

# IMPLEMENTING PROCEDURAL CHANGE: WHO, HOW, WHY, AND WHEN?

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## I. INTRODUCTION

What does it mean to "implement procedural change"? On a narrow view, the question concerns only the fate of a new or different procedural norm or technique once it has been conceived. Yet, as the RAND Report makes clear,<sup>1</sup> both in its discussion of the literature on organizational change and in its application of insights from that literature to the performance of the federal judiciary under the Civil Justice Reform Act of 1990 (the CJRA),<sup>2</sup> the nature and extent of procedural implementation in that narrow sense cannot usefully be considered without reference either to the source of the impulse/directive to change or to the process by which that impulse/directive came into being.

More generally, a consideration of procedural change should include attention to the actors responsible for conceiving it and carrying it out (Who?); the processes by which the responsible actors conceive it and carry it out (How?); the reasons for, and information underlying, the impulse/directive to change (Why?); and the occasions on which action should be taken (When?).

Reflection upon the CJRA, the events that led up to it, and the events that it initiated, has much to offer those who are interested in civil justice reform—which is to say, I hope, all of us—on each of these questions. Moreover, contrary to what may

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1. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, *JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 51-55 (1996)* [hereinafter RAND REPORT].

2. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-82 (1994)).

be fast becoming conventional wisdom, the RAND Report makes a contribution to our knowledge on all of them.

Viewed retrospectively, the CJRA demonstrates the importance of early and ongoing cooperation between the federal judiciary and the Congress in responding to calls for procedural change. "Cooperation" for these purposes requires (1) genuine dialogue, rather than pro forma consultation; (2) restraint in assertions about power, prerogatives, and competence; and (3) willingness to compromise.<sup>3</sup>

Viewed contemporaneously—that is with the benefit of the RAND Report—the CJRA demonstrates both that which limits and the limits of procedural reform. That which limited the CJRA reforms included the legislation's vague wording, which was emblematic both of compromises made during the legislative process and of its weak empirical foundation. It also included Congress' failure to work with the judiciary in the process of identifying the need for change and in the preliminary identification of promising remedies, and the judiciary's consequent failures of leadership when it came time to carry out the negotiated compromises. These failures of leadership rendered impossible changes in the local legal culture of the practicing bar, whose commitment to the CJRA is also subject to question.<sup>4</sup>

As to the limits of procedural reform, the judiciary has reason to stress the Report's finding that "[i]ssues unrelated to judicial case management account for 95 percent of the variation in litigation costs."<sup>5</sup> Yet, the larger significance of that finding may lie in confirming both the fatuousness of claims by either the judiciary or the Congress to exclusive competence or power in this arena, and the importance of cooperation in the search for solutions to the problem of litigation costs. Moreover, as the Report also suggests, the cooperation necessary for effective reform must include the practicing bar.<sup>6</sup>

The RAND Report also demonstrates what social scientists have long realized, but which so often comes as news to those

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3. See *infra* text accompanying notes 11-72.

4. See *infra* text accompanying notes 73-105.

5. Administrative Office of the U.S. Courts, *Rand Study Finds 95% of Cost in Civil Litigation Outside Courts' Control* 1-2 (Jan. 29, 1997) (News Release) [hereinafter News Release].

6. See *infra* text accompanying notes 90-95.

unfamiliar with empirical research; namely, the limits of such research as an aid to lawmaking.<sup>7</sup> However, particularly since there may be a tendency to emphasize, and perhaps to misapprehend, the Report's finding that only very few procedural techniques had a statistically significant effect on measures of interest, it is important to note respects in which those limited findings may have broader significance.<sup>8</sup>

Viewed prospectively, the CJRA, the process it initiated in the federal judiciary, and the experience under it as reflected in the RAND Report, all confirm my view that the urgent need now is for dialogue at a point anterior to actual lawmaking, dialogue concerning "where we have been, where we are going and where we should be going"<sup>9</sup> in procedural law reform.

Whether or not one acknowledges that, in order to be effective, the effort to bring about consequential procedural reform must be broader than the Federal Rules of Civil Procedure, both the processes that led to the CJRA and recent amendments to the Federal Rules and the results of those "reforms" should suffice to persuade that the status quo is unacceptable. Moreover, both experiences should also suffice to persuade that the dialogue must include the practicing bar, which may have the power to defeat change, if not when it is proposed, then when it is put in place.<sup>10</sup>

## II. A RETROSPECTIVE VIEW

### A. *Life (in Court) Before the CJRA*

Complaints about cost and delay in the courts are probably as old as courts themselves.<sup>11</sup> In this country, and in connection with the federal courts, such complaints have periodically fueled

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7. *E.g.*, Richard O. Lempert, "Between Cup and Lip": *Social Science Influences on Law and Policy*, 10 *LAW & POL'Y* 167 (1988).

8. *See infra* text accompanying notes 96-104.

9. Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 *BROOK. L. REV.* 841, 855 (1993) (footnote omitted).

10. *See infra* text accompanying notes 106-29.

11. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 337 (A. Leo Levin & Russell R. Wheeler eds., 1979).

efforts to bring about procedural change.

The major reform effort in this century lasted more than thirty years, and it brought us both the Rules Enabling Act in 1934 and the Federal Rules of Civil Procedure in 1938.<sup>12</sup> Those events represented a major shift in the locus of power to govern procedure in actions at law in the federal trial courts—from the legislative to the judicial branch—what I have elsewhere described as “a power grab by the judiciary, [and] one that was remarkably successful for many years.”<sup>13</sup>

The success of the Federal Rules and of the Enabling Act process that brought them forth was attributable, I believe, to (1) the loose texture of Federal Rules, (2) the long-enduring disposition of federal trial judges to leave “the real power in litigation with lawyers and their clients,”<sup>14</sup> and (3) a related point, the relative homogeneity of the federal bench and of the bar that practiced before it.<sup>15</sup>

Recent years have brought shifts in the locus of power, both in fashioning the rules of the litigation game (or its alternatives) and in directing the game as it is played. In my view, the latter shift—in which power moved from lawyers and their clients to judges—was influential in precipitating the former—in which power moved from the federal judiciary to Congress.<sup>16</sup>

In seeking the causes of, and the critical events that precipitated, the shift in the locus of effective power in federal litigation from lawyers (and their clients) to judges, I have been drawn to the phenomenon we know as complex litigation and to the breakdown in the homogeneity of the federal bench and bar.

Complex litigation became a catalytic force with the electrical equipment antitrust cases in the 1950s and the institutions and techniques that were developed to handle the perceived

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12. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035-98 (1982).

13. See Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 513 (1996); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 14 (1988).

14. Burbank, *supra* note 13, at 514.

15. “Since abuses are in the eye of the beholder, and since federal judges and practitioners for many years had the same vision, there were few perceived abuses.” *Id.*

16. The CJRA is perhaps the most notorious, but not necessarily the most important, example.

crisis that those cases posed for the federal judiciary. The institutions and techniques in question, which included the Judicial Panel on Multidistrict Litigation<sup>17</sup> and the *Manual for Complex Litigation*,<sup>18</sup> empowered judges "at the expense of others, including lawyers, litigants, and juries."<sup>19</sup> They furnished models when the perceived crisis of expense and delay in the federal courts became more widespread in the 1970s.

The federal judiciary was once an elite and relatively homogeneous group, sharing much by way of background, education, and worldview with the lawyers who practiced before it. The social revolution of the 1960s, the quest for diversity on the bench it initiated, and changes in the legal profession brought about both by that revolution and by the revolution of competition all may have contributed to the dissolution of the ties that bound bench and bar, which ties included shared professional values and a shared sense of abusive conduct.<sup>20</sup>

Although the disintegration of the legal profession, in the sense of a professional elite with shared values, was already well underway in the 1970s, it was true then, as it true today, that public images of the practice of law are disproportionately shaped by a small proportion of lawyers whose own experiences and interests determine the nature of those images.<sup>21</sup> And so, complex litigation in federal courts became the dominant image, and the late 1970s witnessed a sustained outcry by the American Bar Association against excessive cost and delay, particularly in discovery.<sup>22</sup>

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17. See 28 U.S.C. § 1407 (1994).

18. See *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960); *MANUAL FOR COMPLEX LITIGATION* (1969); *MANUAL FOR COMPLEX LITIGATION* (2d ed. 1985); *MANUAL FOR COMPLEX LITIGATION* (3d ed. 1995).

19. Burbank, *supra* note 13, at 515.

20. See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 *BROOK. L. REV.* 931 (1993). See also RICHARD A. POSNER, *OVERCOMING LAW* 63-70 (1995) (discussing changes in the legal profession).

21. See, e.g., Marc S. Galanter, *The Day After the Litigation Explosion*, 46 *MD. L. REV.* 3 (1986); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1983).

22. See, e.g., SECTION OF LITIGATION, ABA, *REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE* (1977), reprinted in 92 *F.R.D.* 149 (1982); Amendments to Fed. Rules of Civil Procedure, 446 *U.S.* 995, 998, 1000 (1980)



Faced with requests from powerful forces within the bar to save lawyers from themselves, and having regard "to their own professional interests as well as to the interests of practicing lawyers, litigants, and society,"<sup>23</sup> federal judges generalized the models that had been developed for managing unusual cases, models that empowered them. They also brought to center stage a variety of techniques for disempowering lawyers and their clients that had previously been only bit players in the theater of litigation: sanctions for litigation abuse.<sup>24</sup> Their task in doing so was made easier by a shift in the composition of the Civil Rules Advisory Committee. Originally composed primarily of distinguished members of the practicing bar and academics, by the 1970s that committee came to be dominated by federal judges.<sup>25</sup>

From this perspective, it is no coincidence that at the very time when the federal judiciary was wresting power from lawyers (and their clients) by putting in place general rules that not only enabled but encouraged trial judges to take control of all civil litigation and required them to root out abuse, the judiciary began to lose what had been essentially a monopoly of power to fashion the rules of the game. And from this perspective, contrary to conventional wisdom, it may not have been the Federal Rules of Evidence, which did not survive the Enabling Act process, that marked the critical event, but rather the 1983 amendments to the Federal Rules of Civil Procedure, which did survive that process.

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(Powell, J., dissenting statement) (criticizing 1980 amendments to Federal Rules of Civil Procedure as a "compromise" and as "tinkering changes").

The result is a picture of the dispute landscape sadly lacking in perspective, and the problem is not simply empirical. The rhetorical tendency of the "litigation explosion" story is to deflect attention from values other than efficient administration in the effort to end the "crisis," dam the "flood," or stem the "avalanche."

Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1467-68 (1987) (book review).

23. Burbank, *supra* note 13, at 515 (footnote omitted).

24. See Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989) [hereinafter Burbank, *Transformation*]; Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983) [hereinafter Burbank, *Sanctions*].

25. See Laura Kaster & Kenneth Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15; Burbank, *supra* note 9, at 847-48.

To be sure, the Federal Rules of Evidence marked a sharp break with the past in that Congress refused to acquiesce in proposals coming to it from the Supreme Court under the Enabling Act.<sup>26</sup> Moreover, it may be that the significance of Congress' insistence on its own prerogatives transcended the occasion, breaking the spell of forty years in a defining psychological moment and forever putting Congress on guard against judicial overreaching.

Overreach the proposed Federal Rules of Evidence certainly did, notably (but not exclusively) in the provisions regarding testimonial privileges, and that probably explains why Congress decided to treat the proposed rules as if they were proposed legislation.<sup>27</sup> But, apart from recognizing that the existence and content of evidentiary privileges are of intense interest and importance to many groups in society, we should also remember that this was the first comprehensive attempt to reform the law of evidence in the federal courts. In light of the law applicable before that time, it was a project comparable in ambition and scope to the 1938 Federal Rules of Civil Procedure.<sup>28</sup> Even if one sees in Congress' anxiety about the short amount of time available to review such a project under the Enabling Act<sup>29</sup> portents of its reaction to continuing refinements to a system that had been put in place in 1938, it is hard to see there portents of an appetite for broad legislation governing dispute resolution in the federal courts. Indeed, through a reform effort culminating in the 1988 amendments to the Enabling Act, Congress sought to ensure that it would not have to become actively involved by mandating changes in the process by which Federal Rules are promulgated and by seeking to forestall overreaching.<sup>30</sup>

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26. Burbank, *supra* note 12, at 1018, 1020; see also Charles G. Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1187-88 (1996) (discussing the end of judicial control over the promulgation of procedural rules).

27. Burbank, *supra* note 12, at 1137-43, 1187, 1190.

28. *Id.* at 1137-43; see also Jack B. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353 (1969) (analyzing the choices faced by the drafters of the Rules of Evidence).

29. H.R. REP. NO. 93-650, at 3-4 (1973).

30. Rules Enabling Act, Pub. L. No. 100-702, 102 Stat. 4642, 4648-52 (1988) (codified as amended at 28 U.S.C. §§ 2071 et seq.); Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules*

Thus, the Federal Rules of Evidence may have marked the beginning of the end of the judiciary's monopoly of power to fashion the rules of the game. But, I believe, it was the poisonous environment fostered by the 1983 amendments to the Federal Rules of Civil Procedure, particularly Rule 11, that set the stage for the more recent, and much more serious, power struggles. Those amendments became effective, it is true, but only just barely, the House having passed legislation to prevent them taking effect on August 1, and the Senate bill not coming to the floor in time.<sup>31</sup> In any event, to the extent that the controversy they engendered resulted from overreaching or from a failure of the process, one could have hoped that the 1988 amendments to the Enabling Act would prevent a reoccurrence. The damage was done, however, as the controversy that had preceded their effective date continued—indeed intensified—thereafter, pitting lawyers against lawyers, lawyers against clients, and judges against both.<sup>32</sup>

And so, by the end of the 1980s, not only had the legal profession disintegrated in the throes of competition, but lawyers were at each others' throats in the courtroom as well as the marketplace, and some of them had come to resent federal judges for taking away their control of litigation and setting them against their colleagues and sometimes their clients. The myth of procedure as the neutral facilitator of the substantive law had been exploded, not just by the Federal Rules of Evidence, but by proposals more clearly within the heartland of procedure, including the 1983 amendments and proposals to amend Rule 68.<sup>33</sup> Members of Congress were by then accustomed to lobbying by interests opposed to or favoring proposed amendments and thus were encouraged to view rules of procedure as a magnet, if not for constituent interests, then for special interests.<sup>34</sup> The federal judiciary was without many friends just as civil justice reform

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*Enabling Act*, 1989 DUKE L.J. 1012, 1029-36.

31. See Burbank, *Transformation*, *supra* note 24, at 1948 n.119.

32. See GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* 1-52 (2d ed. 1994); Burbank, *supra* note 9, at 844 n.22.

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

34. See Geyh, *supra* note 26, at 1187-88, 1227; Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991).



writ large became a national political issue.

### B. *The CJRA in Context*

The CJRA was the product of mistakes on the part of both the Congress and the judiciary, which, if only because they attended the conception, progress, and passage of proposed legislation, can properly be called political mistakes.

It is no reproach to Senator Biden that, at a time when big business chose to make civil justice reform a national political issue—and with it reform of court procedure—he responded to the drumbeat of calls for an end to excessive expense and delay in civil litigation by seeking to assume a leadership role on the issues.<sup>35</sup> Nor should he be faulted for seeking guidance from a broad-based and thoughtful group of court users, the Brookings Task Force,<sup>36</sup> quite the contrary. Finally in this aspect, it should not be surprising that when the Task Force achieved substantial consensus on the existence of, and promising methods of solving, problems in the federal courts, Senator Biden deemed that an adequate foundation for proposed legislation.<sup>37</sup>

There were, however, numerous mistakes made at this, the conception stage of implementing procedural change. They relate to the Who, the How, the Why, and the When.

As to the Who and the How, it was a mistake for Senator Biden not to ensure that the group convened to advise him included substantial representation of sitting federal judges.<sup>38</sup> It is no answer to that criticism that federal judges dominated the Enabling Act process, which had failed to come to grips with the problems, because inquiry as to the existence, nature, and extent of problems was presumably the first order of business for the

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35. "Senator Biden is not a captive of the insurance industry any more than he is the son of a Welsh coal miner. He is a politician who wanted a statute on civil justice reform." Burbank, *supra* note 9, at 852 (footnotes omitted).

36. TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION vii (BROOKINGS, 1989) [hereinafter BROOKINGS TASK FORCE REPORT].

37. See S. 2027, 101st Cong. (1990); S. REP. NO. 101-416, at 15 (1990).

38. The Brookings Task Force did not include a sitting federal judge. Four members out of thirty-six had at one time served on the federal bench. See BROOKINGS TASK FORCE REPORT, *supra* note 36, at 45-49.

group, and because two wrongs do not make a right. By the late 1980s it should have been apparent to everyone that federal judges and the practicing bar may have very different notions as to what is wrong with the civil justice system and what, if anything, should be done about it.<sup>39</sup>

Moreover, Congress was just then concluding the most consequential overhaul of the Enabling Act process since 1934.<sup>40</sup> One might have thought that a freshly revised treaty, animated in part by Congress' expressed desire to disengage, would suggest the need closely to consult the judiciary about a possible breach of that treaty, if not to forbear from such a breach altogether. And if it was in part dissatisfaction with the pace of change through the Enabling Act process that animated Congress,<sup>41</sup> let us remember that some significant measure of that pace was due to changes made in anticipation of the 1988 legislation.<sup>42</sup>

At the point when the Brookings Task Force issued its report, and in light of the nature of its recommendations, another mistake was made in immediately translating those recommendations into proposed legislation.<sup>43</sup> For, whatever the merits, the basic thrust of the group's work—reform from the "bottom up"<sup>44</sup>—was radically at odds with one of the basic premises of modern federal procedure.<sup>45</sup> Perhaps more to the point, given that by the 1980s uniformity could reasonably have been thought a myth,<sup>46</sup> the federal judiciary was in the midst of a serious and well-publicized effort, encouraged by Congress, to discipline disuniformity at the local level.<sup>47</sup> "Consultation" in

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39. See *supra* text accompanying notes 23-34.

40. See *supra* text accompanying note 30.

41. See Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 114-16 (1991).

42. H.R. REP. NO. 100-889, at 27 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5987-88 [hereinafter 1988 HOUSE REPORT]; see also Geyh, *supra* note 26, at 1189 n.124 (stating that the 1988 amendments only codified what was already an existing practice).

43. See *supra* text accompanying note 37.

44. BROOKINGS TASK FORCE REPORT, *supra* note 36, at 11.

45. See, e.g., Burbank, *Transformation*, *supra* note 24, at 1929-41.

46. See, e.g., Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2018-21 (1989).

47. See Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J. 62

the form of inviting comment on proposed legislation can be, or be perceived to be, akin to negotiating with a gun to the head.

The federal judiciary was hardly blameless at this stage, however. I will not speak more of the legacy of overreaching, mythmaking, and constituency disintegration that contributed to the climate in which procedural reform engaged sustained political interest.<sup>48</sup> That apart, the judiciary reacted to the proposed legislation that was founded on the Brookings Task Force Report in a way that, as Tom Lehrer would have said, was bound to lead to escalation. In doing so, they took both the high ground and the low ground. Unfortunately, both caved in.

On the high ground, although it was certainly appropriate for the judiciary to remind the Congress of the treaty we call the Enabling Act, then only recently updated, the judges did not stop there. They invoked, in addition, the irreducible prerogatives of the federal courts under Article III of the Constitution as a means to dissuade Congress from proceeding.<sup>49</sup>

These claims were fatuous, and the fact they have subsequently been elaborated does not make them any less so, although it may conjure up a different meaning of the adjective.<sup>50</sup> Against a background of overreaching by the rulemakers, and notwithstanding the 1988 amendments to the Enabling Acts, repeated invocation of the Enabling Act process to forestall congressional action reaps the "[w]ages of [c]rying [w]olf."<sup>51</sup> Far worse, however, is to tell Congress what it may hear as an assertion that it has no constitutional business concerning itself with matters that, notwithstanding the labels we affix to them, have attracted sustained political interest. In any event, the strategy backfired, eliciting equally fatuous claims of exclusive

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(1989); 1988 HOUSE REPORT, *supra* note 42, at 28-29.

48. See *supra* text accompanying notes 11-34.

49. For an account of the judiciary's participation in the legislative process leading up to the Civil Justice Reform Act of 1990, see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 407-18 (1992).

50. See Burbank, *supra* note 9, at 850-52; see also Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1472-83 (1994) (arguing that the CJRA does not violate separation of powers or statutory limits on Congressional rulemaking).

51. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

legislative power in the Senate Report on the CJRA.<sup>52</sup>

On the low ground, the judiciary designated a special task force of judges to work with the Senate Judiciary Committee in revising the proposed legislation. Senator Biden, at least, thought that the process resulted in revisions that were acceptable to the judiciary. He was understandably upset when, thereafter, the Judicial Conference publicly expressed continuing opposition—based on the views not of the members of the special task force, but of the Conference's Committee on Judicial Improvements—so upset that the Senate Report retails a highly unflattering account.<sup>53</sup> Perhaps the judiciary may be excused for naiveté as to the rules of the political game, but the lesson is one they cannot afford to forget.

Finally, as to the Who and the How, we should consider here another mistake made by the judiciary, not in the process that led to the CJRA, but as a direct result of that experience. I refer to the 1993 amendments to Federal Rule of Civil Procedure 26 regarding required disclosures.<sup>54</sup> As proposed, these amendments attracted far more consistently negative comments from the practicing bar than had the proposals to amend Rule 11 in the early 1980s.<sup>55</sup> The reaction was so thoroughly negative that, at one point, the Advisory Committee decided to abandon the enterprise. It was persuaded to take up the cudgels again, however.

Among the arguments that seem to have carried the day was the notion that the judiciary needed to reassert its leadership in discovery reform.<sup>56</sup> This notwithstanding pleas that the rulemakers await the evaluation of experience under the CJRA and notwithstanding the fact that the existence of such experimentation required permission in a putatively national rule to opt out at the local level.<sup>57</sup> The circumstances thus induced an unprincipled departure from the norm of uniformity, one that

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52. See S. REP. NO. 101-416, at 13-14 (1990).

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

54. FED. R. CIV. P. 26(a). For a more favorable view of this episode, by one who was involved in it, see Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994).

55. See Burbank, *supra* note 9, at 846.

56. See *id.*

57. See *id.* at 845-46.

could only doom another expressed goal of the rulemakers in forging ahead, to wit, bringing about "the cultural change the Committee sought."<sup>58</sup>

And who flew the flag of leadership on behalf of the judiciary? Certainly not the Supreme Court of the United States.

It is difficult . . . not to sense a crisis in federal procedural reform when the Chief Justice's letter transmitting the 1993 amendments to the Federal Rules disclaimed any implication "that the Court itself would have proposed these amendments in the form submitted," and when four other Justices indicated their agnosticism about, lack of competence to evaluate or disagreement with, one or more of the amendments. When a majority of the Supreme Court has washed its hands of proposed Federal Rules, and when some of the Justices have aired the dirty linen, what is it that should restrain Congress from responding to those who wish to do the same?<sup>59</sup>

It is a wonder that the 1993 amendments became effective—another very close call<sup>60</sup>—and no wonder that the judiciary emerged from the CJRA and immediately following rulemaking battles with even fewer friends than it had before.<sup>61</sup>

As to the Why and the When, although it is understandable that Senator Biden regarded the work of the Brookings Task Force as adequate foundation for proposed legislation, it is also regrettable. To be sure, we all know legislation that rests on a weaker foundation of demonstrated need and efficacious remedy. Yet, due in large part to the work of Marc Galanter, the mythic quality of much that parades as fact in debates about civil justice reform has been known for more than a decade.<sup>62</sup> That it has been just as widely ignored does not excuse our lawmakers,

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58. Advisory Committee on the Federal Rules of Civil Procedure, Minutes of Committee Meeting 7 (Apr. 13-15, 1992); Burbank, *supra* note 9, at 845 n.30.

59. Burbank, *supra* note 9, at 842 (footnotes omitted).

60. See William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1, 3-4, 9-11 (1993).

61. See Carrington, *supra* note 54, at 295-96.

62. See *supra* note 21. For an amusing, albeit depressing, experience, compare Dick Thornburgh, *America's Civil Justice Dilemma: The Prospects for Reform*, 55 MD. L. REV. 1074 (1996), with Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996). Mr. Thornburgh provides the anecdotes; Professor Galanter administers the antidote. The juxtaposition, of which Professor Galanter was, he informs me, ignorant until the issue appeared, is delicious.



although it does tend to confirm Holmes' observation that "[i]gnorance is the best of law reformers."<sup>63</sup>

It is only a partial defense of Congress, if it is a defense at all, that the federal judiciary's track record of seeking data before initiating procedural reform had been abysmal and that what in this account poisoned the rulemaking well—the 1983 amendments to Rule 11—proceeded in a “virtual empirical vacuum.”<sup>64</sup> For the legislative and rulemaking games are played by different rules, and at least the latter espouses a norm of rationality.<sup>65</sup>

From this perspective, it is not sufficient that the Brookings Task Force may have been diverse (apart from the exclusion of active judges)<sup>66</sup> and achieved substantial consensus on the existence of, and promising remedies for, problems of expense and delay in federal civil litigation. Just as reputations are an aggregation of hearsay, so may notions about the universe of litigation reflect nothing more than the success of cosmic anecdotes in orbit. “The plural of *anecdote* is not *data*.”<sup>67</sup> And in an information vacuum, opinion surveys, however scientifically conducted, are worth the data on which the opinions are founded.<sup>68</sup>

The empirical basis underlying the CJRA is particularly troublesome when it is recalled that, even if an adequate foundation for lawmaking of some sort, it was hardly such for the specific recommendations of the Brookings Task Force, which in turn became the stuff of proposed legislation with which the judiciary had to deal in negotiations. Fortunately, most of what was mandatory in the proposed legislation became hortatory in the finished product.<sup>69</sup> According to this view, the provisions for

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63. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 64 (Mark DeWolfe Howe ed., 1963). See Burbank, *supra* note 9, at 841.

64. Burbank, *supra* note 9, at 844.

65. See POSNER, *supra* note 20, at 126-35.

66. *But see* Mullenix, *supra* note 49, at 389 n.42 (“Despite the apparent diversity of the task force, its membership was heavily weighted with corporate and insurance interests.”)

67. Edith Greene, *A Love-Hate Relationship*, 18 *JUST. SYS. J.* 99, 100 (1995) (book review).

68. Both the Brookings Task Force and the Senate Judiciary Committee placed heavy weight on the results of various surveys. See BROOKINGS TASK FORCE REPORT, *supra* note 36, at 6-7; S. REP. NO. 101-416, at 6-8 (1990). For criticism of the Act's empirical basis, see Mullenix, *supra* note 49, at 396-97 n.90.

69. See Robel, *supra* note 50, at 1450.

mandatory evaluation that have brought us the RAND Report may be the CJRA's greatest and most enduring accomplishment, providing more and more reliable information.<sup>70</sup>

Finally, in connection with the When (the occasions on which action should be taken), it bears repeating that the timing of the CJRA was doubly unfortunate. Coming so closely on the heels of legislation that culminated a four year effort, led by the House of Representatives, to reform and discipline the Enabling Act process,<sup>71</sup> the CJRA, driven by a powerful Senator, could be viewed as repudiation of the new treaty. And, coming in the midst of a serious effort by the judiciary to reform and discipline the process of local rulemaking,<sup>72</sup> it could be viewed as repudiation of both that effort and the premise on which it was built: the continuing vitality of a norm of uniform federal procedure.

### III. A CONTEMPORANEOUS VIEW

Viewed in the light of the RAND Report, the CJRA experience enriches our understanding of procedural change in each of the four dimensions I have charted.

As to the Who and the How, I have already noted the light that the RAND Report casts on defining and thinking about implementing procedural change.<sup>73</sup> One suggestion is that participants in an organizational structure should be involved in a process that leads to a shared recognition of the need for change if that change is to be effective.<sup>74</sup> Another is that the leaders of the enterprise must be not simply involved, but committed—not the chicken, but the pig, in eggs and bacon.<sup>75</sup> A third is that effective change requires “clear-cut directives”<sup>76</sup> and “clearly specified goals.”<sup>77</sup>

In assessing “the limited degree of change” effected by the

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70. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 105, 104 Stat. 5089, 5098 (codified as amended at 28 U.S.C. §§ 471-482 (1994)).

71. *Supra* text accompanying notes 30, 40.

72. *Supra* text accompanying note 47.

73. *Supra* text accompanying note 1.

74. See RAND REPORT, *supra* note 1, at 40-44.

75. See *id.* at 44-45.

76. See *id.* at 33.

77. See *id.* at 41.

CJRA, the RAND Report assigns a major role to the "intentionally vague wording of some of the act's case management principles and techniques," observing that "[h]ad the act been less ambiguous, there might have been more change."<sup>78</sup> Elsewhere, the Report suggests that "explicitly stated expectations would have helped individual districts align their efforts with the objectives of the reform, provided judges and judicial staff with criteria to use in selecting performance strategies and assessing progress, and generated energy within and across districts as members sought to reach clearly specified goals."<sup>79</sup>

All of this may be true, but, given what we know of the process by which the CJRA came into being, greater clarity in these respects would have been purchased at the cost not just of a major confrontation, but of a rupture between the legislative and judicial branches.<sup>80</sup> Thus, the failure to seek early and active participation by the federal judiciary was also a mistake because, in their absence, legislation could not capture a shared vision of the need for change. Once the judiciary was involved, the process became a negotiation towards compromise, which is anathema to "clear-cut directives" and "clearly specified goals." Equally important, there was not a sufficient empirical basis for significantly greater specificity either as to principles and techniques or as to the measures of their effectiveness.

The RAND Report discusses CJRA principles or techniques that were widely (or even universally) eschewed, directly or indirectly, by advisory groups and their districts,<sup>81</sup> as well as others where, although they were the basis of plan elements, "implementation often fell short."<sup>82</sup> Quite appropriately in my view, it suggests as possible contributing causes both the failure to include the judiciary early on in the legislative process and the related failure of commitment to the enterprise by some members of the judiciary.<sup>83</sup> Absence in the conception stage augurs ab-

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78. *Id.* at 33.

79. RAND REPORT, *supra* note 1, at 41 (footnote omitted).

80. *See supra* text accompanying notes 38-53.

81. *See* RAND REPORT, *supra* note 1, at 26, 28.

82. *Id.* at 32.

83. *Id.* at 34-35. Moreover, many judges were already doing many of the things that the Brookings Task Force encouraged, which would have made it difficult, if not impossible, to persuade them of the worth of the enterprise, even if they had been consulted earlier. This is a somewhat different view of both the RAND report and

sence, actual or figurative, when the time comes to carry out change. Reluctant players are not good candidates for leadership of a team.

It is also important, as the RAND Report suggests, to consider the involvement and commitment of the practicing bar.<sup>84</sup> Recall that the litigation explosion, expense, and delay stories are the product of elites within the profession and that the profession itself is sufficiently fragmented to call the very word in question.<sup>85</sup> Recall also that the Brookings Task Force was after all a small group of people who presumably benefited from and were affected by the give and take of a common enterprise in which a powerful Senator had a stated interest. Recall finally that, in negotiating against the workproduct of that group, the federal judiciary was primarily concerned with its own prerogatives and a system that it had designed. This is not a recipe for an embrace of change by the bar.

The opportunity for members of the bar (and the public) to participate in advisory groups was "consistent with the notion of participatory management."<sup>86</sup> Yet, the composition of those groups to the side, the matter may have reached a point for the bar as a whole that was functionally equivalent to the judiciary's opportunity to comment on the proposed legislation: a case of too little, too late.

In any event, although active judicial leadership may be able to change local legal culture, in its absence procedural change is probably doomed. The RAND Report's attempt to mediate between what it calls "culturalist" and "proceduralist" themes by asserting that local legal culture "can be modified by

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the experience studied than that taken by the Judicial Conference of the United States in its report to Congress, which was issued after this paper was delivered. The Conference asserted that:

The RAND study found that the pilot program *per se* did not appear to have significant impact on cost or delay reduction because the courts were already following most of the Act's principles, guidelines, and techniques and more importantly, the cost of litigation was driven by factors other than judicial case management procedures.

JUDICIAL CONFERENCE OF THE UNITED STATES, THE CIVIL JUSTICE REFORM ACT OF 1990, FINAL REPORT 2 (May 1997) [hereinafter JUDICIAL CONFERENCE FINAL REPORT].

84. See, e.g., RAND REPORT, *supra* note 1, at 36-37.

85. See *supra* text accompanying note 21.

86. RAND REPORT, *supra* note 1, at 42.

making the actors conform to different rules that limit discretion<sup>87</sup> is ambiguous. Local legal culture is shaped by both lawyers and judges, and as the Report elsewhere suggests,<sup>88</sup> and experience with the Federal Rules of Civil Procedure confirms, federal judges do not react well to rules that limit their discretion.<sup>89</sup>

In this light, it is not only the CJRA principles and techniques that were avoided and those that were implemented in name only that should attract our attention. Both the possibility of tepid leadership from federal judges and the short period between the initiation of CJRA plans and the RAND study suggest that the failure of more techniques that were implemented to have a statistically significant effect may be due in part to the persistence of local legal culture.

To say that federal judges and practicing lawyers should be actively involved, in a timely fashion, in conceiving and refining proposed legislation concerning dispute resolution in the federal courts does not tell us anything about when such legislation is appropriate. Here again the RAND Report sheds light, although perhaps not in the direction perceived by the judiciary when its representatives wrote the press release spinning that document.

It is extremely useful to know that "of the total variance explained by [the RAND] model, about 95 percent was explained by the control variables . . . [which] means that lawyer work hours seem to be driven primarily by factors other than case management policy."<sup>90</sup> It is also useful to know that "[c]ase stakes and case complexity are the most important predictors of lawyer work hours,"<sup>91</sup> although, why the judiciary's representatives changed stakes and complexity to "attorney perceptions"<sup>92</sup> escapes me.

This finding has obvious, albeit perhaps surprising, implications for the design of future efforts to contain litigation ex-

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87. *Id.* at 37.

88. *Id.* at 36.

89. *See, e.g.,* Burbank, *Transformation*, *supra* note 24, at 1929-34; POSNER, *supra* note 20, at 125.

90. RAND REPORT, *supra* note 1, at 211 (alteration in original). *See supra* text accompanying note 5.

91. RAND REPORT, *supra* note 1, at 211.

92. News Release, *supra* note 5, at 2.



pense, suggesting yet another reason to reexamine the premises that in recent years have led the judiciary not simply to manage, but to create, complex cases.<sup>93</sup>

Its more significant implications may be less obvious. For how is it that, acting alone, the judiciary would be able to attack the phenomenon of case stakes? More generally, if we acknowledge that "[l]awyer entrepreneurs are ever anxious to create new procedural advantages as they are alert to existing advantages[,]"<sup>94</sup> we may be led to the view, ruefully offered by a commentator on recent procedural reform efforts in England, that only the overhaul of the system of litigation finance can consequentially attack the problem of litigation cost.<sup>95</sup> That surely is a task for which Congress would have to take ultimate responsibility.

This finding of the RAND Report, in other words, suggests generally that, as to some matters, effective procedural reform may be impossible if we insist on boundaries set in advance to mark the respective lawmaking preserves of the judiciary and the Congress. Specifically, it highlights the critical importance of finding ways to invest the practicing bar in the business of reform.

As to the Why and the When, it is important that key actors in the civil justice reform debate—judges, legislators and lawyers—appreciate the significance of the RAND Report, both in terms of its findings and as an important event in the history of procedural reform.

Commenting on the work of Hans Zeisel, Judge Jack Weinstein observed that "[i]t is no sound criticism to suggest that much of [his jury studies] confirmed what we suspected. Research supporting our suppositions is as valuable to policy makers as that undercutting them."<sup>96</sup> The same is true of the RAND Report. Indeed, confirmation (or disconfirmation) of our suppositions is peculiarly important in this area precisely because, in the past, suppositions have so often been based on a

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93. See Burbank, *supra* note 22, at 1476-83.

94. Burbank, *supra* note 13, at 517.

95. See A.A.S. Zuckerman, *Lord Woolf's Access to Justice: Plus ça change . . .*, 59 MOD. L. REV. 773, 795-96 (1996).

96. Jack B. Weinstein, *Hans Zeisel's Contributions to the Administration of Justice and the Sociology of Law*, 41 U. CHI. L. REV. 213, 218 n.23 (1974).

hunch or a theory. Speaking in 1959, Michael Sovern observed:

Much of the difficulty stems from our lack of a systematized body of knowledge on the effects of procedural devices. Too frequently, when we wish to determine whether a particular remedy constitutes an improvement, we guess, we suppose, we infer, of course we argue, and if by chance some social scientist has recently implored us to go out and get the facts, we extrapolate; but we rarely get the facts.<sup>97</sup>

The situation had not changed in 1986, when Judge Posner wrote that "[l]awyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing."<sup>98</sup> Nor had it changed in 1996, when Marc Galanter observed that "[a] fund of basic information about the working of our legal institutions, of a sort that we take for granted in discussions of the economy, or health care, or education, simply does not exist."<sup>99</sup>

Moreover, the fact that the RAND study found that so few techniques had statistically significant effects on measures of interest may have broader significance. First, the finding of the RAND Report that few techniques had a statistically significant effect on time to disposition (delay)<sup>100</sup> may suggest either that, properly defined, delay in fact is not a serious problem in the run of cases or at least that it is no more serious today than it was before the CJRA. Indeed, other statistical data in the RAND Report tend to confirm the latter proposition.<sup>101</sup> It may be, however, that a qualitatively adequate consideration of delay must include attention to the rate and timing of settlement.

Second, in this aspect the RAND Report may provide evi-

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97. Michael I. Sovern, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 81 (1960).

98. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986).

99. Galanter, *supra* note 62, at 1155 (footnote omitted). See also JUDICIAL CONFERENCE FINAL REPORT, *supra* note 83, at 46 (limits to federal courts' ability to effect delay reduction).

100. RAND REPORT, *supra* note 1, at 89-90 (Table 10.1).

101. See *id.* at 146 (Table C.10). One reason for this might be that many judges were already doing many of the things that the CJRA encouraged. See *supra* note 83.

dence of a phenomenon that might be called the mouse traps that did not catch any mice; it appears that an enormous amount of time and effort have been devoted to devising new, or propagating old, techniques that do not well serve the purposes for which they were intended. If so, we all might be better off if courts, lawyers, and litigants spent their time doing something else. To be sure, one needs to take account of possible influences, discussed above,<sup>102</sup> that may have contributed to RAND's findings. But we should also remember that, just as "RAND confirm[ed] that many of the case management practices long employed by federal judges and incorporated into the federal rules are effective in reducing delay,"<sup>103</sup> its work calls into question the effectiveness of other long-employed practices.<sup>104</sup>

Third, one of the possible influences on RAND's findings mentioned above merits independent attention here. We should consider whether the time interval between the initiation of techniques and the RAND study of experience with them was sufficient for those techniques to take hold, even assuming a pliable local legal culture.<sup>105</sup> More generally, this experience suggests that a longer lead time should be given in the future for the evaluation of newly initiated procedural techniques. That is not good news for those who are impatient to effect change, and hence not good news for those who believe, as I believe, that empirical work should play a much more significant role in the procedural lawmaking of the future than it has in the past.

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102. See *supra* text accompanying notes 73-92.

103. News Release, *supra* note 5, at 1.

104. See RAND REPORT, *supra* note 1, at 89-90 (Table 10.1).

105. The findings concerning initial disclosure under FED. R. CIV. P. 26(a) in a recent study of discovery conducted by the Federal Judicial Center for the Advisory Committee on Civil Rules may support this hypothesis. In that study, which was completed after this paper was delivered and which was based upon a survey of attorneys in civil cases that were closed during the last quarter of 1996, "more than 80% of the respondents said disclosure had at least one of the desired effects" and "the vast majority said the effect was in the direction intended by the drafters of the 1993 amendments." THOMAS E. WILLGING ET AL., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 24 (FEDERAL JUDICIAL CENTER, 1997) (copy on file with author).

## IV. A PROSPECTIVE VIEW

As a result of the CJRA and of subsequent legislation, notably the Private Securities Litigation Reform Act of 1995,<sup>106</sup> the federal judiciary recognizes the need for cooperation when calls for procedural change become sufficiently loud, prolonged, or widespread to peak sustained political interest. At that point, however, the ball may not be in their court, and by that point the perception of a need to cooperate, rather than to consult in a pro forma way, may not be shared by members of Congress. Moreover, as Professor Geyh has recently and very ably pointed out, when considering cooperation in the legislative process the judiciary confronts a paradox: "to maximize the flow of competent information to Congress in the legislative process and risk credibility loss, or to preserve credibility at the expense of competent information flow."<sup>107</sup>

Conversely, the fact that issues of procedural law reform can peak sustained political interest has alerted the judiciary to consider the power, prerogatives, and competence of Congress when considering amendments to the Federal Rules of Civil Procedure,<sup>108</sup> but there is currently no method in place to seek its active cooperation in the rulemaking process. In addition, far from helping to disengage Congress from the process of procedural rulemaking, the changes made in the 1980s, which assimilated it to the legislative process, may encourage Congress "to second-guess the product of that process or to preempt it."<sup>109</sup>

The judiciary also has come to recognize the value of seeking empirical data before formulating new or amended Federal Rules. It has not been consistent in that regard, however, and consideration of the circumstances recalls Professor Geyh's analysis of the problem of credibility arising when judges' "efforts coincide with personal or institutional self-interest."<sup>110</sup>

Thus, at the very time that the Advisory Committee was carefully seeking facts in place of anecdotes to inform its consid-

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106. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (to be codified in scattered subsections of 15 U.S.C. § 77).

107. Geyh, *supra* note 26, at 1222.

108. See Burbank, *supra* note 9, at 842-43.

109. *Id.* at 849-50 (footnote omitted).

110. Geyh, *supra* note 26, at 1222.

eration of possible additional amendments to Rule 11 in the early 1990s, it refused to heed calls to delay any amendments to Rule 26 pending evaluation of experience under the CJRA.<sup>111</sup> That refusal, as we have seen, more likely reflects a turf war—or, if you wish, a struggle for “leadership”—than a considered judgment about the value of empirical study. Nonetheless, it weakened the judiciary’s credibility both generally and in terms of its ability to insist upon empirical data as “a neutral counter to special pleading.”<sup>112</sup>

More representative of current attitudes, I believe, are the Advisory Committee’s decision to pull back proposed amendments to Rule 23 so as to seek additional information, both empirical data and the views of a broad spectrum of the practicing bar (and academics),<sup>113</sup> and its decision to embark on a consideration of discovery reform that will be similarly modeled.<sup>114</sup> And one can only take heart from the recommendation in the Report of the Subcommittee on Long Range Planning that “[e]ach Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed.”<sup>115</sup>

The rulemakers’ recent attitudes towards cooperation with the practicing bar evince some of the same ambivalence seen in the approach to empiricism, which is to say that personal or institutional self-interest can be a dominating consideration. Thus, some of the progress made by the Advisory Committee in reaching out to the bar, through hearings, conferences, and liaison positions, has been undercut by actions recently taken on proposals to amend the Federal Rules that themselves could be

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111. See Burbank, *supra* note 13, at 516.

112. Burbank, *supra* note 9, at 849.

113. See Burbank, *supra* note 13, at 516; see also Thomas E. Willging et al., *An Empirical Analysis of Rule 23 To Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 80-82 (1996) (explaining the process leading to Federal Judicial Center empirical study).

114. Conversation with Judge David Levi, United States District Court for the Eastern District of California, in Tuscaloosa, Al (Mar. 21, 1997).

115. *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, 699 (1996).



considered a means to build bridges to the bar and the public.

That, in any event, is one possible interpretation of the refusal to go forward with proposals to reestablish a norm of twelve person juries and to give lawyers a right to participate in voir dire.<sup>116</sup> From this perspective, it is ironic that concerns about courthouse construction and the personal impressions of decisionmakers<sup>117</sup> prevailed in the face of compelling social science evidence that the size of the jury makes a difference.<sup>118</sup>

And what of Congress? As I have suggested, neither the CJRA nor the Private Securities Litigation Reform Act of 1995 augurs well for a culture of cooperation with the judiciary when issues of procedural reform have peaked sufficient political interest to motivate a serious legislative proposal. And that hardly exhausts the list of recent statutes that invade territory previously reserved to the judiciary.<sup>119</sup>

On the rulemaking side, congressional liaisons are better than nothing, but, again, there is no structural mechanism for cooperation (as opposed to veto). Additionally, the remaking of the rulemaking process in Congress' image may have increased rather than decreased the likelihood that Congress will respond to calls for it to second guess the rulemakers.<sup>120</sup>

For those who find more apt an analogy between the current rulemaking process and administrative lawmaking, the news is no better, even if it does support the analogy. As part of the so-called Contract with America Advancement Act of 1996,<sup>121</sup> Congress created what Professor Strauss has described as "an automatic process for generating legislative consideration of disapproval in every case of agency rulemaking, that brings all

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116. See Marcia Coyle, *Rules Would Expand Voir Dire, Civil Jury Size*, NAT'L L.J., Mar. 11, 1996, at A12; Burbank, *supra* note 13, at 516 n.16.

117. These are the considerations that have been mentioned to me in conversations with judges who participated in the deliberations. See also Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133.

118. E.g., Hans Zeisel & Shari Seidman Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. CHI. L. REV. 281 (1974); Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury Size Cases*, 73 MICH. L. REV. 644 (1975).

119. E.g., Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. 8, 110 Stat. 1321 (1996) (to be codified at 18 U.S.C. § 3601).

120. See *supra* text accompanying note 109.

121. 5 U.S.C.A. §§ 801-808 (West Supp. 1997).

rules before Congress for review immediately upon their adoption.<sup>122</sup> In other words, Congress has extended the report and wait system we associate with the Enabling Act<sup>123</sup> to all administrative rules. Although a number of Professor Strauss' concerns about this statute resonate with recent rulemaking experience, one is of particular interest.

Professor Strauss worries that, in response to a variety of problems and costs associated with the new system, agencies may

look for alternative means of accomplishing their business. They may be motivated to substitute a large number of lower-consequence rules for "major" ones, if that can lower their oversight exposures and costs . . . or to move from legislative rulemaking, if they can, to the issuance of guidance and policies . . . or, most dramatically, to achieve what they can through case-by-case adjudication.<sup>124</sup>

The use of case-by-case adjudication to circumvent or preempt court rulemaking obstacles posed by the Enabling Act process is not unknown.<sup>125</sup> More to the point, in light of experience under the CJRA we should be concerned about the "temptation to make [difficult] choices in local rules"<sup>126</sup> and concerned that choices made at that level will, in Professor Robel's words, "destroy important procedural values."<sup>127</sup>

Looking forward in terms of Congress' attitudes towards the practicing bar and empirical data, I find no greater cause for optimism. If there is any longer an organized bar for purposes of taking positions on proposed court reform legislation, now that such bills are part of broader civil justice reform agendas, it presumably would be the ABA, the prestige and influence of which are currently at a low ebb in Washington.<sup>128</sup> And no one, I take

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122. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 768 (1996).

123. 28 U.S.C. § 2074 (1994).

124. Strauss, *supra* note 122, at 772.

125. *E.g.*, *Marek v. Chesney*, 473 U.S. 1 (1985); Burbank, *supra* note 33, at 437-40.

126. Burbank, *supra* note 9, at 854 (alteration in original).

127. Robel, *supra* note 50, at 1485.

128. *E.g.*, N. Lee Cooper, *Standing Up to Critical Scrutiny*, 83 A.B.A. J., Apr. 1997, at 6.

it, is so foolish as to see in the CJRA a principled and enduring commitment to founding procedural reform legislation on empirical data. Those who harbor the thought should compare the record leading to, and the assumptions underlying, the 1995 Securities Litigation Reform Act with the results of the Federal Judicial Center's study of class actions.<sup>129</sup>

#### V. CONCLUSION: CHANGING THE PROCESS FOR IMPLEMENTING PROCEDURAL CHANGE

Considering the Who, the How, the Why, and the When, of implementing procedural change, we are confronted with a bleak future if we rest with current arrangements. The challenge is to devise solutions that adequately address all of those questions from the perspectives of all of those who are properly concerned. For that purpose, the RAND Report is again valuable, because it underlines the importance of actively involving all of the relevant constituencies in identifying the need to change current arrangements and in devising alternative arrangements.

Recent years have brought forth a number of thoughtful proposals for changing the process by which procedural change is conceived and effected, most recently from Professor Geyh. His proposal for a "permanent, independent, fifteen-member Interbranch Commission on Law Reform and the Judiciary"<sup>130</sup> strikes me as particularly interesting and worth serious consideration. However, it is premature to the extent that it might be thought to preempt the process by which the vision of needed change is cooperatively developed and recommended solutions cooperatively determined.

That is why I have called in the past, and call again, for a cooperative study of existing arrangements for implementing procedural change by representatives of the three branches of government and representatives of the practicing bar.<sup>131</sup> I agree with Professor Geyh that a commission on the model of

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129. See, e.g., Willging et al., *supra* note 113, at 177-79.

130. Geyh, *supra* note 26, at 1234.

131. See Burbank, *supra* note 9, at 842, 854-55; Burbank, *Transformation*, *supra* note 24, at 1936-41; Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 718 (1988).

the National Commission on Judicial Discipline and Removal might serve well in this context.<sup>132</sup> Rather than fixing on such a body as the permanent solution to preconceived problems, however, I would give it the limited anterior tasks of determining whether there is agreement about the existence and nature of those problems and, if so, of recommending solutions, which might include wholly new permanent structures.

Assuming such a group shared my assessment of the inadequacy of current arrangements, and that they would not easily be moved to recommend wholly new permanent structures of the sort proposed by Professor Geyh, perhaps their primary task would be to see if they could reach consensus on the proper roles of each branch of government as initiators, makers, and implementers of procedural law. To that end, it would be necessary to consider, among other questions, (1) the standards established by, and the procedures for, supervisory court rulemaking under the Rules Enabling Act, (2) the role of local court rulemaking, and (3) the proper occasions for legislation as opposed to court rules.

Consideration of the last question will require a serious reexamination of the norm of trans-substantive procedure that, formally at least, has held sway since 1938.<sup>133</sup> It will no longer suffice for the judiciary (or the ABA)<sup>134</sup> to object to legislation like the Private Securities Litigation Reform Act of 1995 by invoking the Enabling Act process. Under current conceptions that process could not be used to fashion prospective rules whose application was limited to a particular substantive law context. Moreover, in revising substantive statutory law, it is unquestionably Congress' business to consider procedural provisions that may advance its policy objectives.<sup>135</sup>

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132. See Geyh, *supra* note 26, at 1234-35; Burbank, *supra* note 9, at 855 n.102. See also A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV. 877, 900 (1993) (noting that the CJRA could stimulate the creation of a commission on the classic model charged to develop proposals for legislative consideration).

133. See, e.g., Burbank, *Transformation*, *supra* note 24, at 1929-41.

134. See ABA SECTION OF LITIGATION, REPORT ACCOMPANYING RESOLUTION REAFFIRMING SUPPORT FOR THE RULES ENABLING ACT PROCESS 20 (1995).

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

It would also be important for such a group to carefully address the conditions that should be deemed sufficient to prompt any prospective procedural lawmaking and the information (including empirical data) that should be deemed a prerequisite to change. In that regard, both the RAND Report and the Report of the Subcommittee on Long Range Planning suggest that the promise of empirical work in aid of civil justice reform may lie more in its capacity to inform judgments about the need for change than in its capacity to inform judgments about the shape of changes that will meet a demonstrated need.<sup>136</sup>

According to this view, it would usually be too much—take too much time and too much money—to expect, much less to require, controlled experimentation or other rigorous empirical work at the local level before adopting an innovation at the national level. It should not be too much, however, to expect credible evidence that supposed problems in fact exist—and are not the stuff of “cosmic anecdotes”—before amending the Federal Rules or passing federal legislation. Moreover, even if we cannot or will not very often incur the expenses necessary to do a study like the RAND study, it may turn out that a sustained national commitment to collect systematic civil justice data, of the sort recommended by Professor Galanter and his colleagues,<sup>137</sup> would be comparatively cost effective. For, as they point out:

The absence of an adequate knowledge base not only impairs the optimal use of the legal system. It also makes lawyers and courts vulnerable to political attacks. This hostility has much deeper sources than problems of the knowledge base. But the absence of knowledge about the legal system provides a setting in which anger can be more easily mobilized politically and result in misguided policies. Lawyers and judges have a joint responsibility with the academic community to foster and support the development of a cumulative body of reliable knowledge about the working of legal institutions, and they have a heavy stake in its development.<sup>138</sup>

Although there has been a good deal of hysterical rhetoric

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136. See RAND REPORT, *supra* note 1, at 1, 4; *supra* text accompanying note 115.

137. Marc Galanter et al., *How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994).

138. *Id.* at 230.



about the CJRA and the Rules Enabling Act in recent years, the notion that the latter should be regarded as a pact or treaty empowering and limiting both the judiciary and Congress has much to recommend it. In order to be an effective treaty, however, it will probably require additional amendments and, perhaps, supplementation. One possible change that might advance a more effective partnership between the federal judiciary and the Congress is a mechanism for the rulemakers to propose rules for legislative adoption (perhaps on an expedited track).<sup>139</sup> Such a mechanism would be useful for proposals that either approach or cross over the line deemed appropriate for court rules, leaving the normal process for the usual fare (if there is such a thing any more). It could be used by members of Congress to refer to the rulemakers' proposals for legislation that would benefit from thorough consideration by the judiciary but which require Congress' ultimate judgment.

Another change that might improve the partnership is a mechanism for fast-track rulemaking, which could be employed when the process within the judiciary has not elicited controversy and which would probably require process alterations within both the judiciary and the Congress.<sup>140</sup> Consideration of this possibility might benefit from study of the recent system put in place for review of administrative agency rules.<sup>141</sup>

Still another change that should be considered relates to the role of the Supreme Court. The Court's performance in 1993 was an embarrassment,<sup>142</sup> and its current posture towards rulemaking under the Enabling Act may do more harm than good from the point of view of congressional involvement.

Finally, it would be appropriate for such a group to consider the problems that the fragmentation of the bar poses for *any* suggested system of implementing procedural change. The President of the ABA has recently suggested that that organization develop or sponsor a model code of lawyer civility.<sup>143</sup> Civility, however, is not the major problem at the lawmaking stage; personal and professional interests are hard to subordinate. Indeed,

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139. See Burbank, *supra* note 12, at 1195 n.775.

140. See Levin, *supra* note 132, at 899.

141. See *supra* text accompanying notes 121-27.

142. See *supra* text accompanying note 59.

143. N. Lee Cooper, *Courtesy Call*, 83 A.B.A. J., Mar. 1997, at 8.

if the group I propose were to be established, a challenge for the appointing authorities would be precisely to find members who would have the respect and confidence of substantial segments of the practicing bar.

These suggestions, however, are also premature, as I am reminded by the RAND Report that there is a metaprocedure for implementing procedural change.