drafters (and amenders) rely on flexible standards, rather than predictable rules. Put a different way, the federal rules often do not set forth bright-line rules, but instead rely upon judicial interpretations.

Even a cursory review of the federal rules reveals the extent to which the drafters (and amenders) rely on flexible standards, rather than predictable rules. Put a different way, the federal rules often do not set forth bright-line rules, but instead rely upon judicial interpretations. A complaint must contain “a short and plain statement showing that the pleader is entitled to relief”;<sup>30</sup> but what exactly does that mean? Motions to amend require the judge to determine “when justice so requires.”<sup>31</sup> A key inquiry in many class actions is whether “questions of law or fact common to class members predominate” over individual questions.<sup>32</sup> The scope of discovery includes that which is “relevant”—and, now, that which is “proportional to the needs of the case.”<sup>33</sup> Of course a judge may also order separate trials “for convenience” or “to avoid

prejudice.”<sup>34</sup> More examples are plentiful.<sup>35</sup> The point here is simply that the federal rules frequently postpone (or outsource) the procedural mandate to case-by-case determination; the virtue of such *ad hoc* decision-making comes at the expense of uniformity.

## Influence of Case Management on Outcomes

Further, the profound significance of judicial case management on the development and outcomes of cases is increasingly well-known.<sup>36</sup> The federal rules require judges to manage their cases through settlement conferences, status conferences, discovery conferences, and pretrial conferences.<sup>37</sup> But other than establishing a basic agenda for those conferences, the federal rules neither prescribe nor proscribe judicial conduct. Moreover, the disposition of cases while under case management has made adjudication an increasingly opaque process. Gone are the days when cases were resolved either

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by trial in a public courtroom or by a voluntary settlement in the shadow of a trial. Instead an ever-expanding constellation of actors earnestly manage cases toward settlement, toward disposition by motion, or for that rare 1-2% of cases, toward a trial.<sup>38</sup> Importantly, the emergence of a judicial bureaucracy attended this transformation of the judicial role: the number of senior judges, magistrate judges, law clerks, staff attorneys, and externs expanded to assist judges whose duties were more focused on managing cases, than on trying cases.<sup>39</sup> And because all of this occurs beyond the reach of procedural rules, one might fairly assume that there is substantial disuniformity across districts, and probably even among the judges of a single district.<sup>40</sup>



## Disuniformity in Practice

Even at the level of text, one can find a significant amount of disuniformity in procedural practice under the federal rules. Federal Rule 83 authorizes districts to adopt local rules, and these rules have the force of law.<sup>41</sup> The “problem of divergence between local and national rules” is persistent and consequential.<sup>42</sup> But local rules are only one source of this problem. In the late 1980s, the rulemakers’ own inquiry “found that quite a few additional requirements, variously denominated as general orders, standing orders, special orders, scheduling orders, or minute orders, as well as individual judge practices” resulted in disparate practice across the system of federal courts.<sup>43</sup> The Civil Justice Reform Act of 1990 (CJRA) further complicated this picture, by requiring each district to adopt a plan to address the expense and delay of litigation; the CJRA unleashed “ninety-four amateur rulemaking groups ... [to] foment ... a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure in 1938.”<sup>44</sup> Critics have described how these reforms led to a “balkanization” of procedure and turned federal practice into a veritable “Tower of Babel.”<sup>45</sup> Although the CJRA has technically reached its sunset, the phenomenon of inter-district disuniformity persists, with a number of “pilot projects” now also layered into federal practice and procedure.<sup>46</sup>

**States cannot meaningfully replicate federal procedure when the federal procedure itself boasts of an indeterminacy and flexibility that resists definition.**

We have explained the level of generality demanded for trans-substantive rules, explained the broad discretion accorded trial judges, and described the local tailoring of practice and procedure across the federal system. The architects of a procedural system might fairly criticize or defend each of these choices. Our intention in this Part is simply to establish that states cannot meaningfully replicate federal procedure when the federal procedure itself boasts of an indeterminacy and flexibility that resists definition. What can it mean to say that one looks like Proteus<sup>47</sup>?

## B. Intra-State and Inter-State Uniformity

The drafters of the federal rules envisioned that states would replicate this enlightened set of procedural rules. This anticipated conformity would run in the opposite direction of that which prevailed in actions at law under the federal Process Acts and Conformity Acts, when the federal courts followed the procedure of the state in which they sat.<sup>48</sup> In the new regime, as soon as a state adopted the federal model, there would be intra-state uniformity: lawyers and judges in that state would be governed by the same procedure, whether they were in federal or state court. And most ambitiously, when all states made this transition, there would be inter-state (and inter-system) uniformity.

**By 1975 the pace of replication by states grew to a virtual standstill.**

Two decades after the federal rules were promulgated, Charles Clark, the principal drafter of the federal rules, wrote that “the trend of state adoption [was] proceeding apace.”<sup>49</sup> At that point, state procedural systems were approximately evenly divided among procedural systems modeled on the federal rules, the common law, and the Field Code.<sup>50</sup> But by 1975 the pace of replication by states grew to a virtual standstill. A comprehensive assessment of intra-state uniformity was undertaken in 1986, when Professor John Oakley and a former student, Arthur Coon, measured “the degree to which state court civil procedure is wrought in the image of the federal rules.”<sup>51</sup> Although Oakley and Coon found a “pervasive



influence of the federal rules on at least some part of every state's civil procedure," they also effectively eulogized the goal of intra-state uniformity.<sup>52</sup> Based upon a comprehensive, nine-variable examination of all fifty states, the authors "were surprised to find that only a minority of states [had] embraced the system and philosophy of the federal rules wholeheartedly enough to permit classification as true federal replicas."<sup>53</sup> Moreover, the authors found that lesser-populated states represented a disproportionately large share of states that had adopted the Rules: of the ten most populous states, only Ohio had modeled the federal rules, and eleven of the fifteen least populous states were replicas.<sup>54</sup> Even when a "looser test than replication was applied to classify states as generally following the model of the federal rules, the resulting tally embraced a majority of states but a minority of our national population."<sup>55</sup>

## Declining Influence of Federal Rules in State Courts

In 2003, Professor Oakley took a second look at intra-state uniformity and found even less of it.<sup>56</sup> He concluded that the federal rules were "less influential in state courts today than at any time in the past quarter-century" and that they "have lost credibility as avatars of procedural reform."<sup>57</sup> This decline of intra-state uniformity is not because states that adopted the federal rules many decades ago are adopting some alternative procedural system. Rather, it is because the states do not adopt the amendments to the federal rules that have been made in the ensuing years.

The number of amendments to the federal rules is striking, and is increasing.<sup>58</sup> The original set of Rules took effect 78 years ago. In the first 39 years of their history, they were amended five times.<sup>59</sup> In the second 39 years of their history, the federal

rules have been amended an additional 18 times.<sup>60</sup> About two-thirds of the Rules have been amended at least four times.<sup>61</sup> In 2003, one of us wrote that "[o]nly ten of the original Federal Rules of Civil Procedure have never been amended."<sup>62</sup> Today there are none.<sup>63</sup>

Because even the so-called replica states seldom keep pace with these amendments, intra-state uniformity steadily declines over time. But of course not all of these amendments are significant. To get a

better sense of whether there was intra-state uniformity on the more significant matters, we decided to focus on six signature amendments to the federal rules since 1983. Our admittedly arbitrary list included:

- the 1983 and 1993 amendments to Rule 11;<sup>64</sup>
- the 2003 amendments to Rule 23;<sup>65</sup>
- the 1993 and 2000 amendments to Rule 26;<sup>66</sup>
- the 1991 amendment to Rule 48;<sup>67</sup>
- the 1991 amendment to Rule 50;<sup>68</sup> and
- the 2003 amendment to Rule 51.<sup>69</sup>

**In 2003, Professor Oakley concluded that the federal rules were "less influential in state courts today than at any time in the past quarter-century" and that they "have lost credibility as avatars of procedural reform."**

**The states do not adopt the amendments to the federal rules that have been made in the ensuing years.**

Because we were also curious about an amendment that happened much earlier, we added a seventh event to our study, namely:

- the 1966 amendment to Rule 15.<sup>70</sup>

Although we do not claim these are necessarily the most important amendments, each of the enumerated amendments effected a change that might fairly be described as a signature event for the federal rules.

## Disuniformity Among States

A snapshot of our research is attached in Exhibit A. The table reveals that none of the 23 replica states has adopted all seven of the signature amendments. In fact, only seven states have adopted at least half of them. Because states have not adopted the amendments to the federal rules, navigating the procedure in the states courts is like walking through a time machine that transports one to an earlier era of federal procedure. For example, in almost all of the replica states, the class action rule is the Federal Rule circa 2003. In two of the replica states, the rule on relation-back of amendments is essentially the Federal Rule circa 1965. If one were to travel from New Mexico to Arizona to Utah, one could sample practice under the text of three different versions of Federal Rule 11, namely circa 1982, circa 1983, and circa 1993, respectively. Yet these three states are generally thought to be among the category of states that follow the federal model.

**Exhibit A reveals that none of the 23 replica states has adopted all seven of the signature amendments. In fact, only seven states have adopted at least half of them.**

**A local culture can have some assimilative effect on disparate textual mandates as judges, lawyers, and other repeat actors influence the application of law.**

This analysis of intra-state uniformity has focused on textual uniformity. This focus could be dangerously misleading. There is some evidence that textually dissimilar rules may nevertheless be applied uniformly *in practice*.<sup>71</sup> As one might well expect, a local culture can have some assimilative effect on disparate textual mandates as judges, lawyers, and other repeat actors influence the application of law. This would be especially likely in circumstances where the textual mandate is not drafted with exactitude to constrain its application. Uniformity in practice, even if not in form, could be good news in the sense that procedure may not be as disuniform,

chaotic or complex as it appears. But if form and practice need not be aligned, then one must also ponder the reverse, to wit: that uniformity in practice may not follow naturally from textual uniformity. And indeed, the same study that found a similarity of pleading standards in three states that had not adopted the federal pleading rule also found a surprising dissimilarity in summary judgment practice, notwithstanding the fact that those same states had adopted the federal summary judgment rule.<sup>72</sup> This suggests that both uniformity and disuniformity may be beyond the control of (textual) rulemakers.

**Uniformity in practice, even if not in form, could be good news in the sense that procedure may not be as disuniform, chaotic or complex as it appears.**

### III. ADDITIONAL REASONS WHY FEDERAL PROCEDURAL AMENDMENTS AND JUDICIAL PROCEDURAL CHANGES SHOULD NOT BE REPLICATED BY THE STATES

A major reason for the states to replicate federal procedural law would be to provide uniformity, making it easier for judges, lawyers, law professors, and law students to master civil procedure by studying and utilizing only one procedural regime. We have now explained why that rationale lacks merit. But there are multiple other reasons why federal procedure is severely mismatched to state procedural needs.

#### A. The Drafters: A Lack of Neutrality and Vision Skewed by Discovery in the “Big Case”

Since the mid-1970’s, the Federal Rules of Civil Procedure have been amended and federal procedure altered by three different casts of characters: the federal Advisory Committee on Civil Rules, the majority of the Supreme Court of the United States, and the judges on the federal district courts. Fortunately, there has been a good deal of prior scholarship about all of them. Importantly, there is no evidence that any of these three groups have the needs and concerns of *state* court judges, lawyers, or litigants in mind. Indeed, it appears that these three groups do not even represent the full range of *federal* court stakeholders

There is no evidence that [the federal Advisory Committee on Civil Rules, the majority of the Supreme Court of the United States, or the judges on the federal district courts] have the needs and concerns of state court judges, lawyers, or litigants in mind.

The Pound Institute was fortunate to attract Professors Stephen Burbank and Sean Farhang, who are uniquely qualified to discuss the composition and disposition of federal rulemakers. These scholars have meticulously analyzed the composition and votes of members of the Advisory Committee and Supreme Court Justices with respect to federal procedural rules and interpretations of procedural statutes.<sup>73</sup> Burbank and Farhang examined every Advisory Committee proposal affecting the private enforcement of rights that was forwarded to the Standing Committee from 1960 to 2011.<sup>74</sup> There were 29 such proposals, which covered 39 separate items. They found that “[F]rom 1991 through 2011, the net balance favored defendants in every year in which a proposal was made.”<sup>75</sup>

The current “predicted probability that a proposed amendment would favor plaintiffs” is an astonishing zero.<sup>76</sup>

From 1960 to 2013, there have been a number of trends in the composition of the Advisory Committee that go a long way toward explaining the current pro-defendant bias. The original Advisory Committee that started meeting in 1934 and drafted the initial Federal Rules of Civil Procedure was composed entirely of practitioners and academics. “In the last quarter century, judges have constituted a majority of the Committee in every year.”<sup>77</sup> The Advisory Committee members are appointed by the Chief Justice of the Supreme Court. The Chief Justices have all been appointed by Republican presidents since 1971, and the judicial appointees to the Advisory Committee have been disproportionately appointed by Republican presidents. Burbank and Farhang put it this way: “The probability of committee appointment or reappointment of judges appointed to the bench by Republican presidents is about 1.5 times larger than that of Democratic appointees.”<sup>78</sup> Party affiliation need not influence patterns of behavior when it

comes to the choice of procedural rules, but it would be startling if ideology were not relevant when judges are in effect acting in a legislative, rather than judicial, capacity.<sup>79</sup>

There has also been a shift in the ideology of practitioners on the Advisory Committee. Burbank and Farhang demonstrate that since the 1990s the practitioners have shown a substantial shift toward corporate/business representation.<sup>80</sup> Their research is consistent with what Alan Morrison of the Public Citizen Litigation Group observed decades ago: the rulemaking committees include fewer lawyers than in the past, and the lawyers who are named to the committee “are predominantly from large firms, principally people who represent defendants.”<sup>81</sup>

## Who Amends the Rules?

In a carefully documented article on the amendment to the federal rules in 2000 that attempted to limit the scope of discovery under Rule 26, Professor Jeffrey Stempel demonstrated how every stage of the amendment process, from the Advisory Committee through the Standing Committee and Judicial Conference, was strongly influenced by a pro-corporate, defendant bias and that elite attorneys, largely representing large corporations, were highly influential in proposing the amendment and getting it passed.<sup>82</sup> When that amendment was approved by the Judicial Conference, the chair of the rulemaking committee celebrated this “extremely good news” in a memo to the American College of Trial Lawyers (ACTL), a bar interest group “that had spent ‘thousands of hours’ lobbying for it.”<sup>83</sup> That memo also noted that credit was due to a member of the ACTL who sat on the Advisory Committee when it was considering the proposal.<sup>84</sup>

Every stage of the amendment process from the Advisory Committee through the Standing Committee and Judicial Conference was strongly influenced by a pro-corporate, defendant bias and . . . elite attorneys, largely representing large corporations, were highly influential in proposing the amendment and getting it passed.

In the vast majority of cases there is either no discovery or discovery that is proportionate to the stakes involved in the litigation.

The drafters of amendments at the Advisory Committee level largely operate under the influence of the massive and expensive discovery that often takes place in extremely large or complex civil litigation.<sup>85</sup> Numerous studies have repeatedly shown that in the vast majority of cases there is either no discovery or discovery that is proportionate to the stakes involved in the litigation. Perhaps 5 to 15 percent of the cases, predominantly complex litigation, have enormous and expensive discovery.<sup>86</sup> But the multiple amendments

to the federal rules attempting to curtail discovery, including mandatory discovery, limitations on numbers, and limitations on scope (most recently the proportionately amendment), apply to all cases, the vast majority of which did not have a problem to begin with. As we will discuss in Part B below, the state court civil case load does not include a large number of these huge cases, and in Part C below the amendments have not been wise for even the federal case load. We and others have written at great length previously how the myth of wide-spread litigation

The myth of wide-spread litigation abuse has been perpetuated by the business and anti-regulation communities, distorting the dialogue about procedural reform.



**A majority of the Supreme Court, starting in the 1980s, . . . has been . . . influenced by a mindset that assumes, without empirical support, that civil litigation is in some sense “out of control” and infused with discovery abuse.**

abuse has been perpetuated by the business and anti-regulation communities, distorting the dialogue about procedural reform.<sup>87</sup>

A majority of the Supreme Court, starting in the 1980s, in its pleading, summary judgment, class action, compulsory arbitration, and justiciability jurisprudence, has been similarly influenced by a mindset that assumes, without empirical support, that civil litigation is in some sense “out of control” and infused with discovery abuse.<sup>88</sup> In the *Twombly* and *Iqbal* decisions, heading back in the direction of fact pleading, the Court explicitly references massive discovery as a rationale for more rigorous

pleading requirements.<sup>89</sup> Again, trans-substantive procedure plays a part in the mismatch of the rule change that must apply to all federal civil litigation—large, medium-sized, and small.

There is an enormous amount of procedural scholarship demonstrating that a central tenet of the Rehnquist and Roberts Supreme Courts has been anti-civil litigation, anti-rights enforcement, and anti-government regulation.<sup>90</sup> Burbank and Farhang again use precise and careful empirical research to demonstrate the conservative ideology behind Supreme Court decisions impacting and reducing the private enforcement of rights.<sup>91</sup> Whether one agrees with these trends or not, it would be difficult to argue that they are non-ideological and balanced.

**A central tenet of the Rehnquist and Roberts Supreme Courts has been anti-civil litigation, anti-rights enforcement, and anti-government regulation.**

**Multiple conferences have been added, each capable of increasing expense in the vast majority of cases that require no or little judicial management.**

The federal district courts’ influence on procedural change is more nuanced, in that appointees of both Republican and Democratic administrations moved in the direction of curtailing the right to trial through the use of pre-trial procedures.<sup>92</sup> The most noteworthy incursions have been through the use of judicial case management in which district court judges urge settlement and the use of Alternative Dispute Resolution methods.<sup>93</sup> Again, discovery was often said to require judicial

constraints; the judicial control through case management was also predicated on burgeoning federal case loads, although the number of newly-filed federal civil cases each year has been constant for the past three decades.<sup>94</sup> After the case management development had already occurred, it was encapsulated in the Amendment to Rule 16, enlarging the topics to be covered during pretrial conferences. As we will see in Part C, this is very relevant to state court adoption, because multiple conferences have been added, each capable of increasing expense in the vast majority of cases that require no or little judicial management—another reason to be cautious about state court replication.



## B. The Differences Between State and Federal Civil Caseloads

We have now seen that many members of the federal Advisory Committee on Civil Rules and the majority of the Supreme Court had a vision of the role of civil litigation that may not correspond to the preferences and needs of state courts. This is particularly true because of their focus on the big cases and the large amounts and costs of discovery in such cases. It makes sense to ask whether the bulk of civil cases commenced in state courts require the emphasis on reigning in discovery that might be appropriate in large, complex cases. We think that this emphasis was misguided at the federal level, because even there most cases did not and do not have disproportionate discovery to the stakes involved in the case.<sup>95</sup> The mismatch is even more pronounced when one compares the civil caseloads of state and federal courts.

Before looking at some comparative data, it is perhaps helpful to remember that Charles Clark, the Reporter to the original Advisory Committee, who was a principal draftsman of the 1938 federal rules, said all along that even the civil caseloads of the federal courts might require different procedures for simple and complex cases. “In studying the business of the federal courts, he noted that the docket had simple diversity cases, as well as increasing numbers of cases in which the government was a party. He suggested that some sorting mechanism might be required.”<sup>96</sup> The differences between the state and federal dockets are equally stark, and probably more so.

Although it is difficult to obtain state court data that is kept in a uniform way throughout the states and that reflects the state courts in the entire nation, the National Center for State Courts conducted a survey for civil cases (excluding domestic relations matters) disposed of during the fiscal year ending in June 30, 2013 in ten counties from the 45 counties that participated in all four iterations of previous Civil Justice Surveys of State Courts. These were urban counties in ten diverse states and the attempt was to choose counties that together were representative of state litigation in the country. “The 925,344 cases comprise approximately five percent (5%) of state caseloads nationally.”<sup>97</sup>

Although debate concerning criticism of the American civil justice system focuses on high-value tort and commercial contract disputes, they “comprised only a small proportion” of the survey caseload.

“Very few cases need as much time as the rules provide and, ironically, many of them likely take longer and cost more to resolve as a result.”

In civil state court cases resulting in a judgment the monetary values are relatively modest, with a mean amount of \$9,267, and the 50th interquartile range of \$2,441. Only .02% of the cases had judgments in excess of \$500,000. The authors of the report note that although debate concerning criticism of the American civil justice system focuses on high-value tort and commercial contract disputes, they “comprised only a small proportion” of the survey caseload.<sup>98</sup> They blame the misperceptions about state court civil litigation on the media emphasis on federal high-value and complex litigation, and perhaps on the experience of repeat player lawyers with such cases. They note, as have we, the problems of using the same procedures for all cases, and state that their findings make clear that “very few cases need as much time as the rules provide and, ironically, many of them likely take longer and cost more to resolve as a result.”<sup>99</sup>

One difference between the federal and civil dockets is, of course, based on what subject matter jurisdiction has been allocated to federal district courts.<sup>100</sup> That the federal caseload is primarily based on federal question cases, diversity

cases in which the amount in controversy exceeds \$75,000, and cases in which the United States is a party, already distinguishes the federal district court docket. Then, too, there are cases of exclusive federal jurisdiction, such as cases arising out of bankruptcy, patents and copyright, admiralty, and the Sherman Antitrust law. Excluding bankruptcy, because such cases are not brought in federal district courts, other examples of exclusive federal jurisdiction are apt to be complex and large, with the possible exception of admiralty.

**It is quite clear that the state contract cases are not usually complex.**

## Higher State Caseloads, Lower Stakes

But the more normal docket of the federal courts is also a good deal different from that of the state trial courts. There is much more data about federal cases, but here, too, there are empirical difficulties in the compilation and categorization of data.<sup>101</sup> Nonetheless, the state survey and a recent article by Professor Patricia W. Hatamyar Moore on federal district court civil caseload data for 2012-2013,<sup>102</sup> permit us to be certain that the state and federal civil dockets are substantially different. Here are a few examples of the differences. The top six categories of federal civil case filings in 2013 were tort (24%), prisoner (20%), civil rights (12%), contract (9%), social security (7%), and labor (6%).<sup>103</sup> Although, as previously mentioned, both the federal and state data pose categorization problems that inevitably make comparisons imperfect, there are still undeniable differences that indicate that the caseloads are by no means similar.

- In state courts, tort cases represent 7% of the docket compared to 24% in federal court;
- In state courts, contract cases represent 64% of the docket compared to 9% in federal court.<sup>104</sup>

Moreover, it is quite clear that the state contract cases are not usually complex. Thirty-seven percent of them are debt collection, twenty-nine percent are landlord-tenant, and seventeen percent are foreclosure cases.<sup>105</sup>

It is also significant that there are huge variations among the counties in the diverse states in the state survey. For instance, in Cook County, Illinois, 82% of the cases are contract and 5% are small claims; in Marion County, Indiana, 8% are contract and 82% are small claims. Cook County has 10% tort cases and Santa Clara County, California has 9% tort cases, while Maricopa County, Arizona has 1% tort cases.<sup>106</sup> Such variations reveal important differences between

**The liberality of this era, inviting some overreaching by some lawyers in some cases, inevitably led to a backlash and attempts to reign in the wide-openness of that third era procedure—both by amending rules and by boldly reinterpreting extant rules.**

state and federal courts, between and among states, and even within a state; each may have distinct procedural needs. And, of course, different types of cases within a state or county might best be dealt with through different procedures. We will discuss this further in Part E, which specifically deals with the importance of state experimentation.

Another way of looking at the differences between the state and federal dockets is to consider the amount of time that given cases, on average, require. The Administrative Office of the U.S. Courts (AO) “has devised a system of ‘weights’ to apply to different types of cases,” dependent on an estimate of the amount

of time judges will be likely to spend on such cases. “The average civil case weight is about 1.0, which the AO calculates is about 441 minutes.”<sup>107</sup> Many of the highest ratings are for Death Penalty Habeas Corpus (12.89), Environmental Matters (4.79), Civil RICO (4.78), Civil Rights Voting (3.86), and Antitrust (3.45) cases; none of these show up at all as separate categories in the state survey. Obviously, state courts can have some extremely large and complex cases, and these may be

best served by the full panoply of procedural steps that have become the norm in federal court. But just as it makes little sense to apply such ample and expensive procedure (largely introduced through rule amendments and judicial opinions since 1980) to all types of federal cases, it surely makes little sense for the less well-staffed and less well-funded state courts<sup>108</sup> to follow suit.

## C. Ineffective and Unwise Amendments at the Federal Level

We were invited to address the University of Pennsylvania conference that commemorated the seventy-fifth anniversary of the Federal Rules of Civil Procedure (1938-2013). The Conference was held in November 2013, and the papers were printed in the June 2014 volume of the *University of Pennsylvania Law Review*. Professors Burbank and Farhang, whose work we drew upon extensively in Part A, also participated in University of Pennsylvania conference.

**For states with caseloads that feature large numbers of routine cases, the procedures and judicial reinterpretations of the federal courts are an especially poor fit.**

We entitled our paper, “The Fourth Era of American Civil Procedure,” and explained, as we and others had done previously, that the original Federal Rules of Civil Procedure had been predicated on a vision of simplicity and ease of access to the courts.<sup>109</sup> Some of the ways this was accomplished were through liberal pleading requirements, ease of amendment, broad discovery, and more expansive joinder. Lawyers were given great latitude to craft their cases as they saw fit. The idea was to have civil cases decided on the merits, either through settlement, informed by needed discovery, or trial, having eliminated through pleading and discovery those issues that were not in dispute.<sup>110</sup> Motions to dismiss at the pleading stage or through summary judgment were extremely rare.<sup>111</sup> We called this original Federal Rule jurisprudence “the third era;” the eras characterized by common law and code pleading were the first and second, respectively.

We have no illusions that the third Federal Rule era was perfect. In fact, we have noted that the liberality of this era, inviting some overreaching by some lawyers in some cases, inevitably led to a backlash and attempts to reign in the wide-openness of that third era procedure—both by amending rules and by boldly reinterpreting extant rules.<sup>112</sup> But that response (establishing some of the hallmarks of this present fourth era) has not addressed the problems of cost and delay in big (or small) cases, and has exacerbated problems of access and fairness for ordinary cases. Importantly, then, for states with caseloads that feature large numbers of routine cases, the procedures and judicial reinterpretations of the federal courts are an especially poor fit.

Here are some examples. Many of the Fourth Era changes to federal procedure add steps that apply, or can apply, to most cases. These include required initial disclosure, discovery conference, scheduling conference, pre-trial conference, providing expert opinions, providing lists of witnesses and their testimony, and meetings or discussions among lawyers before conferences and motions.<sup>113</sup> These all involve time and expense for lawyers, and often for their clients.

The more rigorous pleading requirements dictated by *Twombly* and *Iqbal*,<sup>114</sup> include two increased expenses: the expense that must go into the drafting of the complaint and the expense required in bringing and litigating (often through lengthy briefs) the motion

**Required initial disclosure, discovery conferences, scheduling conferences, [and] pre-trial conferences all involve time and expense for lawyers, and often for their clients.**

to dismiss. The increased use of summary judgment in federal courts, memorialized in the famous trilogy of Supreme Court cases, increases the need for discovery, and more importantly, leads to extensive preparation and use of affidavits and expensive preparation of briefs.<sup>115</sup> In addition, of course, is the preparation and presentation of oral arguments, to the extent this is permitted.

Each time a change is made in the scope of discovery provisions, allegedly in an attempt to reduce discovery, there is increased incentive to bring motions attacking alleged violations of the rules. This was true when the definition of what is permitted was altered in 2000 (eliminating “subject matter”) and in the recent amendment, adding a proportionality requirement (and thus increasing the plaintiff’s burden) for all discovery. Amendments to Rule 11 (first in 1983, and somewhat liberalized in 1990) also provided an invitation for motions seeking sanctions—again, usually against plaintiffs.<sup>116</sup>

**Each time a change is made in the scope of discovery provisions, allegedly in an attempt to reduce discovery, there is increased incentive to bring motions attacking alleged violations of the rules.**

## The Fourth Era of American Civil Procedure

**There is substantial evidence that the business community and those of a conservative persuasion set out to discredit plaintiff lawyers, civil litigation, and juries and to have conservative judges appointed to the federal courts—and that they succeeded.**

There are five major reasons why the shift to the Fourth Era of American Civil Procedure was unwise. First, it was unsupported by data. The allegations that civil litigation in America is out of control is not borne out by facts. There is no evidence that discovery is excessive in the majority of cases.<sup>117</sup> There is no evidence that a substantial number of cases brought by lawyers are frivolous.<sup>118</sup> There is no evidence that Americans are litigious; in fact, the opposite is true.<sup>119</sup> Most Americans do not litigate harms to them.<sup>120</sup> There is no evidence of wide-spread misuse of punitive damages.<sup>121</sup> There is no evidence that juries, by and large, are irresponsible.<sup>122</sup>

There is no evidence that most cases take too long.<sup>123</sup> There is no evidence that case management by judges is effective, other than setting and keeping firm dates for the conclusion of discovery and for trial.<sup>124</sup> There is, however, substantial evidence that the business community and those of a conservative persuasion set out to discredit plaintiff lawyers, civil litigation, and juries and to have conservative judges appointed to the federal courts—and that they succeeded.<sup>125</sup>

Second, trans-substantive procedure, having the same procedures available for all civil cases, regardless of substance or stakes, is pernicious. The Fourth Era procedure, for the most part, applies to large, medium-sized, and small cases in federal court. This needlessly adds expense. There is substantial evidence that it is considerably more expensive to try the same type of case in federal court than in state court.<sup>126</sup>

**Trans-substantive procedure, having the same procedures available for all civil cases, regardless of substance or stakes, is pernicious [and] needlessly adds expense.**



Third, Fourth Era procedure wastes judicial time. The data is startling. Here is how we put it in our recent *University of Pennsylvania Law Review* article:

The number of [civil] cases decided ‘without court action’ [in federal court] has fallen from fifty-three percent in 1963 to nineteen percent in 2012. Thus, although fourth era judges seldom try cases, they are performing some ‘court action’ at a rate that is almost three times the baseline [1963] amount. This means that assuming everything else were held constant, in thirty-four percent of contemporary [federal civil] cases the courts expend precious judicial resources on matters that the third era resolved without any court action at all. Moreover, the fourth era is no faster at resolving cases than was the third era.<sup>127</sup>

Fourth, and this is perhaps the most galling, the cases that most require judicial case management and constraints are the massive, high stakes, complex cases that have enormous amounts of discovery. The fourth era procedure in federal court puts many limitations on the amount of each type of discovery, and, as we have seen, requires multiple conferences and other requirements. But in most of the provisions the parties, according to the federal rules, can agree to opt out.<sup>128</sup> And this they usually do in the very huge cases that the procedures were designed to control. Consequently, the federal courts have added constraints and often extra expense for all cases, based on the evidence of abuse in large cases alone, and much of the constraint is not applying to those

large cases. There is no evidence that the amendments to the federal rules, whether through the formal process or by judicial opinions, have made much of a dent in the massive discovery and large expense and time that are associated with the large, complex case.<sup>129</sup>

**Much of Fourth Era civil procedure increases judicial discretion.**

Fifth, much of fourth era civil procedure increases judicial discretion. As discussed above, these rules provide very little or no guidance for lawyers.<sup>130</sup> Moreover, cognitive biases by judges, notwithstanding good intentions, have already proven to be inevitable.<sup>131</sup> Much of fourth era procedure has negatively impacted plaintiffs more than defendants, especially in civil rights cases.<sup>132</sup> One price of trans-substantive procedure is that drafters are forced to use wide-open, non-defining language, so that it applies to complex, large cases. This in turn impacts smaller ones, which comprise the bulk of the docket. As we will see in Part E, the state courts have already found ways to craft more defining rules, thus aiding lawyers and judges by providing more predictability and less discretion than are fostered by current federal procedure.

**The cases that most require judicial case management and constraints are the massive, high stakes, complex cases that have enormous amounts of discovery.**

## **D. Changes in Federal Civil Procedure Require Judicial Resources Not Available in State Courts**

As Judge Richard Posner has explained in his study of the federal courts, “... there is no doubt that the average conditions of employment in state judicial systems are inferior to those in the federal system.”<sup>133</sup> One visual manifestation is the proliferation of new, expensive, and large federal courthouses built in the past several decades; this construction presents a stark contrast to the many aging state court buildings.<sup>134</sup> Of even more importance is the enormous growth of federal judicial personnel that provide aid to the relatively small number of federal Article



**Federal judicial personnel include legions of secretaries, full-time clerks, full-time attorney assistants, and magistrate judges.**

III judges.<sup>135</sup> Writing in 1996, Posner explained that “[s]ince 1960, the total number of non-Article III judges has not quite tripled, while the total number of federal judicial employees has increased approximately fivefold.”<sup>136</sup> Judges’ salaries and fringe benefits were 20 percent of the federal courts’ budget in 1960 but only 9 percent in 1980.<sup>137</sup>

Federal judicial personnel include legions of secretaries, full-time clerks, full-time attorney assistants, and magistrate judges.<sup>138</sup> Moreover, there are multiple law student interns and growing numbers of special masters.<sup>139</sup> Federal judges on senior status provide a substantial amount of further judicial assistance. Between 1986 and 2013 full time magistrate positions increased 28%. By 2012, there were 541 full-time magistrate judges aiding the 602 sitting federal district court judges. It is conservatively estimated that senior judges carry a workload that is 25% of the work of active judges.<sup>140</sup>

**The state courts of general jurisdiction “have on average almost three times as many civil cases on their docket and almost six times as many criminal cases as federal district judges.**

## Limited State Court Resources

All of this person-power at the federal level is essential for carrying out the roles required of federal district court judges under current procedure. It makes little sense for most underfunded and under-staffed state courts to attempt to replicate all of the conferences and motions mandated or allowed by the federal rules. Nor is the active case management that is the norm in federal court a good idea for the bulk of state civil litigation. This is true for two major reasons: first, there is no evidence that such management is needed or helpful for

**Substantially reduced budgetary resources since the economic recession of 2008-2009 have exacerbated problems in civil case processing in many state courts.”**

**—Judge Richard Posner,  
7th Circuit**

most cases (except for setting and keeping firm discovery cut-off and trial dates<sup>141</sup>) and second, such case management requires time that can be spent on other judicial functions.

The dearth of state judicial resources compared to the federal courts is particularly unfortunate given the caseloads confronting state judges. Posner points out that although state “judges have less staff support than federal judges,” the state courts of general jurisdiction “have on average almost three times as many civil cases on their docket and almost six times as many criminal cases

as federal district judges, although the average state court case is shorter and easier than the average federal court case.”<sup>142</sup> Moreover, many state court judges, unlike their federal counterparts, must campaign and raise money for election and reelection. “In addition, substantially reduced budgetary resources since the economic recession of 2008-2009 have exacerbated problems in civil case processing in many state courts.”<sup>143</sup>

## E. The State Courts Have Been Experimenting with Better Rules and Methods for Civil Litigation—and They Should Continue to Do So

The previous portions of this paper force one to conclude, we believe, that it does not make sense for the state courts automatically to adopt amendments or changes to federal procedure, whether they were brought about by formal Rule amendments or judicial decisions. Those who have promulgated the changes have not had the needs of state courts

in mind, and for the most part they have been motivated by large scale, complex litigation in which they perceive that discovery is excessive. The Supreme Court’s understanding of the Rules Enabling Act that authorized the Supreme Court to promulgate uniform federal rules has been that the same federal procedural rules must apply to all cases, regardless of substance or size. As we have seen, this had added multiple steps and points of judicial discretion that do not make sense for the bulk of federal litigation. Such time consuming and expensive additional steps, and such non-defining standards that have been introduced (such as “sufficiency of evidence” at the summary judgment stage, “plausibility” at the pleading stage, and “proportional” at the discovery stage) do not seem necessary or helpful for most state civil cases. Moreover, the state courts do not have the personnel to preside over the multiple conferences that have been introduced into federal procedure (such as scheduling and pre-trial conferences), nor do they have the resources to decide preliminary dispositive motions in large numbers of cases.

**Where summary judgment motions have come to be a central part of federal litigation, they represent only one percent of the dispositions in the states.**

The state empirical survey that we have referred to demonstrates that state court judges and attorneys who practice before them have recognized such state limitations. For instance, where summary judgment motions have come to be a central part of federal litigation, they represent only one percent of the dispositions in the states.<sup>144</sup> One reason the many formalities and steps of federal procedure have not taken hold at the state level is probably because so much of state civil

**One reason the many formalities and steps of federal procedure have not taken hold at the state level is probably because so much of state civil litigation proceeds without lawyers for at least one party.**

litigation proceeds without lawyers for at least one party. “One of the most striking findings in the dataset was the relatively large portion of cases (76%) in which at least one party was self-represented, usually the defendant.”<sup>145</sup> In about half of the state cases (46%) a judgment was entered that most of the time was probably a default judgment.<sup>146</sup>

The state survey points out how much procedural experimentation is already taking place at the state level, notably in California, Georgia, Colorado, New Jersey, Pennsylvania, and Texas. “For example, some states have designated and

implemented programs targeting specific types of cases, especially related to business, commercial, or complex litigation.”<sup>147</sup> Many states have varied the amount of discovery permitted for lower stakes cases.<sup>148</sup> We look forward at this conference of state judges to learn what procedural experimentation has been tried in various states, including the use of simplified procedures for more simple cases.

## State Court Advantages

In fact, the states have important advantages over the federal system when it comes to experimenting with ways to improve the litigation of civil cases. In many, if not most instances, they will not be constrained by the sense that the rules must be trans-substantive. Moreover, they can gear their procedures to the specific needs and cultures of their states. Different regions of the country have “distinctive political and institutional properties that depart from the federal model in important ways.”<sup>149</sup> Also, the methods for achieving procedural change at the state level may be less cumbersome than at the federal level, permitting more ease of experimentation and change, if what is tried proves unsatisfactory.

**The states have important advantages over the federal system when it comes to experimenting with ways to improve the litigation of civil cases.**

We also note that the state survey showed that state cases are resolved by trial 3.5% of the time,<sup>150</sup> significantly more than the 1% of current federal civil litigation. We have written extensively elsewhere on the importance of trials and juries to American democracy.<sup>151</sup> Perhaps the federal system can learn from the states what procedural methods make it more possible for the citizenry, judges, and legal profession to gain the benefits accruing from actual trials. By having the states experiment with different procedural models and tracks, perhaps we can learn that some states are not only efficient, in terms

of cost and delay in the processing of cases, but also at the same time are able to conduct a higher percentage of trials, many of which are jury trials.

Justice Brandeis was correct.<sup>152</sup> One advantage of our federal system is the ability of states to experiment and to teach the rest of the country, including the federal judiciary, what they have learned.

## **IV. The High Stakes in the Question of Whether the State Courts Should Replicate Federal Procedure**

We have provided a number of reasons why the state courts should not adopt the changes to federal procedure that have occurred in the past quarter century. We invite the state court judges to consider, though, whether the debate over state replication has deeper implications than whether to adopt a new federal procedural amendment or to follow changing United States Supreme Court procedural doctrine. These implications are two-fold. How do state judges view the place of civil litigation in our democracy? How do state judges view their roles?

**Historically in the United States civil litigation had numerous functions, in addition to resolving disputes without the parties engaging in violence.**

Historically in the United States civil litigation had numerous functions, in addition to resolving disputes without the parties engaging in violence. After all, one could resolve disputes by flipping coins or rolling dice. But our country, especially in the last half century, has chosen to use private lawyers bringing civil lawsuits to define and enforce public norms and social policy. As Burbank and Farhang have documented, Congress used fee-shifting and damages-multipliers to help create a private bar that would enforce public law through civil litigation; the alternative, of course, was a dramatic increase in federal executive bureaucracy.<sup>153</sup> Discovery, so ridiculed by anti-litigation rhetoric, has been a vital part of the ability to use civil law suits to enforce law.<sup>154</sup>

**Our country, especially in the last half century, has chosen to use private lawyers bringing civil lawsuits to define and enforce public norms and social policy.**

Our democracy has also valued trials in open court as a means of permitting our citizens to air and decide their grievances.<sup>155</sup> Civil litigation, especially through the use of juries, has been important in providing community input to the application of somewhat amorphous concepts, such as reasonableness, proximate cause,

intent, bad faith, unfair competition, discriminatory intent.<sup>156</sup> Juries also educate the public about the importance of the rule of law, permit lay citizen participation in governance, and provide some break on concentrated power; the Constitution enshrines a right that society long has cherished.<sup>157</sup> Yet federal procedure has diminished the importance of trials and juries in favor of a process of decision-making that is bureaucratic and opaque. Do state judges want to contribute to this diminution of the importance of trials and juries?<sup>158</sup>

**Discovery, so ridiculed by anti-litigation rhetoric, has been a vital part of the ability to use civil law suits to enforce law.**

## Litigation and Democracy

Of equal importance, and in concert with the diminution of the American trial and the American jury, the historic roles of judges in the United States have been dramatically altered and reduced. It was previously thought that the primary role of judges was to preside over trials and to decide motions necessary to promote fair trials. Such roles contributed to high settlement rates, with little or no further judicial involvement.<sup>159</sup> Motions to dismiss at the pleading

**Judges in federal courts have become part of a large bureaucracy and have, to a large extent, become case managers, with the goal of disposing of civil cases without trial.**

stage or through summary judgment were extremely rare in federal courts,<sup>160</sup> and fortunately are apparently not the norm in many state courts today.<sup>161</sup> Judges in federal courts have become part of a large bureaucracy and have, to a large extent, become case managers, with the goal of disposing of civil cases without trial. Many federal judges feel that the trial of a case is evidence of judicial failure.<sup>162</sup>

The debate on the extent to which state courts should replicate federal procedure as it has evolved since the 1980s should include, in our view, what state judges think their judicial roles should be and how they see the place of civil litigation in our democracy. The state courts

handle about 95% of the civil caseload in the United States; the views of state court judges on these critical questions about the judicial role and the place of civil litigation in our society are of momentous importance.

It is important that the state courts, for the most part, have an advantage over the federal system when it comes to procedural rules. They are not bound by a “one size fits all” constriction. They have the opportunity to devise rule-bound systems, with clear cut-off times and discovery amounts, whereby the bulk of cases can be litigated with few procedural steps and hurdles, while larger cases can be judicially managed on a more hands-on basis. They have the opportunity to experiment with different procedures for different case-types and to determine whether some cases would benefit from such crafting. At the same time, state judges have the opportunity to return to their historic roles as judges.

**Many federal judges feel that the trial of a case is evidence of judicial failure.**



## EXHIBIT A

### Replication of Federal Amendments by States that have Adopted the FRCP

This Exhibit offers specific data to support the conclusions that are presented supra in Part II.B. States that are thought to be replica states are represented in the first column. The remaining columns correspond to each of seven signature amendments to the Federal Rules of Civil Procedure. A solid square in a cell symbolizes the replication by that state of the federal amendment. Anything less than a solid square suggests something less than replication. A legend detailing the significance of each symbol follows the table.

	11	15	23	26	48	50	51
AL	□	■	□	□	□	■	□
AK	⊠	■	□	■	□	□	
AZ	■	■	□	■	□	■	
AR	■	■	□	□	□	□	□
CO	■	■	□	■	⊠	□	□
DE	■	■	□	□	□	⊠	□
DC	■	■	□	⊠	■	■	■
GA	□	■	□	□		□	
HI	■	■	□	□	□	■	
ID	■	■	□	□	□	□	
IN	□	■	□	□	⊠	□	
KS	⊠	■	■	□	□	■	⊠
KY	■	■	■	□	□	□	□
ME	□	■	□	□	⊠	■	
MA	□	□	□	□	□	□	□
MN	■	■	⊠	□	■	■	■
MS	□	■		□	□	□	
MT	■	■	■	□	□	■	■
NV	■	□	□	□	⊠	■	■
NM	□	■	□	□	□	■	
NC	■	□	□	□	□	□	
ND	■	■		□	■	■	■
OH	□	■	■	□	⊠	□	□
OK	■	■	⊠	⊠		□	
RI	■	■	□	□	■	■	□
SC	□	■	□	□	□	□	□
SD	■	■	□	□	□	■	■
TN	■	■	□	□	□	□	
UT	■	□	□	■	⊠	■	
VT	■	■	□	□	□	■	□
WA	■	■	□	□	□	■	
WV	■	■	□	■	⊠	■	□
WY	■	■	□	■	□	■	□

#### LEGEND

##### Rule 11: 1983 and 1993 amendments

- Adopted neither the 1983 nor 1993 amendments (i.e., FRCP circa pre-1983)
- Adopted the 1983 amendments, but not the 1993 amendments
- ⊠ Adopted the 1983 and 1993 amendments, but with significant modifications
- Adopted the 1983 and 1993 amendments

##### Rule 15: 1966 amendments

- Did not adopt the 1966 amendments (i.e., FRCP circa pre-1966)
- Adopted the 1966 amendments

##### Rule 23: 2003 amendments

- Rule deviates substantially from any version of the FRCP
- Did not adopt the 2003 amendments (i.e., FRCP circa pre-2003)
- ⊠ Adopted the 2003 amendments, but with significant modifications
- Adopted the 2003 amendments

##### Rule 26: 1993 and 2000 amendments

- Adopted neither the 1993 nor 2000 amendments (i.e., FRCP circa pre-1993)
- Adopted the 1993 amendments, but not the 2000 amendments
- ⊠ Adopted the 1993 and 2000 amendments, but with significant modifications
- Adopted the 1993 and 2000 amendments

##### Rule 48: 1991 amendments

- Rule deviates substantially from any version of the FRCP
- Did not adopt the 1991 amendments (i.e., FRCP circa pre-1991)
- ⊠ Adopted the 1991 amendments, but with significant modifications
- Adopted the 1991 amendments

##### Rule 50: 1991 amendments

- Did not adopt the 1991 amendments (i.e., FRCP circa pre-1991)
- Adopted the 1991 amendments

##### Rule 51: 2003 amendments

- Rule deviates substantially from any version of the FRCP
- Did not adopt the 2003 amendments (i.e., FRCP circa pre-2003)
- Adopted the 2003 amendments



## Notes

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- <sup>3</sup> See generally Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072-2074).
- <sup>4</sup> See generally James C. Duff, *Overview for the Bench, Bar, and Public: The Federal Rules of Practice and Procedure* (Admin. Office of U.S. Courts 2016), available at <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> (last visited May 18, 2016).
- <sup>5</sup> See generally Katherine Shaw, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L. Rev. 1533 (2016) (forthcoming), available at <http://ssrn.com/abstract=2772245>; Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327.
- <sup>6</sup> See generally, Symposium, *State Civil Procedure*, 35 W. ST. U. L. REV. 1-304 (2007).
- <sup>7</sup> A SELF-STUDY OF FEDERAL JUDICIAL RULEMAKING: A REPORT FROM THE SUBCOMMITTEE ON LONG RANGE PLANNING TO THE COMMITTEE ON RULES OF PRACTICE, PROCEDURE AND EVIDENCE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 168 F.R.D. 679, 683 (1995).
- <sup>8</sup> 107 Nw. U. L. REV. 447 (2013).
- <sup>9</sup> *Id.* at 449 (collecting citations).
- <sup>10</sup> See, e.g., Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014). See also Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1601 & nn. 35-36 (2015) (citing authorities).
- <sup>11</sup> Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules; A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 311 (2001).
- <sup>12</sup> Main, *supra* note 9, at 311-12 (internal footnotes and citations omitted).
- <sup>13</sup> Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 992-95 (1987).
- <sup>14</sup> B.H. Carey, *In Favor of Uniformity*, 3 F.R.D. 505, 507 (1943).
- <sup>15</sup> Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916).
- <sup>16</sup> See Subrin, *supra* note 11; see generally Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 371-386 (1990).
- <sup>17</sup> Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988).
- <sup>18</sup> See *infra* notes 26-44 and accompanying text.
- <sup>19</sup> See *infra* notes 34-38 & 107-141, and accompanying text.
- <sup>20</sup> See Main, *supra* note 8, at 1627.
- <sup>21</sup> See *infra* notes 91-92 & 157-160.
- <sup>22</sup> See *infra* note 160.
- <sup>23</sup> See generally Subrin, *supra* note 11; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).
- <sup>24</sup> See generally EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 9:1 (3d ed. 2006) (recounting historical background of the trans-substantive nature of the federal rules).
- <sup>25</sup> See generally Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989) (responding to criticisms of trans-substantivity). See also Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 776-79 (1993) (reviewing merits and demerits of trans-substantivity).
- <sup>26</sup> See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U.L. REV. 377, 379, 383 (2010); Subrin, *supra* note 11; Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 455 (2003).
- <sup>27</sup> Subrin, *supra* note 11, at 977. See also Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 13 U. PA. L. REV. 2067, 2081-84 (1988) (arguing in favor of trans-substantive rules and noting that "procedural complexity defeats substantive rights").
- <sup>28</sup> Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 949 (1996) (quoting FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 195 n.6 (William G. Hammond ed., 3d ed. 1880)).
- <sup>29</sup> See Subrin, *supra* note 11 (chronicling the extent to which the federal rules were modeled on equity rather than common law antecedents).
- <sup>30</sup> Fed. R. Civ. P. 8(a)(2).
- <sup>31</sup> Fed. R. Civ. P. 15(a)(2).
- <sup>32</sup> Fed. R. Civ. P. 23(b)(3).
- <sup>33</sup> Fed. R. Civ. P. 26(b).
- <sup>34</sup> Fed. R. Civ. P. 42(b).

- <sup>35</sup> See, e.g., Fed. R. Civ. P. 1, 4(f)(3), 8(e), 11.
- <sup>36</sup> See generally Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1262-1268 (2005) (chronicling “the ascendance of a judicial ideology [over the past thirty years] that commends intensive judicial case management and active promotion of settlement”); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 414-431 (1982).
- <sup>37</sup> See generally Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 U. KAN. L. REV. 849 (2013).
- <sup>38</sup> See Main, *supra* note 8, at 1599.
- <sup>39</sup> See generally Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983) (“The proliferation of staff and subjudges and the delegation of power to them weaken the judge’s individual sense of responsibility.”). See also Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 93 (2012) (documenting the contributions of senior judges).
- <sup>40</sup> See generally Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987) (describing judicial discretion inherent in the federal rules); Burbank, *supra* note 15, at 715 (arguing that ad hoc decision-making sacrifices predictability); Stephen B. Burbank & Linda J. Silberman, *ivil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 679 (1997) (noting criticism that discretion in the federal rules prevents predictability and uniformity); Subrin, *supra* note 24, at 391 (noting that discretion empowers judges to treat similar cases differently).
- <sup>41</sup> See Fed. R. Civ. P. 83; *Hollingsworth v. Perry*, 558 U.S. 183, 130 S. Ct. 705 (2010).
- <sup>42</sup> See 12 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3153 (2d ed.) (citing a 1991 article from a former Director of the Federal Judicial Center that referred to “rampant inconsistency between local and national rules, and noting that “policing local divergences has proved difficult”).
- <sup>43</sup> See Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 555 (1998) (citing COMMITTEE ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989); Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (summarizing Local Rules Project)).
- <sup>44</sup> Linda Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 376-77 (1992).
- <sup>45</sup> See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1427 (1992) (recognizing balkanization of procedure resulting from rules); Mullenix, *supra* note 42, at 381 n.22 (crediting Professor Rosenberg as first to use Tower of Babel metaphor for local rules). *But see* Carl Tobias, *Fin-de-Siècle Federal Civil Procedure*, 51 FLA. L. REV. 641, 659 (1995) (cautioning against exaggeration of empirical data of balkanization).
- <sup>46</sup> See, e.g., Laura McNabb, *Pilot Project Reduces Delay and Cost in Federal Litigation*, 41 No. 3 ABA, LITIGATION 55 (Spring 2015) (describing project designed to streamline pretrial discovery in certain employment cases). See also ELECTRONIC DISCOVERY SPECIAL MASTERS, U.S. DISTRICT CT. W. DIST. PA., available at <http://www2.pawd.uscourts.gov/Pages/ediscovery.htm> (providing special masters to assist on e-discovery); JUDICIAL IMPROVEMENTS COMM. OF THE S. DIST. OF N.Y., PILOT PROJECT REGARDING CASE MANAGEMENT TECHNIQUES FOR COMPLEX CIVIL CASES, available at [http://www.nysd.uscourts.gov/rules/Complex\\_Civil\\_Rules\\_Pilot.pdf](http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf).
- <sup>47</sup> Proteus was a Greek water god whose shape was, like the sea itself, in a constant state of change. From this feature of Proteus is derived the adjective *protean*, which means changing frequently and easily. See 2 SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002).
- <sup>48</sup> See, e.g., Act of June 1, 1872, ch. 255 §§ 5-6, 17 Stat. 196, 197. Typically the federal courts were obliged to follow state court procedure “as near as may be.”
- <sup>49</sup> Charles Clark, *The Federal Rules of Civil Procedure, 1938-1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 435 (1958).
- <sup>50</sup> See WILLIAM M. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 9.1-9.53 (Wright ed., 1960).
- <sup>51</sup> John Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1368 (1986). See also Main, *supra* note 9, at 383.
- <sup>52</sup> Oakley & Coon, *supra* note 49, at 1369.
- <sup>53</sup> *Id.* at 1369. Their nine criteria for “replica” status included: (1) state civil procedure is specified in judicially promulgated rules rather than a statutory code; (2) these rules are organized and enumerated in general conformity with the scheme of the Federal Rules of Civil Procedure; (3) there has been a merger of law and equity into one form of civil action; (4) the substance of the state rules of civil procedure conform generally to the federal joinder rules as amended in 1966; (5) the substance of the state rules of civil procedure conform generally to the federal discovery rules as amended in 1970; (6) the state rules provide for summary judgment according to the model of the federal rules; (7) the rules as written and interpreted provide without qualification for the liberal conception of ‘notice pleading’ practiced in federal courts under the aegis of *Conley v. Gibson*, 355 U.S. 41 (1957); (8) to the extent the terms of the state rules or their interpretations are otherwise idiosyncratic or unconventional by federal standards, such variation in practice is not at bottom inconsistent with the federal rules’ philosophy of ‘procedure as the handmaiden of justice’; and (9) the state courts regard precedent and commentary construing counterpart provisions of the federal rules as persuasive authority in the construction of the state rules. *Id.*
- <sup>54</sup> *Id.* at 1413.
- <sup>55</sup> *Id.* at 1369.
- <sup>56</sup> John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003).
- <sup>57</sup> *Id.*
- <sup>58</sup> See generally Main, *supra* note 24, at 480-81.
- <sup>59</sup> The Rules were amended in 1948, 1961, 1963, 1966, and 1970. We are ignoring technical amendments that were made in 1941, 1951, 1968, 1971, 1972, and 1975; if these were included in the tally, the Rules were amended 11 times in their first 39 years.

- <sup>60</sup> The Rules were amended in 1980, 1983, 1985, 1991, 1993, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2009, 2010, 2013, 2014, and 2015. Another set of amendments is in the queue and, absent Congressional involvement, will take effect December 1, 2016. We are ignoring technical amendments that were made in 1987, 1988, 1995, 1997, 1998, 1999; if these were included in the tally, the Rules were amended 24 times in their second 39 years.
- <sup>61</sup> See Fed. R. Civ. P. 1, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 43, 44, 44.1, 45, 50, 52, 53, 54, 55, 56, 58, 60, 62, 65, 65.1, 66, 68, 69, 71.1, 72, 73, 77, 79, 81, 82, 84 & 86.
- <sup>62</sup> Main, *supra* note 24, at 481.
- <sup>63</sup> See 2007 Style Amendments to the Federal Rules of Civil Procedure. See generally Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (2004); Jeremy Counsellor, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L.J. 519, 520 (2009); Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 N.W. U. L. REV. 447, 471-472 (2013).
- <sup>64</sup> The 1983 amendment added bite to the certification obligations triggering sanctions, and the 1993 amendment responded to the criticism that the 1983 amendments went too far. See generally STEPHEN B. BURBANK, AMERICAN JUDICATURE SOCIETY, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULES OF CIVIL PROCEDURE 11 (1989); JEROLD S. SOLOVY ET AL., SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 11 (1996); Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171 (1994); Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U.L. REV. 1, 3, 11 (2002) (discussing the 1983 and 1993 amendments).
- <sup>65</sup> The 2003 amendments rewrote several sections of the class action rule, including the timing of the class certification decision, the content of class notices, the appointment of class counsel, and the judicial approval of settlements. See generally Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 REV. LITIG. 721, 765 (2013); Symposium, *Clear Notices, Claims Administrators and Market Makers*, 18 GEO. J. LEGAL ETHICS 1223 (2005).
- <sup>66</sup> The 1993 amendment to the discovery rule introduced mandatory initial disclosures, among other reforms. See generally Linda S. Mullenix, *Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules*, 14 REV. LITIG. 13 (1994); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525 (1998). The 2000 amendments modified the mandatory disclosure obligation so that a party need only disclose information supporting its claims rather than all relevant information.
- <sup>67</sup> The 1991 amendment to Rule 48 removed the presumption that juries consisted of twelve members. See generally Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1 (1993); Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 264 (1995).
- <sup>68</sup> The 1991 amendment to Rule 50 jettisoned the terms “directed verdict” and “JNOV”/ “judgment notwithstanding the verdict” in favor of “judgment as a matter of law” and “renewed judgment as a matter of law,” respectively. This was not a substantive change, but it is important terminology for federal practice. The Advisory Committee’s Note explains that the terminology was changed because the former terms concealed the close relationship between the two motions. At the same time, however, the Note suggested that parties who used the old terminology should not be penalized. This change is one scholar’s example of needless wordsmithing by procedural amendment. See Freer, *supra* note 61, at 470.
- <sup>69</sup> The 2003 amendment to Rule 51 substantially rewrote the rule regarding jury instructions. The amendment clarified that an objection must be made on the record and it clarified when objections must be made. The amendment rule permits plain error review even when a party fails to properly object, provided the error affects substantial rights.
- <sup>70</sup> The 1966 amendment to Rule 15 added the notice and mistake components to the criteria for relation-back of amendments. Prior to the amendment the rule allowed relation-back whenever the claim arose out of the same transaction or occurrence as the pleaded claim. However, the prior rule did not express address amendments that added *parties*; the prior rule addressed only amendments that added *claims*. See Harold S. Lewis, Jr., *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rights Revision*, 85 MICH. L. REV. 1507, 1507-08 (1987).
- <sup>71</sup> Main, *supra* note 9.
- <sup>72</sup> *Id.*
- <sup>73</sup> Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013); Burbank & Farhang, *supra* note 8; Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015).
- <sup>74</sup> Proposed changes in the federal rules are suggested to the Advisory Committee by committee members, judges, lawyers, interest groups, citizens, and other individuals and organizations. For an overview of the rulemaking process, see *supra* note 2.
- <sup>75</sup> Burbank & Farhang, *supra* note 71, at 1579.
- <sup>76</sup> *Id.* In the early 1960’s, there was an 88% chance that a proposed amendment would favor plaintiffs. *Id.*
- <sup>77</sup> *Id.* at 1572.
- <sup>78</sup> *Id.* at 1576.
- <sup>79</sup> *Id.* at 1572.
- <sup>80</sup> *Id.* at 1569.
- <sup>81</sup> *Id.* at 1588 (citing RULES ENABLING ACT: HEARINGS BEFORE THE SUBCOMM. ON COURTS, CIVIL LIBERTIES & THE ADMIN. OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 98th Cong. 29 (1983 & 1984) (statement of Alan Morrison, Director, Pub. Citizen Litig. Grp.)).
- <sup>82</sup> Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking*, 52 ALA. L. REV. 529 (2001).
- <sup>83</sup> Burbank & Farhang, *supra* note 71, at 1592 n. 123 (citing Memorandum from Robert S. Campbell, Jr. to Members, Fed. Civil Procedure Comm., Am. Coll. of Trial Lawyers 1, 3 (Sept. 16, 1999)).
- <sup>84</sup> *Id.*

- <sup>85</sup> See, e.g. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597 (1998).
- <sup>86</sup> Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Proposals*, 52 SMU L. REV. 229, 248 (1999); Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L.J. 1141, 1144-1150 (2015).
- <sup>87</sup> Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1869-1972 (2014).
- <sup>88</sup> See generally Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012).
- <sup>89</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662, 670-74, 678-79 (2009).
- <sup>90</sup> See, e.g., Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309-10 (2013); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 468 (2010).
- <sup>91</sup> Burbank & Farhang, *supra* note 8.
- <sup>92</sup> The federal courts of appeals also played some role in the anti-litigation and anti-trial jurisprudence that pervaded the federal courts starting in the mid-1970’s, and expanding in the 1980s. Some of the Circuit Court decisions anticipated Supreme Court anti-plaintiff jurisprudence. For instance, the requirement of more rigorous pleading in municipal liability cases, in order to protect official immunity by foreclosing discovery at the pleading stage, was duplicated in *Iqbal*, which insulated federal officials from discovery by dismissing the case due to inadequate pleading.
- <sup>93</sup> See Subrin & Main, *supra* note 85, at 1853-54, 1861-67.
- <sup>94</sup> See Main, *supra* note 8, at 1600 & n.26.
- <sup>95</sup> See *supra* note 84.
- <sup>96</sup> Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115, 148 (New York University School of Law Ingram Documents in Legal History, Peniah Petruck, Ed., 1991).
- <sup>97</sup> NATIONAL CENTER FOR STATE COURTS CIVIL JUSTICE INITIATIVE ANNUAL REPORT, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 3 (2015), available at <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>. Because this Report lacks printed page numbers, we refer to page numbers on the assumption that the Acknowledgements page is page one.
- <sup>98</sup> *Id.* at 3.
- <sup>99</sup> *Id.* at 42.
- <sup>100</sup> See 28 U.S.C. §§ 1331-1340.
- <sup>101</sup> See, e.g. Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1183-84, 1198, 1208-09.
- <sup>102</sup> *Id.*
- <sup>103</sup> *Id.* at 1209.
- <sup>104</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 95, at 24.
- <sup>105</sup> *Id.* at 25.
- <sup>106</sup> *Id.* at 24.
- <sup>107</sup> Hatamyar Moore, *supra* note 99, at 1188, 1191 (citations omitted).
- <sup>108</sup> See Part II, D *infra*.
- <sup>109</sup> Subrin & Main, *supra* note 85.
- <sup>110</sup> Subrin & Main, *supra* note 85, at 1845-46.
- <sup>111</sup> Subrin & Main, *supra* note 85, at 1845.
- <sup>112</sup> See Subrin & Main, *supra* note 85, at 1858-59 & n. 100.
- <sup>113</sup> See, e.g., Fed. R. Civ. P. 26(a).
- <sup>114</sup> See *supra* note 87.
- <sup>115</sup> See Subrin & Main, *supra* note 85, at 1851 & n.69
- <sup>116</sup> See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1957-62 (1989); AMERICAN JUDICATURE SOCIETY, *RULE 11 IN TRANSITION THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULES OF CIVIL PROCEDURE 11* (Stephen B. Burbank, Reporter, 1989).
- <sup>117</sup> See Subrin & Main, *supra* note 85, at 1850-51, 1887 & nn. 61-63 (citing authorities).
- <sup>118</sup> See *id.* at 1887 & n. 281 (citing authorities).
- <sup>119</sup> See *id.* at 1887 & nn. 276-277 (citing authorities).
- <sup>120</sup> See *id.* at 1885 & n. 259 (citing authorities).
- <sup>121</sup> See *id.* at 1887 & n. 281 (citing authorities).
- <sup>122</sup> See *id.* at 1883 & n. 248 (citing authorities).
- <sup>123</sup> See *id.* at 1887 & n. 278 (citing authorities); Main, *supra* note 8, at 1612-15 (demonstrating the relative constancy since 1963 of the time from filing to termination in the median case, the big case, and the small case)

- <sup>124</sup> See Subrin & Main, *supra* note 85, at 1886 & n. 270 (citing authorities).
- <sup>125</sup> See *id.* at 1869-1875 (citing authorities).
- <sup>126</sup> See Kritzer, Grossman, McNichol, Trubek & Sarat, *Courts and Litigation Investment: Why do Lawyers Spend More Time on Federal Cases?*, 9 JUST. SYS. J. 7, 12, 15 (1984).
- <sup>127</sup> Subrin & Main, *supra* note 85, at 1885-86. See also Main, *supra* note 8, at 1618-1627.
- <sup>128</sup> See Subrin & Main, *supra* note 85, at 1850 & n. 62 (citing authorities).
- <sup>129</sup> It is true that in both *Twombly* and *Iqbal* dismissals at the complaint stage have eliminated discovery. The first was a country-wide anti-trust case and the second involved high-ranking federal officials. We have seen no evidence that these are typical; in fact, some scholarship has suggested that it would have been wise for the Supreme Court to base its more rigorous pleading requirements on the uniqueness of this type of anti-trust case under federal substantive law and on official liability doctrine, thus foreclosing the trans-substantive effect of the decisions.
- <sup>130</sup> See *supra* notes 22-33, and accompanying text.
- <sup>131</sup> See Subrin & Main, *supra* note 85, at 1879 & nn. 228-229 (citing authorities).
- <sup>132</sup> *Id.* at 1847-49, 1854 & nn. 40-45, 51, 55, 58, 82 (citing authorities).
- <sup>133</sup> RICHARD A. POSNER, *THE FEDERAL COURTS—CHALLENGE AND REFORM* 37 (Harvard Univ. Pr. 1996).
- <sup>134</sup> See Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823 (2012). See generally JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).
- <sup>135</sup> See Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589 (1998).
- <sup>136</sup> *Id.* at 8, 9.
- <sup>137</sup> *Id.*
- <sup>138</sup> See *supra* note 37.
- <sup>139</sup> See, e.g., Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2151 (1989), cited in POSNER, *supra* note 131, at 9.
- <sup>140</sup> Hatamyar Moore, *supra* note 99, at 1188 (citations omitted).
- <sup>141</sup> See *supra* note 122.
- <sup>142</sup> POSNER, *supra* note 131, at 38.
- <sup>143</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 95, at 3. See generally Dianne Molvig, *Court Funding: Security at Risk*, 89-JAN Wis. Law 14 (2016) (noting that when states lose funding, the burden often shifts to county budgets, which have even less money, compromising justice and court security).
- <sup>144</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 95, at 30.
- <sup>145</sup> *Id.* at 4.
- <sup>146</sup> *Id.*
- <sup>147</sup> *Id.* at 10, 11.
- <sup>148</sup> See, e.g., Subrin, *supra* note 24, at 394 & nn. 74-75.
- <sup>149</sup> See, e.g., Burbank, Farhang & Kritzer, *supra* note 71, at 714 (citations omitted) (referring to what students of legislative regulatory policy have found).
- <sup>150</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 95, at 31. Only 0.1% were jury trials.
- <sup>151</sup> See, e.g., Subrin & Main, *supra* note 85; Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 399 (2011); Main, *supra* note 8. For an especially eloquent defense of the importance of the jury trial in our country, see Sheldon Whitehouse, *Opening Address*, 162 U. PA. L. REV. 1517 (2014) (at the conference commemorating the 75<sup>th</sup> anniversary of the Fed. R. Civ. P.).
- <sup>152</sup> See *New State Ice Co. v. Liebmann*, 285 U.S.262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
- <sup>153</sup> Burbank & Farhang, *supra* note 8. See also SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).
- <sup>154</sup> See, e.g., Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind*, 34 REV. LITIG. 647 (2015).
- <sup>155</sup> See, e.g., Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logic of the Public’s Role in Court-Based ADR*, 15 NEV. L.J. 1631 (2015).
- <sup>156</sup> See Subrin & Main, *supra* note 85, at 1879 & n.229 (citing Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 399, HARV. C.R.-C.L. L. REV. 401-02 (2011) (discussing the importance of the citizenry’s role in deciding questions of mixed fact and law)).
- <sup>157</sup> See, e.g., Whitehouse, *supra* note 149; Subrin & Main, *supra* note 85.
- <sup>158</sup> Subrin & Main, *supra* note 85.
- <sup>159</sup> *Id.* at 1885.



<sup>160</sup> *Id.* at 1844-45.

<sup>161</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 95, at 35. For example, there were 5,815 dispositions by summary judgment in the 820,893 dispositions. We are uncertain of the number of dispositions in the survey based on granted dismissals at the pleading stage, but given the nature of the bulk of the cases, it is not likely to be a high percentage.

<sup>162</sup> Subrin & Main, *supra* note 85, at 1861-62, 1873-74.

# Oral Remarks of Professor Subrin

I want to talk about two different things. The first question is whether or not state courts should follow federal procedure merely because it's federal procedure; because it's the Advisory Committee or the Supreme Court of the United States, we should follow it. Our answer is a resounding no, and I think it will take me very little time to convince you of that.

The second question is, though, regardless of who makes the rules—the Supreme Court of the United States, the district courts, the advisory committees—are they good rules? Is it good procedure for the litigation of civil cases? That's a separate question, and that's the one I really hope you talk about among yourselves today and in the future.

## Should State Courts Adopt the Amendments to the Federal Rules?

On the first question, though, whether you should adopt amendments to the federal rules, changes made by the Supreme Court of the United States, why am I so positive that's a no?

**The original federal rules were adopted by considerably fewer than half the states. Nine out of ten of those populated states never adopted the federal rules, and it's become even less possible to have uniformity since.**

First of all, a major reason you might want to do it, which was mentioned earlier, is the advantage of uniformity. It would be nice, as an attorney or as a judge in a given state, to know that there is one procedure. It would be certainly helpful for lawyers. But it's been years and years and years since that was any kind of possibility. The original federal rules were adopted by considerably fewer than half the states. Nine out of ten of those populated states never adopted the federal rules, and it's become even less possible to have uniformity since.

There was an article that showed that.<sup>1</sup> The same people wrote a second article<sup>2</sup> later that showed that not many states were adopting amendments to the federal rules. And then Tom Main put together that chart at the end of the article we wrote, and they're adopting it even less now. Moreover, if you put together standing orders in federal court, local rules, local cultures, it's just not true. There is no uniformity. There is not even uniformity among the federal district courts. So I mean that's just an illusion, so that would not be a good reason to adopt them.

**It's impossible to argue with a straight face that the rulemakers are in any way neutral.**

## Lack of rulemaker neutrality

More importantly, it's impossible to argue with a straight face that the rulemakers are in any way neutral, whether or not you're talking about the Advisory Committees or the Supreme Court of the United States, there has been study after study after study, including Steve Burbank and Sean Farhang, who you've heard from today. There have got to be a dozen different articles, including what Patricia Hatamyar Moore has written, that demonstrate beyond debate that the bulk of the rulemaking is being done predominantly by people who were appointed by Republicans, but, more importantly, who have a pro-corporate, pro-business mentality. There is no question anymore, because Sean and Steve have proven it beyond debate—that the voting patterns follow the political preferences, and they follow the background of the people making the rules.

So you can put that one to bed. The rulemakers are not neutral, and the major Supreme Court decisions tend to be 5-4. And who can argue seriously that that doesn't have something to do with one's views of private litigation? I think that, of everything I read in the two papers, to me, the most troubling and profound sentence came from Steve and Sean. The odds of the current Advisory Committees coming up with a pro-plaintiff set of rules is zero. Zero. This is empirically. They just won't do it. So to think that you would adopt the same rules on the grounds that they went through a fair, neutral process is just preposterous nowadays. There is too much scholarship proving otherwise.

## Lack of state court resources

Maybe even more important are the resources of the state courts. What's happened in federal court is that they have kept adding layers and layers and layers of process. You've got discovery conferences, you've got scheduling conferences, you've got reports that have to be filed, you have trial conferences, you have all the paper now going into 12(b)(6) and summary judgment. You guys don't have the resources to deal with that, even if it was a good idea. Judge Posner pointed it out years ago. You judges in the state courts have six times the number of criminal cases as does the average federal judge. You have three times the number of civil cases. The federal judges have law clerks, they have secretaries, they have almost as many magistrate judges as there are federal district court judges.

**Even more important are the resources of the state courts.**

Go to a federal courthouse. You'll find beautiful buildings, an enormous number of personnel, and a paucity of trials and a paucity of federal judges being in court. Then there's the amount of money spent on your courts. You guys know. I don't have to tell you. It's tragic. The legislatures aren't allocating money to you. So even if you did want to model this very expensive, step-heavy federal system, you couldn't do it. You don't have the people to do it. So that's a no. You aren't going to model everything the federal courts are doing. You couldn't do it if you wanted to.

## What kind of system do we want?

But more importantly, what do *you* want out of a civil litigation process? And who do you want to be as a judge? That's what you ought to be talking about. What is your vision of what makes a sensible litigation process? And what is your vision of what it means to be a judge in the United States democracy?

I don't see how one can disagree with Arthur Miller. It's depressing.

Let's start with the philosophy of the federal civil litigation system. I've spent my adult life studying the federal civil litigation system. I've studied the documents. I've studied the hearings. For the last several years, federal district court judges have been instructed that it is a mistake to try a case. I'm not making this up. The quotes are, "I think I have made a mistake if I ever have to try a case." These are trial judges being indoctrinated with a philosophy that you've done something wrong if you try a civil case.

**For the last several years, federal district court judges have been instructed that it is a mistake to try a case.**

And what have they done with the steps of litigation? Haven't they made it literally impossible for anyone without great resources to get into federal district court? Add together the things that Arthur listed—rigorous pleading, scheduling conference, discovery conference, paper-intensive summary judgment, reports on expert opinions, the reports that have to be

made if, God forbid, you insist on going to a trial. They'll make you feel like you've done something wrong because you ought to be in mediation or you ought to settle the case, right? It's considerably more expensive to go to federal court than to state court. And it's inconceivable to me that you want that to be your philosophy—that to get into your courts you would require multiple steps, each one costing money. It makes no sense. But I'm just getting started.

## Loss of jury trial

The real tragedy is the American jury. In your conversations, I want you to think about that. Well before the Revolutionary War, the colonists thought that ordinary people ought to partake in governance and democracy, ought to be educated in law through the jury process, and, most importantly, ought to have the ability to be a counterbalance to power. It's very hard to bribe a jury. It's very hard to get them all to agree in advance. Very hard to get them not to

**It's very hard to bribe a jury. It's very hard to get them all to agree in advance. Very hard to get them not to listen to each other.**

listen to each other. There's a reason they believed in the jury. They believed in it because we're a democracy and they thought ordinary people ought to have a shot to decide factual issues.

I'm puzzled about how mediators mediate anymore when they don't have the foggiest notion of what would happen at a trial. What are they mediating against? Guessing if, God forbid, we ever had a trial, it might be worth X? And what about things like reasonable care, unfair competition, proximate cause, intentional

discrimination? Isn't that exactly where you want the community to have some say in what is meant by these words, let alone legitimacy?

What about morality? What happened to the idea that it was important for judges and juries to have to hear a narrative, to have to face the people who are going to be harmed? Why do we go to plays? Why is it that human beings still go to a play? Why is it if you have something important to discuss with your kids, you want them in the room? This idea of paper upon paper upon paper upon paper without the chance to have a judge or a jury look at the people affected is very troubling.

## Who do you want to be as a judge?

And, finally, who do you want to be as a judge? Historically, judges didn't have the major purpose of getting rid of lawsuits. That was not the job of judges. The job of trial judges was to preside over trials, in open court, and decide the motions that had to do with trial. When Tom and I wrote the history of what happened with the federal rules for the first 20, 30 years, there were virtually no 12(b)(6) motions, and virtually no summary judgments. That was thought of as taking away the right to jury trial. They thought they had no right to do that. And don't tell me that what's "plausible" or what is a "sufficiency of evidence" is not a subjective decision. Of course it's a subjective decision. This is why we had juries.

**Historically, judges didn't have the major purpose of getting rid of lawsuits. That was not the job of judges.**

So what I want you to talk about is, do you want to be the way Judge Posner has described the current federal court system—a massive bureaucracy where a minority, like 12 percent of the people in the bureaucracy, are judges, whose major job is to get rid of cases? Is that what you want your legacy to be?

The bottom line is that there is absolutely no reason to automatically mirror federal procedure. More importantly, I don't think there is good reason to mirror the system itself.

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## Comments by Panelists

### DEAN MICHAEL WOLFF

I'm Mike Wolff. I live in St. Louis, Missouri, which is from time to time labeled a "judicial hellhole," because they actually do try a lot of cases there. I want to summarize a little bit and thank both Steve and Tom for again busting the myth of uniformity. To some of the earlier speakers about the writing of rules, I have to say it reminds me of what I learned years ago about the "Golden Rule:" They who have the gold make the rules. So get over it. All right?

So what I want to do is take you through a process that I was involved with at the state level before and during the time that I was a judge. I was named to the Civil Rules Committee, which was set up in the mid-'80s. I was kicked off for a couple of years when I was Governor's Counsel—I think that would have been a violation of separation of powers. And then I went back on the Committee when I went back to being a professor again.

We had a committee that was a couple of professors, a couple of judges, and a whole bunch of lawyers, and our charge was kind of to update the Rules of Procedure, which were a charming mix of the Field Code, Federal Rules 1.0, and a few anecdotes thrown in here and there from people's practice. And so they decided to take a more systemic look at it.

One of our charges, of course, was that there were too many references in the rule to "he," so they wanted us to get the thing to be more gender-neutral, so we used a lot of nouns instead of pronouns. And the procedure that we followed was to break this whole set of rules down and review them. We were making recommendations to the court.

**I think the important thing about a . . . a civil rules committee . . . is to have a good mix of . . . "real lawyers," people who are actually trying cases, and from a variety of perspectives.**

The Supreme Court of Missouri has, as most state supreme courts have, the power to prescribe rules of procedure. The court does not have the power to enact a code of evidence—that's for the legislature.

Then there's the matter of limitations. I don't think anybody has mentioned this yet, but in both the Federal Rules Enabling Act and in the Missouri Constitution, and I dare say probably other state constitutions, there is a limitation that says that you cannot change substantive rights.<sup>3</sup> And in our system, the legislature can change a rule adopted by the court but only in a bill adopted to that purpose. In other words, they can't slip something into one of those omnibus bills and reverse something that the court was doing in the realm of procedure.

I think the important thing about a rules process, or a civil rules committee, if you will, is to have a good mix of what I call "real lawyers," people who are actually trying cases, and from a variety of perspectives. You need some big firm lawyers that try cases, you need some small firm and solo people, so that you get some sense of the culture in



which people practice. We had a number of controversies, and I think that it's fair to say how they came out and what was willing to change and what was not willing to change. I was always kind of grateful in a way that one of the informal mottos of our state is the "Show Me" state: that is, "You have to show me."

So the first thing I have to show you is that in our pleading rules, we don't call something a complaint, we still use the charming notion that it's a petition. And in the words of our Rule 8, we left the word "facts" in there, so you have to plead *facts* showing that you have a claim for relief. What does that mean? Well, you can get into all that discussion you had in law school about ultimate facts and all that, but what it really means in practical effect is that you go to your Missouri-approved jury instructions, find the elements of your claim, and plead them in a general way. And the pleading therefore carries the weight of being an outline of what it is that you propose to prove at trial.

So that eliminates an awful lot of this nonsense about having pretrial layers where you restate pleadings or make things more specific and all that kind of stuff. Also, as you go through something that might be somewhat complex, you're going to be amending as you refine your theory. It's ridiculous to even think about a motion for more definite statement being granted. Sometimes people make them just to sort of pin you down somewhat. So we left all that alone.

One of the first controversies we had was, we have a version of Rule 11, back from Federal Rules 1.0, that said that the attorney, by signing a pleading, says that he has read the pleading. I'm just restating that generally. But there wasn't anything about sanctions for this, that, and the other thing. At the time we were deliberating, Federal Rule 11 was the monster rule that was swallowing up litigation in the federal courts, because you would have a motion, and if it was granted, then you would have a Rule 11 motion to sanction the person whose behavior was unwarranted. So there was a big push for us to do that because there was this idea that we should be more like the federal system.

One of the heroes on the committee was a very, very fine defense lawyer from Kansas City who told a story about being pushed by the general counsel of one of his clients, who was a New York company, to file a Rule 11 motion, and he said to the man in New York, "You don't understand. I practice in Kansas City, Missouri." (By the way, you say "Missoura" when you want to impress somebody from the East Coast that you're actually really from there. Otherwise, skip it.) "We don't do it that way, and if you want me to do that, I'm not going to do it. And if you want it done, find another lawyer." The client said, "Okay." Well, that story cheered me up a great deal. We never did that. Our dispute was resolved and kind of settled when the feds came up with their "safe harbor" thing where you can make a Rule 11 motion, and then the person has 30 days to withdraw the pleading and all that. And so the Missouri Supreme Court decided to adopt that version of it. It's completely benign when you look at the culture of the law practice.

**The culture of your law practice is important.**

And I say that culture is important because, for example, with the summary judgment rule, which is very, very rarely used in our state court system, our rule used to say that you had to prove by indisputable proof that there weren't any facts at issue. And then they changed it to make it exactly like the federal rule, and that was after that trio of cases from the '80s that they were talking about,<sup>4</sup> and still nobody used it because we still had it in our heads that it had to really be indisputable that you could do that. And so we had a preference for taking the case forward to trial.

Another one, again they were trying to push to get rid of the voluntary dismissal rule. A plaintiff can dismiss a claim or a party in Missouri without prejudice any time before the jury is impaneled, and if it's a non-jury trial, any time before the first witness is called. So there was a big push to get rid of that because there was a lot of shopping around and scaling

down and things that the defense bar thought was unfortunate. The rules committee forwarded a proposal, over the objections of some of us, that was going to change that a lot, but the court didn't do it because the court heard from the bar saying, "We like that the voluntary dismissal rule; we want to be able to do that," and the court left it alone.

There is also a rule that allows a lawyer in Missouri to get a change of judge just by asking for it, and each side can have the opportunity to get a change of judge, and that includes an intervenor and it includes a third-party defendant. So there was a push to change that to be like the federal system. If you've ever tried to get a federal judge to recuse, or to disqualify a federal judge, you know it's hard. I tell my students when I'm teaching civil procedure, "If you're going to shoot the tiger, do not wound the tiger. You be damn sure you're right, because otherwise you're going to have a wounded tiger on your hands, and it's not a pleasant situation."

So in discovery, we in Missouri still have what I call Federal Rule 1.0. I think the feds have lost their minds with all of this stuff that they do with the disclosures and all that, and especially with respect to expert witnesses. Henry Kantor can tell you a little bit about the Oregon rule. Oregon doesn't do discovery with expert witnesses. I thought it was brilliant. Most of the lawyers in my state thought I was an idiot, but that's okay. I'm an academic; they can think I'm an idiot. And so I really think that the Oregon approach was something that would recommend itself, but it didn't get changed. They set up a committee, I think to humor me, and the committee decided, "No, we don't want to change it." But we're still okay. We don't have experts write a report and subject themselves to a deposition. You can find out who the experts are and you can depose them.

**The reason you don't want to follow the federal rules is that you want to be able to adjust to things that come up and do it in a way that's fairly nimble.**

I have one other thing that is current, and then I'm done. The reason you don't want to follow the federal rules is that you want to be able to adjust to things that come up and do it in a way that's fairly nimble. Not too long ago there was a story in the newspapers that said that one of the major health care systems

in Saint Louis had sold a whole bunch of its receivables to one of these bottom feeder organizations. It filed thousands of collection cases in the courts in the Saint Louis area, and took default judgments on almost all of them. Nobody showed up in court.

Now, here's the thing. Under the styles of our procedural system, the statute of limitations, as you learned in law school, is an affirmative defense. And so if you file a lawsuit against somebody, even on a stale claim, and they don't show up, a judgment can be entered because the defendant waived the affirmative defense. Well, how is that fair? So some of us pushed my old colleagues and said, "Let's do something about that." It's in the Rules Committee now. Just require somebody who's filing these kinds of cases to say in their pleading when the debt was incurred, or that the statute of limitations has not run.

You can get all technical about it being an affirmative defense, but do you want to do justice? You're not going to have a system that does justice if you're going to give default judgments against thousands of people who had moved on years before on these claims.

So I think that it's worth having this mix of lawyers in this, and I agree with what Elizabeth Gleicher said in our first panel: "Rulemaking is power."

We all know, from listening to all the rhetoric in the air, that Washington doesn't always know best, so why would we think it now?

## HONORABLE HENRY KANTOR

Yes, I am the rare state court trial judge who is here to speak to you, state court appellate judges, about whether to adopt Federal Rules of Procedure to govern state court civil trials. That's almost as rare as a DRI representative here.

I bring about 37 years of experience as a trial lawyer and a trial judge working on thousands of civil cases and presiding over hundreds of civil trials. And I know many of you here have been trial lawyers in the past, or trial judges, or both, but I also know that for many of you, you've had very little recent trial experience, even if you occasionally did some motion practice as a judge or a lawyer. But your exposure to trial practice, of course, is significant. You see the aftermath of all those trials—but only, of course, if the case was worth appealing.

I can't avoid repeating what others have said, and I agree with most of it. My focus this afternoon is going to be that of a trial judge, but I'm not too much of an alien because I spent a few months helping out on the Oregon Court of Appeals, so at least I have some vague idea about what it is you all do.

And I spent six years as a member of the Oregon Council on Court Procedures, which is our state's trial court civil rulemaking body. The Council is made up of a varied mix of lawyers from the plaintiffs' bar and from the defense bar, who handle big cases and little cases, from urban and rural communities. We have several trial court judges from across the state, and, yes, we have a few appellate judges who have a real interest in making sure that our trials remain fair.

### Expert witnesses in Oregon

I want to comment just briefly. Mike Wolff said something about “no expert witness discovery” in Oregon. That's true. It's even stronger than that. We have no expert witness *disclosure*. People learn about the other side's experts at trial, and pretty much never before, unless they happen to agree to exchange that kind of information.

We also don't have *any* interrogatories in Oregon! And the truth is that our experiments have worked well. I say “experiments.” It's the only way we have done it for years and years, but other states see us as experimental. Maybe we're just different.

### Balanced rulemaking committees

So very intentionally, I started off by identifying myself and you, my audience. You're an incredibly diverse group—at least in terms of professional backgrounds and skills. Not so much at the Duke conference, and through the lengthy rulemaking process that you've already heard about. While there were a handful of lawyers there who didn't exclusively handle complex cases, the great majority of the lawyers presenting and involved were from large firms with large corporate clients. These lawyers were at the very top of their fields, very skilled, and very influential. The judges in charge of the entire process were smart, capable judges whose mantra was, and is, as you have heard and read, “A trial means we have failed.” These judges mostly came from big law firm or criminal prosecution backgrounds.

The bottom line, there was no real or even pretended balance to the process. The result was predictable, powerful, and incredibly one-sided. As you and your colleagues approach rulemaking, I urge you to guarantee true fairness and practical case management by making sure that the participants are representative of the people in your state and not just those who volunteer for the group.

## Talk to your trial court judges

My second point, beyond the broad makeup of your rulemaking body, is that there is an earlier step that I suggest you take. Before you decide if you need any of these new rules, you should ask, “Who should we consult?” Well, the answer is me, of course—I mean your friendly, experienced state court trial judge. We are in the trenches. We see what goes on, we learn what is needed, we see the trends in case filings and trials before you do. We deal with the increasing number of self-represented litigants. Try explaining proportional discovery to someone who is coming in without a lawyer and for whom their case is the most important case that has ever existed.

We trial court judges are practical, more like plumbers than architects. We care about the litigants and lawyers in different ways than you do. We worry about our court budgets. We know what we’re doing. So please trust us. Talk with us about the kinds of cases we mostly see in our trial court. Let us explain what we really need to manage our cases. Then make the very tough decisions we trust you to make to lead and govern our courts.

**Before you decide if you need any of these new rules, you should ask, “Who should we consult?” The answer is your friendly, experienced state court trial judge.**

## Talk to federal magistrate judges

Now, based on the comments I heard this morning, I want to add something. The other people you might want to consider talking with are the federal magistrate judges. They’re the ones who are going to be implementing this new rule, and they’re going to be the ones writing up the decisions, and very few of those decisions are going to be appealed or even published. So you may want to talk to your local federal magistrate judges about how well they’re enjoying this process.

## Tailoring the use of federal-style rules

Next, some of your states have adopted or plan to adopt some of these new federal rules. That can be fine. Some of them actually can be helpful from time to time. And, Arthur, you’re right, some of them are written pretty well. As you will learn from your trial judges, the vast bulk of civil litigation does not need and, with certainty, would be harmed

by these rules. Fewer rules tend to benefit the litigants and lawyers in those kinds of cases. They will settle or they will try just fine, as always.

**The vast bulk of civil litigation does not need and, with certainty, would be harmed by these rules.**

I urge you not to require any of these rules to apply in all cases. Make them plainly available for judges to use in the right kind of case. Otherwise, expect the expense of all civil litigation to rise dramatically, and expect to have to run to your legislature asking

for more judges and more money. I don’t know about your states, but if we did that, the Oregon legislature would promptly send us packing.

Many of the practices set out in these new rules are already available to your trial judges just as they were available to the federal judges before, through existing general rules or their well-known broad discretionary powers. So, please, don't require a sledgehammer approach when, in most cases, a gentler touch is more than sufficient.

## Try talking!

My last point this afternoon is one of more and pure practicality, more plumbing. Whether you stick with your current rules or adopt some of the new rules, consider adding a requirement in cases where both sides have lawyers, that before a discovery dispute is presented to a trial judge, the lawyers must actually talk in person or over the telephone. In my experience, conferral via emails, texts, letters, voicemail, social media, and even through legal assistants simply does not do the job. Cooperation, as Mr. Kuppens said earlier today, really works better in every way.

**Consider adding a requirement that before a discovery dispute is presented to a trial judge, the lawyers must actually talk in person or over the telephone.**

So in closing, before you adopt any of these new federal rules to deal with perceived discovery delays and problems, try something simple like real conversation. It's easier, cheaper, and much more successful, like tightening the faucet instead of replacing the sink if all you have is a little drip.

## DONNA MELBY

**Think about cherry-picking: using what works, discarding what doesn't work.**

I practice in Los Angeles, California, at Paul Hastings. I'm on the defense side. I've been practicing about 37 years.

I want to thank you for inviting me to participate in today. And I want to just say how impressed I am with all of the discussion that has gone on, notwithstanding the fact that the defense bar was called "Pavlov's dog" at one point today.

In response to whether or not the state courts should follow the federal system in court rulemaking and procedural practice, as others have already observed before I stepped up here today, the most reasonable answer to that has to be *yes and no*, because as Professor Miller aptly observed, this is not an all-or-nothing proposition.

## Cherry-Picking What Works

Think about cherry-picking: using what works, discarding what doesn't work. If the idea of uniformity is the most compelling reason for wholesale adoption of federal district court rules in the state courts, I would suggest it is not compelling.

Uniformity is illusory. It is oversimplification. The federal rules build in enormous discretion, and while I don't disagree that discretion is always important, the kind of discretion that is built into the federal rules without any tools for the district court judges in terms of the application of those rules makes for no uniformity at all.



So in cases with similar facts, in different districts, the outcome, in practice, is always different. A judge in the Eastern District of Virginia on the same facts will give a completely different ruling applying the same rules than will a judge in the Northern District of California. Uniformity is not a compelling reason.

## One Size Doesn't Fit All

In the state courts in particular, one size just can't fit all. We have different governance for all of our state courts across the country. In California, for example, we have the constitutionally mandated Judicial Council of California. Some other states have judicial councils, some have different ways of doing it, different court sizes, different dockets.

**In the state courts in particular, one size just can't fit all.**

It used to be, as someone observed before me today, that the federal and state courts were more similar than they are today. I would suggest that today the differences are much greater and that the gap has widened substantially.

In fact, one of the things that's been mentioned, but not stressed enough in my view, is the underfunding of the state courts. Underfunding, which is more acute in some states than others, presents unique challenges that simply are not contemplated by the federal rules—not in technology, not in staffing, not in caseloads, not in dockets.

## The Civil Justice Initiative

I would like to just take a minute to share some thoughts about something that many of you may already be familiar with, which is the Civil Justice Initiative that was recently commissioned and put into place by the Conference of Chief Justices. With the help of the National Center for State Courts, the help of **the Institute for the Advancement**

**Civil cases need to be triaged at the front end immediately in order to determine the amount of judicial attention that each case deserves.**

**of the American Legal System (IAALS)** for two years, there was a Civil Justice Improvements Committee. Some judges who are here today have served on that committee or have had colleagues who served on that committee. And I can tell you that the representation on the committee was diverse and representative. There were some lawyers, but very few—two plaintiffs lawyers and one defense lawyer. There was a careful balance. There were state court jurists, state court administrators, and as a result of two years of work, they worked on

a comprehensive set of recommendations designed to work across legal cultures to overcome the significant (and I do mean significant) financial and operational roadblocks to change.

I mention this because I think the result is a good example of the application of what works in the federal rules and a discarding of what doesn't work for the state courts in finding ways to better serve our citizens who deserve cost efficiency, convenience, and better access to justice.

The underlying realities of these recommendations are that the court has to control the pace of the litigation, and “the court” doesn't just mean the trial judge (though it certainly is led by the trial judge). “The court” is the entire branch, including staff and technological staff and resources.

Civil cases need to be triaged at the front end immediately in order to determine the amount of judicial attention that each case deserves. Based upon that initial assessment, there should be a pathway to which each case is assigned, one of three: either “streamlined,” “complex,” or “general.”

Judging in the state courts today and practicing in the state courts today demand effective rules, effective procedures, and effective business practices that are critical to a “just, speedy, and inexpensive” resolution, whether that resolution is a jury trial or something else.

## The Civil Justice Improvements Committee Recommendations

I want to share with you what some of the recommendations of the Civil Justice Improvements Committee are. As I understand it, they will be presented to, or may already have been presented to, the Conference of Chief Justices. This is essentially an executive summary of the recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee. If you want the full detail, you can get it from the website of the National Center for State Courts, and you can download all of the detail, and I commend it to you for your reading if you have the opportunity to look at it.<sup>5</sup>

This will give you an idea of the representatives who were on the committee and who had input into the process, including Mary McQueen, the President of the National Center for State Courts, and Rebecca Love Kourlis, who, as many of you know, is the Executive Director of IAALS. There was a federal courts liaison as part of the committee, and an ABA liaison as well.

Here are the recommendations:

- **RECOMMENDATION 1:** Courts must take responsibility for managing civil cases from time of filing to disposition.
- **RECOMMENDATION 2:** Beginning at the time each civil case is filed, courts must match resources with the needs of the case.
- **RECOMMENDATION 3:** Courts should use a mandatory pathway-assignment system to achieve right-sized case management.
- **RECOMMENDATION 4:** Courts should implement a Streamlined Pathway for cases that present uncomplicated facts and legal issues and require minimal judicial intervention but close court supervision.
- **RECOMMENDATION 5:** Courts should implement a Complex Pathway for cases that present multiple legal and factual issues, involve many parties, or otherwise are likely to require close court supervision.
- **RECOMMENDATION 6:** Courts should implement a General Pathway for cases whose characteristics do not justify assignment to either the Streamlined or Complex Pathway.
- **RECOMMENDATION 7:** Courts should develop civil case management teams consisting of a responsible judge supported by appropriately trained staff.
- **RECOMMENDATION 8:** For right-size case management to become the norm, not the exception, courts must provide judges and court staff with training that specifically supports and empowers right-sized case management. Courts should partner with bar leaders to create programs that educate lawyers about the requirements of newly instituted case management practices.
- **RECOMMENDATION 9:** Courts should establish judicial assignment criteria that are objective, transparent, and mindful of a judge’s experience in effective case management.
- **RECOMMENDATION 10:** Courts must take full advantage of technology to implement right-size case management and achieve useful litigant-court interaction.
- **RECOMMENDATION 11:** Courts must devote special attention to high-volume civil dockets that are typically composed of cases involving consumer debt, landlord-tenant, and other contract claims.

- **RECOMMENDATION 12:** Courts must manage uncontested cases to assure steady, timely progress toward resolution.
- **RECOMMENDATION 13:** Courts must take all necessary steps to increase convenience to litigants by simplifying the court-litigant interface and creating on-demand court assistance services.

These, I would suggest, give us the most useful parts, but discard what is not useful, of the Federal Rules of Civil Procedure, and highlight for the 21st century the unique needs of the state courts, especially with the financial challenges that we are facing across the country—and I can tell you that in California, those challenges are magnified.

## ELISABETH M. STEIN

My name is Elisabeth Stein. I am Policy Counsel at the Constitutional Accountability Center, which is a think-tank, law firm, and action center devoted to fulfilling the progressive promise of the Constitution’s text and history.

Prior to working at CAC, I was Federal Relations Counsel for the American Association for Justice (AAJ), and in that position, I did a significant amount of work on what were at that time the proposed changes to the Federal Rules of Civil Procedure. Those were the same changes, of course, that went into effect this past December and that we’re discussing today. I should mention that none of my comments today are on behalf of CAC.

Access to information  
means access to justice.

### Access to Information is Access to Justice

I want to start by emphasizing what is, or certainly should be, very well known to everyone in this room: access to information means access to justice. This is true for all litigation, but it is particularly important in a key subset of cases where there is an inherent asymmetry of information, such as in an employment discrimination cases or really any number of cases dealing with congressionally granted private enforcement of constitutional or statutory rights.

In those kinds of cases, most of the information a plaintiff needs is solely in the custody of the defendants, and, despite claims to the contrary, this is really where the new Rule 26(b) proportionality standard is going to have the greatest impact. Simply put, it will benefit corporate actors at the expense of smaller plaintiffs, and it’s going to make it significantly harder for those plaintiffs to successfully access the required discovery.

To add some additional context, and you certainly have heard this throughout the day, including in Professor Miller’s comments today at lunch, what we’ve seen in the Judicial Conference’s new proportionality rule is really part of a larger trend to curtail access to justice.

### Tilting the Scales of Justice

In a paper I recently wrote for CAC, which was titled, “Tilting the Scales of Justice: Conservatives’ Multi-Front Assault on Access to the Courts,”<sup>6</sup> I examine the ongoing campaign of business advocates to effectively nullify legal protections for consumers, employees, and other individuals by limiting access to the courts. The paper was written for a congressional audience, and so the details are somewhat outside this conference, but the overall point is this: changes to the Rules, combined with congressional action limiting rights, combined with Supreme Court decisions narrowing access to the courts through restrictive pleading standards, mandatory arbitration, and limitations on class actions, are making it increasingly difficult for smaller plaintiffs to obtain redress for harms caused by corporate actors.

## Objections to the Proportionality Rule

The concept of proportionality really does sound reasonable at first blush. Following Chief Justice Roberts's most recent Year-End Report touting the benefits of the new Rules, the *Washington Post* editorial page, not exactly known as a pro-corporate bastion of conservative rhetoric, ran an editorial on the Report. The title of the editorial proclaimed that the Chief Justice had "[made] the right call on civil justice." The editorial further states, and I quote, "there is no good argument against insisting that lawyers' requests be proportionate."<sup>7</sup>

I mention this editorial because I think it's demonstrative of how far the corporate lobby has come in making their perspective mainstream. Most of us in this room know, particularly after listening to all of today's speakers, that the statement above is not so absolute. There are, in fact, many good arguments against the new proportionality standard. And some of the key reasons to object to the new standard are discussed in this afternoon's paper on the motivations behind the rules: that is, a pro-defense bias and an overemphasis on discovery problems that largely arise in complex litigation with little regard for how the new standard impacts smaller plaintiffs.

This proportionality standard is really not an issue for the vast majority of business-to-business cases, the ones that really have the intensive discovery costs. After all, in those cases, both parties require information from the other

**This proportionality standard is really not an issue for the vast majority of business-to-business cases, the ones that really have the intensive discovery costs.**

side, and, critically, they have equal bargaining power to set the parameters for discovery in the case at hand. Regardless, echoing what a number of today's speakers have already said, one size does not fit all, and discovery issues in business-to-business cases are fundamentally different and have fundamentally different discovery costs than cases involving a smaller plaintiff against a corporate actor. State courts remain an important forum for smaller plaintiffs to enforce their right in the range of cases that you all deal with on a daily basis.

## Empirical Studies Prior To the Rule Change

I want to talk a little bit about some of the studies that were cited in support of these rule changes. The fundamental flaw of these studies is that they rely on these very business-to-business cases.

The balanced empirical studies that were done prior to the proposal of these rules, such as the 2009 Federal Judicial Center study, which has been mentioned a number of times today, have shown essentially no support for these changes. Testimony from the author of the FJC study in 2013 stated outright, "[d]iscovery is not a pervasive litigation cost problem for the majority of cases. The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases." But to support its claims of discovery run amok, the defense bar relied on its own self-generated studies—which, not surprisingly, given the corporate audience surveyed and the underlying goal of supporting the proportionality standard, found that civil justice takes too long and is too expensive.

**Testimony from the author of the FJC study in 2013 stated outright, "[d]iscovery is not a pervasive litigation cost problem for the majority of cases."**

Let me give you just one example of the kind of problematic study that was presented by the defense bar. These were presented as reasons for why these rules needed to change, why we needed a new proportionality standard. A group called Lawyers for Civil Justice, which is a defense bar group, did a study of Fortune 200 companies.<sup>8</sup> They got a response rate of around 20 percent, far below the generally accepted threshold to broadly extrapolate findings, but they used their study to support the proportionality standard in their submission to the Judicial Conference.

For example, one of the study's findings was that the ratio of number of pages of documents produced to average number of exhibit pages was 1,044 to 1—one tenth of one percent of the pages produced. Now, regardless of the accuracy of this number, in reality, it gives absolutely no support for the need for proportionality in discovery. All it shows is that defendants produced a large number of documents that are not useful as exhibits. And one could posit, and a number of plaintiffs lawyers did throughout this process, that this kind of document dump could be part of a deliberate strategy to bury the smoking gun, to raise costs for the plaintiff, etc., in a large document production.

## Comments on Rule Amendment Proposal

Another demonstration of the harms of the proportionality standard and recognition of who this proportionality standard really benefits is clearly reflected in the more than 2,300 comments submitted to the Judicial Conference following the release of the proposed rules in 2013. As Professor Miller mentioned today, this is far more submissions than any other rule has received, showing just how dramatic these new rules were going to be and how many people they were going to impact.

The comments generally fell into two categories: corporate actors and those who represent corporate actors discussing the critical need for amendments to the federal rules curtailing discovery, and plaintiffs and those who represent plaintiffs explaining the serious harms and limitations on access to justice that would come from the proposed proportionality standard.

## The Role of Judicial Discretion

As this afternoon's paper also discusses, the new Rule 26(b) proportionality standard is going to inherently create more judicial discretion through active judicial involvement in discovery proceedings. In fact, this kind of early and more active case management was one of the stated goals of the Judicial Conference in enacting the rule change, and it was emphasized in the Chief Justice's 2015 Year-End Report, where he noted that the proportionality standard "require[s] the active involvement of a neutral arbiter, the federal judge, to guide decisions respecting the scope of discovery."<sup>9</sup>

Of course, there is nothing wrong with asking judges to use their discretion. That is, in fact, what the federal and state judiciaries are tasked with. The concern is that, because the standard does not fully consider the impact on these smaller plaintiffs facing large corporations with the means and incentive to make discovery difficult, the proportionality standard is going to create a skewed framework within which this increased judicial discretion operates. So the judicial discretion at play is inherently going to favor the well-funded defendant against the smaller plaintiffs, because that is what the new proportionality rules do. Defendants now have a literal checklist—and I believe the language of the new Rule 26(b) is in your packet—

**The proportionality standard is going to create a skewed framework within which this increased judicial discretion operates.**



that elucidates, in the text of the Rule, why they will not have to produce the discovery a plaintiff needs to meet their burden of proof.

Finally, as the paper's authors point out, that very grant of judicial discretion will mean even more variation in application, feeding into the dis-uniformity between state and federal practices that already exist. Why would states want to import this problematic framework wholesale when it is inherently anti-plaintiff—and, if anything, would result in less uniformity between and within state and federal courts?

## To Adopt or Not?

I want to close with one final comment on the exhibit that was included in this afternoon's paper: the chart that shows which states have adopted certain rule changes to the Federal Rules of Civil Procedure, including prior

**Even if it's aggressively policed by fair-minded trial judges, the new framework is very likely to compound the inherent inequality between small plaintiffs and large well-heeled corporate actors.**

changes to Rule 26. It shows that only four states have fully adopted the 1993 and 2000 amendments to Rule 26, with only another four states adopting them in some part. I suggest that with all the fundamental problems with the proportionality standard that you have heard today, and the increasing lack of uniformity that will result from the judicial discretion created under the new proportionality standard, this is not the time to start importing federal rules to state courts. The simple fact is that wholesale importation of the new proportionality standards to the state courts is bad for justice. Even if it's aggressively policed by fair-minded trial judges, the new framework is very likely to

compound the inherent inequality between small plaintiffs and large well-heeled corporate actors.

Thank you again for the opportunity to speak today. I look forward to our ongoing conversation.

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## Response by Professor Thomas Main

I'm the transition into the comment/question period. I'm going to be very brief. I have three points that I would like to make in response. I'm going to try to make observations that are slightly different from what you've already heard, although I would love to echo everything that's been said and talk about it at length.

### Point 1: Rulemaker Bias

The first point is in response to the idea about diversifying a rulemaking committee or about motives and intentions of rulemaking committees. References to bias in this morning's paper and in our own paper may seem harshly to impugn the intentions or the character of all rulemakers. But the reality is there is no view from nowhere. Indeed, we all come to any decision that we need to make as a product of our own experiences and biases. We each have blinders in certain respects. We each have preferences.

**We all come to any decision that we need to make as a product of our own experiences and biases. We each have blinders in certain respects. We each have preferences.**

The hurdle that I want to make sure that we get over—as far as thinking about this rulemaking process is concerned—is to say that these mistakes can be made notwithstanding the best intentions and efforts on the part of those who come to the task of rulemaking.

## Point 2: The Death Spiral of Case Management

The second point is that I feel that we're in a paradoxical death spiral as far as case management is concerned. Rulemaker-judges see case management as the answer to every problem that presents itself. I think that the American Psychological Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) has some label for the condition in which you find yourself to be the answer to every problem that's around you.

Of course, it's hard to be against case management as such, because it depends on what case management means. But I would like to observe that we should be suspicious when, as a rulemaker, we find ourselves to be the answer to the problem. Surely more case management isn't always the solution.

If we define case management broadly to encompass all forms of judicial interference, we would include, as part of case management, issues about motions to dismiss and motions for summary judgment—in addition to the more standard fare of case management like scheduling conferences, discovery conferences, and pretrial conferences. It is this broader notion of case management that has led judges to get involved in places where historically they were not.

We find ourselves in a paradox where the prevailing notion is that, to save more time, we need to add more stages and more rigor to the process. . . . But by adding more stages in the process, we're increasing the amount of time spent on the process.

It is not only academics who are urging judges to *try* cases rather than to *manage* them. I commend you to read the scholarship of Judge William Young out of the District of Massachusetts, who has proven that trying cases leads to as much disposition of cases as trying to manage cases.<sup>10</sup>

We find ourselves in a paradox where the prevailing notion is that, to save more time, we need to add more stages and more rigor to the process—being more aggressive at the motion to dismiss stage, putting teeth into the summary judgment stage, and requiring more conferences. But by adding more stages in the process, we're increasing the

amount of time spent on the process. The judicial attention given to matters in the name of preventing trials, in fact, consumes more time and energy than preparing to try those cases.

For decades, we've had empirical evidence that there are only two kinds of case management that work. In other words, there are two kinds of case management that actually save time and money, and no other case management technique has an empirical foundation. The two things that save time and money are (1) a firm trial date; and (2) a firm discovery cutoff date. Now, where do those come from? The RAND study has demonstrated this.<sup>11</sup> Other studies have made the same point.

This observation that judges may accomplish more by interfering less is consistent with the values that are embedded in the earliest version of the Federal Rules of Civil Procedure, where judges prepared cases for trial. By preparing cases for trial the vast majority of them settled with no judicial interference whatever. As Steve Subrin asked,

and as our paper asked, What's the proper role of judges? Judges try cases. Surely that's what judges do best. That's their value add. And judges who set an early trial date, judges who set a firm discovery cutoff, and who actually host trials, as Judge Young has demonstrated, will dispose of as many cases, or more cases, than will those who instead employ earlier case management and more targeted case management, who follow the 15-point matrix that we've heard referenced here, and who demand more forms and more papers—all in the name of efficiency. That's the paradox of case management.

### Point 3: Selective Incorporation

My third point is to pick up on a point that Donna mentioned about selective incorporation by states of federal reforms. This surely has to be the right answer, as the federal rules might actually have some good ideas for state court incorporation. But I want also to build on that by noting that several of us in the legal academy are looking for state courts who are using different approaches to achieve the goal that they share with federal court judges, state court judges, federal court litigants, and state court litigants, which is the “just, speedy, and inexpensive determination of every action.”

And so the more that we can get not only thoughtful incorporation of the federal into the state courts, but also broadcast the interesting, novel state approaches that you folks are taking, the better course of reform that federal amendments might take. I want to help with that, and I think that the folks in your state law schools might want to help with that. After all this is Brandeis's embrace of states as “experimental laboratories,” a point with which I'm sure you are familiar and that we also cited in our paper.

So we hope you won't incorporate the federal rules for the sake of uniformity. Of course, when we're talking about rules that are trans-substantive, they're uniform only in the most trivial sense, because they're drafted so abstractly to apply to huge cases and little cases that there is no guidance in them at all. Uniformity for the sake of uniformity has been debunked today quite vigorously. But to make sure that we're not just beating up a straw man in our conversations today, I also want to make sure that you hear from us that the academy is looking for better ideas. How can litigation be more affordable? How can we better achieve the “just, speedy, and inexpensive determination of every action”? I want to help, and I think many other civil procedure professors want to help get that message out when there are other techniques that can be used to achieve that.

**The academy is looking for better ideas. How can litigation be more affordable? How can we better achieve the “just, speedy, and inexpensive determination of every action”?**

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## Notes

- <sup>1</sup> Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367 (1986).
- <sup>2</sup> Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev. L.J. 354 (2002-2003).
- <sup>3</sup> 28 U.S.C. § 2072 (b) Such rules shall not abridge, enlarge or modify any substantive right. . . .
- <sup>4</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).
- <sup>5</sup> <http://www.ncsc.org/sitecore/content/microsites/civil-justice-initiative/home/CCJ-Reports.aspx>
- <sup>6</sup> Available at <http://theconstitution.org/sites/default/files/briefs/Tilting-the-Scales-of-Justice.pdf>.
- <sup>7</sup> Available at [https://www.washingtonpost.com/opinions/chief-justice-john-robertss-good-sense-on-civil-justice/2016/01/12/4b02757c-b4c5-11e5-a76a-0b5145e8679a\\_story.html?utm\\_term=.9754b46199d4](https://www.washingtonpost.com/opinions/chief-justice-john-robertss-good-sense-on-civil-justice/2016/01/12/4b02757c-b4c5-11e5-a76a-0b5145e8679a_story.html?utm_term=.9754b46199d4).
- <sup>8</sup> <http://www.uscourts.gov/file/document/litigation-cost-survey-major-companies>
- <sup>9</sup> 2015 Year-End Report at 7.
- <sup>10</sup> See, e.g., William G. Young, *Bench Presence: Toward a More Complete Model of Federal District Court Productivity*, 118 Penn. St. L. Rev. 55 (2013), available at [http://www.pennstatelawreview.org/118/1/2-Singer%20&%20Young%20\(PS%20final\).pdf](http://www.pennstatelawreview.org/118/1/2-Singer%20&%20Young%20(PS%20final).pdf)
- <sup>11</sup> See James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 14* (1996).

# CLOSING PLENARY

**KATHLEEN FLYNN PETERSON.** At this time, I have with me on the panel our paper presenters, and I would like to ask if any of you would like to make any comments to the group, and then we'll have any comments from the judges.

**PROFESSOR FARHANG.** I want to thank you and I really did learn an enormous amount by sitting in on the group discussions. And as a social scientist and scholar, I would love it if there was some way that I could make all of you get together again, but I could prepare for it and I could go from room to room and ask groups of people questions.

In learning about the variation across states and institutional practices and norms of practice, there was just such interesting, rich variation on the issues of procedural law that I learned about today, so it's motivated me to want to work on thinking about doing some kind of cross-state study. The only problem is that social scientists are rewarded for working on really complex variation when they can explain it, and it just seemed like a complete mess to me, so maybe I won't do it!

**HONORABLE COLLEEN O'TOOLE, ELEVENTH DISTRICT COURT OF APPEALS OF OHIO.** I just want to know—I really appreciated all the lectures, they were very informative and very good. But I know everything is taking more time. What are some prospective things? I mean, what's the solution? I don't think we're going back to the world of the Wild West where everybody files their complaints and we all go to jury trial. We can't get jurors, and there's a host of other things. There is such a small percentage of jury trials now, and they are kind of time consuming. I love a jury trial. I tried cases as a practitioner, but I think going forward with the immediacy, with people's time limitations, even the lack of attention span in a lot of jurors, especially younger folks, millennials.

What would be a better alternative? I understand not deciding cases on summary proceedings where nobody ever sees the real people at issue. But do you have any ideas for a best practice or a better practice?

**PROFESSOR SUBRIN.** I think you hit upon a real problem, and I would add to that problem that we're getting more and more judges and alleged "litigation" lawyers who don't know how to try a case, both from the judges' point of view and from the lawyers' point of view. So you're absolutely right. There is a real problem. I'm not convinced, though, that there aren't a large number of cases in which, if a judge set a firm trial date, and tried to quickly dispose of discovery issues, they would actually go to trial, and not have the constant, heavy-handed case management that's going on now.

One statistic that I keep remembering is that, in the mid-1960s, 54 percent of the cases were disposed of in federal court with no judicial intervention—no intervention. I think there's a lesson to be learned from that. I mean, the people who taught me to be a trial lawyer said, "Give us a trial date and leave us alone." Most of those cases settled.



There really is nothing like a firm trial date to focus the attention of the lawyers on getting rid of those cases that you can get rid of without all these stages. So that's where I would begin.

As to the point about the attention span, you're absolutely right. Try teaching law today!

**JUDICIAL PARTICIPANT.** Because of budget cutbacks, we're not getting new judges. I have seven cases every Friday set for trial—every Friday, and that's jamming cases.

**PROFESSOR SUBRIN.** Some of the judges tell me that their colleagues are willing to try cases if they aren't hearing an appellate case, and that could help relieve the backlog, right?

**JUDICIAL PARTICIPANT.** If they can do it.

**PROFESSOR SUBRIN.** If they can do it.

**JUDICIAL PARTICIPANT.** But now we're reaching a big backlog of cases.

**PROFESSOR SUBRIN.** Well, that's refreshing to hear that there's a backlog of people who want to try cases.

# THE JUDGES' COMMENTS

In each of the discussion groups, the judges were invited to consider identical pre-ordained questions relating to the papers and oral remarks. The judges devoted more time to some questions than to others, and they raised other interesting topics.

Remarks made by judges during the discussions are excerpted below, arranged according to the discussion questions. These remarks have been edited for clarity only, and the Forum Reporter did not intentionally alter the substance or apparent intent of any comments. Conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of agreement that arose out of the discussion groups, please see page 125 of this report. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

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## Judicial involvement with the rulemaking functions in state court systems

I am the supervising justice for both the civil rules and the criminal rules in our southern state. We have committees that are established by appointment of the court. Normally, that is done on my recommendation. I can call a committee any time I want to. I try to get an equal number of defense and plaintiff's bar and representation from the government of lawyers so that we have a great variety of people. What we are looking for is rules that are fair and equitable to everybody. I remind them regularly that the federal courts are courts of limited jurisdiction. Being courts of limited jurisdiction, you can't look at the federal rules and just do what they do. We are not overly impressed, I guess because of my attitude, by the federal rules. I have an equal number of lawyers who do federal practice on those committees.

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No one on our court—in fact, no one in our courts at all—is involved in rulemaking. It's totally legislatively determined.

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In our midwestern state the Supreme Court promulgates all rules, does not have a standing committee, takes input from everybody, and makes a decision by majority of the justices. Most of our Supreme Court Justices were nominated or elected on a platform of justice system “reform,” meaning limiting access to the courts.

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Our state constitution makes the Supreme Court responsible for rules of practice, pleading, and procedure in our state. We adopt all of the rules for practice, pleading, and procedure in the state. We get recommendations from civil and criminal practice committees.

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I am substantially involved. I've really got a second full-time job rewriting all of our rules of procedure from appellate to civil to family on down. I have spent probably a couple thousand hours on it so far.

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I'm on our superior court, which is the trial court. I am the chair of the Rules Committee. We write all of the rules. The trial court has designated authority to write the rules. What were they thinking, right? But that is what we do.

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We've had a great deal of controversy in our state because of the constitutional provision that leaves rules of practice, pleading, and procedure with the court. We have run up against our rules conflicting with legislation, particularly in the area of civil justice reform. Our position is that, under the state constitution, our rules are supreme to any legislation concerning practice, pleading, and procedure. In the last two sessions, there has been an attempt to get a constitutional amendment placed before the people to remove that authority, so far unsuccessfully.

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In our southwestern state the bar association has the ability, in their annual meetings, to propose rule changes, which ultimately have to be approved by the Supreme Court.

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Our state's civil rules committee is appointed by the chief justice of the Supreme Court. By practice, not by rule, it is a 50/50 split between plaintiff and defense. They try to have a representation from the big cities and the smaller counties, and they also usually have one to three judges there. They are very intense sessions, with a lot of discussion.

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Our legislature has given sole rulemaking duties to the Supreme Court, and the legislature in fact likes the way the Supreme Court has handled the rule making so much that, many times when they pass new legislation, they'll say "We're delegating to the Supreme Court the task of writing the rules on how this legislation will operate."

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In our state, the rulemaking authority is with the legislature. There are advisory committees, but there are fewer and fewer lawyers in our state legislature. The leaders of both houses are lawyers, but from very small towns, and their view of what is a problem and what isn't a problem, I think, is through the prism of what they see.

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In our state we have a Republican-dominated legislature who would like to take the rulemaking function from the courts. They try every year to do it, and will likely be successful in 2017 when we convene our constitutional revision commission where they will finally get their way. They stripped us of everything else—every dime, everything. So they are going to get our rulemaking function soon. It's just a matter of time. Conservative legislatures are very distrustful of courts. They want all the control they can get from us. I think that is no secret.

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I don't think it is necessarily party-driven. I think it is cult- and personality-driven, depending on who has control.

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I will tell you that I have to take issue with the notion that the rulemaking process is in any way directed by the partisan association of judges. Frankly, I think the suggestion that we act that way impugns our life work.

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In our state, the legislature is almost God. They have plenary powers unless it is taken away by the constitution.

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In our mid-Atlantic state the civil rules are enacted by the legislature. But the chief judge has rulemaking authority and administrative powers.

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Our state Supreme Court votes on all the rules and is very protective of that right, although it is not explicit in the constitution. We feel that it is part of the separation of powers that we get to say what goes on in the courts. We have from time to time invalidated legislative enactments that have encroached on that power.

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In our midwestern state our Supreme Court has the authority under the constitution. In fact, we even pushed back on separation of powers issues if the legislature tries to wander into our bailiwick.

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Our border state court occasionally will strike down statutes as violations of separation of powers if the Supreme Court feels they have attempted to put a procedural civil rule or criminal rule into a substantive statute.

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Our legislature can create or pass rules, laws with a two-thirds majority vote that can override any rules and procedure that are promulgated by the Supreme Court.

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In 1981, our state legislature controlled all the rules of the court system and the court arrogated to itself the power as a third judicial branch of government to hold all rules adopted by the legislature to be void and enacting the rules. It has been that way ever since. The Supreme Court decides the rule.

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In our state we don't have formal rules committees for changes to the rules of civil procedure or the rules of evidence. That's all done by our legislature. Our legislature keeps an iron fist on our judiciary. Within the last year we became a *Daubert* state pursuant to a change in rules of evidence that our legislature adopted.

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For our rules of civil procedure or criminal procedure, or any of them regarding discovery, we have pretty much no input. Our legislature does it entirely, and generally does not seek our opinion on it or care what our opinion on it might be. And they have certainly done some changes that we find interesting.

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I have never felt that there was any sort of a political agenda as to the rulemaking in the courts.

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## Have you seen evidence of a “counterrevolution against litigation”?

I would say yes, but what I really started thinking about is how much have the judiciaries also been responsible for that, with the real push toward ADR from the courts themselves.

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I would identify our state legislature and the chamber of commerce organizations as the biggest organizations to do whatever they can to limit litigation, medical malpractice, statute after statute, making it more difficult. The chamber of commerce campaigns against judges every election cycle based upon how “business-friendly” or unfriendly we are. There is a war going on. It is hard for our local organizations that specialize in litigation even to get members anymore because nobody can try enough cases. They have to change the number of cases.

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I’m from probably the reddest state in the nation and I will tell you that the number-one policy problem we have is that the legislature is convinced that all litigation is frivolous, and they are constantly taking measures to restrain “frivolous litigation.” And there is a constant tension between the legislature and the judiciary, and we may be soon headed toward a constitutional crisis in terms of separation.

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Certainly there was a counterrevolution in the 1990s with medical negligence, tort reform laws, and damage caps, and our state has adopted the federal rule amendments on e-discovery, and I do think that makes a difference.

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There is a legislative counterrevolution, but not a rulemaking counterrevolution. But it has an impact on rulemaking.

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I don’t think there is a counterrevolution against litigation. There is a counterrevolution against *trials*.

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I think we are seeing people with money trying to buy the privilege. We are not the first state that that has happened in. I think you see the pro-business and the backlash and the pushing forward of the federal rules. There is a lot of political pressure on courts where you have the courts making the rules.

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I believe the federal court has seen a counterrevolution, but not our state, absolutely not. We have never been one that has been following federal.

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As to the counterrevolution, I have not seen that in our state, and even if it were proposed, it would take years before our rules committee would actually move something like that up to the court of appeals.

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I think it really depends on who are the better lobbyists and who is in power. There is always a push that way. The plaintiff bar will push the other way. It depends who controls which house or not.

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—Well, there could be an argument that there are too many lawsuits, and that’s the first argument. There are way too many lawsuits going on and too many frivolous lawsuits going on, and it’s expensive to litigate those.

—You know, I’ve been a trial judge for 28 years. I’ve never had a frivolous lawsuit. Arbitration has gotten rid of most of that. We’ve seen our trial work diminished considerably as a result of arbitration. Everyone believing that the federal rules controls everything and there’s no leeway, if you will, and no access to the court if you want to.

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The closest thing I have seen to a counterrevolution was during the late 1990s, when they did all the tort reform in the legislature. You can change the rules all you want, but the effect I found was that it poisoned the jury pool. There was a huge amount of advertising about lawsuit abuse, about unfair juries, about runaway juries, and it was in all the media, and it affected the jury pool more than anything you can imagine. It changed the juries from being skeptical to being corrosively cynical. Before that happened, I never dismissed a jury panel. After it happened, I had to bust jury panels on a regular basis.

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Of course there is a counterrevolution. There is the national Chamber's campaign to elect pro-business judges, for instance. Pro-business judges. It is like you are having the Georgia/Florida football game. Is it okay to have a pro-Georgia referee? How is that legitimate? All of this is deliberate. I think like all power and all politics, they do this because they can.

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Can a counterrevolution continue for 30 years before becoming a revolution of its own?

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## Indications of a “counterrevolution” observed by the judges

People have been abandoning the court system, for whatever reasons, and we want to get people back in the court system to use it, rather than run to mediation and arbitration and those things. That is what we are trying to do. I don't know if we can compete. We are going to give them a run for their money.

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What I see, like everybody else, is a decline in the caseload with respect to civil litigation.

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I think there is generally a recognition that trial resources are scarce resources. We do not have money. We do not have the court rooms. We do not have the resources to try the cases we used to be able to try. The filter mesh is getting finer.

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—We're seeing absolutely no increase in the number of cases that go to trial.

—More filing, fewer trials.

—Decrease. Way down.

—In 1992, in our county in our southeastern state, we tried 176 civil trials to verdict. At the end of June of this year, we tried our seventh so far this year. The number about two years ago was 28. The numbers are way down. It is just crazy.

—In our border state what we have seen is an increase in motions to force arbitration.

—Our trial rate in our county in our southwestern state is half a percent in civil cases. I would say that is not necessarily a bad thing for plaintiffs. If you want to reduce a plaintiff's case to a value of zero, bring it to one of our juries. They will do it for you most of the time. The diminishing trial rate is not necessarily a reflection of a systemic bias one way or another. I think it is a reflection of how much it costs to bring a case to trial.

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What I saw as a trial judge and now as an appellate judge is this development of this private body of law because of so many arbitration clauses to try to stay out of public forums. When you compound that with the degree of mediation that seems to be encouraged, forced, whatever the rule may be, it really takes people out of the trial system. It seems that there is this multilayer approach to keep or prevent people from airing their grievances in a public forum in a trial. The thought is, “Oh, we are streamlining so well by going into private forums.” With arbitration, we don’t know there is a whole other body of law with respect to quantum and how people are resolving these differences.

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—They have *Daubert* hearings on whether or not cutting the wrong fallopian tube leads to infertility. They *Daubert* everything. I think that is the point. It is our version of proportionality. It is an issue that causes a lot of hearings that are completely unnecessary, and it costs a lot of unnecessary money.

—If something is accepted, though, in the scientific community, then you don’t have to have a hearing. It is generally accepted.

—Yes, you do. To establish that it is generally accepted.

—They make the motion and you have to produce an expert. It produces a hearing and extra litigation.

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We’re seeing arbitration clauses written in every nursing home contract now. And we’ve seen a lot of litigation over those, as to whether or not they provide adequate remedy to the plaintiffs and if not, whether certain provisions are severable or whether the whole thing gets thrown out.

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I’m from a pretty blue state, so I have to say that apart from arbitration, which has been percolating and being addressed, and been overturned by the Supreme Court, I have not been aware of issues involving rulemaking. But now that proportionality has been brought to our attention I am looking at it in a slightly different light than when it was before us.

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I have spent 24½ years in the state court system throughout various levels. It never occurred to me when I was buying into the concept of arbitration where we have ended up. I still think it is a very valuable tool.

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Our arbitration system has become not a cottage industry, but a kind of a *mansion* industry from retired judges making so much money off of this thing. The wealthy people are going into arbitration. The regular folk are staying with the court system. They can’t afford those arbitration fees.

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I think the business community is trying to stay out of the courtroom.

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We have had a tremendous amount of litigation about whether or not these are actually enforceable arbitration agreements.

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They have been “reforming” our tort system for so many decades, you’d think it would be perfect by now.

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## Different procedural rules for different types of cases

I don't like the idea that your rights are limited or expanded depending on what kind of case you have. Everyone should have the same rights.

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On the specialty court thing, like mass tort litigation, complex cases, and business courts, some states have different types of procedural rules or hybrids. Ours does not. The rules that apply to general civil cases apply to our business court. The difference is that the judges apply them rigorously. There is predictability. One of the biggest problems we have is in discovery disputes; they are mostly resolved without written decisions, so you don't have a body of law to fall back on.

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Our challenge in our midwestern state is the huge number of pro se litigants. We are actually looking at making our rules easier. In our court of appeals right now, 25 percent of our cases are litigated pro se. The highly technical, highly complex rules don't allow people to even get in the door. We also have veterans courts, drug courts, mental health courts, probate courts, domestic relations courts, business court. We have all of these specialized dockets.

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I think there are two different concepts. You have specialized courts. I think most of us do have specialized courts for different areas versus complex rules for complex cases. But we have one set of rules, civil rules. They apply to all of the cases. I don't personally see a need to have a different set of rules for complex cases.

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Fundamentally, you have one set of rules for everybody so they have equal access to the courts. If you are trying a juvenile, it is different than if you are trying an adult. But the basic rules that govern your court—fairness, impartiality, and equal justice under law—don't change.

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If there is an expedited process that the parties can agree to, I think that is very effective, but I don't think it should be mandated. I think it should be by agreement of the parties that they want to limit discovery and move forward faster.

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I think the only different rule probably in most of our jurisdictions is if the case is complex. The standard and goals may be longer for a complex case than a simple case. I think that is the only difference.

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In our southern state we do have a different set of rules to expedite the smaller cases.

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We have business courts in our southeastern state. They are very strong. They have their own separate set of rules, including discovery rules. Sometimes there is tension between the business court rules and the other rules of discovery and evidence and we have to interpret what is the correct way to go in a particular case.

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In our state, it's unconstitutional to have a special legislation that affects only a small subset of cases, and that constitutional provision was the basis of the Supreme Court striking down legislative efforts to treat professional negligence and medical malpractice cases as different from other types of cases.

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Should there be different procedural rules depending on the case? I think it's pretty clear that, yes, there should be, whether it's small claims or the smaller, limited jurisdiction courts.

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We had a task force that developed a business court, and we have just made it formal. I think we have only had 40 cases in three years, but it is enough that the business community likes it. We have special judges assigned there and special settlement judges and it is working real well.

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Yes. I think it helps, quite frankly, that we have such divergent rules for different types of cases. Where you're talking about termination of parental rights, the rules need to be different than they would be for large-scale class action litigation. So having different rules to govern different types of cases is helpful. One pilot project we have had is in cases involving small amounts and creditors, putting those through an expedited proceeding. It limits the time it takes to produce and get discovery, and what we have found is that plaintiffs and defendants, attorneys on both sides, have liked the expedited litigation. So I think the fact that we do have these different sets of procedural rules has been a good thing.

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We do have authority over a wide variety of different matters. We must have 25 or 30 sets of rules, depending on the type of litigation involved. So each of us ordinarily takes on being a liaison to two or three, sometimes four or five rules committees. I currently have the civil appellate rules. I was liaison with more rules committees before I took over the lawyer discipline process. But we tend to spend a lot of time on rulemaking.

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In our southeastern state we don't by and large have different procedural rules for different cases and we don't have an official rocket docket. It just depends on who the judge is.

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In our southern state they divide the cases up in three different levels—simple to most complex, lowest to highest amount in controversy. Each level has a different number of hours available for depositions. Then they have limitations on the number of interrogatories you can send, based on the complexity of the case. It's all self-policing. You just check off the box when you file the case, so the impulse is to always make the case more complex than it is. But all these rules depend on the trial judge moving things along. The discovery issues are the bane of every judge's existence.

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The rules should be the same. \$5,000 for one individual may be just as important as a million dollars is for a corporation. We are all citizens, and should be equal under the law. So there should not be separate sets of rules for Walmart and for individuals.

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## Social benefits from broad availability of discovery and from litigation overall

I think the social benefits [of discovery] basically are the promotion of justice, which is what we are supposedly all about. In a broad sense, transparency achieves that. But then, of course, we have to balance that with economics.

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Is there a social benefit to scaling down discovery or a social benefit to scaling up? I think as a policy matter, this rule, whether it is the old one or the new one, this is the pivot. Discovery rules are the pivot behind what makes our judicial system valuable. If we can't deliver a just result in an economic matter, who is going to use us? Why would they?

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I think one of the questions is whether there are benefits that may not be quantifiable—whether there are benefits to society, not just the litigants, of having the broad availability of discovery.

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To get the social benefit of having a developing common law, you do need people in your trial system. We need to be making decisions that develop the common law if we are going to have a robust common law. It does require us to be fair to both sides in order to induce all parties to want to litigate their cases in the states courts, not always flee either to arbitration or to the federal courts. Sometimes they have that option. Certainly, those are issues very consciously to the forefront of our concerns.

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It really is a tough competition among the various interests. On one hand, we have discovered that cigarette manufacturers have purposefully put additives in their tobacco to make people addicted, and that to save \$100 on the Ford Pinto (this dates me!) they didn't put something between the gas tank and the rear bumper, at a cost of a considerable number of lives. You wonder, where does it ultimately play out? What ultimately is beneficial for the public versus beneficial for the system, which tends to get bogged down with ruthless lawyers on both sides? I don't know. It's a good question.

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The truth of the matter is the reason discovery cost is up is because the person who doesn't want you to discover it is the one who puts it in the silo in the first place. They know exactly where it is. When they are warehousing their problems, they are hiding them.

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Other than trial lawyers, has anybody seen anything in the media about people outside the legal arena complaining about there is too little litigation these days? No. Obviously, there are complaints about access to the justice system, itself.

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Quite frankly, as a judge, I am a little uncomfortable if people want to use my court to push a social agenda. That being said, I have also done a lot of work in the Middle East. If it were not for the American justice system, we wouldn't probably have five-mile-an-hour bumpers, which they do not have over there. If you look at a Toyota Corolla in Egypt and compare it to one in the United States, it is very different. It is also a lot cheaper. I wouldn't want to be in one in an accident. Now, is that a social benefit from litigation in the United States, which they don't have in Egypt? I don't know.

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If private enforcement is where you are going, instead of bureaucratic, administrative, governmental enforcement, then do you need broad discovery to make that policy work? I think that is the question.

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In the vast majority of cases, this is not really a big problem. There may be other ways where it becomes a problem. One of the areas where it becomes a problem is when plaintiffs and defendants try to leverage the tool of discovery for a benefit that is not related to the merits of the case. That is called stonewalling on the defense side, and over-broad discovery on the plaintiff's side. It is pervasive in a small segment of cases. It is from that, I think, you see all of this expensive abuse that is driving the discussion about why we need to change the rules.

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Certain groups gin up controversies so that they have legitimacy in what they are pushing forward. I hate to say it that way, but groups exist to create issues so they can continue to exist. They can sell an agenda to raise money on the idea that we are being hurt because of fishing expeditions.

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I am not particularly interested in the social side. I am interested in the litigants in front of us and what the effect is on that.

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I think it affects public confidence in the court. That is a social benefit.

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It's about basic safety. You can learn things in discovery about certain products or certain things. I built a swimming pool not too many years ago. I was talking to the builder of the pool. In the bottom you have two suction drains eight feet away from each other. I was talking to him about it. I did not even realize about all the lawsuits when there were single drains. How much does it cost to add that extra suction? \$25. Countless children were killed by the single suction. My brother-in-law is a colorectal surgeon, and he had two patients who were little children who, because some of those pools are still out there, had their intestines sucked out. It's basic safety.

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The fastest way to defang the litigation system and shove it all into arbitration is to make the court system as inefficient as possible. If you believe that litigation has some social value, then you better do it efficiently or it is going to lose ground further to arbitration. I would suggest that unfettered discovery that results in inefficiency has the opposite of the social value that the proponents of traditional litigation are trying to achieve.

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I do not think there is any argument that litigation has broad social benefits. The discovery piece of that I think is a little trickier question to answer.

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The benefit is in the development of the common law. That is how the common law developed. Otherwise, it is just private law.

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The social utility of public trials is paramount to our whole system of justice. When you look at a rule that starts to attack discovery, you just say, “Wait, is this another opportunity to keep you from getting enough to defeat a summary judgment so you can get in a court?” I just question that.

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Do we think that what we do has a social value? Sure.

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## Factors that contribute to, or undercut, the legitimacy of the court rulemaking process

Rulemaking is more like sausage making than we would like to think maybe. There is stuff that happens that is like legislation. Stuff happens in committees. You end up with a product that may or may not be the result of careful study and rational consideration and analysis. For states, the question then is, do you trust that process implicitly or do you want to take a closer look at it?

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In the process we employ in our state, all of our meetings are open to the public. All of our petitions for rule amendments are posted online. Any human being anywhere in the world is able to file a comment on them on our rules forum. There is absolute transparency. I don’t think it is possible to criticize the process when you have that transparency.

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I hadn’t really thought about it until this discussion, but in my mid-Atlantic state we have a blue ribbon committee that makes the rules, but it’s almost like a club. You get tapped by someone to come in and it’s all very hush-hush. From the people that I know that are in the group, it’s probably a pretty homogenous group and homogenous in thinking.

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It’s like a secret society.

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—In our western state, there is tremendous conflict between the judiciary and the legislature on control of the rules.

—Conflict means that both sides have leverage, and in my southeastern state, the legislature does everything. So there’s no conflict, because there’s not much we can do. They pass statutes saying that the rules of evidence and the rules of civil procedure are statutory.

—Our southeastern state similarly has a disarmed judiciary. We do not have a unified court system, so each of our classes of courts makes their own rules. Our Supreme Court is not in a position to compete head to head with the legislature about who is going to make the rules that affect the system overall.

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Balance all sides. Even as judges, we are all biased.

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A lot of times the appointer of the rulemaking committee knows where they want to go. They appoint likeminded people or people they know will support their position.

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It’s good to have a cross section of people. Better rules that way.

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I would say it is a lack of transparency, the lack of diversity geographically, ethnically, and by practice area, and a lack of independence.

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It is true and it always has been and always will be true that advocacy groups from the business industry, from manufacturers, to plaintiffs' interest, to children's groups, everybody is going to weigh in as they feel necessary and appropriate to try to influence rules and influence procedures, to influence the outcome of future litigation for those who they represent. That is a natural part of democracy. We face it all the time and always will. It is not a bad thing.

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It's who appoints the committees and who is appointed to the committee. Obviously, it is not all that legitimate if one person with a bias appoints only biased members to a committee.

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If the rules are generated for the purpose of reducing the court's docket as opposed to a legitimate reason for them.

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Whether or not you take public comments seriously or is it just, "Okay, tell us what you think, and then we're going to do it anyway"?

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A blog wouldn't be a bad idea.

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Lack of actual citizen input.

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Once you have a good rule, you have to make sure that it is followed, that the lawyers are participating. The judges are participating. They put together a rule that makes sense. The big thing is making sure that you enforce that rule. I see it time and again with judges. They do not follow their own rules.

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You have to be aware of democracy. When I first started, we had a rule saying you should not discriminate against race, sex or sexual orientation. Our state Supreme Court took that and said, "Screw that. We are cutting out sexual orientation." Thanks to one of our justices, we later changed that, on a 4-3 vote. And then the next thing came up—a friend of mine said, "What about transgender?" Two other states had a rule on that. The seven largest firms sent a letter to the court, and we sent it on to the state bar, which has committees that go on forever. Nothing would be done. We just went ahead and passed it, 4-3. We had no committee, no process. We just passed it.

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## Is uniformity with the federal courts, or with other state systems, a goal for your state court system's rulemakers?

No.

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It used to be that the Federal courts were doing pretty much the same thing we were. It's just that they were doing it as between citizens of different states and we were doing it with citizens within our own states. Now what they do is qualitatively so much different from what we do and I think a lot of what they're doing doesn't make sense [to state courts] now like it used to. For the first 20 years, the feds would change their rules, and our western state's rules advisory committee would look at it and say, "Yeah, why not? Let's, in the interest of uniformity, adopt them; they're all pretty sensible." In the last couple of decades, that has no longer been the deal. I think a lot of what they are doing now is not helpful, and states probably ought to give up on uniformity as a goal in itself.

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We are not overly concerned with uniformity. We shouldn't be worried about tapping into a body of federal case law. The last thing I need to see is somebody citing 16 F.R.D. decisions to tell me how to interpret a state rule. Our chief told our taskforce, "If you need to look at a court decision to understand the rule you just wrote, you have failed."

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Uniformity is not terribly important. Our state Rule 12(b)(6) is the same as the federal rule, but we rejected *Iqbal!*

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What we are highlighting is the tremendous difference between state and federal court. We have a bunch of cases. They have a few cases. We have general sovereignty over everything. They have a little bit. They are limited. They don't know what domestic relations is.

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The federal court system is so different. They have so much more money. They are not elected. Most of us are elected. They can do whatever they want without any fear of retribution.

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It is not a goal in my state.

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I think uniformity happens, but it is not a goal. It is not an objective to try to be uniform with other states, although that is a foreseeable outcome of consulting other states in promulgating your own rules so you don't reinvent the wheel.

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The interpretation of any statute or any rule is where the problems begin. I think we have all written Rule 26 differently. I see Rule 26 as being favorable to the plaintiffs in our jurisdiction. I think it just kind of depends on the interpretation.

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In our western state we take what we like and then we just reject the rest of it or adapt it. We don't feel this slavish need to follow federal interpretation.

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The states are supposed to be the independent laboratories for the federal model. We are supposed to be testing these things out. The feds are supposed to be adopting our things and not the other way around. Now, it is all coming from above.

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I don't know if it is the goal of our mountain state rules committee. Some of our case law talks about being uniform "when we can." I think that maybe clients will appreciate uniformity because that gives them more predictability. Predictability should not be espoused at the expense of fairness.

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For some reason, the people in our western state have a disdain for uniformity, unless everyone signs on to what our state does. Although there have been moments when federal rules have seemed attractive, and we sometimes follow policy biases, like for summary judgment. For the most part, we tend to chart our own course for good or ill. Uniformity is not a prime value. In our judicial council there are interest groups involved, each with their own ax to grind.

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In our southeastern state, our legislature is not a big fan of the federal government, so they might substantively adopt the rules but they would never admit it.

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Our midwestern state has adopted the Federal Rules of Evidence almost completely. Not totally, but really close. But when it comes to Federal Rules of Civil Procedure, our state has not really been particularly lockstep with the federal. There are a lot of similarities, but I think again we're just dealing with a different group of problems. I think we have just kind of a different clientele, and we need to tailor our rules for that clientele.

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You hear about states' rights, states' rights, states' rights. Why doesn't that hue and cry for states' rights that we hear in civil rights cases and constitutional cases, come up when we're talking about civil procedure?

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Quite frankly, no, it is not oriented to be uniform. We look for those that work for us, and we have not adopted everything.

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Fifty years ago when the new rules came out, we adopted them mostly. Since then we have been doing what I call regional variations on them, and we don't necessarily adopt a new rule just because the feds have it.

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We adopted a majority of the federal rules in 1980, but we haven't changed anything since then. So we have not benefited from any of the improvements or so-called improvements.

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No. At this point, I would tend to agree with Professor Miller. For instance, we haven't adopted the *Celotex* trilogy. [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).]

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Not adopting federal rules allows a state to do more or other things than the federal rules do.

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I am not sure the feds look to the states for good ideas.

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Uniformity per se is not important in my mind, but I think predictability is. I think that people should know when they go to court what the procedures are going to be, what's going to happen, all that. Sometimes uniformity leads to predictability.

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We have our own rules.

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## State courts' experimentation with court rules

There is that laboratory paradigm where we looked at other states and other counties in states, all the varieties and jurisdictions, to try to look for answers.

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We are trying to eliminate the power of the courts to sua sponte appoint special masters. It is an access to justice issue. Courts should lack the power to cause people to spend their money on private providers. Justice is a free service.

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In our mid-Atlantic state we have a summary jury trial system where the parties agree that they will try the case in one day, without a record, and with no right to appeal. Usually they stipulate to a high/low on the side, but it's not necessarily required. They are almost always personal injury cases, where the lawyers kind of know what the value is going to be.

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We now have this protocol where you file your complaint, and within a certain number of days you've got to make voluntary disclosures about who you're going to call and who knows about the facts and what you claim and the evidence you brought, without any request having been made. If the case is valued under \$50,000 you don't get any interrogatories; you only get three hours of deposition time. For \$50,000 to \$300,000 you get a few interrogatories, a little more deposition time. Above \$300,000, you get maybe 15 hours of deposition time, 20 interrogatories, including subparts and so forth.

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We have adopted many experimental procedures based upon incentives from the federal government.

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We increased the jurisdictional level of the municipal and the district courts. We consolidated the district courts so they had full-time judges.

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In my state we have a number of big city jurisdictions with commercial courts, with expert judges who can handle these cases. They don't want the cases to go to arbitration. They don't want the cases to go to Delaware. I think that is what a lot of states are going to be doing.

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One trend that is noteworthy, are "futures commissions." The bars are pulling these together to study the future of the profession in whatever state it is. They are very much influenced by the ABA's Futures Commission which was in turn very much influenced by the federal rules. They are looking at ways to radically change the way in which law is practiced, including how the courts function. They are focusing on

how we manage civil cases, on the technology that we use. They are focusing on the holy grail of docketing systems and processes. They say the purpose is to prepare the courts, which are 20th century institutions, to survive in the 21st century, but I think that the goal, principally, is to minimize utilization of civil court proceedings for dispute resolution and to undermine the judiciary.

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In our western state, they amended our rules of procedure in 2011 and created a different discovery structure and rule based upon the amount in controversy. We have a small claims court with a limit of \$10,000, and from there we have three tiers: \$30,000 to \$100,000, \$100,000 to \$250,000, and then above. You estimate the value of the case and designate the tier when you file the case. Available discovery depends on the level of the case. That seems to be working okay, except that the trial court judges are not yet strict on their enforcement, keeping each case to the tier that it has been filed in.

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I don't mind deadlines. What I like and what you get in the federal court that you don't see often enough in the state court is a scheduling order. Have deadlines for the disclosure of experts. Have deadlines for the filing of motions. That way you are actually able to get things done in a logical fashion and get everybody ready for trial in a fair way. I am fine with that.

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We have an informal discovery practice whereby the attorneys can talk to the judge. If you're in a deposition, you can call up and ask the judge a question.

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For the last 25 years, our state has had mandatory disclosures with real teeth that are actually substantive. Compliance isn't perfect, but if it were we wouldn't even need discovery. Discovery is a backstop to our mandatory disclosure requirements. It has been a very successful experiment.

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We tried to implement a rule for situations where you have let your property go blighted. We have multiple courts where those cases could come. They tried to run a "blight court" in our municipal court to make it a little bit easier for the municipality to grab the property back, but people explained to the mayor that there are really some due process issues here that we have to be careful about. It really didn't take off.

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We have been very frustrated in our state by the specialty courts. I know a lot of it is driven by federal money and funding for things like veterans courts. There are grants available. That is what drives a lot of the process. A lot of it is driven by elections, actually. You want to be the court that has this, so you come up with a work court, or a drug court, or a whatever court. We do allow specialty dockets, but they have to apply to us first and then explain what is involved. That doesn't keep people from calling them specialty courts, even though they are not, really.

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We have a pilot project for non-arbitrator appellate mediation.

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—We mediate appeals for nothing. We do it as volunteers. After they file a notice of appeal, if everybody approves, then we will mediate. They can pay a mediator if they want to at that point or they can get us for free.

—We have offered an appellate mediation program for six years now. It has been a spectacular failure. People are not taking advantage of it.

—Us, too. We have a 50 percent success rate.

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We don't change the rules according to the type of action.

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## Movements in state courts to adopt proportionality as a principle

Is there a movement? There will be when I get home.

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Our state adopted the initial federal rules. We haven't adopted a lot of the changes since then, and I don't think we would be inclined to adopt this proportionality rule, especially because the way I see it, when you adopt this proportionality, the defense can stonewall. It would be the plaintiff now that has the burden of showing that it's not disproportionate.

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Our state discovery code says discovery should be "inexpensive, speedy, and just." That is the only framework you need if you are the trial judge. More than one time, I have looked at the litigants as a trial judge and said, "You know what, discovery is to be inexpensive, speedy, and just, and none of that is going on in this case. Here is how you are going to do it. . . ." I don't think we need "proportionality." Within a context of inexpensive, speedy, and just, you can resolve any issue in front of you.

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Our state hasn't adopted it formally, and I don't think we are going to, but I think that in any complex litigation the judge needs to take control and oversee the discovery, so I think as a practical matter, proportionality does tend to factor in.

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Certainly it is the goal of our Republican legislature that we [have uniformity with the federal courts], which is why I think the Republican leaders, with the Chamber of Commerce, are pushing the proportionality rule to be adopted.

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In my view, proportionality has always been a part of discovery.

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Sometimes these limitations on discovery, from the state court perspective, really help the plaintiff, because the plaintiffs a lot of times are unrepresented and we are dealing with oppressive discovery against the plaintiffs.

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I reject the premise that proportionality is some evil mission to hurt plaintiffs. When you have discovery that is appropriate to the needs of the case, that allows parties to develop their case on the merits, but doesn't waste money, I don't see how that can be a bad thing.

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Before I came to this Forum I had never even heard of the proportionality principle. We don't pay any attention to the federal rules.

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I hope not. It is still new. In our western state we like to see what other states in our area are doing first.

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Regardless of what the rule says, what is really critical is how the rule is applied, and that depends on who the judge is. A lot of discretion is given to the trial court judge, and there is little supervision at the appellate court level. Regardless of what the rule says, we are not going to reverse a trial court judge.

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I honestly don't think it is a big deal. I think trial judges are going to use it as a tool to prevent abuses. Beyond that, it will be business as usual.

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—You are not going to see state trial judges doing 24-space matrices, obsessing like that.

—That guy has too much time on his hands.

—That is weird OCD stuff.

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A good trial judge would rather have fewer rules than more rules.

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That proposal has sense to it.

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If the burden is shifted to the plaintiff, and the plaintiff hasn't gotten much discovery done, how on earth are they going to know what to argue? It's going to make it much, much more difficult for the plaintiff to make an argument for discovery that may involve large numbers of records.

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I was a trial judge, and listening to you today, I just wonder how many times I made decisions strictly based on the rules that I probably wouldn't have if I had the background that you are giving me today. I feel terrible about being so rigid in applying the rules. I had no conception of what you are telling us today.

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## Changes that might result from adoption of the 2015 federal discovery amendments' "proportionality" test

To me, it's a tremendous limitation on what's discoverable.

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We already have a certain level of proportionality built into judicial adjudication of discovery disputes. I don't think anything would dramatically change.

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If the question is would it change the way discovery is done in our mid-Atlantic state, to me the answer would be absolutely, because we have a fairly broad discovery.

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[The proportionality test] is asking too much prognosticating. It presumes that I filed a lawsuit because something bad happened to my client and I am supposed to know everything that is connected to it. When you shift a burden or when you change a quantum of proof, it is going to have a long-term effect.

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I think the problem with the rule is that there is an unforeseen consequence. The proponents are going to argue that their request is relevant and proportional. The defendant is going to say, “No, it is not.” The judge is going to make a ruling that it is not proportional. Then something comes up at trial where it is not only relevant, but it is proportional, and it is too bad and too sad. So even if the ruling is correct at the time, there is an unforeseen consequence that it may be proportional and very important at the trial.

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Under this rule, it looks like you can look at how wealthy the plaintiff is and make that a factor. It says you can look at the party’s resources. This thing is just so problematic.

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My problem is the burden shifting. Nine times out of ten, it is the defendant who is raising these types of discovery objections, whether they are burdensome or irrelevant, not the plaintiff. The last part of the rule is whether the burden of the proposed discovery outweighs its likely benefit. To me, that is unduly burdensome right there.

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I would get a lot more motions practice on discovery brought at the trial court level. I don’t have a magistrate to sort it out for me.

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The appellate courts would get either more writs or writs on protective orders, or appeals from decisions on discovery. Even though it has increased in recent years, the appellate courts are still not that involved in discovery issues. That is generally handled at the trial level. It is an unusual circumstance for it to be before us on appeal.

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—Nothing.

—The trial judges may see a few more motions.

—In essence, it will be more expensive for the companies.

—If it got really bad, then the legislature would step in and write their own rules. That would depend upon which ox is gored the most. The defense bar probably would be. They would get something done.

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In our midwestern state, it seems to me that the change is in who has the burden to show the need for discovery. We went from a philosophy of being able to discover everything, and then have a fair trial with the information, to where now the burden is on the person who wants the information to absolutely be justified at all costs—but you don’t always have all the facts and the information, because the other side has the facts and the information in the big cases.

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It would shift the burden to the proponent of the discovery.



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## Electronic Discovery

I found it difficult to concede that electronic storage has actually made discovery more expensive. I did a class action back in the day and was all over the country pulling documents from warehouses, paper by paper, and packing up thousands of boxes to send to plaintiffs, with nothing to do but review it by hand. I can't accept that doing it electronically is more expensive, even if you count in the cost of having an IT department search for it.

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I just had a medical malpractice case involving a young doctor who unfortunately died while she was in the hospital. She had a computer. She had a phone. She had a tablet. The hospital wanted all of her metadata from all of those devices. The plaintiff's lawyer wanted all of the conversations had by every doctor who touched her while she was there (for only three or four days). They wanted all of their doctors' tablets, their emails. So they all came to me.

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If you type up a letter or a document in your business and it is a rather damning letter or document and then as something evolves, you keep amending it and changing it, but never saving the previous versions, the trail of those previous versions is retrievable through a forensic computer person that your regular search engine is not going to get.

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There is now a vast sea of information where there used to be conversations or phone calls that were not retrievable. Those documents need to be reviewed by counsel, for example, to check for privilege or other things, in order to decide what of those 10,000 emails they should actually produce. So I think the costs are partly because of the volume and partly because of the document review that becomes necessary for corporate documents.

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With paper, you had to go through every piece of paper and look for a relevant document. With computer technology, you can run searches to draw out the relevant documents without looking at every piece of paper. Further, if it is a large litigation, you can also use computer technology to code and review the documents and have fewer attorney bodies working on the documents. In fact, technology-assisted review consistently is shown to more accurately code and identify relevant documents than human reviewers.

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I think there is a little bit of gamesmanship going on with the claim that electronic discovery has made things more burdensome.

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## Discovery Abuse

I am in favor of proportionality. I was a trial lawyer for 17 years, and I was a trial judge for 12 years before I became a judge on the court of appeals. I was in a big law firm in our southern state for many years. I watched discovery abuses go on right in our firm, where we billed people into oblivion to keep the firm afloat so the partners at the top could make more money than they were entitled to. I watched it. I know it goes on. It still goes on.

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It is just a different culture where I am from. We haven't had a real problem with discovery abuse, except someone came from out of state and started doing that stuff. We have had disputes. Not everybody gives everything, but we try to work them out. If we can't, the court decides.

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I practiced law for 37 years before going on the bench, and I was involved in a lot of complex cases, some of which were very costly, I think it is a little offensive to say that people like me continue cases just to make money for the hell of it. We certainly did not do that. Most lawyers do not do that. It is unethical to do that. That is what leads to these popular misconceptions. Some cases are very expensive because they have to be. Others are not. I think occasionally that is the reason for sanctions. I think most lawyers act in good faith. It is our obligation to ensure that they do. When they don't, it is our obligation to punish them. I do not think we should have a presumption that lawyers continue cases just because they are making a hell of a lot of money. That is a very narrow subspecialty on the plaintiff side and the defense side.

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In discovery disputes the state is more litigious about discovery disputes than any private litigant I have ever seen. That is because they don't know where their tail is. They have a completely inefficient record keeping system, so they fight discovery. They increase the level of distrust toward government with each discovery request denied. If you want to maintain a stable society, you give people access to information in the court in the same way that they can get access on the darn internet.

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It seems to me that you have discovery to search for the truth, but you have discovery abuse. As a practitioner, I was either victimized by it or it was my partners (not me) who insisted on perpetrating it. If you leave it to the lawyers to try to figure out a differentiated case management program that allows a certain kind of case to go at a certain speed and another case might have expanded discovery, it makes a lot of sense to me because you limit the availability of abusive tactics. A small dollar case, you can't get a gazillion dollars' worth of discovery on and vice versa.

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## Case management

In our midwestern city we have a huge volume and some horribly complicated litigation in our state court system. We have seen a huge trend towards mediation. We have a section that deals with complicated commercial cases. The judges simply don't have time to try cases. There is a whole cadre of retired judges who serve privately as mediators to try to resolve the case. I did it myself as a trial court judge. We order them to hire a mediator privately, at their own expense, to resolve discovery disputes. I said, "I do not have time to go through this 279 page request for production of documents and try to decide that you get number 72 and you get number 113." It is just not a productive use of time.

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When I took over the court, there were 2,400 cases on my docket. The judge I took over from was somewhat lackadaisical, so I worked that docket crazy. I was sending cases to mediation. I was calling pretrial conferences. I was massaging the docket like crazy, and I got it down to about 900 cases and I backed off, because it's your lawsuit. I am here to help you resolve your dispute. It's not my lawsuit—within reason. First

continuance, sure you can have it. Second continuance, if both sides agree, probably. Third continuance? You come in here and tell me why you need a third continuance. Just practical stuff.

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I ran an informal “rocket docket.” I was just a small rural judge and I had a small enough caseload. I just said, “We are going to run these things through.” Our northwestern state is emphasizing case management by trial judges, and I haven’t been persuaded yet that there are problems with the rules that prevent trial judges from taking that active role.

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When lawyers come to me with disputes about every discovery request, I will say, “Go to the law library. Come back in an hour and a half. But don’t come back with 15 problems—come back with two problems, *real* problems.” It is crazy. It is a waste of time.

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## If a case goes to trial, has the judge failed?

No.

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If there is an issue, try it.

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What do you want your world to look like as a judge? What do you consider justice? Trials are so all-or-nothing. Plaintiffs (and their lawyers) often walk away with zero. If two people want to settle, and the rules allow this, why do we think that’s a bad thing? Everybody gets a little something,

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I think settlements are great, but in our state there is such a disincentive to go into trial. When I was a civil litigator, there were a bunch of jury verdicts upon which we could base a potential verdict. We would use that for settlement negotiations. We have nothing now. So who is doing it? It is all these mediators that are deciding what the value of a case is. There aren’t any standards set through written case law, and who knows what these mediators are actually relying on, what they are telling the lawyers?

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Why are we decrying the lack of jury trials if no one wants to try a case?

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So you say, “Plaintiff, don’t take that \$50,000. Go to trial.” Plaintiff goes to trial and loses. Do you then say, “Oh, but it was a level playing field. I leveled it out for you.”?

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I thought that’s what we were supposed do, is try cases.

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No.

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Most of the people in this room remember a time where we didn't have any mediation, no ADR at all, and it was going to solve the court's problems. We were trying too many cases. The system couldn't handle it. Now, we're victims of our own success. We've swung all the way back around and now we're trying to find a way to get ourselves out of this mess, to try more cases again. Hopefully I'll live long enough to see what the next cycle brings.

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The answer is no. The system has not failed. I would disagree with one of our speakers with the notion that you set a firm trial date in every case early on. That is a false premise. You can't set a firm trial date in every case early on because you don't have enough time in your life to try all of those cases. You have to choose the ones that are going to trial.

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If you tell me who the attorneys are, I can tell you if the case is going to trial.

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I think that our judgment isn't as important as the judgment of the parties and their rational judgments about do they want to settle a case.

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You want to encourage jury trials? Do away with discovery.

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If you never have a trial, it doesn't help the development of the common law. Jury trials are very important for that. That is another social benefit to me—citizen participation in making the law. Yes, they decide facts, but those facts drive the law. As a consequence, if you don't have jury participation, then you lose confidence in the judicial system because the citizenry is not participating. When you cut down on trials that is the result.

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Having your day in court is the whole idea.

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Most cases should settle, and there are many reasons for that. But there shouldn't be a situation, which there is now, where judicial management is making judges feel like if they don't settle cases they have failed somehow, or lawyers feeling like if they have to take a case to trial that they have failed somehow, or that some judge is being dinged because he or she didn't settle enough cases. And the bigger issue—and a much more serious issue—is, what is happening to the American jury trial? It is disappearing, and why is it disappearing? There are many reasons that we need to—as part of the profession—grapple with or we are going to lose our Sixth and Seventh Amendment rights to trial by jury. So yes, most cases should settle, but we should have jury trials. We have to have jurisprudence in order to continue on, and the only way we get that is from trying cases to conclusion, either to a judge or to a jury. But presumably to a jury. This is what makes up our democracy.

— *Panelist Donna Melby, during a visit to one of the discussion groups*

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## Judicial Relevance and Authority

We have no armies. If people don't have faith in the judiciary, and they don't look at us and say, "Yes, you have the power," then we have no power.

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Much of what happens in state judiciaries at this point is done based upon the way that the courts are administered. It is the administrative function of the court that is changing the characteristics in our states more than anything else. In many states, if we are going to be really, really honest about it, the state court administrator is more powerful than any given judge.

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It goes to core competency. What is the core competency of the court? To be perceived as fair. To administer what the public perceives is justice. To treat people with respect. Then you go to the National Center for State Courts and you learn that the core competency is in court tools. If people don't think we are relevant, we will not be relevant.

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# POINTS OF CONVERGENCE

In the discussion groups, the moderators were asked to note areas in which the judges' thinking on issues raised in the Forum appeared to converge. These observations were summarized and announced during the Closing Plenary.

## Judges' involvement with the rulemaking function

- Constitutional and political structures, which vary from state to state, dictate the level and extent of involvement of courts in creating rules.
- Judges reported the full spectrum of participation among the branches of government, ranging from full control of rulemaking by the state supreme court to full control by the legislature.
- Many state supreme courts make the rules, using committees for suggestions and drafts.
- Dissatisfaction with the state rulemaking process was noted in states where rulemaking is solely within the legislature, especially where legislators are primarily non-lawyers.
- There is broad involvement among the legal community in rulemaking, with various stakeholders involved: the bar association, the supreme court, and a significant number of lawyers.
- Many judges said they were involved in rulemaking; many others said they wish to be involved in the rulemaking process.
- The extent to which the rulemaking process is politicized varies from state to state.

## Is there a “counterrevolution against litigation”?

- Some judges did see what they thought was a “counterrevolution” in the push for non-court dispute resolution, for arbitration, for administrative agencies to handle legal issues, and for legislative tort “reform” measures to change substantive law (less so in the procedural area).
- Other judges had not. It depended on political and geographic factors, like the makeup of the legislature, the diversity of the state, etc.
- The claims about ever-increasing litigation do not square with reality. There is a noticeable movement away from dispute resolution in open court.
- While some judges do not see a “counterrevolution” against litigation in the rulemaking arena, they have witnessed aggressive efforts by pro-business interests to restrict plaintiffs' access to the courts, e.g. by electing pro-business judges and passing pro-business, anti-plaintiff legislation.
- Cases are being removed from the judges' domain by arbitration and mediation, and judges do not think this is a positive development.

## Should there be different procedural rules for different types of cases (e.g. complex v. simple, large amount in controversy v. small)?

- This may be a good idea, depending on whether the court is a limited or general jurisdiction court. But such rules should not limit the rights of the parties, especially with regard to access to justice.
- States are doing this to an extent, with specialized courts, judges, and rules.
- Judges from court systems with special rules generally found them helpful, but saw no need for adoption of the federal rules specifically.
- Establishing different sets of procedural rules for different kinds of cases seems to work if judicially—and judiciously—managed.
- Similar cases should be subject to the same basic procedural rules, with perhaps different docket-management techniques to reflect other differences.
- Some courts are experimenting with different rules for large and small amounts in controversy, if the parties consent to that approach. Most states are not doing this, however.
- Efficient process is more important than a perfect rule. The judge has to use discretion and deal with each case individually, according to the needs and complexity of that case.

## Social benefits of broad availability of discovery, and from litigation overall

- There is social benefit from litigation overall, particularly relating to safety issues.
- There should be a presumption in favor of discovery, and the party opposing discovery should bear the burden of demonstrating that discovery is not appropriate.
- When you limit discovery, you limit the scope of the information available to the judge and appellate court in evaluating the case.
- The broad availability of discovery forces businesses to improve their products and procedures.
- Well-managed discovery has a social benefit, but there was no real agreement as to what “well-managed” means.
- Discovery for discovery’s sake is not a value, but access to justice and transparency is very valuable, where it leads to the availability of impartial justice (as shown by, e.g., the asbestos litigation).
- Discovery creates opportunities to identify public hazards, helps to protect consumers, and assists with the development of consumer law.
- Costs associated with discovery disputes do not add value. Some discovery may be negative for the plaintiff if left unchecked—for instance, where the cost is greater than the case value.

## The legitimacy of the court rulemaking process

- Factors contributing to legitimacy:
  - Balanced committees;
  - An open, diverse, inclusive process, with opportunity for public comment;
  - Public comments that are earnestly considered;
  - Recognition that decision-makers don't know everything, and that rulemakers have biases;
  - Open meetings; and
  - Involvement in the rulemaking process by a broad cross-section of the bar.
- Factors undercutting legitimacy:
  - Influence of interest groups, which must be balanced by groups representing the public;
  - Lack of transparency, lack of diversity on committees (i.e. in practice areas, geography, ethnicity, and experience), lack of independence, lack of citizen input;
  - Powerful struggles with the legislature in states where the legislature controls rulemaking;
  - Too many committees; and
  - Attacks on judges as political actors, which undercut the legitimacy not only of rulemaking, but also of the courts themselves.

## Uniformity with the federal courts, or with the systems used by other states

- The federal rules may be useful reference points in certain cases, but uniformity alone is not an important goal—or at least should not dictate policy choices.
- There is no independent value in uniformity for uniformity's sake. The goal is efficacious procedures.
- Uniformity can lead to predictability.
- The goal of the legislature and the business community is to go to federal uniformity. But qualitatively, state courts handle different types of cases than do federal courts, therefore state civil rules must be different in order to be fair and just.
- The economics of the state and federal courts are totally different.
- Fact-pleading states have rules much different than the federal rules.
- Even within the state, rules may vary depending on the size of the docket.
- Codification of the common law, and the American Law Institute Restatements, have demonstrated an impulse toward uniformity—due to a common cultural belief that uniformity is good, when it isn't necessarily so.
- The federal system has superior resources, which state courts can't match, so achieving uniformity would be financially challenging for states.
- Some state systems emulate the federal Rule 11, but without its “safe harbor” provision.
- Special interest legislation undermines desirable uniformity.
- The trajectories of the state and federal courts have diverged. Uniformity with the federal rules used to be a goal in some states, but less so now.
- Fairness should trump predictability.

## Examples of state court experimentation with court rules

- An option to elect abbreviated procedures and get to trial faster.
- Mediation at the appellate level.
- Mandatory arbitration for cases of a specific monetary value.
- Court-ordered, but non-binding, settlement facilitation.
- Voluntary one-day summary jury trial, with no right of appeal.
- Different rules for small claims courts or commercial divisions.
- Individual judges devising their own rules.
- Mandatory initial disclosures.
- “Short-track” jury trials.
- Interlocutory intermediate appellate court.
- Fixed schedule for conference dates.
- Different rules for different amounts in controversy.
- Separate commercial dockets.
- “Futures commissions” to look into the function of the courts and the practice of law.
- Special procedures for family cases
  - Affidavit procedures for divorce cases, precluding trial.
  - Local rules authorizing informal discovery procedures and procedure specific to family cases.

## Movements or pressure to adopt the “proportionality” principle

- Many judges said there’s no such movement in their states.
- “That would be unrealistic in our state.”
- This is present in some states under different nomenclature, such as “burden of discovery” and “fee-shifting,” or using the term “appropriate” instead of “proportional.”
- Many judges felt that they already have proportionality, but not as an affirmative burden on the party seeking discovery. They felt that only in rare cases should the burden be on the requesting party.
- There is so much discretion for judges that the specific rule is less important.

## If a standard similar to the 2015 federal discovery “proportionality” test were adopted in your state, what would change, if anything?

- Even if the “proportionality” language were adopted, it might require appellate court action to implement it.
- It could change trial practice.
- Constitutional “open courts” provisions might override such procedures.
- More motions would be filed, and state court judges don’t have the staff to handle them the way the federal courts do.
- Adopting proportionality would make it more difficult for plaintiffs, because it would shift the burden to them to move to compel discovery.
- It would have little effect on appellate courts in states where they don’t have appeals from discovery rulings.
- It takes three to five years for a new rule to mature and for appellate courts to see its effect.
- Even if the rule changed, the standards of review would probably remain the same.

## If a case goes to trial, has the judge failed?

- No. It is the duty of the court to have trials, and litigants deserve their day in court.
- Only if the trial court doesn’t push the case toward trial.
- Firm trial dates can become settlement dates.
- The system is geared to talk the litigants out of trial.
- No. Jury trials provide a civics lesson. It’s important that some clients want to settle.
- Trials are important, but some lawyers don’t have trial experience.
- Costs are often *increased* by requiring arbitration or mediation.





# APPENDICES

## FACULTY BIOGRAPHIES

### PAPER WRITERS AND SPEAKERS

**STEPHEN B. BURBANK (MORNING PAPER CO-AUTHOR)** the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School, is the author of definitive works on federal court rulemaking, interjurisdictional preclusion, litigation sanctions, and judicial independence and accountability. Burbank is also an authority on international civil litigation, and has lectured and taught widely in Europe, serving in 2013 as the Herbert Smith Visitor to the Faculty of Law at Cambridge University. He was law clerk to Chief Justice Warren Burger in 1974–75, and served as the first General Counsel of the University of Pennsylvania from 1975 to 1980. He has been reporter of judicial discipline rules for the Third Circuit and of that circuit’s task force to study Rule 11, and wrote the task force’s report, *Rule 11 in Transition*. He was appointed by the Speaker of the U.S. House of Representatives to serve as a member of the National Commission on Judicial Discipline and Removal, and was a principal author of the Commission’s Report. Burbank’s co-edited collection of essays, *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH*, explores the problem of judicial independence from interdisciplinary and comparative perspectives.

Burbank is currently collaborating with Sean Farhang on a systematic empirical study of the counterrevolution against federal litigation—work that has yielded a series of articles and will culminate in a book to be published by Cambridge University Press in 2016. He frequently consults on complex litigation, and has mediated and arbitrated scores of complex disputes. He is a Life Member of the American Law Institute, and for many years served on the Board and Executive Committee of the American Judicature Society and chaired its Editorial Committee. Burbank also served as Chair of the Board of the American Academy of Political and Social Science. He is currently a Trustee of the American Academy in Berlin and, having served for nine years as Special Master of the National Football League, is the System Arbitrator of the NFL. Professor Burbank is an Academic Fellow of the Pound Civil Justice Institute.

**SEAN FARHANG (MORNING PAPER CO-AUTHOR)** is Professor of Law, and Associate Professor of Political Science and Public Policy, at the University of California at Berkeley. His research focuses mainly on civil litigation, the role of litigation and courts in regulatory implementation, and the causes and consequences of choices by Congress and the Supreme Court to mobilize or demobilize private enforcement of law through litigation. He is author of *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (Princeton University Press, 2010), which received the Gladys M. Kammerer Award from the American Political Science Association for the best book in the field of U.S. national policy, as well as the C. Herman Pritchett award for the best book on law and courts. His second book, *RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION* (with Stephen Burbank) is forthcoming on Cambridge University Press.

**STEPHEN N. SUBRIN (AFTERNOON PAPER CO-AUTHOR)** is a leading authority on civil procedure, and has published extensively on this subject, with an emphasis on procedural reform and the historical background of the Federal Rules of Civil Procedure. He has taught Civil Procedure, Evidence, Complex Litigation, Alternative Dispute Resolution, Federal Courts, Civil Trial Practice, and Law and Literature: Life as a Lawyer. He is coauthor of a seminal casebook, *CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT*. With Professor Margaret Y.K. Woo, he has written a text about American civil procedure for the Chinese legal community, published in Chinese, and *LITIGATING IN AMERICA, CIVIL PROCEDURE IN CONTEXT* (Aspen Publishers, 2006). Professor Subrin has taught Civil Procedure at Harvard Law School and Renmin University in Beijing, China, and Complex Litigation at Yale Law School. He has also taught Introduction to the American Legal System at the Cornell Summer Institute of International and Comparative Law in Paris. He was reporter to the Massachusetts Supreme Judicial Court's Standing Advisory Committee on Rules of Civil Procedure for 12 years, and was consultant to the reporter on the Local Rules Project of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Before joining the Northeastern University faculty in 1970, Professor Subrin practiced civil litigation and labor law for seven years with the Boston firm of Burns & Levinson, where he became a partner in 1966.

**THOMAS MAIN (AFTERNOON PAPER CO-AUTHOR)** is an expert in the fields of civil procedure, conflict of laws, and remedies. His scholarship focuses primarily on procedural history, with current projects examining judicial efficiency initiatives in the 1960s, 1970s, and 1980s. Professor Main is a former Chair of the Civil Procedure Section of the Association of American Law Schools. He is also an elected member of the International Association of Procedural Law and the American Law Institute. Prior to entering academia, he clerked for Judge Ruggero J. Aldisert of the U.S. Court of Appeals for the Third Circuit, was an associate in the trial department at the law firm of Hill & Barlow (Boston, MA), and was the associate general counsel of Platinum Equity (Los Angeles, CA). His articles have been published by the *UNIVERSITY OF PENNSYLVANIA LAW REVIEW*, the *WASHINGTON UNIVERSITY LAW REVIEW*, the *NOTRE DAME LAW REVIEW*, the *AMERICAN JOURNAL OF COMPARATIVE LAW*, and other respected journals. He has also authored books published by Aspen, West, Foundation Press, and Oxford University Press.

**ARTHUR R. MILLER, CBE (LUNCHEON SPEAKER)** is one of the nation's most respected and best-known legal scholars in the areas of civil litigation, copyright, unfair competition, and privacy. He is University Professor at New York University School of Law, Associate Dean of the NYU School of Professional Studies, Director of the Tisch Sports Institute, and Chairman of the NYU Sports & Society Program. He was formerly Bruce Bromley Professor of Law at Harvard Law School. He received his undergraduate degree from the University of Rochester and his law degree from Harvard Law School. He is the author or co-author of more than forty books, including Wright and Miller's *FEDERAL PRACTICE AND PROCEDURE* treatise and a civil procedure casebook with Professors Jack H. Friedenthal, Mary Kay Kane, and Helen Hershkoff. He has also written numerous articles on other subjects, including copyright and privacy issues. He maintains an active law practice, particularly in the federal appellate courts, and has served as a member and reporter for the Advisory Committee on Civil Rules of the Judicial Conference of the United States, as the Reporter for the American Law Institute's Project on Complex Litigation, and as a Commissioner on the United States Commission on New Technological Uses of Copyrighted Works.

Outside of the classroom, Professor Miller has had a parallel career as a media commentator on legal matters. He hosted the "Miller's Court" television series for eight years, served as legal editor of ABC's "Good Morning America" program, hosted Court TV's weekly "Miller's Law" series, and moderated several programs in the PBS Socratic dialogue series, "The Constitution: That Delicate Balance." In 2011, Queen Elizabeth II named him a Commander of the Order

of the British Empire for his charitable and media work. His more recent articles include *Are the Federal Courthouse Doors Closing? What's Happened To the Federal Rules of Civil Procedure?*, 43 Tex. Tech L. Rev. 587 (2011) and *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293 (2014) (Thrower Symposium keynote address).

**KATHLEEN FLYNN PETERSON (FORUM MODERATOR)** is President of the Pound Civil Justice Institute. She is a Registered Nurse, a certified civil trial specialist and a partner in the firm of Robins, Kaplan, Miller & Ciresi, LLP, in Minneapolis. She holds a B.A. degree in nursing from the College of St. Catherine, and a J.D. degree from the William Mitchell College of Law, *cum laude*. Her practice is focused on medical negligence litigation. She is a Fellow of the American College of Trial Lawyers, and is a member of the American Board of Trial Attorneys, the International Society of Barristers, the International Academy of Trial Lawyers, and the American Bar Foundation. In 2007-08 she served as president of the American Association for Justice. She has also served as president of the Minnesota Chapter of the American Board of Trial Attorneys and chair of the Minnesota State Committee of the American College of Trial Lawyers.

## PANELISTS

**JENNIE LEE ANDERSON** is Secretary of the Pound Civil Justice Institute. She is a founding partner of the San Francisco law firm of Andrus Anderson LLP, and represents plaintiffs in a variety of class and complex cases in both state and federal court, including consumer, antitrust, employment and product liability matters. Ms. Anderson has served as lead or liaison counsel in multiple state and nationwide class actions. Active in both the legislative and rule-making process, Ms. Anderson has testified before the federal Advisory Committee on Civil Rules of Civil Procedure, and has participated in several invitation-only conferences regarding proposed changes to the Federal Rules of Civil Procedure and to discovery and case management in state and federal cases. She also serves on the American Association for Justice Board of Governors, is the past Chair of the AAJ Class Action Litigation Group and Business Torts Section, and is a current Chair of the AAJ Antitrust Litigation Group. Ms. Anderson is also active in the American Bar Association's Class Actions and Derivative Suits Committee, the Consumer Attorneys of California and the San Francisco Trial Lawyers Association.

**HONORABLE ELIZABETH L. GLEICHER** has been a judge of Michigan's Second District Court of Appeals since 2007. In 2012 she was elected to a new six-year term. She received her bachelor's degree from Carleton College, her law degree from Wayne State University Law School, and was in private practice for 27 years. She is an elected Fellow of the International Society of Barristers and the American College of Trial Lawyers, and received the State Bar of Michigan Champion of Justice Award in 2001. Off the bench, Judge Gleicher is an adjunct professor at Wayne Law, teaching *Pretrial Advocacy and the Survey of Michigan Law*.

**HONORABLE HENRY KANTOR** has been an Oregon trial judge with the Multnomah County Circuit Court since 1995, presiding over thousands of civil and criminal jury and bench trials. Judge Kantor has managed many of his court's most complex civil cases and dockets. He regularly presents at CLE seminars, including a previous Pound Forum, and was invited to address the Federal Rules Committee at the 2010 Duke Law School Conference. Judge Kantor served 8 years on the Oregon Commission on Judicial Fitness and Disability and for several months pro tempore on the Oregon Court of Appeals. As a lawyer, he handled trials and appeals in complex civil litigation in state and federal courts, specializing in securities, banking and consumer class actions, and served 6 years on the Oregon Council on Court Procedures, responsible for the Oregon Rules of Civil Procedure. Judge Kantor was a member of the Oregon Trial

Lawyers Association and the Association of Trial Lawyers of America from 1979 to 1995. He graduated with a BA from the University of Pennsylvania in 1976 and a JD from the Northwestern School of Law of Lewis & Clark College in 1979. Judge Kantor lives in Portland, Oregon, with his wife Jill, who teaches English to Speakers of Other Languages at Portland Community College. They have 2 adult daughters doing interesting and worthwhile things.

**JOHN F. KUPPENS** is the First Vice President of DRI—The Voice of the Defense Bar, the international membership organization of lawyers involved in the defense of civil litigation. Mr. Kuppens is a partner with Nelson Mullins Riley & Scarborough LLP, where he practices in the areas of class action litigation, product liability litigation, commercial litigation, and consumer product risk prevention and regulatory counseling. He graduated with a BS in Accounting from Clemson University in 1986 and a JD from the University of South Carolina School of Law in 1989. He lives in Columbia, South Carolina, with his wife Jill.

**DONNA M. MELBY** is a nationally recognized business trial lawyer who represents Fortune 50 companies and their boards in many types of litigation. She is a member of the Paul Hastings litigation practice, co-chair of the firm's employment law practice in Los Angeles, co-chair of the firm's global diversity Committee, and chair of its Women's Initiative. She serves on the California Judicial Council—the policy making body of the California Judiciary, the largest in the United States—and on its Executive and Planning Committee and its Litigation Management Committee. A member of the Board of Directors of the National Center for State Courts for the last six years, she chairs the Lawyers Committee for the Center. She was appointed by the Conference of Chief Justices to the Civil Justice Initiative, a national initiative focused on improving the delivery of justice in the civil courts across the United States. She is a member of the American College of Trial Lawyers and the International Society of Barristers, and is past National President of the American Board of Trial Advocates (ABOTA).

**PATRICIA W. HATAMYAR MOORE** teaches at St. Thomas University School of Law in Miami, Florida. She has taught Civil Procedure, Evidence, Pre-Trial Litigation, Complex Litigation, Family Law, Trial Practice, and Advanced Topics in Civil Procedure. She received her B.A. in economics from Northwestern University, where she was a member of Phi Beta Kappa. She earned her J.D. with honors from the University of Chicago Law School, was an Associate Editor of the *UNIVERSITY OF CHICAGO LAW REVIEW*, and was selected to membership in the Order of the Coif. Following law school graduation, she practiced civil litigation with Sonnenschein, Nath & Rosenthal in Chicago, and was the first woman to rise through the ranks to partnership in the firm's litigation department. After eleven years in practice, Professor Moore joined the faculty at Oklahoma City University School of Law. She joined the St. Thomas faculty in 2009. Her recent publications include: *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177; *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 133 (2013); *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICHMOND L. REV. 603 (2012); and *The Effect of "Tort Reform" on Tort Case Filings*, 43 Valparaiso U. L. Rev. 559 (2009).

**ELISABETH M. STEIN** is Policy Counsel at the Constitutional Accountability Center ("CAC")—a think tank, law firm, and action center dedicated to fulfilling the progressive promise of the U.S. Constitution's text and history. She specializes in constitutional law, consumer protection, civil justice, and access to justice issues. Ms. Stein is the author of CAC's recent special report, *Tilting the Scales of Justice: Conservatives' Multi-Front Assault on Access to the Courts*, <http://theconstitution.org/think-tank/tilting-scales-justice-conservatives%E2%80%99-multi-front-assault-access-courts>. Prior to joining CAC, Ms. Stein was Federal Relations Counsel for the American Association for Justice. She also spent several years working on Capitol Hill, first as Judiciary Counsel to Congressman Henry C. "Hank" Johnson



and then as Counsel to the House Judiciary Committee, Subcommittee on Courts and Competition Policy, where she developed expertise in access-to-justice issues and court policy. Ms. Stein was previously in private practice at Fried, Frank, Harris, Shriver & Jacobson LLP. She received her J.D. from New York University School of Law and her B.A. from Wesleyan University.

**MICHAEL A. WOLFF** is Dean of St. Louis University School of Law. He returned to SLU Law after serving 13 years on the Supreme Court of Missouri, during which time he served as Chief Justice of Missouri from 2005 to 2007. In addition to his judicial duties, he served as chair of the Missouri Sentencing Advisory Commission. He received his bachelor's degree from Dartmouth College and his J.D. *cum laude* from the University of Minnesota Law School. He worked as a reporter for *The Minneapolis Star* (now the *Star Tribune*) during law school 1967-1970. Following graduation, he was a law clerk in the U.S. District Court in Minneapolis, and a Legal Assistance attorney in Minnesota, Colorado, and South Dakota. He taught for 23 years at SLU Law, and has also held faculty appointments in SLU's Department of Community the Medicine, School of Medicine and the School of Public Health. He has been a visiting professor at Sichuan University, Peoples Republic of China. Wolff served as chief counsel to Missouri Governor Mel Carnahan from January 1993 to August 1994, and special counsel to the governor from 1994-1998. He has received numerous awards for judicial excellence and public service. He is an Academic Fellow of the Pound Civil Justice Institute.

## DISCUSSION GROUP MODERATORS

**LINDA MILLER ATKINSON** is Of Counsel to the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Michigan and emeritus member of the Wisconsin and Georgia bars. A 1963 graduate of Oberlin College, Oberlin, Ohio, and a 1973 graduate of Wayne State University Law School in Detroit, Michigan, she is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, and of *LAWYERS DESK REFERENCE* (8<sup>th</sup> edition, Thomson-West), and is author of the "Depositions" chapter of *LITIGATING TORT CASES* (AAJ Press, published by Thomson-West). She received the American Association for Justice's Champion of Justice Award in 2007, the Trial Lawyer of the Year Award in 1995, and the Women Trial Lawyer's Caucus Marie Lambert Award in 2000. She is a past president of the Michigan Association for Justice, a member of the President's Club of the American Association for Justice, a Trustee of the Melvin M. Belli Society and Chair of the Belli Seminar Faculty, and a Fellow and Trustee of the Pound Civil Justice Institute. In her life outside the courtroom she is a certified Hunter Education Instructor and has provided outdoor emergency care with the National Ski Patrol for more than 20 years.

**LESLIE A. BRUECKNER** is a Senior Attorney with Public Justice—a national public interest law firm that specializes in socially significant and precedent-setting civil litigation. Ms. Brueckner graduated from U.C. Berkeley *summa cum laude* in 1983 and from Harvard Law School *magna cum laude* in 1987. She joined Public Justice in 1993, where her areas of practice include class actions, constitutional law, food safety, federal preemption, and combating court secrecy. Among other victories, Ms. Brueckner has won unanimous preemption rulings from the U.S. Supreme Court in *Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002) (boat safety), and from the California Supreme Court in *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal. 4th 298 (2015) (organic produce). In 2011, Ms. Brueckner became the director of Public Justice's Food Safety & Health Project, which seeks to hold corporations accountable for the manufacture, distribution and marketing of food and other products that endanger consumers' safety, health and

nutrition. Ms. Brueckner is counsel for one or more plaintiffs in a series of lawsuits challenging so-called “ag-gag” laws that seek to criminalize whistleblowing in animal agriculture and elsewhere. In 2012, Ms. Brueckner was honored by the Animal Legal Defense Fund with its Pro Bono Achievement Award for her work combatting the unsafe and inhumane treatment of animals on factory farms. In addition to her litigation work, Ms. Brueckner has taught appellate advocacy at American University Law School and Georgetown University School of Law. She is a Fellow of the Pound Civil Justice Institute.

**MARK P. CHALOS** is the managing partner of the Nashville, Tennessee office of Lief Cabraser Heimann & Bernstein, LLP, specializing in complex civil cases in federal courts in Tennessee and across the United States. He serves on the plaintiffs’ steering committee and as the federal/state litigation liaison in multi-district litigation concerning epidural steroid injections. He also works on product defect cases resulting in injuries or death or economic loss, and has held leadership roles in numerous complex civil cases. He is a co-author of *LITIGATING INTERNATIONAL TORTS IN UNITED STATES COURTS* (Thomson Reuters West, 2015 ed.), has published articles in *TRIAL Magazine* and *The Trial Lawyer*, and serves on the Editorial Board of the *Nashville Bar Journal*. He is a member of the American Association for Justice, chairs its Public Education Committee, and is a member of its Public Affairs Committee. He is a Fellow of Pound Civil Justice Institute and of the American Bar Foundation.

**KATHRYN H. CLARKE** is a sole practitioner in Portland, Oregon, who specializes in appellate practice and consultation on legal issues in complex tort litigation. She served as President of the Pound Civil Justice Institute from 2011 to 2013, and is currently a Trustee. She is a member of the Oregon Trial Lawyers Association, and has been a member of its Board of Governors for over 25 years, serving as President from 1995 to 1996; in 2006 she received that organization’s Distinguished Trial Lawyer award. She is also a member of the Board of Governors of the American Association for Justice. She was a member of the adjunct faculty at Lewis and Clark Law School, and taught a seminar in advanced torts for several years. In 2008 she served as a member of a work group on Tort Conflicts of Law for the Oregon Law Commission, which resulted in a bill passed by the 2009 legislature. She has served as member and Chair of Oregon’s Council on Court Procedures, and has been a member of the Oregon State Bar’s Uniform Civil Jury Instructions Committee.

**ANNIKA K. MARTIN** is a partner in the New York office of Lief Cabraser Heimann & Bernstein, LLP, specializing in mass tort, consumer protection, and environmental litigation, including the class action litigation arising from the 2010 *Deepwater Horizon* disaster in the Gulf of Mexico. She has also been involved with the *New England Compounding Pharmacy products liability litigation*, the *General Motors ignition switch litigation*, and other litigation involving vehicle product defects. She has published articles in the *Texas Journal of Women & the Law*, and in *Trial magazine*. She is a Fellow of the Pound Civil Justice Institute and an active member of the American Association for Justice.

**SHAWN J. MCCANN** received his B.S. degree from Villanova University and his J.D. degree from Loyola Law School, Los Angeles, where he served on the Entertainment Law Review. He is a partner in the firm of Banafsheh, Danesh & Javid, P.C., in Beverly Hills, California, specializing in wrongful death and catastrophic injury cases. He regularly lectures on trial skills and discovery at CLE programs, and serves on the board of governors of the Consumer Attorneys of California and on the Los Angeles County Bar Association’s Judicial Election Evaluation Committee. He is currently the Second Vice-President of the Consumer Attorneys of Los Angeles. He is a member of ABOTA and also serves on the executive committee of the Los Angeles Chapter. He is a Fellow and Trustee of the Pound Civil Justice Institute.

**ANDRE M. MURA** is a partner at Gibbs Law Group, LLP in Oakland, California, representing plaintiffs in class action and complex litigation concerning consumers' and workers' rights, products liability, drug and medical devices, federal jurisdiction, and constitutional law. Previously he was senior litigation counsel at the Center for Constitutional Litigation PC, in Washington, DC, where he represented plaintiffs in state and federal appellate courts, including the United States Supreme Court. In *Watts v. Lester E. Cox Medical Centers*, 376 S.W.3d 633 (Mo. 2012), Mura successfully argued that a state law limiting compensatory damages in medical malpractice cases violated his client's constitutional right to trial by jury. The Missouri Supreme Court's decision overruled a 20-year-old precedent. He is a regular contributor to Consumer Law Watch, a blog analyzing developments in the law of consumer class actions. He is a member of the Lawyers Committee of the National Center for State Courts, a member of the ABA Tort Trial and Insurance Practice Section (TIPS) Plaintiffs' Policy Task Force, and serves as vice-chair of the ABA-TIPS Appellate Advocacy Committee. He is also a member of the American Association for Justice and the Consumer Attorneys of California, and a Fellow of the Pound Civil Justice Institute.

**VALERIE M. NANNERY** will begin a year as the United States Supreme Court Fellow at the Federal Judicial Center in August, 2016. She is presently senior litigation counsel at the Center for Constitutional Litigation (CCL) in Washington, DC. She has briefed and argued cases in state and federal courts at both the trial and appellate levels, including merits briefing in the U.S. Supreme Court, and has monitored the federal rulemaking process on behalf of the American Association for Justice, including drafting comments on proposed rule amendments. Her practice includes constitutional challenges to caps on damages, personal jurisdiction issues, mandatory arbitration, federal preemption of state tort law causes of action, mass torts, and complex civil litigation generally. In 2008 she argued *Conte v. Wyeth*, 85 Cal.Rptr.3d 299, a precedent-setting decision of the California Court of Appeal that enabled consumers of prescription drugs to sue brand-name manufacturers of drugs for misrepresenting the risks associated with the drugs. Prior to joining CCL, Nannery was the Alan Morrison Supreme Court Assistance Project Fellow at Public Citizen Litigation Group, and an associate at Quinn Emanuel in Los Angeles, CA. She serves as a vice-chair of the ABA-TIPS's Appellate Advocacy Committee.

**WAYNE PARSONS** practices in Honolulu, Hawai'i. He received B.S. and M.S. degrees in engineering, physics and mathematics from the University of Michigan. He went to work with NASA on the Apollo space project, which took him to the astronomical observatory on the Island of Maui. After seeing Hawai'i, he went to the University of Michigan Law School and moved to Hawaii permanently. He specializes in personal injury matters for plaintiffs and engages in consumer advocacy in the construction industry. Mr. Parsons has been president of the Hawaii State Bar Association, was a founder of the Consumer Lawyers of Hawai'i, has served as a governor of the American Association for Justice and has been the Hawai'i chair of the Public Justice organization. He is a Fellow of the Pound Civil Justice Institute and a member of several construction, engineering and architecture organizations.

**GALE PEARSON** is senior partner of the law firm of Pearson, Randall & Schumacher, P.A., in Minneapolis. Her practice concentrates on environmental, pharmaceutical, medical device and corporate fraud litigation, including class actions. She received her bachelor's degree from California State University at Northridge with a major in Laboratory Medicine, Physics and Chemistry and her law degree from Loyola Law School in Los Angeles. She is a Certified Clinical Laboratory Scientist. She is a member of the Minnesota and American Associations for Justice and has served in the speakers bureaus for Minnesota's "We the Jury" project.

**JOHN VAIL** is the proprietor of John Vail Law PLLC, “An appellate voice for the trial bar.” Since 1997 Mr. Vail has focused his work solely on access to justice issues, representing clients in numerous state supreme courts and in the Supreme Court of the United States. He has received the Public Justice Achievement Award from Trial Lawyers for Public Justice for his “outstanding work and success challenging the constitutionality of legislation limiting injury victims’ access to justice.” His legal theories, and the evidence he has developed to support them, have been used widely to keep open the doors to America’s courtrooms. His articles, such as *Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. Sch. L. Rev. 323 (2006) and *Big Money v. The Framers*, Yale L.J. (The Pocket Part), Dec. 2005, <http://www.thepocketpart.org/2005/12/vail.html>, have enlivened scholarly debate and have guided practitioners. Mr. Vail spent seventeen years doing legal aid work, concentrating on major litigation to advance rights. He has been recognized by the legal services community for “inspired vision and outstanding leadership” and for “tireless devotion as a champion for the rights of low income people.” He was an original member of the Center for Constitutional Litigation, where he was Vice President and Senior Litigation Counsel. Mr. Vail has served as Professorial Lecturer in Law at the George Washington University School of Law. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

# JUDICIAL PARTICIPANTS

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Hon. Diane Johnsen, Court of Appeals, Division One

Hon. Peter Swann, Court of Appeals

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Hon. Josephine L. Hart, Supreme Court

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Hon. Mark Klingensmith, Fourth District Court of Appeal

Hon. Joseph Lewis, Jr., First District Court of Appeal

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Hon. Robert Morris, Second District Court of Appeal

Hon. William Palmer, Fifth District Court of Appeal

Hon. Sandra Perlman, Seventeenth Judicial Circuit Court

Hon. Lori Rowe, First District Court of Appeal

Hon. Carole Taylor, Fourth District Court of Appeal

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Hon. Paula Nakayama, Supreme Court

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Hon. Alexander P. White, Circuit Court of Cook County



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Hon. Edward Mansfield, Supreme Court

Hon. David Wiggins, Supreme Court

## **KANSAS**

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Hon. Kevin P. Moriarty, Johnson County Court

## **KENTUCKY**

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Hon. Joy Kramer, Court of Appeals

Hon. Irv Maze, Court of Appeals

Hon. Janet L. Stumbo, Court of Appeals

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Hon. Geraldine Hines, Supreme Judicial Court

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Hon. Cynthia Stephens, Court of Appeals

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## **NORTH CAROLINA**

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Hon. Susan Owens, Supreme Court

Hon. Laurel H. Siddoway, Court of Appeals

## **WEST VIRGINIA**

Hon. Brent Benjamin, Supreme Court

## **NON-JUDICIAL ATTENDEES**

Professor Stephen B. Bright, Yale Law School / Southern Center for Human Rights

# 2016 FORUM UNDERWRITERS

The Pound Civil Justice Institute's innovative judicial education program is possible only with the financial support of lawyers, law firms, and other organizations. The Institute gratefully acknowledges the support of the following 2016 contributors, whose generosity helps to assure that Pound will enrich the understanding of the law in courtrooms throughout the United States.

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Arkansas Trial Lawyers Association	Florida Justice Association	New Hampshire Association for Justice
Arnold & Itkin LLP	Georgia Trial Lawyers Association	New Jersey Association for Justice
Lisa Blue Baron	Kansas Assoc. for Justice, Legacy of Justice Foundation	New York State Trial Lawyers Association
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Connecticut Trial Lawyers Association	Maryland Association for Justice	Ohio Association for Justice
Consumer Attorneys Public Interest Foundation (CA)	Michigan Association for Justice	Oregon Trial Lawyers Association
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# ABOUT THE POUND CIVIL JUSTICE INSTITUTE

## What is the Pound Civil Justice Institute?

The Pound Civil Justice Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs and publications. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest scholars. The Pound Institute promotes ongoing dialogue among the academic, judicial, and legal communities on issues critical to protecting the right to trial by jury. At conferences, symposia, and judicial forums, in reports and publications, and through grants and awards, the Pound Institute promotes a balanced debate which brings positive changes to American jurisprudence and strives to guarantee access to justice.

## What Programs Does the Institute Sponsor?

**Annual Forum for State Appellate Court Judges**—Since 1992, Pound's Judges Forum has brought together judges from state supreme courts and intermediate appellate courts, legal scholars, practicing attorneys, and policymakers for open dialogue about major issues affecting the civil justice system. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as rule making, electronic discovery, mandatory arbitration, transparency in the courts, judicial independence, and the civil jury. The Forum is one of the Institute's most respected programs, and has often been called by jurists "one of the best seminars available to jurists in the country."

**Academic Symposia**—One of Pound's primary goals is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated its Academic Symposium, which seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. Symposia to date include *The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century* with Rutgers Center for Risk and Responsibility and Northeastern Law School (2016); *The "War" on the Civil Justice System* with Emory Law (2015); on medical malpractice with Vanderbilt Law School (2005); and on forced arbitration with Duke University Law School (2002). The academic papers prepared for the Symposia are published in the co-sponsoring law schools' Law Reviews.

**Appellate Advocacy Award**—The Institute established this award for legal practitioners in 2015 in an effort to recognize excellence in appellate advocacy in America and those who achieve it. The Award is given to attorney(s) who have been instrumental in securing a final appellate court decision with significant impact on the right to trial by jury, public health and safety, consumer rights, civil rights, and access to civil justice.

**Howard Twigg Memorial Lecture on Legal Professionalism**—Founded in 2010 to honor former Pound President Howard Twigg—a legal giant, consummate professional and champion of justice for Americans—this lecture series educates attorneys on legal ethics and professionalism. Lectures have been delivered by Prof. Stephen Bright of Yale Law School, Hon. Mark Bennett of U.S. District Court (IA), Hon. R. Fred Lewis of the Florida Supreme Court, Hon. James Kitchens of the Supreme Court of Mississippi, Oliver Diaz, formerly of the Supreme Court of Mississippi, and attorney Mark Mandell of Rhode Island.

**Papers of the Pound Institute**—Pound has an expansive collection of research resulting from its Judges Forums, Warren Conferences, academic research grants, Academic Symposia, Roundtable discussions, and other sponsored publications. Reports of these activities, called *Papers of the Pound Civil Justice Institute*, are available via Pound’s website ([www.poundinstitute.org](http://www.poundinstitute.org)) or by contacting the Pound Institute.

**Fellows Receptions**—Members of the Pound Institute, called Fellows, gather twice annually to celebrate the work of the Institute. Invited guests include the Officers and Trustees of the Pound Institute, Pound Fellows, legal academics, and judges.



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# PAPERS OF THE POUND CIVIL JUSTICE INSTITUTE

## Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for full viewing at [www.poundinstitute.org](http://www.poundinstitute.org).)

### 2016 • Who Will Write Your Rules—Your State Court or the Federal Judiciary?

Stephen B. Burbank, University of Pennsylvania Law School and Sean Farhang, University of California, Berkeley, School of Law, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*

Stephen Subrin, Northeastern University School of Law and Thomas Main, University of Nevada, Las Vegas, Boyd College of Law, *Should State Courts Follow the Federal System in Court Rulemaking and Procedural Practice?*

### 2015 • Judicial Transparency and the Rule of Law

Judith Resnik, Yale Law School, *Contracting Transparency: Public Courts, Privatizing Processes, and Democratic Practices*

Nancy Marder, IIT Chicago-Kent College of Law, *Judicial Transparency in the Twenty-First Century*

### 2014 • Forced Arbitration and the Fate of the 7th Amendment: The Core of America's Legal System at Stake?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*

Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Concepcion*

### 2013 • The War on the Judiciary: Can Independent Judging Survive?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*

Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

### 2012 • Justice Isn't Free: The Court Funding Crisis and Its Remedies

John T. Broderick, University of New Hampshire School of Law and Lawrence Friedman, New England School of Law, *State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

### 2011 • The Jury Trial Implosion: The Decline of Trial by Jury and its Significance for Appellate Courts

Marc Galanter, University of Wisconsin Law School and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

### 2010 • Back to the Future: Pleading Again in the Age of Dickens?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

### 2009 • Preemption: Will Traditional State Authority Survive?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption Against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

### 2008 • Summary Judgment on the Rise: Is Justice Falling?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*

Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending Against Summary Justice: The Role of the Appellate Courts*

### 2007 • The Least Dangerous But Most Vulnerable Branch: Judicial Independence and the Rights of Citizens

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of Minnesota v. White*

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

### 2006 • The Whole Truth? Experts, Evidence, and the Blindfolding of the Jury

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*

Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

**2005 • The Rule(s) of Law: Electronic Discovery and the Challenge of Rulemaking in the State Courts**

Linda S. Mullenix, University of Texas School of Law, *The Varieties of State Rulemaking Experience and the Consequences for Substantive and Procedural Fairness*

Hon. John L. Carroll, Dean, Cumberland School of Law at Samford University, *E-Discovery: A Case Study in Rulemaking by State and Federal Courts*

**2004 • Still Coequal? State Courts, Legislatures, and the Separation of Powers**

Robert F. Williams, Rutgers University School of Law-Camden, *Keeping Coequal: State Court Responses to Legislative Encroachment*

Helen Hershkoff, New York University School of Law, *Lawmaking and Judicial Review: What Degree of Deference Should State Courts Give to Legislative Findings?*

**2003 • The Privatization of Justice? Mandatory Arbitration and the State Courts**

Jean R. Sternlight, University of Nevada Boyd School of Law, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*

David S. Schwartz, University of Wisconsin-Madison Law School, *State Judges as Guardians of Federalism: Resisting the FAA's Encroachment on State Law*

**2002 • State Courts and Federal Authority: A Threat to Judicial Independence?**

Georgene M. Vairo, Loyola Law School, Los Angeles, *Trends in Federalism and What They Mean for the State Courts*

Hon. Frank J. Williams, Chief Justice of Rhode Island, *A Historical Perspective on Maintaining Judicial Independence, Luncheon Address*

Wendy E. Parmet, Northeastern University School of Law, *Issues State Courts Face When Considering Federal Preemption of State Court Procedures: An Analysis for State Judges*

**2001 • The Jury as Fact Finder and Community Presence in Civil Justice**

Neil Vidmar, Duke University Law School, *Juries, Judges, and Civil Justice*

Stephan Landsman, DePaul University College of Law, *Appellate Courts and Civil Juries*

**2000 • Open Courts with Sealed Files: Secrecy's Impact on American Justice**

Laurie Kratky Doré, Drake University Law School, *The Confidentiality Debate and the Push to Regulate Secrecy in Civil Litigation*

Richard A. Zitrin, University of San Francisco School of Law, *What Judges Can and Should Do About Secrecy in the Courts*

**1999 • Controversies Surrounding Discovery and Its Effect on the Courts**

Dean Robert Gilbert Johnston, John Marshall Law School, *Discovery: Facts and Myths*

Paul D. Carrington, Duke University Law School, *Recent Efforts to Change Discovery Rules: Do They Advance the Purposes of Discovery?*

**1998 • Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty"**

Robert O'Neil, University of Virginia School of Law, *Protecting Judicial Independence in a Politicized Environment*

Erwin Chemerinsky, University of Southern California Law School, *When Do Legislative Actions Threaten Judicial Independence?*

**1997 • Scientific Evidence in the Courts: Concepts and Controversies**

Sheila Jasanoff, Cornell University, *Judging Science: Issues, Assumptions, Models*

Michael H. Gottesman, Georgetown University Law Center, *Should State Courts Impose 'Reliability' Thresholds on the Admissibility of Expert Scientific Testimony Respecting Causation In Tort Cases?*

**1996 • Possible State Court Responses to American Law Institute's Proposed Restatement of Products Liability**

Marshall S. Shapo, Northwestern University Law School, *ALI Legislation as a Consumer Product: Should Courts Buy the Proposed Restatement of Products Liability?*

Oscar S. Gray, University of Maryland School of Law, *Potential Intermediate Positions Under the Proposed Products Liability Restatement*

**1995 • Preserving Access to Justice: The Impact on State Courts of the Proposed Long Range Plan for Federal Courts**

Jed Rubenfeld, Yale Law School, *The Federal Question*

Harlon Dalton, Yale Law School, *Judicial Federalism and Individual Rights*

**1993 • Preserving the Independence of the Judiciary: The Dual Challenge of Democracy and the Budget Crisis**

Stephen L. Carter, Yale Law School, *Does Democracy Threaten Judicial Independence?*

Ruth Wedgwood, Yale Law School, *Is There a Constitutional Claim to Minimum Funding of the Courts?*

**1992 • Protecting Individual Rights: The Role of State Constitutionalism**

Paul W. Kahn, Yale Law School, *Interpretation and Authority in State Constitutionalism*

Akhil Reed Amar, Yale Law School, *Using State Law to Protect Federal Constitutional Rights*

**Academic Symposia Cosponsored with Law Schools**

**2016 • The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century (Rutgers University Law Review, Vol. 69 (forthcoming May 2017))**

Northeastern University School of Law and Rutgers Center for Risk and Responsibility

**2015 • The “War” on the U.S. Civil Justice System (Emory Law Journal, Vol. 65, No. 6)**

Emory University School of Law

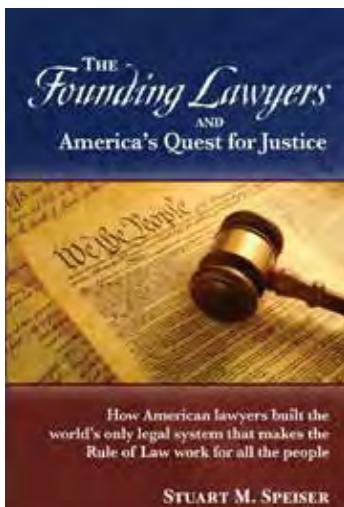
**2005 • Medical Malpractice (Vanderbilt Law Review, Vol. 59, No. 4)**

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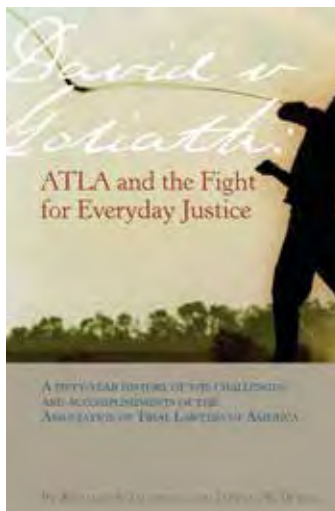
**2002 • Mandatory Arbitration (Law and Contemporary Problems, Vol. 67, No 1 & 2, Duke Law)**

Duke University School of Law

**Books distributed by the Pound Civil Justice Institute**



*The Founding Lawyers and America's Quest for Justice*  
by Stuart M. Speiser (2010)



*David v. Goliath: ATLA and the Fight for Everyday Justice*  
by Richard S. Jacobson & Jeffrey R. White (2004)  
(Free viewing and downloading at [www.poundinstitute.org](http://www.poundinstitute.org).)



*The Jury In America*  
by John Guinther (1988)

## Reports of the Chief Justice Earl Warren Conferences on Advocacy

1989 • Medical Quality and the Law

1986 • The American Civil Jury

1985 • Dispute Resolution Devices in a Democratic Society

1984 • Product Safety in America

1983 • The Courts: Separation of Powers

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1981 • Church, State, and Politics

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1977 • The American Jury System

1976 • Trial Advocacy as a Specialty

1975 • The Powers of the Presidency

1974 • Privacy in a Free Society

1973 • The First Amendment and the News Media

1972 • A Program for Prison Reform

## Reports of Roundtable Discussions

### 1993 • Justice Denied: Underfunding of the Courts

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

### 1991 • Safety of the Blood Supply

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, D.C., attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

### 1990 • Injury Prevention in America

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of *Everyday Law* and *TRIAL* magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

### 1988-89 • Health Care and the Law III

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

### 1988 • Health Care and the Law II

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

### 1988 • Health Care and the Law

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”



# Research Monographs

## Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts.

This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

## The Pound Connective Tissue Injury Research Project: Final Report. Valerie P. Hans, Ph.D.

Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public's views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

## The American Lawyer's Code of Conduct, Revised Draft. Available at [www.poundinstitute.org](http://www.poundinstitute.org).

# Civil Justice Digest



A quarterly newsletter on current and emerging legal trends. Distributed 1994-2003 to judges, law school professors, and attorneys. Back issues available at [www.poundinstitute.org](http://www.poundinstitute.org).

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