



Spring 2009

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Recommended Citation

Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. Rev. 261 (2009).
Available at: <https://digitalrepository.unm.edu/nmlr/vol39/iss2/4>

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RECOVERING ACCESS: RETHINKING THE STRUCTURE OF FEDERAL CIVIL RULEMAKING

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INTRODUCTION

Rule 1 of the Federal Rules of Civil Procedure provides that the Civil Rules should facilitate the “just, speedy, and inexpensive determination” of legal claims.¹ The Civil Rules Committee—the committee responsible for drafting the Civil Rules²—considers this familiar mandate when drafting the rules. Yet, perhaps because this terminology is so timeworn, there is no agreement about how to interpret its three-part directive. The Civil Rules govern a complex system of civil litigation, and as a consequence, a range of competing principles must guide the production of those rules. What are these guiding principles, and how do they help us to interpret the meaning of just, speedy, and inexpensive?³ Moreover, even if there is a unified interpretation of this rulemaking mandate, an equally fundamental question is how to structure a rulemaking process that best achieves those interpretive standards. In this article, I attend to these questions by examining the structure of the rulemaking process with respect to one such standard—access.⁴

Scholarship about the civil rulemaking process has not yet addressed the ways in which the institutional rulemaking structure influences the content and efficacy of the rules. What has occupied many scholars is a concern about the legitimacy of the rulemaking process, specifically how the process can be justified when the committee structure is incongruent with certain principles of a representative democracy. One branch of this scholarship attempts to answer concerns that arise

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1. FED. R. CIV. P. 1.

2. There are seven steps for drafting and amending the Civil Rules: (i) the Advisory Committee on the Federal Rules of Civil Procedure drafts the rules; (ii) the Standing Committee on the Federal Rules of Practice and Procedure approves the rules and sends them out for public comment; (iii) the Civil Rules Committee reviews the public response and revises the rules if necessary; (iv) the Standing Committee reviews the rules and approves them; (v) the United States Judicial Conference approves the rules; (vi) the Supreme Court does the same; and (vii) Congress acts to defeat or postpone the proposals or does nothing and the rules become law. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1663–75 (1995); see also Federal Rulemaking, <http://www.uscourts.gov/rules/proceduresum.htm> (last visited Apr. 16, 2009). The process generally takes three years from start to finish. See McCabe, *supra*, at 1673. I will refer to the Advisory Committee on the Federal Rules of Civil Procedure as the “Civil Rules Committee” or the “Committee,” the Standing Committee on the Federal Rules of Practice and Procedure as the “Standing Committee,” and the United States Judicial Conference as the “Judicial Conference” or the “Conference.”

3. See *infra* Part II.B.2 for a discussion of alternative articulations of the rulemaking mandate.

4. As I argue, the purpose of the Civil Rules and the guiding principles of the rulemaking process cannot, and should not, be separated. The goals of the rules themselves must be reflected in the process that creates them. However, in this article, I do not undertake to define a comprehensive set of principles, nor do I assign a value system to competing guiding principles. Rather, my argument is first that we should commence a dialogue about what the guiding principles might be, and second, that access is one of these goals. For an article that discusses the difficulty of defining and balancing another relevant rulemaking principle, fairness, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485 (2003).

when an unelected body makes law and offers alternative grounds for legitimating the process.⁵ Other scholars explore whether delegation of the rulemaking function to the judiciary is constitutional.⁶ Finally, a third group of scholars argues for rulemaking reform, but they generally criticize a specific rule and suggest process changes to avoid that category of rule amendment going forward.⁷ Missing from the scholarship thus far is an examination of what principles should guide rulemaking in general and a consideration of how to structure a rulemaking process that best promotes those principles.

In this article, I focus on access to the justice system as a guiding principle and argue that the current rulemaking structure is not commensurate with the achievement of that goal. Over the past few decades, the trial has vanished,⁸ litigation has exploded,⁹ judges have become managers,¹⁰ and notice pleading has died.¹¹ Reasonable people can debate the precise scope of each of these claims about the state of civil litigation. What is less debatable is the effect of these trends on litigants. Real or perceived, these trends have led to the restriction of access to

5. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 909 (1999) (arguing that an effective rulemaking process requires deliberation, not public participation, which makes the current system legitimate); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1171 (1996) (proposing that an interbranch commission to review rulemaking activity would lend more credibility to the rulemaking process).

6. See, e.g., Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1043 (1993) (“[C]ommentators have placed recent emphasis on the relationship between Congress and the Court in the rulemaking process as the source of the restriction against affecting substantive rights.”); Martin H. Redish, *The Supreme Court, The Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1307–08, 1326 (2006) (arguing that current rulemaking oversteps constitutional bounds because the committee produces substantive rules and proposing that rules falling into a “non-housekeeping” category of procedural rules or that “are found to implicate significant economic, social, or political dispute(s)” should require congressional and presidential approval); see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982) (“Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress. The pre-1934 history also makes clear that the protection of state law was deemed a probable effect, rather than the purpose of, a limitation designed to allocate lawmaking power between federal institutions.”).

7. This scholarship responded to controversial amendments during the 1980s and 1990s. The self-described furor over these amendments led to multiple calls for reforms in the civil rulemaking process. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 841–42 (1993) (arguing that the rulemaking process should rely more heavily on empiricism and called for a moratorium on rulemaking pending further study); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991) (arguing that the discovery proposals lacked empirical foundation and calling for reform of the rulemaking process); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 481 (1993) (arguing for a limit on the Committee’s discretion to be accomplished through a set of administrative agency-like guidelines).

8. Marc S. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 491 (2004).

9. WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (Dutton 1991). But see Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (using empirical analysis of litigation filing rates to challenge the conception of a litigation explosion); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (arguing that the litigation explosion lacked empirical grounding).

10. Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 377–79 (1982).

11. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B. C. L. REV. 431, 431–32 (2008) (writing that “[n]otice pleading is dead” after the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). See also *infra* notes 156–159.

justice.¹² The opportunity to resolve the merits of a legal claim—what I broadly define as access¹³—is in jeopardy notwithstanding the preeminence of access as an organizing principle at the founding of the Civil Rules.¹⁴

Numerous institutions have contributed to this access restriction, and the role of these institutions in civil litigation is well studied.¹⁵ In this article, I focus on a less-examined institution—the civil rulemaking body—and the role it can play in recovering access. My thesis is that the structure of the rulemaking process should be modified to better facilitate an interpretation of the rulemaking mandate that includes access.

The body of this article is divided into three parts. In Part I, I define access and outline the limits of this definition. Next, in Part II, I provide an account of the adoption of the Rules Enabling Act and the rulemaking process. I demonstrate that the proponents of the Rules Enabling Act and court-based rulemaking designed the rules with access firmly in mind. Access was not the only concern, but by contextualizing the statements of reform proponents, the history shows that access was at least on equal footing with competing concerns like systemic efficiency. Over time, I show that the perception of a litigation explosion, combined with persistent weaknesses of the civil litigation system, have created political pressure to reduce access to the justice system, and that rulemakers have responded by creating rules that do just that.

Finally, in Part III, I depart from this historical account and turn to a structural discussion of the rulemaking process. I first argue that the rulemaking process should reemphasize access. The historic centrality of access in the genesis and development of rulemaking and the fundamental role of access in procedural efficacy demand such a result. Yet, I argue that the current rulemaking structure is not sufficiently designed to withstand the political pressures exerted on the Committee. I then explore how existing scholarship regarding the structure of the rulemaking process does not adequately address the question of how to put access on par with competing goals. In light of this omission in the literature, I argue that the way to recover access is to completely rethink the structure of the process. I conclude by offering a spectrum of reforms to the structure that have the potential to restore access as a fundamental principle of civil rulemaking. These proposals include modifying the Committee's composition to be more representative of litigants and passing legislation mandating that access be considered in the rulemaking process.

12. See, e.g., Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273 (1991); Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Pre-suit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 220–21 (2007) (discussing asymmetries of information in civil litigation); Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 975 (1998) (“[T]here has been a push-and-pull of expansion and contraction of jurisdiction and access during the past twenty years. Since the mid-1970s, however, the greater gravitational force has exerted itself in the direction of higher barriers to court access and full adjudication, particularly in federal court.”).

13. For a detailed definition of access, see *infra* Part I.

14. Or, as Professor Richard L. Marcus has noted, we have a “litigation machine that often seems indifferent to the merits.” Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 766 (1993).

15. See *infra* Part II.B.3 for a discussion of these institutions.

I. ACCESS DEFINED

Access means the opportunity to reach the merits of a legal claim. More specifically, I define access to mean that a litigant's effort to reach a legal resolution should not be obstructed by procedural hurdles that unduly disadvantage one group of litigants over another. This definition applies to both plaintiffs and defendants, as each side should ideally reach the merits of a case on the same terms.

Under my definition, procedural rules can best facilitate access by precluding certain individual and institutional behaviors. Thus, the simplest way to explain how procedural rules can further access is by negative implication. If the rules diminish particular adverse effects, then access to the system is augmented. For ease of discussion, I categorize these adverse effects as follows: (1) tactical; (2) biased; and (3) complexity/cost. First, by tactical, I mean that the rules should not create or encourage their strategic use. Stated another way, even if some degree of tactical behavior is unavoidable, the procedural rules should not reward behavior not intended to get to the substance of the case. Second, by biased, I mean the rules should not be applied disparately. No matter the location of the court nor the identity of the parties, the rules should be the same. Finally, I use the related terms complexity and cost to represent the idea that the rules should not be needlessly convoluted or impose excess cost. The rules of procedure best facilitate access, as I define it, if they preclude or minimize tactical behavior, biased application, and complex/costly effects.

A difficulty with this explanation is that it can collapse into a restatement of the just, speedy, and inexpensive mandate of civil rulemaking. My purpose is not to restate the mandate, but to rethink how it is understood and institutionalized. This is an imperfect exercise because the values that aid interpretation of the mandate overlap with one another. For example, a "speedy" resolution of legal claims can be driven by both access and a competing concern like efficiency. Delay can be used as a tactical weapon to prevent access, but delay can also make the entire system inefficient.¹⁶ This article does not purport to prioritize access or to argue that access should be an interpretive principle to the exclusion of all others. Rather, I acknowledge that access is one of many competing concerns and argue that we should rethink its interpretive impact when defining what the rulemaking mandate requires.

Having defined access and how the procedural rules intersect with that definition, there are two express caveats to be made. First, the use of "unduly" in the access definition cabins the amount of access that is afforded. If the legal system were completely open, frivolous legal actions would not be deterred and the system could not properly function. Yet, in this article, I do not attempt to define an undue limitation on access. The paradigmatic dilemma of the civil litigation system is the

16. Just as the mandate terms "just, speedy, and inexpensive" are not mutually exclusive concepts, the words used to interpret the mandate—uniform, efficient, simple, plain, adequate, and fair to name a few—have common characteristics. Access, as I define it, animates many of these terms; for example, plain rules make the justice system more accessible by minimizing the legal expertise required to use them. Yet, plain rules also create systemic efficiencies by decreasing the resources expended on resolving complexity. As this simple example shows, the terminology used to interpret the purpose of the Civil Rules has multiple locutions.

proper balance between justice and efficiency, and while this article contributes to that discussion, it does not undertake to resolve this quandary. Second, access, as defined here, does not capture an attempt to equalize resource disparities among litigants.¹⁷ Rather, it only encapsulates the idea that the same system should be available to each litigant and her effort to adjudicate legal claims.

II. HISTORY OF THE CIVIL RULES

In this Part, I apply the access definition articulated above to a brief summary of the history of civil rulemaking. I examine how proponents of the Rules Enabling Act and the drafters of the Civil Rules conceived of access as a fundamental goal of the rules.¹⁸ I then chronicle how access has diminished as a guiding norm over time.

A. *The Rules Enabling Act*

The Rules Enabling Act of 1934 famously merged law and equity and granted the Supreme Court the power to “prescribe general rules of practice and procedure” for the federal courts.¹⁹ The history of the Act is already well established in literature, but these accounts do not aim to establish what interpretive principles should guide rulemaking.²⁰ The following retells a brief version of this rulemaking story in order

17. Equalizing resource disparities is not directly addressed in the procedural rules. There is a good argument that a mechanism like discovery acts like a resource equalizer by, in most cases, requiring the defendant to pay for discovery costs. However, procedures like discovery do not get at the heart of resource inequality in litigation and how society should address that issue by, for example, providing counsel for a low-income litigant or waiving fees for a pro se filer. These questions are better captured by the social justice literature, and while I rely to some extent on that literature’s definition of access, I do not intend to engage in a resource distribution debate here. For a detailed discussion about the social justice aspect of access, see, for example, DEBORAH L. RHODE, *ACCESS TO JUSTICE* (Oxford Univ. Press 2004); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *Geo. J. Legal Ethics* 369 (2004). Similarly, for a discussion of equality in procedure, see William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1888 (2002). Finally, for a discussion of how political theory can help to define access to the civil justice system, see Kenneth Einar Himma, *Towards a Theory of Legitimate Access: Morally Legitimate Authority and the Right of Citizens to Access the Civil Justice System*, 79 *Wash. L. Rev.* 31 (2004).

18. One methodological difficulty bears mentioning. As noted above, the mandate terms “just, speedy, and inexpensive” are not mutually exclusive concepts, nor are the words that proponents used to give these terms meaning. In this historical account, I argue that particular statements demonstrate how access was an important guiding principle of rule reform, but by focusing on access, I do not exclude the possibility that these statements have multiple complementary and contradictory meanings. This summary should be read with that limitation in mind.

19. 28 U.S.C. § 2072 (2006).

20. Professor Stephen Burbank provides a comprehensive history of the Rules Enabling Act to suggest that the purpose of the Act was not to protect federalism principles, but was instead an effort to delegate responsibilities between Congress and the Court. See Burbank, *supra* note 6, at 1024–26. Burbank’s article exhaustively reviews the legislative history of the Act and consults many of the same sources upon which I rely, but does so with an eye towards sussing out the “institutional limits” of the Act’s rulemaking authority. *Id.* at 1025, 1197. Professor Stephen Subrin provides a historical account of discovery rules, but notes that the Enabling Act legislative history was silent as to discovery. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 *B.C. L. Rev.* 691, 691–94 (1998). Subrin consults the minutes of the initial Committee meetings, but does so in order to chronicle the developing impressions about discovery and its place in civil litigation. *Id.* at 716–29. In another article, Subrin also recounts the Enabling Act history to argue that the Civil Rules are a result of equity winning over common law and that some common law principles should be revisited. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 *U. Pa. L. Rev.* 909, 1002 (1987). Finally, Jack Weinstein retells the history of the adoption of the Act and the rules in order to highlight the political and professional forces animating the Rules

to highlight key moments where supporters of the legislation articulated access as one of the guiding principles of procedural reform.

The history breaks down into the following three critical periods: (1) from 1896 to 1913, when the procedural reform movement began and culminated in legislation first being proposed; (2) from 1913 to 1922, when the legislation was debated and repeatedly voted down in congressional committees; and (3) from 1922 to 1934, when the legislation was redrafted and eventually passed into law. During these phases, those who supported the Act were continually called upon to explain the purpose of procedural reform. Their frequent statements about how the rules should not create tactical, biased, or complex/costly effects demonstrate that access was a driving purpose behind procedural reform.

1. A Movement Becomes Legislation

From 1896 until 1913, the idea of procedural reform evolved from an organized movement into concrete legislation. The American Bar Association (ABA) was the first organization to criticize the existing procedural regime, and thus, it is regarded as the institution that commenced the rulemaking reform movement.²¹ In 1896, the ABA's Committee on Uniformity of Procedure and Comparative Law complained about the Conformity Act of 1872.²² Under that Act, federal courts applied the procedural law of the state in which they sat.²³ Lawyers argued that this led to great confusion; inter-jurisdictional lawyers had to account for multiple procedural rules, and often, the particular rules were not apparent, leaving lawyers to consult with individual clerks of court for each legal action.²⁴

In its report, the ABA committee argued that the existing system created bias and complexity.²⁵ First, the committee complained that the lack of uniformity was unfair.²⁶ Well-resourced litigants could easily overcome the inconvenience of different rules, while less-resourced litigants were effectively excluded from court if they could not reconcile the variant rules.²⁷ Second, the ABA committee argued

Enabling Act and Civil Rules. See 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, 29 (1988). None of these accounts culls the historical documents to recover the Enabling Act proponents' views of the purpose of the rules and how the structure of the rulemaking process should reflect that purpose.

21. Burbank, *supra* note 6, at 1040-45.

22. See J. Newton Fiero, Chairman, *Report of Committee on Uniformity of Procedure and Comparative Law*, 19 ABA REP. 411, 411 (1896).

23. The ABA Committee on Uniformity of Procedure and Comparative Law undertook a study and found that "the methods of practice [applied in the then-forty-five states] are exceedingly difficult of classification, and while they fall under the heads 'common law practice,' 'code procedure,' and 'practice acts,' it is not always easy to say under what division the procedure in a particular State is to be classed." *Id.* at 414. See also *id.* at 424-32, for a summary of the procedure employed in the forty-three states the committee studied.

24. *Id.* at 420 ("[A]side from the few practitioners who make a specialty of practice in the Federal courts, the clerk of the court must be consulted upon all questions of practice, and attorneys are compelled to rely upon his courtesy for information as to even the most simple matters of procedure.").

25. Burbank, *supra* note 6, at 1041-42.

26. *Id.* at 1042.

27. See Fiero, *supra* note 22, at 420 ("With the mixed condition of affairs where practice is regulated by Federal statute, by rules of the Federal court, by the statute and rules of the court where the venue is laid, or possibly by the Chancery practice, modified by statute and rules, a lawyer practicing in the Federal courts, even in his own state, feels no more certainty as to the proper procedure than if he were before a tribunal of a foreign country.").

that under the Conformity Act, the procedural rules were too complex. As the committee explained, the goals of a procedural system were “simplicity and permanence.”²⁸ Under a system of different rules, like the one in place in the late 1800s, these goals were less obtainable.²⁹ The “fixed and arbitrary” regulation in many states resulted in “inconvenience and injustice.”³⁰ As a result, “[m]eritorious applications frequently fail[ed] by the barest technicality.”³¹ The existing procedural rules did not “aid in the administration of justice,” but only worked to “hamper...embarrass...hinder...and delay...under the...most minute questions of practice.”³² Thus, the committee lobbied for the adoption of a simple, uniform set of federal rules that would provide better access for all litigants....³³

The ABA report, while articulating these salient criticisms, did not convince the full ABA body or Congress to consider a uniform system of federal procedure, and enthusiasm for reform faded.³⁴ It was not until almost a decade later that interest in federal rulemaking was renewed. In 1906, Roscoe Pound delivered his speech about the “popular dissatisfaction with the administration of justice.”³⁵ That speech included a complaint about the absence of uniform federal rules of procedure, noting that the rules were arbitrary because as a result of such hyper-technical rules, “we still try the *record*, not the *case*.”³⁶ Like the ABA, Pound argued that archaic procedural rules were preventing courts from reaching the merits of citizen disputes.³⁷

Following this speech, Pound became a critical proponent of the movement for procedural reform. In a series of articles published between 1909 and 1910, he argued that the Supreme Court’s promulgation of such rules was the “most fundamental in a program of procedural reform.”³⁸ He focused on how the existing

28. *Id.* at 417.

29. See J. Newton Fiero, P.W. Meldrim & Francis B. James, *Report of the Committee on Uniformity of Procedure*, 21 ABA REP. 454, 462 (1896). The committee explained that in the Federal courts, [law practice] is, if possible, in a still more confused and unsatisfactory condition, since it depends upon, first, the positive enactments of Congress relating to matters of procedure; second, upon the practice in the state in which the action is being carried on; third, and perhaps mainly, upon the individual views of the Federal judge or the personal preferences of the clerk of the court in which the action is pending.

Id.

30. *Id.* at 460.

31. *Id.*

32. *Id.*

33. See Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1910–11 (1989).

34. Burbank, *supra* note 6, at 1045 (noting that disagreement among members of the ABA about the necessity of uniform federal rules created a barrier to the reform movement and contributed to a lack of action by Congress).

35. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), reprinted in 46 J. AM. JUDICATURE SOC’Y 55, 64, 65 (1962).

36. *Id.* at 64–65.

37. Pound later added that the chief benefits of judicial reform would be the assurance of greater certainty and precision of application of the rules on which rights depend. See Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 392 (1910). Yet, he also acknowledged that procedural reform was not a panacea—it would not get rid of all “dissatisfaction” with the justice system. *Id.* at 389.

38. Burbank, *supra* note 6, at 1048. Pound also joined the Committee of Fifteen (otherwise known as the far less catchy “A Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation”) to study the need for procedural reform. *Id.* at 1046. It filed a report suggesting that the Supreme Court’s admiralty and equity rulemaking power should be expanded to civil procedure. *Id.*

system allowed for tactical use of the rules—a use that precluded reaching substantive claims.³⁹ He defended the reform by arguing that the rules would “help litigants” by “assist[ing] them in getting through the courts,”⁴⁰ and rejected the current procedural system as an “instrument[] of stratagem for the bar and of logical excitation for the judiciary.”⁴¹ He wrote, “[R]ules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such an opportunity.”⁴²

In response to these continued calls for reform, Thomas Shelton, the Chairman of the ABA Committee on Uniform Judicial Procedure, and Henry Clayton, the House Judiciary Committee Chair, drafted a rulemaking bill. This 1913 “enabling legislation” provided for the Supreme Court to make uniform rules of procedure.⁴³ Shelton was confident that the bill would pass, but it did not.⁴⁴ In a later defense of this legislation, Clayton argued that “it is not to be doubted that such [procedural] rules will make more certain and speedy the vindication of rights and, as a corollary, the condemnation of wrongs.”⁴⁵ Both Clayton’s assertion and his bill would be debated over the decade that followed.

2. A Decade of Debate

Draft enabling legislation remained under committee review for the next ten years. During that time, a number of committee hearings were held to discuss the wisdom of reform.⁴⁶ In addition, proponents of the proposed legislation continued

39. Pound wrote, “But the controlling reason for a systematic and scientific adjective law must be to insure precision, uniformity and certainty in the judicial application of substantive law.” Pound, *supra* note 37, at 388.

40. *Id.* at 400.

41. *Id.*

42. *Id.* at 402. To this principle, Pound added, “It should be for the court, in its discretion, not the parties, to vindicate rules of procedure intended solely to provide for the orderly dispatch of business, saving of public time, and maintenance of the dignity of tribunals; and such discretion should be reviewable only for abuse.” *Id.* In later related articles Pound noted, “Thus, after a period of rigidity in practice, in which substance has been sacrificed to form and end has been subordinated to means, we are evidently about to enter upon a period of liberality in which the substance shall prevail and the machinery of justice shall be restrained by and made strictly to serve the end for which it exists.” Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 438 (1910).

43. H.R. 26,462, 62d Cong. (1912), reprinted in 36 A.B.A. REP. 542 (1913). The bill provided: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice, and procedure to be used in all actions, motions and proceedings at law of whatever nature by the district courts of the United States.

Id.

44. Burbank, *supra* note 6, at 1050–54. The bill slowly passed through the House committee, but did not make it through the Senate committee process. *Id.* at 1061–65. As discussed in the next section, see *infra* Part II.A.2, the bill’s failure was due in large part to the opposition led by Senator Walsh. Burbank, *supra* note 6, at 1063–65.

45. Henry D. Clayton, *Uniform Federal Procedure*, 84 CENT. L.J. 5, 11 (1917).

46. See, e.g., *Procedure in the Federal Courts: Hearing on H.R. 2377 and H.R. 90 before the Committee on the Judiciary*, 67th Cong. (1922) [hereinafter *H.R. 2377 and H.R. 90*]; *Simplification of Judicial Procedure in Federal Courts on S. 1011, 1012, 1546, 2610, and 2870 before the Subcommittee of the Committee on the*

to speak publicly in favor of the bill. These debates restated many of the same arguments and continued to highlight access as a common theme. For example, when John R. Briscoe, Chairman of the Judicial Section of the ABA, was called to speak before Congress in favor of the pending legislation, he invoked the following statement by President Wilson:

I do know that the United States in its judicial procedure is many decades behind every other civilized government in the world; and I say that it is an immediate and imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready *access* of justice, is the greater part of justice itself.⁴⁷

In public and professional discourse, supporters like Senator Elihu Root also articulated the importance of procedural reform by arguing that the Civil Rules should not be needlessly complex. He argued, “Procedure ought to be based upon the common intelligence of the farmer, and the merchant, and the laborer.... There is no reason why a plain, honest man should not be permitted to go into court and tell his story and have the judge before whom he comes permitted to do justice in that particular case....”⁴⁸ According to Root, this could be achieved with “plain and adequate [procedural] provisions.”⁴⁹

Henry Clayton expanded on this sentiment by focusing on the complex/costly effect of the current procedural system. In a 1921 speech to the State Bar Association of California at Riverside, he explained that justice should be “as free as the air” and that “[i]t is the duty of the state...to keep the courts of the country open at all times to the poorest in the land that rights may be asserted and enforced with the least practicable delay and cost.”⁵⁰ Clayton did not distinguish between defendants and plaintiffs on this point. He stated that a citizen with a just claim should be “entitled to redress for wrongs done him...without unreasonable delay” while a citizen with “an unjust claim asserted against...[him] should not be embarrassed or annoyed or [have] his business interfered with any longer than it is

Judiciary, 67th Cong. (1922).

47. *H.R. 2377 and H.R. 90*, *supra* note 46, at 2 (emphasis added). Briscoe finished Wilson’s quote, “If you have to be rich to get justice, because of the cost of the very process itself, then there is no justice at all. So I say there is another direction in which we ought to be very quick to see the signs of the times and to help those who need to be helped.” *Id.* at 2–3. In this unusual instance, the reform proponent positively invoked access in connection with speedy delivery of justice as a goal. This quote exemplifies how supporters used now-familiar terms like speedy and inexpensive to communicate variant meanings. In this case, the term is in proximity to access, making the interpretive principle easier to draw out. But, as I argue in this section, even when not expressly stated, access was a guiding principle of rulemaking reform.

48. ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 231 (Robert Bacon & James Brown Scott eds., Harvard Univ. Press 1916). In his address to the Economic Club of New York on October 25, 1915, Root reflected on the 1915 New York State Constitutional Convention and discussed his frustration with, among other things, the New York rules of procedure. *Id.*; see also *Root Glorifies the Constitution*, N.Y. TIMES, Oct. 26, 1915, at 8. He rejected New York’s existing procedure and stated, “We have got our procedure regulated according to the higher trained, refined, subtle, ingenious intellect of the best practiced lawyers, and it is all wrong.” ROOT, *supra*, at 229. Root noted that New York’s defective code system and many other inadequate procedural systems were “found throughout the Union, in the government of most, if not all, of the states.” *Id.*

49. ROOT, *supra* note 48, at 231.

50. Henry D. Clayton, *Popularizing Administration of Justice: Need of Making Work of Courts More Intelligible and Satisfactory to Public by Removing Grounds for Criticism as to Law’s Delay, Cumbersome Procedure, Technicalities and Expense*, 8 A.B.A. J. 43, 50 (1922).

necessary.”⁵¹ By eliminating the cost and complexity of the existing system, Clayton believed that access to the justice system would be universal, not necessarily skewed toward one party or another.

In the midst of this public discussion, the critical debates over the fate of enabling legislation continued in committee hearings.⁵² As legislators, ABA members, and commentators continued to speak publicly for procedural reform, the chief critic of procedural reform, Senator Thomas J. Walsh, articulated his counterargument on the committee floor. In 1915, Senator Walsh and ABA Committee Chairman Shelton had their first public debate about the bill, but the relation of tactics, bias, and complexity to access was not explicitly discussed. Instead, they argued about the propriety of delegating rulemaking responsibility to the judiciary and about the impact that the uniform federal rules would have on home-state lawyers.⁵³ Ultimately, Walsh’s message resonated with legislators, and the rulemaking reform legislation remained under committee review.⁵⁴

Thus, this period did not end with reform, but with a call by then-Chief Justice Taft to take further action on the bill.⁵⁵ He spoke at a 1922 Annual ABA Meeting, and like other supporters, Taft elevated access by arguing for the elimination of procedural complexity. He argued,

[T]he plan is to make the system so simple that it needs no special knowledge to master it. It is for the plaintiff to write a letter to the court and state his case, and if he has not amplified it enough to make the case, to give him the opportunity in the course of the proceedings to put in the facts which are lacking, if he can do so.⁵⁶

51. *Id.* at 44.

52. Burbank, *supra* note 6, at 1061–94.

53. *Simplification of Judicial Procedure: Hearing on S. Res. 552 Before the Subcommittee of the Committee on the Judiciary*, 63d Cong. 21, 25 (1915). Walsh’s complete criticism of rulemaking reform will be summarized in the next section. Not to oversimplify his argument, but one view of Walsh’s position is that parochial concern for the lawyers in his constituency prioritized efficiency (and possibly home-court advantage) for those lawyers over access for litigants.

54. Burbank, *supra* note 6, at 1065.

55. William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts: Better Results Would be Secured by Measures Permitting Judicial Team-Work in Handling Business of District Court, Increasing Discretionary Appellate Jurisdiction of Supreme Court, Abolishing Separate Courts of Law and Equity, and Providing for Reconciling Two Forms of Procedure by Rules of Court*, 8 A.B.A. J. 601, 604 (1922). More specifically, he argued for a statute to merge law and equity, and he proposed that the judiciary create its own rules of court. *Id.* Taft knew that his proposal would be met with great resistance in part because it expanded the judiciary’s power. *Id.* at 607. He noted that his proposal would “involve some increase in the power of the Judges of the Courts” and that the proposal would “be opposed solely on this ground.” *Id.* Thus, to achieve this legislation, he suggested an interbranch solution that showed great sensitivity to ongoing concerns about the judiciary’s legitimacy. *Id.* He proposed a commission appointed by the President. *Id.* This commission, comprised of two Supreme Court justices, two circuit judges, two district judges and three lawyers, would draft the necessary legislation and provide for another commission to create the necessary procedural rules. *Id.* Taft even proposed that these “rules” be presented to Congress, who could act on them within a six-month period or not act and they would become law. *Id.* Finally, Taft reminded Congress that it could rescind the rulemaking power or modify it if the judiciary abused it. *Id.*

56. See William Howard Taft, *Three Needed Steps of Progress: Increase in Number of Federal District Judges, Simplified Procedure in Federal Trial Courts, and Certain Changes in Supreme Court Jurisdiction Would Improve Administration of Justice*, reprinted in 8 A.B.A. J. 34, 35 (1922).

Taft had observed the success of such rules in England.⁵⁷ That system allowed for great flexibility in bringing cases to court, and was motivated in part by a desire to ease accessibility.⁵⁸ Taft quoted English jurist Albert Venn Dicey who praised the procedural changes in England for giving “reality to the legal rights of individuals.”⁵⁹ Taft called for the judiciary to draft like procedural rules in order to “simplify procedure and speed justice in our federal courts.”⁶⁰

3. A Revised Rules Enabling Act and Its Serendipitous Adoption

Heavily persuaded by Taft’s speech, Senator Albert B. Cummins, who was originally on Senator Walsh’s side, began to work with Shelton to revise the rulemaking bill.⁶¹ The redraft looked much like the eventual statute, providing among other things that “the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia . . . the practice and procedure in actions at law.”⁶² The statute gave the Court authority to make its own rules of court, and to meet an ongoing concern about granting rulemaking power to the judiciary; it expressly prohibited the Court from prescribing substantive law.⁶³

Yet, even when a prohibition on substantive rulemaking was delineated, the bill did not go to a vote.⁶⁴ Senator Walsh best articulated the ongoing opposition to the bill in his speech to the Oregon Bar Association in 1926.⁶⁵ He first questioned the value of uniformity by downplaying bias in the rules and arguing that the home-state lawyer would be burdened with learning two systems instead of one.⁶⁶ He also

57. Taft, *supra* note 55, at 606.

58. *Cf. id.* (arguing that the reform in the English courts allowed for simpler pleadings, and great freedom as to joinder and counterclaims).

59. *Id.*

60. *Id.* at 607.

61. Burbank, *supra* note 6, at 1071–72.

62. S. 2061, 68th Cong. (1924).

63. *See id.* It stated that the “rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” *Id.* The inclusion of this sentence demonstrates the discomfort surrounding the delegation of rulemaking authority that has led many scholars to question the constitutionality of the Rules Enabling Act. *See supra* text accompanying note 6. The 1926 Senate Report on the legislation painstakingly explained that the statute would not enable the Court to pass rules relating to things like “limitations of actions, provisional remedies, such as orders of arrest and attachment, and the selection or qualification of jurors.” S. REP. NO. 69-1174, at 9 (1926). Many have questioned the utility of this particular sentence. As Professor Paul Carrington notes, Article III limits how the judicial branch can make law to “writing opinions in cases or controversies.” Paul D. Carrington, “*Substance*” and “*Procedure*” in the Rules Enabling Act, 1989 DUKE L.J. 281, 287 (1989). Thus, to use the Enabling Act to do otherwise would violate Article III of the Constitution. *Id.* In addition, if substance and procedure are mutually exclusive—which as Carrington notes is a questionable proposition at best—designating the procedural function of the Enabling Act in the first sentence excludes any ability to make substantive rules. *Id.*

64. Burbank, *supra* note 6, at 1089.

65. Thomas J. Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 OR. L. REV. 1 (1926).

66. *Id.* at 2–3. He stated that a uniform system of procedural rules:

would impose an exceedingly heavy burden upon any lawyer, even on the young practitioner whose ideas are not fixed and whose mind is active, but to those of more advanced age, who do not learn the new methods so quickly, who are wedded to the systems in which they were bred, it would be an almost intolerable burden.

Id. at 3. In a fairly patronizing retort, Pound took Walsh to task for his opposition to the Enabling Act legislation. *See* Roscoe Pound, *Senator Walsh on Rule Making Power on the Law Side of Federal Practice*, 13 A.B.A. J. 84 (1927). As to the argument regarding the burdens on local lawyers, Pound argued instead that Walsh was only concerned about the local lawyers losing their essential monopoly over cases from outside of the state. *Id.* at 85.

questioned whether the proposed system would eliminate complexity. He alleged that similar systems, like David Dudley Field's New York Code, had largely failed and created confusion.⁶⁷ Finally, he argued that the Constitution prohibited delegation of this rulemaking power.⁶⁸

Once again, Walsh's criticisms proved effective. By 1930, the Judiciary Committee had repeatedly failed to vote the bill out of committee and, the original proponents of the legislation, the ABA, began to retreat.⁶⁹ In 1933, the ABA Committee on Uniform Judicial Procedure lapsed, and the final death knell sounded when President Roosevelt appointed Senator Walsh as his Attorney General.⁷⁰ It was clear that Attorney General Walsh was not going to push for a uniform set of procedural rules.

However, as both misfortune and luck would have it, Walsh passed away shortly after his appointment.⁷¹ President Roosevelt appointed Homer Cummings to the post, and Cummings immediately took up the issue of procedural reform.⁷² In 1934, at an address to the New York County Lawyers' Association, he invoked access by saying that "[c]ourts exist to vindicate and enforce substantive rights" and that "[p]rocedure [was] merely the machinery designed to secure an orderly presentation of legal controversies."⁷³ To untangle the unnecessarily complex procedural "machinery," which had only "serve[d] to delay justice or entrap the unwary," Cummings explained that both he and President Roosevelt supported procedural reform.⁷⁴ Within three months of Cummings' suggestion to both the House and

According to Pound, Walsh was really concerned about "depriv[ing]...the local bars of business which now comes to them." *Id.*

67. Walsh, *supra* note 65, at 4–5, 7. Pound rejected this argument as well by asserting that "[e]very argument against a civil code is valid against the existing system." Pound, *supra* note 66, at 85.

68. Walsh, *supra* note 65, at 13. William G. Ross wrote:

Proposals to permit the Supreme Court to promulgate such rules, subject to congressional approval, encountered opposition from some liberal critics of the federal judiciary who questioned the constitutionality of congressional delegation of rule-making powers to the courts, opposed additional centralization of power in the federal government, and feared that the new rules would be unduly rigid.

WILLIAM G. ROSS, *THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 1930–1941*, at 236 (Herbert A. Johnson ed., Univ. of South Carolina Press 2007). Pound responded by first arguing that the Court had long made procedural rules in other areas such as "equity, in admiralty, in bankruptcy, and in copyright causes." Pound, *supra* note 66, at 86. Pound also rejected the constitutional argument. *Id.* He turned to the historical development of the English courts to argue that the "court may constitutionally have the power to regulate the practice in the causes it has the power to review, as was the doctrine at common law as between the courts at Westminster and the circuits." *Id.*

69. Burbank, *supra* note 6, at 1094. The ABA passed a resolution acknowledging the bill's stagnation and deciding against further intervention. *Id.* Interestingly, in early 1933, Congress passed legislation that enabled the Supreme Court to promulgate procedural rules for criminal appeals. ROSS, *supra* note 68, at 235. Yet, the willingness to confer this authority in the criminal context still did not translate into the civil one, presumably because the monetary stakes in civil litigation for lawyers and segments of the public were much higher than in the criminal context.

70. Burbank, *supra* note 6, at 1095–96.

71. He was married shortly after his appointment and passed away while on his honeymoon. *Current Events*, 19 A.B.A. J. 197 (1933).

72. Burbank, *supra* note 6, at 1095–96.

73. *SELECTED PAPERS OF HOMER CUMMINGS* 182 (Carl Brent Swisher ed., 1939). Cummings made these statements at an address at the Silver Anniversary Banquet of the New York County Lawyers' Association on March 14, 1934.

74. *Id.* at 182–84.

Senate Judiciary Chairmen that the bill be reintroduced, a bill that looked essentially like the 1923 version Senator Cummings drafted became law.⁷⁵ The Rules Enabling Act was born less than four months after Cummings took his post, but almost forty years after its origination.⁷⁶

As Henry Clayton explained in an earlier speech, the broad purpose of rulemaking reform was to give “every man” a fair shot at justice.⁷⁷ If one unpacks statements by Clayton and other key proponents of the Act, it is my contention that a “just, speedy, and inexpensive” procedural system encapsulated more than systemic efficiencies. Quite apart from efficiency, these men also imagined a sort of aspirational accessibility for all individuals—in this most ambitious sense, the doors to justice would be wide open.⁷⁸ The calls to remove archaic barriers to substantive claims, eliminate bias in rule application, and reduce tactical use of the rules demonstrate that these men considered access to be a driving goal of procedural reform. To be sure, a procedural system that prioritized justice and efficiency would engender many goods, but one of the essential goods was access to the resolution of legal claims. Following the passage of the Act, the question then became how the rules themselves could best achieve these goals.

B. The Civil Rules: From the Original Rules to Present

After the Enabling Act passed, the Supreme Court was responsible for drafting and amending a unified set of procedural rules. The following section provides a summary of the rules and rulemaking process as they evolved over time. Broadly speaking, the account is divided up into three periods: (1) from 1934 to 1956, when the rules were drafted and only modestly amended; (2) from 1956 to 1983, when the civil rulemaking process was restructured; and (3) from 1983 to the present, when the civil rulemaking process and civil litigation endured greater scrutiny.

75. Burbank, *supra* note 6, at 1096–97.

76. The 1934 Act provided as follows:

Sec. 1. [T]he Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect 6 months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

78 CONG. REC. 9362 (1934). The only change to the 1923 version of the Act was the addition of the word “civil” in the first sentence of Section 2.

77. Henry D. Clayton, *Uniform Federal Procedure*, 84 CENT. 5, 11 (1917). Clayton stated, “[Courts] ought to be aided in their effort to give, at the lowest practicable cost and, in our American spirit and in our American schoolboy vernacular, to every man, ‘a fair show for his white alley,’ where the game is square and according to just rules.” *Id.* To Clayton and many others, this “aid” would come in the form of uniform procedural rules.

78. Weinstein, *supra* note 33, at 1906. This statement echoes Weinstein’s observation that the architects of the Act and Civil Rules intended for the rules to “open wide the courthouse doors.” *Id.*

1. The Rules Become a Reality

The Rules Enabling Act authorized the Supreme Court to create procedural rules for the federal courts.⁷⁹ When the Act passed, no one expected the Supreme Court itself to draft and promulgate the rules.⁸⁰ Guided by that perception, the Court appointed a committee of “experts,” chaired by former Attorney General William D. Mitchell, to craft the rules.⁸¹ These “highly competent” committee members included government lawyers, academics, and firm lawyers, but did not include members of the judiciary.⁸²

Besides authorizing general rulemaking authority, the Act was scant on details. It did not require a particular rulemaking process nor did it state what the new procedural rules should do. Perhaps only Senator Walsh appreciated the difficulty presented by this lack of detail, stating before his death that “[t]he task to be set the Supreme Court is not only appalling in its magnitude. . . , it is [] well-nigh impossible

79. 28 U.S.C. § 2072 (2006).

80. As early as 1909, proponents of a uniform system of court-made procedural rules like Pound admitted that the Court itself would not draft the rules. *See* Pound, *supra* note 37, at 406. He stated that “it is not necessary that the judges actually draw up the rules themselves in the first instance. . . . Bar association committees or volunteers may devise proposed rules for submission to the court as easily as proposed statutes for submission to legislators.” *Id.* In a speech following the adoption of the Act, then-Chief Justice Hughes announced that the Court would appoint an “Advisory Committee” that would be “responsible to the Court, which w[ould] be called upon for such assistance as the Court may from time to time require,” including “advice of the highest value” about the procedural rules. Charles Evans Hughes, *Address of Chief Justice Hughes*, 21 A.B.A. J. 340, 342 (1935). Consequently, during the first Committee meeting, Chairman Mitchell noted, “[The Court] want[s] your judgment and your help in going at [rulemaking] in an orderly way; they are busy with other things, and they have delegated to you the job [of] looking this field over, making your mind up as to what proper organization you should have, and how you should go about it.” ADVISORY RULES COMMITTEE, MINUTES OF JUNE 20, 1935, at 22 (1935), available at <http://www.uscourts.gov/rules/Minutes/CR06-1935-min.pdf> [hereinafter MINUTES OF ADVISORY RULES COMMITTEE]. However, there was at least one outlier. Henry Clayton thought that the Court could draft the rules on its own. Clayton, *supra* note 77, at 13. Clayton stated that providing for a “commission to be composed of lawyers and judges to formulate these rules” was “not necessary.” *Id.* He argued, “[T]he court is composed of pre-eminently able and skillful lawyers who can best determine what the rules should be.” *Id.*

81. Order Appointing Comm. to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934). The Committee members were as follows: William D. Mitchell (Chair), Charles E. Clark (Reporter), Edgar B. Tolman, Scott M. Loftin, George W. Wickersham, Wilbur H. Cherry, Armistead M. Dobie, Robert G. Dodge, George Donworth, Joseph G. Gamble, Monte M. Lemann, Warren Olney, Jr., Edmund M. Morgan, and Edson R. Sunderland. *Id.* at 774–75. Edward H. Hammond attended the initial meetings as a representative of the Department of Justice. *See* MINUTES OF ADVISORY RULES COMMITTEE, *supra* note 80, at 2. An appreciation of the historical context is also necessary to understand the development of the rulemaking process. This period witnessed a great growth in government. During Roosevelt’s presidency, new federal bureaucracies were born, and the idea of administrative lawmaking became a reality. *See generally* DANIEL E. HALL, ADMINISTRATIVE LAW: BUREAUCRACY IN A DEMOCRACY (4th ed. 2009). Thus, the basic tenets of the current rulemaking process reflect a view that technical rulemaking power is properly vested in bureaucratic entities. Even then, however, the Court and Committee members understood that vesting this power in an unelected branch of government could be controversial. Carrington, *supra* note 63, at 301–02 (explaining that “[t]he Rules Enabling Act was avowedly anti-democratic in the sense that it withdrew procedural law-making from the political arena and made it the activity of professional technicians”).

82. Chief Justice Hughes referred to the committee as “highly competent.” THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 315 (David J. Danelski & Joseph S. Tuchin eds., Harvard Univ. Press 1973). As noted later in the discussion, the Committee solicited suggestions from each of the federal circuit courts that had already created their own committees to draft and submit rule suggestions. Lori A. Johnson, *Creating Rules of Procedure for Federal Courts: Administrative Prerogative or Legislative Policymaking*, 24 JUST. SYS. J. 23, 24 (2003). Beyond this, however, the Supreme Court did not directly engage judges. This is in striking contrast to the current committee, which is dominated by judges. *See infra* discussion in Part III.

].”⁸³ Because of the Act’s silence, at the Committee’s first meeting, the members were occupied with the Act’s scope and the technical details of the rulemaking process. For example, they discussed whether, under the Act, they were permitted to draft rules of evidence, appellate procedure, or bankruptcy rules.⁸⁴ They also debated how to structure the rulemaking process.⁸⁵ The Committee decided to adopt the American Law Institute’s model for drafting the rules, which meant the Reporter would draft and circulate rules to the Committee for review.⁸⁶ In addition, sensitive to how the Bench and Bar would receive the rules, the members agreed to send the proposed rules to certain judges and lawyers before forwarding them to the Supreme Court.⁸⁷ In this one meeting, the Committee determined the fundamentals of a rulemaking structure that would endure for the next eighty years.

When it came to the content of the rules, the members were not as preoccupied with the Enabling Act’s silence. The members brought their own strong opinions about the rules’ substance. And, they were attentive to the same concerns that animated the passage of the Act, including what effects the rules should avoid to ensure access. First, the Committee was adamant about uniformity of the rules. A debate about rule uniformity spans sixteen pages of the initial minutes, ending with a resolution that the rules would be constant in each and every district court.⁸⁸

In addition, the now-familiar substance of the rules showed the rulemakers’ concern with access. Under the leadership of Clark, the Committee drafted flexible pleading, liberal joinder, and broad discovery rules.⁸⁹ By introducing this flexibility,

83. Burbank, *supra* note 6, at 1088–89; *see also* Walsh, *supra* note 65, at 9 (“[T]he magnitude of the task thus to be imposed upon the Supreme Court of the United States is something I am perfectly certain has not even been conceived of by those who seek to institute this reform.”). Walsh expressed that the Supreme Court was too busy to draft the rules, so it “would be obliged to farm it out to some kind of a commission who would be charged with the duty of doing this great work.” *Id.* He also noted that “[n]o provision is made for the creation of such a commission in the bill or for the paying of the commissioners who would do the work or even for the payment of the necessary clerk hire in order that it might be carried on.” *Id.*

84. *See* MINUTES OF ADVISORY RULES COMMITTEE, *supra* note 80, at 111–28, 176–78. Ultimately, the Committee adopted a resolution that “it is the sense of this Committee that the writing of a code of evidence is not included within the general scope of the statute.” *Id.* at 126–27. At the behest of Clark, this was their “tentative” sense, leaving open the option of drafting a code of evidence at a later date. *Id.* at 127. The Committee did not disagree as much about drafting rules of appellate and bankruptcy procedure. *Id.* at 125–52, 176–78. The Committee agreed to draft rules about the method of appeal at the district court level, leaving any appellate court procedure to Congress. *Id.* at 149. Finally, the Committee also debated whether, in light of the existing venue statute, it could draft rules adapting or incorporating venue. *Id.* at 159–63.

85. *See supra* note 76. Under the statute, the rules had to be reported to Congress at the beginning of its session and would take effect after that session closed, but no other process was required. *Id.*

86. *See* MINUTES OF ADVISORY RULES COMMITTEE, *supra* note 80, at 6.

87. The Chief Justice indicated that the Committee would call on outside assistance, including “helpful agencies, . . . the Department of Justice, . . . lawyers, judges and expert students of procedure.” *See* Hughes, *supra* note 80, at 342. Clark explained that moving forward with the rulemaking process too quickly, to the exclusion of the Bar, “would not give a good impression.” MINUTES OF ADVISORY RULES COMMITTEE, *supra* note 80, at 19. The Committee members repeatedly expressed concerns about how the draft rules would be received by the Bar. For example, when discussing what terms of art to use in the rules, Chairman Mitchell worried that the Bar would reject the rules if they contained a lot of new terms. *Id.* at 153. He stated, “You are running into a serious problem there, if you hand out to the Bar a set of rules with a lot of new words in it, a lot of new definitions and so on, so that they don’t entirely approve of them; you are liable to have a severe kick-back.” *Id.* The minutes are fraught with expressions of concern regarding how the Bar would react to the rules.

88. *See* MINUTES OF ADVISORY RULES COMMITTEE, *supra* note 80, at 90–105. The Committee noted that if a point of procedure was not covered by the new rules, the local rule would fill that void. *Id.* at 103–05.

89. PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF CHARLES E. CLARK 43–68 (Reasoner & Wright eds., 1965) [hereinafter ESSAYS]. Clark was responsible for the pleading and joinder rules. Professor Edson R.

the structure eliminated complex procedural barriers that had thwarted litigants from reaching the merits of their claims in the past. The purpose of these reforms, according to Clark, was to “favor [] less binding and strict rules of form [] upon the litigants and their counsel.”⁹⁰ In addition, Clark reiterated that uniform procedural rules that did not bias any group of litigants were necessary. As he later wrote, “Regular procedure is necessary to secure equal treatment for all; it is necessary, too, for the quite important factor of the *appearance* of equal treatment of all.”⁹¹ The “settled habits” set out in the new procedural rules were critical to this proper “process of adjudication,” where litigants were able to reach the merits of their claims without unnecessary procedural barriers.⁹²

With these goals in mind, the Committee met several times over a two-year period to create the rules.⁹³ The rules were readily approved by the Supreme Court in December 1937, forwarded on to the Attorney General, and presented to Congress at the beginning of its 1938 session.⁹⁴ The rules became law at the end of the congressional session on September 16, 1938.⁹⁵ Following all of the activity that went into creating this seminal 1938 package of rules, the Committee was far less active. The Supreme Court officially designated the Committee as a continuing body on January 5, 1942, and the Committee presented some technical amendments over the next several years, but did not modify the original substance of the rules.⁹⁶ By the end of this period, the Committee operated more or less in quiet isolation.⁹⁷

2. Rulemaking: A Minor Crisis and Restructuring

This relative calm for the rulemaking committee did not last for long. By the early 1950s, there was a perception that the Supreme Court was simply “rubber stamping,” and not fully considering, the work of the Committee.⁹⁸ The Committee responded by suggesting a number of process reform proposals to the Supreme

Sunderland of the University of Michigan was responsible for the discovery and summary judgment drafts. See Subrin, *supra* note 20, at 710; Edson R. Sunderland, *The Theory and Practice of Pretrial Procedure*, 36 MICH. L. REV. 215, 216 (1937).

90. ESSAYS, *supra* note 89, at 76. Clark showed concern for how litigants felt about the system. See *id.* at 77–78, for Clark’s re-telling of Crosgate’s Case, a dialogue that demonstrated how silly and unsatisfying legal technicalities can seem to those “ignorant” of legalese.

91. *Id.* at 70.

92. *Id.* Clark also noted the tension between “develop[ing] a rule sufficiently complex to suggest the various applications to which it is susceptible and yet sufficiently flexible not to restrict.” *Id.* at 132.

93. The Committee met in June 1935, November 1935, February 1936, April 1936, August 1936, October 1936, February 1937, and November 1937. See Federal Rulemaking website, <http://www.uscourts.gov/rules/minutes.htm> (last visited Apr. 23, 2009).

94. THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES, *supra* note 82, at 315; Walker, *supra* note 7, at 465.

95. Walker, *supra* note 7, at 465.

96. Continuance of Advisory Comm., 314 U.S. 720 (1942). In that order, the Supreme Court deemed the Committee an “Advisory Committee.” *Id.* Again, in this article, I will call the Advisory Committee on the Civil Rules the “Committee.”

97. *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, 685 (1995) [hereinafter *1995 Self Study*].

98. *Id.*

Court.⁹⁹ For reasons not altogether clear, the Supreme Court did not respond to these proposals, but instead disbanded the Committee.¹⁰⁰

In response, organizations like the ABA and the Judicial Conference fought to bring a rulemaking body back into existence.¹⁰¹ In 1958, Chief Justice Earl Warren, Justice Tom C. Clark, and Fourth Circuit Chief Judge John J. Parker resolved the conflict.¹⁰² They proposed a process that looked strikingly similar to what had been in place since 1934. However, there were some notable changes. First, the Chief Justice was responsible for appointing committee members.¹⁰³ In addition, the Judicial Conference of the United States¹⁰⁴ was now required to advise the Supreme Court about changes to the rules.¹⁰⁵ Specifically, the Conference was responsible for “institut[ing] and carry[ing] on a continuous study of the federal rules of practice and procedure in the federal courts” and for “mak[ing] recommendations as to additions and revisions of the same to the Supreme Court.”¹⁰⁶ This meant that the Committee no longer reported directly to the Court, but instead filtered its proposals through the Conference.

Congress codified this agreement,¹⁰⁷ but the statute remained silent as to a rulemaking process and mandate. In response, the Judicial Conference formed a different committee structure: a Standing Committee with oversight over five advisory committees (one each for admiralty, bankruptcy, appellate, civil, and criminal rules).¹⁰⁸ The Conference also instructed all of its committees “to promote simplicity in procedure, fairness in administration, the just determination of

99. *Id.*

100. *Id.*; Order Discharging the Advisory Comm., 352 U.S. 803 (1956). The negativism aimed at the Committee coincided with increased tension about the Court and its “activism” in overturning popular legislation. Decisions like *Brown v. Board of Education*, 347 U.S. 483 (1954), and a number of First Amendment cases that the Court decided in favor of Communists and Communist sympathizers created a perception that the Court was not following the will of the nation or particular subsets of the nation. As during the 1930s, Congress threatened the Court’s authority by threatening to limit the Court’s jurisdiction. For more on this period with respect to the Court’s jurisprudence and the public response, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 YALE L.J. 153 (2002).

101. *1995 Self-Study*, *supra* note 97, at 685–86.

102. This solution was reached not in the halls of Congress, but on a cruise ship. *Id.* at 686. The three men took daily walks around the deck of the Queen Mary, as they floated toward the 1957 ABA Convention. *Id.* According to Justice Clark, they “thrashed out the problem thoroughly” while taking these walks. *Id.* The eventual agreement was later called the “Queen Mary Compromise.” *Id.*

103. *Id.*

104. *See supra* note 2.

105. *1995 Self-Study*, *supra* note 97, at 686. The statutory language requires the Judicial Conference to continually study the “operation and effect” of the rules of practice and procedure. The Judicial Conference is made up of the Chief Justice and chief judges from each of the thirteen courts of appeal, the Chief Judge of the Court of International Trade, and twelve district judges chosen from each circuit by the judges of that circuit. *Id.* at 687. The Conference meets twice a year to “[c]onsider the administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.” *Id.*; *see also* Jeffrey Stempel, *Politics & Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 619–21 (2001).

106. *A Discussion of Rule-Making Under a Plan Soon to be Considered by the Congress of the United States*, 21 F.R.D. 117, 117 (1957) [hereinafter *Discussion of Rule-Making*].

107. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (1958).

108. JUDICIAL CONFERENCE OF THE U.S., ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 6–7 (1958) [hereinafter *JUDICIAL CONFERENCE REPORT*]; McCabe, *supra* note 2, at 1659.

litigation, and the elimination of unjustifiable expense and delay.”¹⁰⁹ Just, speedy, and inexpensive continued to be the basic directive, but the Conference did not explain how to interpret these terms.

These changes to the committee structure were intended to address concerns about the process, but they did not put a stop to that criticism.¹¹⁰ Instead, this period closed with a key misstep in rulemaking history. In 1972, the Evidence Rules Committee¹¹¹ proposed controversial rules that were ultimately rewritten by Congress.¹¹² The rules were criticized for being unresponsive to concerns about the scope of important societal interests like spousal privilege.¹¹³ Most commentators cite this so-called “evidence debacle” as the beginning of the end for unadulterated rulemaking independence.¹¹⁴ At the very least, the gaffe over the Rules of Evidence brought much greater scrutiny to the rulemaking process.

3. Crisis for Civil Litigation and Civil Rulemaking

Following the problems with the Evidence Rules, commentators and legislators began to take aim at the entire rulemaking operation by challenging how the process worked.¹¹⁵ In an attempt to head off further criticism of its activities, the Standing

109. JUDICIAL CONFERENCE REPORT, *supra* note 108. The Bench and Bar responded positively to these changes. Judge Maris, a Senior Third Circuit Judge wrote the following in an ABA article summarizing the new process:

With such backing from the Chief Justice of the United States and with the cooperation of the Bench and Bar the program of the Judicial Conference for the improvement of federal procedure will be effective and the Supreme Court will be afforded the assistance which it needs in order to enable it to keep the federal rules of procedure always in such form as to promote, in the light of the best current thought and practice, simplicity, fairness and the just, economical and prompt determination of litigation in the federal courts.

Alfred B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 777 (1961).

110. Apprehension of the procedural rulemaking process paralleled apprehension of the Court itself. By 1962, the now-familiar critique of the Court’s legitimacy was articulated by Alexander Bickel. He coined the term—the “counter-majoritarian” difficulty of judicial review—in his book, *The Least Dangerous Branch*. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (Yale Univ. Press 1986) (1962).

111. I will refer to the Advisory Committee on the Rules of Evidence as the “Evidence Committee.”

112. In 1965, the Judicial Conference created the Evidence Committee to draft the first-ever Federal Rules of Evidence. *1995 Self-Study*, *supra* note 97, at 686. The Admiralty Rules were merged into the Federal Rules of Civil Rules in 1966; thus, there were still only five advisory committees after the Evidence Rules Committee was created. McCabe, *supra* note 2, at 1659. Up to that time, the “rules” of evidence were spread between common law and some codified procedural rules. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL PRACTICE DESKBOOK* § 99 (2002). In response, the Conference thought it prudent and in the interest of uniformity to create one set of evidentiary rules. See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 674 (1975). Seven years later, the Judicial Conference presented proposed rules to Congress. *1995 Self-Study*, *supra* note 97, at 686. The rules were controversial. Most notably, especially the rules concerned with privilege. *Id.* For example, the Evidence Committee drafted a rule prohibiting forced testimony against one’s spouse; however, it rejected a rule privileging all spousal communications. Friedenthal, *supra*, at 683–84. For a full discussion of Congress’s rejection of the proposed rules of evidence, see *id.* at 673–86.

113. See Friedenthal, *supra* note 112, at 682–83.

114. For example, Congress passed a law that departed from common rulemaking practice by requiring express congressional approval of any evidentiary privilege rule. See 28 U.S.C. § 2074(b) (2006). In anticipation of continuing discord between the Judiciary and Congress, Chief Justice Burger commissioned a study of the federal rulemaking process by the Federal Judicial Center. See WINIFRED R. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES*, at vi (Federal Judicial Center 1981). Burger acknowledged that “another look at the entire... process” might be warranted. *Id.*

115. See, e.g., Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Civil Rules of*

Committee codified its “evolved practice” in 1983.¹¹⁶ These practices included conducting public hearings about rule proposals and recording and publishing hearing transcripts.¹¹⁷ Up to this time, the Committee held closed meetings, only made public comments available to people who could show a “legitimate purpose,” and did not otherwise publicize the Committee minutes, notes, materials, and rule drafts.¹¹⁸ Unsatisfied by these changes, Congress passed an amendment to the Rules Enabling Act in 1988, called the Judicial Improvements and Access to Justice Act (the Justice Act), which codified these changes and added many others.¹¹⁹ The amendment required open meetings with prior notice, a written report to document what the committee considered (including negative public comments), public hearings, a longer public comment period, and publicized meeting minutes.¹²⁰ Through the Justice Act, Congress involved itself in the rulemaking process in a way that had been unprecedented since 1934.¹²¹

In spite of these changes, the perception that the Committee was out of touch did not wane. First, commentators and Congress persistently criticized the rules.¹²² Second, Congress continued to legislate in areas considered the judiciary’s domain. For instance, under the Civil Justice Reform Act of 1990 (CJRA),¹²³ Congress required each district court to create a plan to reduce cost and delay. While the CJRA did not directly affect the rulemaking process, it deviated from the principle of uniformity by allowing for district courts to pass different rules.¹²⁴

To this day, Congress and commentators continue to express unease about civil rulemaking. “Crisis” rhetoric is often employed to describe its state of being.¹²⁵ The

Procedure: Some Questions About Power, 11 HOFSTRA L. REV. 997 (1983); John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435 (1994); see also *supra* note 7 and discussion *infra* Part III.A.

116. Walker, *supra* note 7, at 468 (citing JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 66 (1983)).

117. *Id.* Professor Walker criticizes these changes as insubstantial. First, public attendance at the meetings was not discussed. And, even though the Standing Committee and Judicial Conference reviewed the rules, Walker argues that there was no evidence that those bodies did much to limit the discretion of the committee. *Id.*

118. McCabe, *supra* note 2, at 1671.

119. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4648–4652 (1988) (requiring open meetings); see also *1995 Self-Study*, *supra* note 97, at 687.

120. Bone, *supra* note 5, at 903; Walker, *supra* note 7, at 468–69.

121. The House version of the bill also eliminated the Act’s “supersession” clause, but the Senate rejected that provision. McCabe, *supra* note 2, at 1662–63. For a full discussion of this issue, see Carrington, *supra* note 63, at 322–26.

122. See Burbank, *supra* note 7, at 845. Professor Burbank criticized the Rule 26 amendments by arguing they passed with “little relevant empirical evidence, and, indeed, the Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under the rules.” *Id.*; see also Stempel, *supra* note 105, at 636. Professor Stempel wrote in disapproving of the 2000 discovery amendments that

[a]t the metaphorical end of the day, the proposal to limit discovery scope is explained less by the cerebral power of an idea whose time has come and more by the political structure of the rulemaking process and the socio-political structure of the elite bar and the current federal bench, particularly conservative Chief Justice Rehnquist, who selects the Advisory and Standing Committees.

Id.

123. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–482 (2006)); McCabe, *supra* note 2, at 1664.

124. See Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1285–87 (1993).

125. See Richard Marcus, *Reform Through Rulemaking?*, 80 WASH. U.L.Q. 901, 910–11 (2002) (chronicling

cause of the discomfort with civil rulemaking is complex. It is driven by concerns that are both intellectual—institutional pressures and politics—and mundane—personality conflicts and turf wars. For this article I focus on one source of disquiet regarding the Civil Rules and the rulemaking process: the state of civil litigation.

Starting in the 1970s, a so-called “litigation explosion” captured the attention of lawyers and lay people alike.¹²⁶ A negative view of litigation—one that relied heavily on frivolous lawsuits burying the justice system and providing a windfall to undeserving litigants—began to take hold.¹²⁷ Since then, the debate over frivolous litigation has permeated the discussion of civil litigation in the media, on the legislative floor, and in academia.¹²⁸ Moreover, high-profile cases and damage awards¹²⁹ and overburdened judicial dockets¹³⁰ have only compounded the argument that the civil justice system is in need of repair. There is rich academic literature on both sides,¹³¹ and I do not rehearse the debate here. Rather, I call attention to this movement in civil litigation as the impetus for the diminution of access in civil rulemaking.

The state of civil litigation has led to a call for systemic efficiency, and multiple institutions have heeded that call.¹³² As the counterweight to efficiency, access to

the negative rhetoric used to explain the state of civil rulemaking, including statements of its being “under siege” and in its “death throes”).

126. Miller, *supra* note 9, at 984–86.

127. *Id.* at 987.

128. See *id.* at 985–1016. The media has fostered political rhetoric about the negative impact of litigation. See, e.g., Robert S. Peck & John Vail, *Blame It on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323 (2007) (summarizing the increased public hostility to the civil justice system and trial lawyers); Jonathan D. Glater, *To the Trenches: The Tort War Is Raging On*, N.Y. TIMES, June 22, 2008, at B1; Steve Pearlstein, *Altering the Economics of Civil Litigation*, WASHINGTON POST, July 4, 2008, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/03/AR2008070303239.html>, July 4, 2008 (criticizing the Supreme Court’s decision in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), as being “to 21st-century jurisprudence what Dickens’ *Jarndyce v. Jarndyce* was to the 19th century”). Similarly, politicians have cultivated a negative view of litigation and the judicial system. See, e.g., John McCain, Remarks by John McCain on Judicial Philosophy (May 6, 2008), available at <http://i.usatoday.net/news/mmemmottpdf/mccain-on-judges-may-6-2008.pdf>.

129. The McDonalds hot coffee spill litigation is the emblematic high-profile case. The media portrayed this case as an example of the ridiculous claims individuals could be compensated for in court. See Miller, *supra* note 9, at 987–88 & n.15 (noting that the plaintiff had a valid claim because the coffee was “superheated,” and because the victim sustained serious burns that required substantial hospitalization).

130. The court system is burdened, but this is not just the result of an increase in civil litigation, which, as noted, is debatable when compared to earlier civil filing trends. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986). Congress has created additional substantive rights and increasingly criminalized activities under federal law. This has contributed to the increase in docket activity in federal courts generally. See Miller, *supra* note 9, at 990–95. Moreover, there are not enough judges, and caseloads per judge have steadily increased. See Harlington Wood, Jr., *Real Judges*, 58 N.Y.U. ANN. SURV. AM. L. 259, 265 (2001) (“In the past three decades, judges of the United States courts of appeals have seen a nearly two hundred percent increase in their average caseloads, and a federal district judge’s average caseload has increased by over fifty-five percent.”).

131. See, e.g., E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985); Miller, *supra* note 9; Stempel, *supra* note 12; Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155 (1993).

132. See Stempel, *supra* note 12, at 996 (“[I]t seems likely that the availability of full adjudication has declined during the past twenty years. The total number of cases continues to increase as a function of population growth, social complexity, changes in substantive law, litigiousness and the like. However, today’s disputant considering litigation to assert a claim seems likely to find the option less attractive than was the case in the 1970s.

the justice system is deemphasized. Civil rulemaking, subject to these same political, institutional, and societal pressures, is not immune to this movement. Below, I offer examples of how recent Civil Rules have diminished access. These examples are not exhaustive, nor do they represent an argument that the rulemakers affirmatively moved to restrict litigant access. To the contrary, these examples show how civil rulemaking is caught up in a larger movement that aims to restrain litigation and demonstrate how, as a consequence, access has faded as a guiding principle.

The first example is the 1983 amendment to Rule 11. Rule 11 had always authorized sanctions for filing frivolous claims, but this amendment *required* such sanctions.¹³³ This change to the rules was lauded as one necessary tool to fix the litigation explosion.¹³⁴ Yet, the rule produced at least one unintended consequence—satellite litigation over the merits of Rule 11 motions—cutting against the idea that the rules should not engender unnecessary complexity or reward tactical behavior.¹³⁵ In addition, the rule resulted in a biased application to litigants. Studies of Rule 11’s impact show that plaintiffs were sanctioned more often than defendants, and that even within plaintiffs as a group, particular

Although the growth of alternatives to ADR may provide an adequate substitute for trial, obtaining trial itself is a more difficult and cumbersome process.”). The summary I provide oversimplifies the contributing factors to this diminished access. I do so to make a point about the role of civil rulemaking in restoring access—the idea that, to the extent we sacrifice access, we should do so thoughtfully. I do not make the argument in order to assert that there is a right side and wrong side to how access is treated within our justice system. I take respite in this complexity by relying on Professor Stephen Yeazell’s un-binary view of the civil justice system. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 (1994). Yeazell writes,

Although we consciously chose the individual legal changes, we have not entirely comprehended their combined effect. As a consequence, we sometimes debate particular features—for example, styles of judging, the virtues and vices of discovery, abuses of the legal system, alternatives to litigation, and various docket-speeding local experiments—without acknowledging their links to the system as a whole. We need a better sense of these connections and a more comprehensive sense of how process functions as a system.

Id.

133. Carl Tobias, *The 1993 Revision to Federal Rule 11*, 70 IND. L.J. 171, 172 (1994). The rule was amended to remove the subjective standard of whether the filing was made in good faith and replace it with an objective standard requiring sanctions if the filing was not reasonably investigated to assure it was “well grounded in fact” and “warranted by existing law.” See WALTER R. MANSFIELD, REPORT FROM ADVISORY COMMITTEE ON CIVIL RULES TO STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 3–4 (1982), available at <http://www.uscourts.gov/rules/Reports/CV03-1982.pdf>.

134. Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 858–59 (1992) (“Most of the [litigation explosion] contentions were controversial then and remain so. Notwithstanding these complications and a paucity of applicable data, the Advisory Committee and the Supreme Court suggested Rule 11’s substantial revision as one response to litigation abuse.”).

135. Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1941–42 (1989) [hereinafter Burbank, *The Transformation of American Civil Procedure*]; see also Tobias, *supra* note 134. Rule 11 was controversial when adopted. The House rejected the rule, and the Senate was prepared to do the same. Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 228 (1997) [hereinafter Burbank, *Implementing Procedural Change*]. A timing lapse allowed the rules to become effective, however, because the Senate bill rejecting the rules did not come to the floor in time. *Id.* at 228. See generally Tobias, *supra* note 133 (discussing in depth the 1983 and 1993 amendments to Rule 11). It could be argued that Congress’s attempt to override Rule 11 demonstrates that the system is attuned to access concerns. While it is true that Congress almost prevented the rule from being adopted, the rule ultimately passed. Congress was unable to stop the rule from passing for some of the reasons that I outline in Part III.A. In response to that structural defect, I argue for Congress to have a greater presence in the ongoing process so that it has less tendency to step in at inopportune times or to miss a chance to stop a faulty rule. See *infra* Part III.B.

plaintiffs—such as those bringing civil rights claims—were sanctioned more often than plaintiffs bringing other types of substantive claims.¹³⁶ Thus, the rule created, rather than precluded, tactical maneuvering, bias, and complexity/cost.¹³⁷ Or, put another way, an efficiency response to the litigation-explosion critique took precedence over access.

Discovery rule amendments have similarly been designed to curb the litigation explosion. Discovery rules were originally viewed as a key component of the Civil Rules.¹³⁸ The rules give litigants insight into information not otherwise in their control, and thus, increase the potential for reaching the merits of their case.¹³⁹ Yet, beginning in the 1960s, commentators began to articulate concerns about “discovery abuse.”¹⁴⁰ The Committee responded to this charge by implementing a string of discovery amendments meant to stifle the abuse.

For example, in 1993, the Committee attempted to “simplify” discovery by requiring automatic disclosure of items relevant to matters “alleged with particularity” in the pleadings.¹⁴¹ This change was incredibly controversial.

136. Tobias, *supra* note 134, at 859–60; *see also* Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986). *But see* Marcus, *supra* note 14, at 797–99 (disputing some of these claims about the impact of Rule 11).

137. Over a decade later, the Committee went back to the drawing board and amended the rule to make the sanctions discretionary and to provide litigants with a safe harbor. The 1993 amendments to Rule 11 arguably lessened these consequences, but some commentators argue that the rule amendment continues to chill some litigation. Tobias, *supra* note 134, at 897 (“Nevertheless, an incorrect balance was struck because the proposed Rule will insufficiently ameliorate the burdens for parties and attorneys, particularly poorer ones.”); Tobias, *supra* note 135, at 192; *see also* Stempel, *supra* note 12, at 994 (“[B]oth the 1983 Amendment and the 1993 Amendment represent increased procedural hurdles and risk for litigants, resulting in a net shrinkage of access to courts.”). An argument can be made that access concerns led the Committee to revise the 1983 amendment. Yet, the Committee was largely driven to change the rule because studies determined that the rule was not efficacious in decreasing frivolous suits; it was less convinced when it came to access concerns. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, 137 F.R.D. 53, 65 (June 13, 1991). The Committee considered the following in revising Rule 11:

(1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party’s belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel.

Id. at 64–65. The first consideration augments access, yet the remaining concerns are more systemic. As to chilling litigation, the second consideration, the Committee notes that this was only an “occasional” problem and not a primary concern.

138. *See* Subrin, *supra* note 20, at 710–29.

139. Sunderland stated, “Only by a preliminary proceeding in which each party may call upon the other to submit himself and his witnesses to interrogation under oath, can the true nature of the controversy be satisfactorily ascertained.” *Id.* at 716 (quoting Edson R. Sunderland, *Improving the Administration of Civil Justice*, in 167 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 60, 74 (1933)).

140. *See* Stempel, *supra* note 105, at 540–49, for a discussion of the origin and response to “discovery abuse.” *See also* FED. R. CIV. P. 26(f) advisory committee’s note (“There has been widespread criticism of abuse of discovery.”); COLUMBIA UNIVERSITY SCHOOL OF LAW PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY (1965); Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958).

141. *See* STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PROPOSED AMENDMENTS TO THE

Plaintiffs worried that defendants would abuse the rule because the mandatory discovery requirement was triggered by specific facts and did not rely on a notice pleading standard.¹⁴² They complained that defendants could avoid producing material evidence by asserting the documents did not relate to a matter pled with particularity.¹⁴³ Defendants worried about how to determine what should be disclosed under the rule and what that determination would cost.¹⁴⁴ Largely because no one was happy with this rule, the Committee allowed for districts to opt out of it.¹⁴⁵ This move ran afoul of uniformity principles and created bias in how the rule was applied to plaintiffs and defendants alike. In other words, a defendant in one district court could be subject to a different rule than a similarly situated defendant in a neighboring district court.¹⁴⁶ Moreover, some commentators asserted that the rule amendments created an opportunity for gamesmanship because defendants could refuse to produce meaningful discovery by claiming that the plaintiff had not pled an issue with sufficient particularity.¹⁴⁷ This violated the principle that the rules not reward tactical behavior.¹⁴⁸

These rules exemplify how access, as understood by the proponents of the Rules Enabling Act, has been deemphasized in the civil rulemaking process. It is worth noting, however, that the civil rulemaking body is not the only institution trying to control litigation in this fashion. Rather, a number of institutions are doing so.

In recent decades, Congress has shown a greater willingness to engage in procedural reform as a way to thwart what it views as wasteful litigation. One example is the 1995 Private Securities Litigation Reform Act.¹⁴⁹ Among other things, the Act required heightened pleading standards for plaintiffs in securities litigation actions, and it limited discovery until a motion to dismiss was decided by the court.¹⁵⁰ A more recent example of congressional intervention is the 2005 Class Action Fairness Act, which moved jurisdiction for most class actions from state to federal court.¹⁵¹ These legislative acts were meant to curb so-called frivolous

FEDERAL RULES OF CIVIL PROCEDURE AND FORMS 72–111 (1992), available at <http://www.uscourts.gov/rules/Reports/ST09-1992.pdf>.

142. Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 179 (1994); Robert E. Oliphant, *Four Years of Experience with Rule 26(A)(1): The Rule is Alive and Well*, 24 WM. MITCHELL L. REV. 323, 332 (1998).

143. Hench, *supra* note 142, at 198.

144. Oliphant, *supra* note 142, at 332.

145. See PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, *supra* note 141, at 95.

146. The rule was amended in 2000 to eliminate the opt-in provision, but it was also arguably made even more restrictive by limiting the scope of the mandatory disclosure to items related to claims or defenses (not to “relevant subject matter”). Stempel, *supra* note 105, at 549–52. For more on the impact of this amendment, see *id.*

147. Hench, *supra* note 142, at 211–14.

148. See generally Hench, *supra* note 142. The irony of this is that the rule was originally conceived, in part, to end the kind of gamesmanship that its proponents believed was prevalent under the existing discovery system. See Mullenix, *supra* note 7, at 820.

149. Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.); see also related changes in the Securities Litigation Uniform Standards of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

150. PSLRA § 101(a). For an overview of the PSLRA, see Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 552–61 (1998).

151. For an article summarizing CAFA, see Sarah S. Vance, *A Primer on the Class Action Fairness Act of*

litigation, but many commentators believe that they also limit meritorious litigation. In other words, even legitimate litigants may be stifled from filing or reaching the merits of their claims because of the barriers this legislation erects.¹⁵²

The Supreme Court has similarly reacted to the litigation explosion. The best demonstration of this response is the so-called trilogy of cases, where in one year, the Court decided three crucial cases about summary judgment.¹⁵³ While the academic discourse about summary judgment is intensely divided, a number of scholars have questioned whether summary judgment has in fact decreased frivolous litigation.¹⁵⁴ Moreover, many scholars have argued that there is a defendant bias in summary judgment and that increased summary judgment filings have denied many litigants the opportunity to reach the merits of their claims.¹⁵⁵

2005, 80 TUL. L. REV. 1617 (2006).

152. See Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2002) (arguing that the PSLRA's heightened pleading requirements have eliminated litigation at the motion to dismiss stage, when in the very least, the litigation was better suited for summary judgment or trial); but see Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913 (2003) (arguing in part that the overall quality of securities litigation improved following the adoption of the act). See also Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1876 (2006) ("By moving nationwide class actions involving state-law claims into federal court, the defense-side backers of CAFA were not engaged in a mere shell game. The point of moving such classes into federal court is to subject them to a distinctively federal body of class certification principles, and in so doing, to alter the outcomes of class certification decisions from what they otherwise would have been—at least in some courts within some state judicial systems."); Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1038 (2006) ("[C]ritics point out that CAFA has shifted bargaining power to defendants by denying plaintiffs access to the forum of their choice. Most corporate defendants prefer a federal forum, in large part because they win more often there."); but see Allan Kanner & Ryann Casey, *Consumer Class Actions After CAFA*, 56 DRAKE L. REV. 303, 304 (2008) ("In all likelihood, CAFA will facilitate consumer class actions over the long term because CAFA has given federal courts a strong mandate to capture the benefits of beneficial class actions.")

153. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that "the [initial] burden [of production] on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) (holding that when "ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden"); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (limiting the inferences to be drawn in a summary judgment motion to those called for by the underlying substantive law).

154. See, e.g., Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988) (criticizing the court for its trilogy of cases); but see Jack Achiezer Guggenheim, *In Summary It Makes Sense: A Proposal to Substantially Expand the Role of Summary Judgment in Nonjury Cases*, 43 SAN DIEGO L. REV. 319 (2006) (arguing that summary judgment has proved to be so efficient, its use should be expanded).

155. See Miller, *supra* note 9, at 1071 ("Overly enthusiastic use of summary judgment means that trialworthy cases will be terminated pretrial on motion papers, possibly compromising the litigants' constitutional rights to a day in court and jury trial. That is a risk the trilogy has created."). Some scholars have even argued that summary judgment is unconstitutional because it denies a litigant her right to trial. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007). The empirical work done on summary judgment is still unsettled. In a recent Federal Judicial Center study, the center found that the number of summary judgment motions filed had not increased at a great rate since 1986. See Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskop, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 861 (2007). The filing rate went from 12 percent to 21 percent. *Id.* at 896. The same held true for the number of motions granted, which doubled for motions granted in part from 6 to 12 percent and for motions granted in full from 4 to 8 percent. *Id.* Yet, the study also noted that filing rates significantly increased in civil rights litigation, which may have increased during the study. *Id.* at 900; see also Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 16 (Cornell Law Sch. Legal Studies Research Paper Series, Research Paper No. 08-022, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138373 (finding in another study

Commentators similarly worry about how the Court's recent decision in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*¹⁵⁶ will affect litigants. Some argue that, as a result of these cases, the Court is moving toward a heightened pleading regime.¹⁵⁷ The ultimate impact of *Twombly* and *Iqbal* is being debated in both the courts and in academic literature.¹⁵⁸ Yet, for the Court to even reconsider the notice pleading standard repeatedly upheld in *Conley*¹⁵⁹ and its progeny is disturbing to many commentators and signals an attenuation of access as a guiding principle of our civil litigation system.

A final institutional actor is the organized bar group. From the American Law Institute to the American Association for Justice¹⁶⁰ to the ABA, these groups are heavily involved in shaping civil litigation. And, much of their organized work impacts how Congress and the Supreme Court approach procedural rules.¹⁶¹ Depending on the groups' ideological bent, they lobby for different reforms. Yet, in recent decades, some have argued that the defense-side bar associations have exerted a greater influence, thereby diminishing access for some litigants.¹⁶²

Together, these institutions have worked to curb what is viewed as inefficient litigation, and as a consequence, access has diminished. With respect to civil rulemaking, Rules 11 and 26 demonstrate that rulemakers have been less attentive to precluding the tactical, biased, and complex/costly effects of procedures. To be sure, rulemakers are generally sensitive to access concerns. Yet, as I argue in the next Part, the Committee members' weighted litigation experience and the lack of an explicit access mandate has allowed access to be overshadowed by persistent litigation-explosion concerns. In the next Part, I turn from a historical discussion of

that the grant rate only increased for employment discrimination cases). All of these studies only sample particular districts; thus, it is difficult to determine the overall effect that the changes to summary judgment practice have had on litigants.

156. *Twombly*, 500 U.S. 544, 555 (2007) (holding that to survive a motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level"); *Iqbal*, 129 S.Ct. 1937, 1949 (2009) (holding that to survive a motion to dismiss, a plaintiff must plead enough "factual content" to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").

157. Spencer, *supra* note 11, at 433. One study conducted by a student has found that dismissals in civil rights litigation have increased by 11 percent. See Kendall W. Hannon, Note, *Much Ado About Twombly? A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

158. See, e.g., Symposium, *The Future of Pleading in the Federal System: Debating the Impact of Bell Atlantic v. Twombly*, 82 ST. JOHN'S L. REV. 849 (2008); Suja Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008). Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009). According to one study, the case was cited 4000 times in its first nine months. Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1222 (2008). Beyond these decisions, the Supreme Court has also contributed to the increase in arbitration or other alternative dispute resolution methods. The Court expanded the Federal Arbitration Act in 1984 and its impact has increased ever since. See generally IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* (1992).

159. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (noting that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). But see *Twombly*, 500 U.S. at 563 ("retiring" this oft-quoted *Conley* language); *Iqbal*, 129 S.Ct. at 1953 (confirming that *Twombly* applies to all "civil actions").

160. This group was formerly known as the Association of Trial Lawyers of America.

161. These groups have an impact on the substantive law by lobbying Congress for particular statutes. They also influence our understanding of the law by drafting restatements of the law (the American Law Institute) and by helping to develop code systems like the Uniform Commercial Code.

162. See Stempel, *supra* note 105, at 623–34 (discussing the impact of the ABA and the American College of Trial Lawyers on discovery reform).

access to an examination of how structural changes to the rulemaking process can augment access going forward.

III. RECOVERING ACCESS

The decline of what I define as access in civil litigation can be addressed in part by civil rulemaking, but only if structural changes to the process are made. In the previous Parts, I demonstrated that civil rulemaking should endeavor to account for access when crafting the rules. This conception of the Civil Rules, one that elevates access, is supported by the historical insight into proponents' views of the Rules Enabling Act and rulemaking process. By recovering a historical account of access that maps onto the access meaning that I propose and by reviewing the state of current civil litigation and its impact on the Civil Rules, I conclude that access has been diminished. In this Part, I examine how the civil rulemaking process can be better structured to facilitate the consideration of access as a co-equal principle. Before engaging in that discussion, I provide a brief survey of the academic discourse about the structure of the rulemaking process.

A. Federal Civil Rulemaking Options: The Academic Response

Commentators defend the current court-based rulemaking structure by doing one or both of the following: (1) rejecting a legislative model of rulemaking and/or (2) suggesting modifications to the existing court-based structure that will augment the body's legitimacy.¹⁶³ Following this overview, I argue that these structural suggestions, while orthogonal to efficacy, are not constitutive of efficacy. In other words, some of the structural proposals may be required on legitimacy grounds, but they do not necessarily address the adequacy of the rules themselves.¹⁶⁴

1. Structural Options

Most commentators accept that the Supreme Court should delegate its rulemaking responsibilities. As the entity named in the Act, the Supreme Court is the most obvious body to handle rulemaking from a statutory perspective.¹⁶⁵ Yet, as already noted, no one expected the Court itself to draft the rules.¹⁶⁶ How can the

163. There are scholars who challenge the constitutionality of court-based rulemaking. See sources cited *supra* note 6. In this section, I discuss only those scholars that accept the delegation of procedural rulemaking as constitutional and comment on the structure of that process.

164. See discussion *infra* Part III.B (regarding interrelated concerns about the legitimacy of the process and the adequacy/efficacy of the rules).

165. It is also the most visible body in the judicial branch. Members of the Supreme Court are vetted by Congress. That process is fairly well publicized, and unlike the appointment of circuit and district court judges, Supreme Court appointees are subject to rigorous public exposure and debate. Moreover, academics and practitioners, with the exception of a few star members of these groups (i.e., academic Alan Dershowitz and practitioner Mark Geragos), are not subject to that kind of public and political scrutiny.

166. See *supra* note 80. In 1957, Chief Justice Hughes wrote that "[t]he existing personnel and facilities of the Supreme Court are in no sense adequate to the great responsibility for rule-making...." *Discussion of Rule-Making*, *supra* note 106, at 118; see also Maris, *supra* note 109, at 774. Maris noted that the "Supreme Court itself has neither the time nor the staff to undertake the extensive study and research involved" in drafting and amending procedural rules. *Id.* Thus, the 1958 Act that re-established the rules committee structure granted greater oversight to the Judicial Conference, not the Court. *Id.*

Court schedule meaningful rulemaking time into its already-packed docket?¹⁶⁷ Thus, delegation of the rulemaking function is generally considered the feasible institutional choice.

The question that scholars wrestle with is how court-based rulemaking is better than legislative rulemaking. Professor Robert Bone is at the forefront of this argument. He asserts that legitimacy in rulemaking “does not derive from public participation or political accountability, but instead from a model of principled deliberation akin to common law reasoning.”¹⁶⁸ According to Bone, the process does not have to be representative or public; it must be deliberative.¹⁶⁹ He concedes that public input can be useful when properly regulated and used, so the Committee should seek outside opinions of the proposed rules.¹⁷⁰ But, this does not mean that the process has to be completely open to “broad-based participation.”¹⁷¹

Bone and others concede that limited public participation in rulemaking is beneficial, but that a risk of such participation is a Committee that functions like Congress.¹⁷² The primary concern is that interest-group politics would not produce good rules.¹⁷³ Bone notes that in 1983 the process server lobby almost blocked a reasonable change to Rule 4 that would have, among other things, required service by certified or registered mail and not necessarily by an official process server.¹⁷⁴ In that instance, the lobby influenced Congress, which used its authority to delay the rule change and require an official process server to carry out the task.¹⁷⁵ Considering the impact of a relatively small interest group with respect to an otherwise reasonable rule change, one can imagine how challenging the process would become if it were baldly representative.¹⁷⁶

167. Moreover, in thinking of judicial review, it would be odd for the Court to review its own originally drafted rules and amendments. But, perhaps this discomfort calls into question the concept of the Court making its own procedural rules, whether directly or by proxy. See JACK B. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* 8 (Ohio State University Press 1977). Judge Weinstein notes that “[o]ne matter of some concern [is] the ability of any court to remain impartial in its consideration of a rule when an attack was made upon the rule’s wisdom or constitutionality, since the same body that promulgated the rule was passing upon it.” *Id.*

168. Bone, *supra* note 5, at 890.

169. *Id.* at 908–09.

170. *Id.* at 950.

171. *Id.* As will be discussed later, Bone believes that the Committee composition and mandate should be modified; that the “efficacy of the institutional design” will lend much more to the legitimacy of the institution than any additional “degree of public accountability.” *Id.*

172. *Id.* at 909; Burbank, *supra* note 7, at 849.

173. See Burbank, *supra* note 7, at 849–50 (“[T]he more we fashion the rulemaking process in Congress’ image, the more Congress will be tempted to second-guess the product of that process or to preempt it.”); Bone, *supra* note 5, at 923 (“Because of...collective action problems... legislative rulemaking is likely to be plagued by inefficient logrolling.”); Mullenix, *supra* note 7, at 801 (“[P]oliticiz[ing] the rulemaking process [will lead the Advisory Committee to] create vacuous, ineffective rules that are the result of political compromise... [to] fail to effectuate any rule reform, becoming bogged down in endless stalemate, delay, and legislative paralysis.”).

174. Bone, *supra* note 5, at 902–03. The amendment also allowed, with a few exceptions, process by any non-party adult.

175. *Id.*

176. Another example of interest-group politics affecting rulemaking occurred in 1988. In that case, Senator Inouye pushed through a revision to Rule 35 of the Federal Rules of Civil Procedure that allowed a court to order mental examinations by licensed clinical psychologists (and not just psychiatrists or psychologists with medical degrees). Burbank, *supra* note 6, at 1165. The rule change smacked of nepotism because Senator Inouye’s daughter-in-law was a licensed clinical psychologist. *Id.* Moreover, the rule reflected the broader dangers inherent in interest-group driven rules of procedure. As Burbank notes, the Rule 35 amendment is “an excellent example of the kind of legislation that turned the New York Field Code of 1848 into a monstrosity.” *Id.* If every interest

Relatedly, a disparity in lobbying resources is a reason to reject legislative rulemaking. Litigants already suffer a great difference in resources pre-, during, and post-trial. This disparity would only be exacerbated if litigants with greater resources could unevenly impact rulemaking through lobbying efforts. Paul Carrington lauds what he calls the current “apolitical approach to matters of procedure” because it does not allow “groups...such as ‘repeat players’ and the organized bar [to] exercise disproportionate influence on the process” and protects the interests of the “disorganized (and hence powerless).”¹⁷⁷

Thus, while a legislative model of federal court rulemaking has not been attempted, the general consensus is that such a body would be dysfunctional.¹⁷⁸ Consequently, one would expect commentators to agree that the existing committee system is optimal. However, there is no such consensus on that point. There is an acceptance of the delegated process writ large, but the devil is in the details. It is a struggle to structure a process that meets the vacillating complaints that commentators, the public, and Congress have about the rules produced by the Committee.

For example, up until the late 1980s the Committee functioned as a fairly isolated body.¹⁷⁹ When criticism of the Committee increased, Congress adopted the Justice Act to require greater transparency in the process.¹⁸⁰ Some, like Professor Stephen Yeazell, embrace these changes and argue that the public comment inquiry should be even more aggressive, with the committee actively seeking a “cross-section of the bar, specifically identifying those whose views might be adverse to the proposed rules.”¹⁸¹ Others reject these changes as superficial, arguing that the effect is only to put a gloss on a process that is, by its nature, skewed in one ideological direction.¹⁸² Thus, there is no agreement on what structure will achieve the best rules.

Ultimately, this conundrum about how the delegated body should function has led some to suggest solutions outside of the existing structure. Proposals include the creation of additional entities to regulate and/or participate in the rulemaking process, as well as clearer guidelines or steps designed by an outside body.¹⁸³ For

group mobilized to lobby an elected rulemaking body, the rules could similarly grow in length and complexity. Or worse, the result could be complete rulemaking gridlock.

177. See Carrington, *supra* note 63, at 301–02. Of course, the current rulemaking process is not all that different in this respect from a legislative body. Recent changes to the process have pushed rulemaking towards a legislative model. As Burbank notes, the rulemaking process has “come to resemble the legislative process,” which is “an overtly political process.” Burbank, *supra* note 7, at 849. Thus, the view of the current process as “apolitical” may be a bit naïve. Nonetheless, the concern about the effect that resource disparities between plaintiffs and defendants would have in a representative rulemaking process has some salience.

178. See *supra* notes 164–76 and accompanying text.

179. See discussion *supra* Part II.B.3.

180. See *supra* Part II.B.3. Namely, Congress required that the meetings be open to the public, that the minutes of the meetings be published, and that the public comment period be more robust.

181. See Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229, 248. Professor Yeazell argues that this approach would be far more effective than the current hearing process employed by the committee. *Id.* As it currently stands, the committee generally will hold two hearings, regionally located to allow for the most participation, to discuss the current rules. Yeazell asserts that these hearings are “transcontinental junketing and often-desultory.” *Id.*

182. See, e.g., Stempel, *supra* note 105, at 613–14 (discussing the impact of ideological composition of the rule makers on the rulemaking process).

183. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in*

example, in response to the concern that a judicial rulemaking body may act only in its own self interest,¹⁸⁴ Professor Charles Gardner Geyh proposes a solution that would allow rulemaking to remain a function of the judiciary while engendering more institutional credibility. In his opinion, an interbranch commission made up of representatives from all three branches, academia, and practitioners—what he calls an “Interbranch Commission on Law Reform and the Judiciary”—would lend credibility.¹⁸⁵ This commission would validate or dispute proposed rule changes before they went to Congress.¹⁸⁶ Academics have viewed Geyh’s proposal benevolently; yet, it has not been adopted.¹⁸⁷ This is not a surprise as comparable proposals that would modify the balance of power between the branches have already been rejected.¹⁸⁸

Congress, 71 N.Y.U. L. REV. 1165 (1996); Walker, *supra* note 7, at 481–82.

184. Geyh, *supra* note 183, at 1212–14. Geyh cites the public choice theory-based work by Professor Jonathan Macey. *Id.* In his work, Macey states the possibility that judges seek to maximize self-interest is “particularly valid in the context of a discussion about procedural rules” because they are “promulgated under the direction of judges.” See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627 (1994); but see Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1994) (rejecting many of Macey’s contentions about judicial self interest). A related concern is that the public is far more likely to seek a legislative solution to its procedural issues by going directly to Congress, a body that is set up to respond to constituencies. Geyh, *supra* note 183, at 1245. Because groups have no faith in the rulemakers, they will just usurp that authority by going directly to Congress. Professor Mullenix thinks that the question of who will do the rulemaking and how “will be decided by default or politics.” See Mullenix, *supra* note 7, at 856.

185. See Geyh, *supra* note 183, at 1234–36. Geyh writes that “interbranch interaction is necessary and desirable—the process of reform must begin by developing avenues of escape from the competence–credibility paradox, so that the judiciary can continue to exercise an active and influential role in lawmaking with a minimum of damage to its institutional credibility.” *Id.* at 1171. Specifically, the President and the Chief Justice would appoint four commissioners for staggered terms and the Speaker of the House and President Pro Tem of the Senate would appoint two (one from each political party). *Id.* at 1234. These twelve commissioners would then choose three additional members who were either litigators or academics. *Id.*

186. This validation would confirm that the rules are independently good, and not self-interested. Geyh provides no other evaluation standard, however. *Id.* at 1247. In response to the criticism that this body would have effective veto power over proposals, Geyh asserts that the commission charter can specify its advisory role purpose. *Id.* at 1247–48. Finally, Geyh rejects the critique that this would make an already cumbersome system unwieldy by stating that critics have overstated the complexity of the process. *Id.* at 1248.

187. See Burbank, *Implementing Procedural Change*, *supra* note 135, at 246. Burbank calls Geyh’s proposal “thoughtful” and “worth serious consideration.” *Id.* However, he ultimately rejects the idea because “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.” *Id.*

188. For instance, as Geyh noted, in 1989 the Federal Courts Study Committee Subcommittee on the Role of the Federal Courts in Relation to State Courts suggested that Congress create an agency “to engage in ongoing review of the use of federal judicial resources” called the “Office of Judicial Impact Assessment.” Geyh, *supra* note 183, at 1229; see also REPORT TO THE FEDERAL COURTS STUDY COMMITTEE OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES 138 (March 12, 1990). Under the Subcommittee’s original proposal, the agency would be located under Congress with a staff that would be removable only for cause. *Id.* at 138, 152. This independent agency would report on the judicial impact of proposed legislation, assess the judicial impact of decisions by the courts and the Executive, and act as a liaison between the branches. *Id.* at 141–49. The Judicial Conference’s rejection of the proposal was perceived to arise out of its unwillingness to cede turf. Geyh, *supra* note 183, at 1229–30. The Subcommittee’s suggestion to locate the agency under the Federal Judicial Center was also rebuked. *Id.* at 1232. Similar proposals to bring in an outside body have also been rebuffed. Paul Carrington’s suggestion to vest outside rulemaking regulation (including acting as a congressional liaison) to legal commissions made up of representatives from the Judicature Society, the ABA, and the like, fell on deaf ears. See Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 166 (1991).

A final structural proposal is to change the Committee's composition. As already noted, the original Committee did not include any then-sitting judges.¹⁸⁹ The Committee consisted of five academics, with government and private lawyers making up the balance.¹⁹⁰ Even in the late 1950s, when the Committee was reconstituted, the members were predominantly practicing lawyers and academics.¹⁹¹ The shift to a judge-dominated committee began in the 1960s.¹⁹² The reason for the change is not known, but whatever the reason, the trend is still strong today.¹⁹³ In 2005, the Committee consisted of eight judges (two circuit court judges, four district court judges, a federal magistrate judge, and a state supreme court judge), four practitioners (including one Department of Justice representative), and two academics (one of which serves as the Reporter and is not a voting member).¹⁹⁴ Judges are now an integral part of the rulemaking process.¹⁹⁵

This has led some to argue that judges should be eliminated from the Committee.¹⁹⁶ Professor Yeazell would take judges out of the initial drafting process and put them in an advisory role.¹⁹⁷ He argues that it is perverse to ask judges to engage in the rulemaking process when much of the activity around the rules has actually moved from the courtroom to the attorneys' offices.¹⁹⁸ In addition, he notes that the Committee invites congressional criticism by making judges such a prominent part of the process.¹⁹⁹ Further, Yeazell posits that the debate at the committee level would be better without judges because attorneys and academics are too deferential to the judges on the Committee.²⁰⁰

189. Many of the committee members were later appointed to the bench. Most notably, then-Professor Charles Clark became a Second Circuit judge.

190. See Order Appointing Comm. to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1934).

191. Maris, *supra* note 109, at 774. In 1961, the Committee consisted of eight attorneys, four professors, and three judges. *Id.* Maris noted that the members of the Committees “constituted a nationally known group of experienced judges, lawyers and law teachers” who “were carefully selected by the Chief Justice so as to be widely representative of the Bench, the Bar and law teachers.” *Id.* He wrote that the group included “representative lawyers engaged in various types of practice, in the legal specialties, and those active in the bar associations.” *Id.* They were “widely distributed geographically” and appointed to overlapping four-year appointments, renewable only once “thus assuring the infusion of new blood and new ideas in the program as the years pass.” *Id.*

192. Yeazell, *supra* note 181, at 237.

193. *Id.* (noting the trend toward fewer practicing lawyers but not speculating what might have caused it).

194. See CIVIL RULES ADVISORY COMMITTEE, MINUTES OF OCTOBER 27–28, 2005, available at <http://www.uscourts.gov/rules/Minutes/CV11-2005-min.pdf>. Yeazell's article articulates some interesting statistics. Yeazell, *supra* note 181, at 237. In 1938, there were no judicial members, but by 1998 over half of the members of the Standing Committee and advisory committees were judges. *Id.* Similarly, in 1961, over half of the civil committee members were lawyers, but by 1998, only five of the fourteen members were practicing lawyers (the balance being six federal judges, one state judge, and two academics). *Id.* Finally, while legal academics made up 40 percent of the early committees, academic representation had fallen to between 15 to 20 percent by 1998. *Id.* at 237–38.

195. *Id.* at 237.

196. *Id.* at 229.

197. *Id.* at 249.

198. *Id.* at 242.

199. *Id.* at 241 (“[I]f Congress does not like something, the judiciary is the obvious group to blame, and the ensuing accusations harm judicial independence.”). Yeazell would eliminate the Judicial Conference's role in the rulemaking process. He would also require the Standing Committee (which would continue to be comprised of judges) to provide the final approval and leave the Supreme Court to review the rules when presented for judicial review only. *Id.* at 242–43.

200. *Id.* at 245. As Yeazell explains in greater detail, there are three distinct advantages to taking judges out of the process. *Id.* at 249. First, by not serving on committees, judges would have more time to devote to their

On the other side of the spectrum, Bone calls for more judges.²⁰¹ As discussed above, he argues that the rulemaking process should be a deliberative one. To him, the best way to effectuate deliberation is to staff the Committee with individuals who are not subject to great outside influence. “[I]nsofar as outcome quality is concerned, the better response to public choice problems is to improve the deliberative process by controlling rulemaker incentives rather than accommodate competing interests.”²⁰² To Bone, the best way to legitimize the deliberative process is to have judges—the optimal source of neutral arbiters—making the rules. In response to the criticism that this structure looks self-interested, Bone argues that any appearance of impropriety can be offset by thoroughly vetted and clearly explained rules.²⁰³

Rather than attend to the occupation of the Committee members, Professor Jeffrey Stempel questions whether the Committee should have a particular ideological make-up. Stempel believes the Committee is ideologically skewed toward one interest. For judges, the concern is their own self-interest; they reserve power for themselves as opposed to making a determinative rule that will be consistently enforced.²⁰⁴ For other members (and for some judges), the concern is that the members are predisposed to protecting their clients (or former clients)—namely, corporate defendants.²⁰⁵

The Committee originally consisted of government service lawyers, who had less financial stake in the rules.²⁰⁶ Moreover, even the corporate-law-firm lawyers on the Committee were considered “lawyer-statesmen,” individuals whose careers were not controlled so deeply by their financial interest in litigation and the process that governed it.²⁰⁷ Today, the ideological composition of the Committee is very different. For example, Stempel notes that when the 2000 discovery amendments were adopted, the Committee’s practitioners were predominantly defense-side, with only one plaintiff-side attorney as a member.²⁰⁸ He connects this ideological divide to particular political affiliations. In the case of the 2000 discovery amendments, six of the eight judges on the Committee were Republican appointees.²⁰⁹ Based on this ideological composition and his individual assessment of the discovery rules,

primary occupation—that of serving on the bench and moving cases through the process. *Id.* at 249–50. Second, the rulemaking process would be more legitimate because judges would not be involved in the “politics” of rulemaking. *Id.* at 250–51. More specifically, if Congress did not like a rule, the judiciary would not be the fall guy. *Id.* Instead, Congress would have to focus its ire on groups of practitioners and academics. *Id.* In addition, the Supreme Court could more legitimately give the rules “judicial review” because it would not hesitate to act for or against a rule, no longer succumbing to the pressure that comes with the rule having been created by their “brethren.” *Id.* Thirdly, the rules would be defederalized—meaning that because lawyers are better suited to draft for other lawyers both at the federal and state level, the rules would feel less dictatorial to the Bar. *Id.* at 251–52.

201. Bone, *supra* note 5, at 926.

202. *Id.* (emphasis omitted).

203. *Id.* at 923–26.

204. Macey, *supra* note, at 631–32.

205. *See infra* note 210.

206. Stempel, *supra* note 105, at 614.

207. *Id.* at 615.

208. *Id.* at 616.

209. *Id.*

Stempel concludes that the rule changes were driven by ideological fervor, not a neutral concern for fair and speedy civil justice.²¹⁰

2. Structure and Legitimacy Concerns

Most structural proposals for the rulemaking process are not made with express reference to the purpose of civil rulemaking. Rather, the suggestions are responsive to concerns about the perceived legitimacy of the rulemaking process itself. For example, Geyh's proposal for an interbranch commission is primarily intended to augment the credibility of the rulemaking process, not to better facilitate rules reflective of the rulemaking mandate. The Committee's statement of its guiding principles similarly reflects a tendency to discuss process legitimacy. In a long-range planning study, the Standing Committee defined five norms of procedural rulemaking: "efficiency, fairness, simplicity, consensus, and uniformity."²¹¹ Yet, the norms apply to the process more than the product. For example, the discussion of fairness contemplates access, but not in the sense of creating rules that allow for access to the justice system. Instead, the norm aims to create access to the rulemaking process for "those whose interests are most likely to be affected by any proposed change."²¹² In general, the structural proposals made by Geyh, other commentators, and rulemakers themselves are not as much about efficacy as they are about institutional legitimacy.

This is not to say that these structural proposals do not bear on both rule efficacy and process legitimacy. For example, if Geyh's commission confirmed that the rules met an agreed-upon mandate, it might serve efficacy as well as legitimacy concerns. Thus, worthy proposals like the ones outlined above should be considered as ways to achieve effective rulemaking. But, in order to augment the efficacy of the rulemaking process, the proposals for structural change must directly address the guiding principles of the Civil Rules. In the next section, I will use some of these suggestions, and offer up some of my own, to demonstrate how the Committee can restore access as a guiding principle of civil rulemaking.

B. Rethinking the Structure of Rulemaking

Civil rulemaking's primary mandate, as stated in Rule 1 of the Federal Rules of Civil Procedure, is to ensure the "just, speedy, and inexpensive determination of

210. *Id.* at 613–14. Stempel concludes that

[t]he 1999 Committee membership was thus dominated by Republican judges and large firm defense lawyers....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 other rulemakers continue to strive for nonpartisan fairness, the position of the Rulemakers has become distinctly more conservative in both ideology and social background. Defense-oriented law and business groups have become considerably more aggressive and sophisticated in pushing their agenda for reducing claimant access to the courts.

Id. at 613–17.

211. 1995 *Self-Study*, *supra* note 97, at 693. As other commentators have noted, the definitions assigned to all of these terms are rather fuzzy. Robert Bone has noted, "there is...no explanation for how the balancing [of these norms] is supposed to be done." Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 489 n.12 (2003).

212. 1995 *Self-Study*, *supra* note 97, at 694.

every action and proceeding.”²¹³ As demonstrated in the preceding discussion, the proponents of the Rules Enabling Act and the attendant Civil Rules believed this mandate meant more than achieving systemic efficiencies. Beyond that concern, these individuals envisioned a justice system that would facilitate access to the merits of legal claims without being encumbered by procedural barriers. Concerns about creating bias, tactical maneuvering, and complex/costly effects were central to procedural reform. Over time, as the litigation explosion has driven a civil litigation reform movement intent on reducing access, the rulemakers have created rules directly responsive to that goal. Access has diminished as a guiding principle because the institutional structure of the rulemaking process makes it difficult for rulemakers to sufficiently weigh and withstand this political bias. Thus, in order to restore the access principle to civil rulemaking, the rulemaking process should be restructured.

My proposals fall onto a spectrum. On one end are the changes that are feasible, but potentially less effective. On the other end are changes that, while effectual, might be more difficult to implement. The first changes modify the composition of the Committee in three ways: (1) increasing congressional presence; (2) balancing the members’ occupations; and (3) expanding the members’ experience base. More sweeping structural changes would require Congress to pass legislation requiring the Committee to consider access when amending the rules. A related change would require either Congress or another outside body to validate each rule proposal for its impact on access. This final change would give teeth to any access-based legislation.

The first change to the Committee’s composition would give Congress a larger presence in rulemaking. Right now, the Committee has very little direct interaction with Congress. This is problematic because if the Committee strays from access, Congress is too busy to notice. The only way Congress can stop a rule is to act on it affirmatively in a legislative session. This sounds good in principle, but in reality, the rules are not given primacy. And, as history has shown, even when motivated to stop a rule, it is difficult for Congress to coordinate that action.²¹⁴ Therefore, Congress should have a greater presence vis-à-vis the Committee.²¹⁵

The exact structure of this involvement can take many forms. It could be as simple as appointing a congressional staff member to sit in on the meetings—something like the Department of Justice’s presence on the Committee.²¹⁶ The other option is to establish a liaison (perhaps an actual member of Congress or a congressional staff member) to work with the Committee. This person would not necessarily attend the meetings, but the Committee Chair and Reporter could debrief the liaison on the activities of the Committee with the goal of keeping all of Congress apprised of the Committee’s activities. Whatever the

213. FED. R. CIV. P. 1 (emphasis added).

214. See Burbank, *Implementing Procedural Change*, *supra* note 135, at 228.

215. See CIVIL RULES ADVISORY COMMITTEE, MINUTES OF MAY 1–2, 1997, at 1–2 (1997), available at 1997 WL 1056241. Then-Chair Honorable Paul V. Niemeyer noted, “Congress is taking ever greater interest in procedural matters. If this Committee believes in a proposal, it probably will have to work harder to encourage adoption, keeping many different groups informed of the proposal and the justifications for it.” *Id.*

216. I would not want the congressional staff member to have a voting position like the Department of Justice. I do not want Congress to draft the rules, I am only arguing for Congress to be more engaged in the process.

actual measure, the simple idea would be to have Congress play a more direct role in the development of the rules.

The danger with this proposal is that Congress could become too involved in rulemaking. As Bone and others have discussed, there are distortions that attend elected bodies, and they are not conducive to optimal rulemaking.²¹⁷ The level of involvement I propose, however, is not meant to give Congress rulemaking power. Rather, Congress would be better informed through this change, which would lead to improved information exchange between the two institutions and less reactive politics by individual members of Congress. It is true that the Administrative Office of the Courts works with Congress regarding the rules and impending federal legislation that affects the rules. However, this work is fairly unilateral, originating from the Administrative Office to Congress. If Congress had a more direct role in the process, it would lead Congress to be more interactive and less reactive. With the limited involvement that I suggest, however, Congress's presence would not create the electoral distortions that rulemaking should avoid.²¹⁸

In addition to bringing Congress into the process to a greater degree, the occupational make-up of the Committee could also be modified. In the House version of the 1988 Amendments to the Act, the bill required that the rules committees have a "balanced cross section of bench and bar, and trial and appellate judges."²¹⁹ The judiciary did not quibble with this language, yet, the final bill did not contain the requirement to have a "balanced cross section," stating only that the committees consist of "trial judges, appellate judges and members of the bar."²²⁰ Access would be served by a balance of occupations—something close to an even number of judges, practitioners, and academics. The Committee's perspective can be skewed to one particular view of the justice system because there is only one voting member on the Committee from the academy and eight voting members from the bench. In this respect, I agree with Professor Yeazell's argument that judges should not have such a prominent presence in civil rulemaking. I would not, as he suggests, eliminate them completely from the process, but they should not dominate the Committee as they do now

Relatedly, in establishing the Committee's composition, there could be an effort to balance backgrounds so that the Committee has a fair picture of litigation interests. On the current Civil Rules Committee, there is only one plaintiffs' attorney. Thus, regardless of any effort to balance the interests of adversarial parties, with the current composition, the Committee is inclined to support defense-side positions.²²¹ I do not question the motivation or the mores of the Committee

217. See discussion *supra* Part III.A.

218. See discussion *supra* Part III.A.1.

219. See H.R. REP. NO. 100-889, pt. 1, at 3 (1988).

220. McCabe, *supra* note 2, at 1662.

221. This is especially the case as certain groups endeavor to have a greater impact on the Committee process by regularly attending meetings and presenting comments both in those meetings and during the public comment period. Thus far, the groups that attend these meetings are largely defense-centric. For example, the ABA often sends a representative to Committee meetings. See CIVIL RULES ADVISORY COMMITTEE, MINUTES OF APRIL 19–20, 2007, at 1 (2007), available at 2007 WL 4090405. Jeffrey Greenbaum attended as the ABA Litigation Section liaison. *Id.* Alfred W. Cortese, Jr., a representative for Lawyers for Civil Justice is a consistent attendee at the Civil Rules meetings as well. *Id.* (noting Cortese's attendance at the meeting). Lawyers for Civil Justice is a self-described "national coalition of defense trial lawyer organizations and corporations which seeks to restore and

members in the slightest; in my personal experience, the Committee members, no matter their background, are at pains to be evenhanded and fair. But, the reality is that an individual's view of the way the rules should be structured is heavily informed by her experience with the civil justice system. When a committee member has only worked for defense-side interests, it is only human nature to instinctively move toward positions based on that knowledge. In other words, empirical evidence is powerful, but individual experience can often trump that empiricism. Moreover, when fellow committee members echo this experience, it gives the common story greater credibility within the group. Anecdotal evidence is persuasive but, as scholars like Deborah Hensler have noted, it has dubious reliability.²²²

My proposal is not to litmus-test every individual that sits on the Committee or to look at whether they self-identify as a Republican or a Democrat. That kind of inquiry—one that Professor Stempel might support—would simply politicize the process even further.²²³ Rather, I argue for greater experiential balance on the Committee, not for ideological balance. The composition should reflect all interests of those who appear in federal court. My suggestion would go beyond balancing big corporate defense lawyers against big institutional plaintiff lawyers—although that is a good start. Lawyers that have smaller and different practice areas should also be represented. This would mean that interests outside of mass-litigation would be better represented on the Committee, and the Committee would have a broader understanding of how the Civil Rules affect the full spectrum of litigation in federal courts. In other words, in addition to empirical studies of the rules and the common experience of particular committee members, there would be anecdotes from all corners of the litigation story. This would give access concerns a better voice in the

maintain balance in the civil justice system for the benefit of the public.” Associate Member Law Firm Registration Form, http://www.lfcj.com/admin/document_administration/document.cfm?DocumentID=585 (last visited May 4, 2009). Moreover, while the public comments and attendance at hearings are often sparse, when a rule is particularly controversial, the public comments and hearing participation increases. This means that there is greater “interest-group” participation and an even greater need to ensure the committee is viewed as balanced and measured. For instance, the Committee received over 300 comments and had over seventy testimonials for the 1998 discovery rules. See Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules to the Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure 2 (May 11, 1999), available at <http://www.uscourts.gov/rules/Reports/CV05-1999.pdf>. This issue has been noted in other committees as well. Jack Weinstein’s reflections regarding his service on the Evidence Rules Committee include a critique that the advisory committee “had no representatives of some of the younger groups in the law profession, such as those representing poverty agencies.” WEINSTEIN, *supra* note 167, at 10. He also noted that “conservative elements of Congress, represented by Senator McClellan, and the Department of Justice probably had an impact greater than” groups representing criminal defendant interests. *Id.* at 10–11. Those groups were not members of the committee.

222. Hensler notes

Anecdotes, no matter how individually compelling, are an inadequate substitute for systematic analysis of the interrelationship between the legal system and the economy, because critical details that could determine what inferences we derive from an anecdote are often missing. Also, we have no way of telling whether an anecdote represents a common or aberrant occurrence, which we need to know to decide how much weight to assign the anecdote.

Deborah R. Hensler, *Dr. Hensler Replies*, 75 JUDICATURE 254, 254 (1992).

223. Stempel, *supra* note 105, at 637 (“On a longer term, but perhaps more elusive level, policymakers should consider fine-tuning the generally wise Rules Enabling Act process to ensure that the various committees are more evenly balanced in socio-political makeup.”). Stempel advocates doing this by appointing a more balanced committee, and if the Chief Justice will not do so, then by taking the power away from him and allowing another body to make appointments. *Id.*

Committee; yet, by remaining an appointed rulemaking body and not an elected one, this representation would come without the electoral distortions already discussed.²²⁴

The major criticism of these composition proposals is that they do not go far enough to restore access as a co-equal principle of civil rulemaking. Substituting committee members and involving Congress will not guarantee that access will be considered. And, at least with respect to the proposal to involve Congress, it might even add further complication to an already cumbersome process. This is a valid criticism, but I counter with two points. The first is that no reform can assure perfection in rulemaking. These proposals are intended to move the ball in the right direction by bringing broader perspectives to the rulemaking process. The second response is that more radical reforms would be necessary to restore access with certainty.

One more aggressive reform would require rulemaking legislation. In that legislation, Congress could mandate that access be considered in the rulemaking process. To enforce that legislation, Congress would have to put a monitoring mechanism in place. There are a range of possibilities for how this mechanism could be structured. The Committee itself (or the Standing Committee) could verify that access was considered in the rule process and provide a report outlining the rules' impact on access. Another possibility is for an outside body like the Federal Judicial Center to serve this function. Similar to Professor Geyh's proposal for an independent commission, the Federal Judicial Center could monitor the rulemaking process and substantiate the impact of the proposed rules.²²⁵

The difficulty with involving an outside body is that the judiciary will likely resist that effort. As previous efforts to bring in a monitoring entity have shown, the judicial branch is not keen on such oversight.²²⁶ Even without this verification, there may still be value to Congress articulating access as a valid rulemaking principle. The major obstacle in getting such legislation passed is inertia. Without a willingness to articulate a rulemaking mandate in the first place, it is unlikely that access on its own will drive Congress to pass such legislation. Yet, while not the most feasible solution, an articulation of what the Civil Rules should achieve would go a long way to restoring access.²²⁷

Finally, as already discussed, the civil rulemaking process is but one part of the litigation system. As long as other institutions restrict access in response to the litigation explosion, access will suffer. I acknowledge that civil rulemaking cannot change this reality on its own. By recovering access as a goal of the Civil Rules and by proposing some structural reforms that may aid in restoring this goal, a dialogue about the guiding principles of civil rulemaking has begun. The dialogue will remain only that, however, unless Congress and other institutional actors reemphasize access in our civil justice system.

224. See discussion *supra* Part III.A.1.

225. Another option is to have an independent body, like the 1989 Federal Courts Study Committee's "Office of Judicial Impact Assessment," serve this function. See *supra* note 188.

226. See discussion *supra* Part III.A.

227. As Yeazell notes, "We are still debating whether the drafters of the Rules achieved their goals of eliminating artifice and enabling cases to be decided on their merits." Yeazell, *supra* note 132, at 659.

CONCLUSION

The history of the Enabling Act and original rules demonstrates that access was a fundamental purpose of the Civil Rules. Over time, the place of access has diminished, and in order to restore that principle, the structure of the civil rulemaking process should be modified. By modifying the Committee's composition and articulating a rulemaking mandate that incorporates access, access can become the co-equal rulemaking principle the Enabling Act proponents envisioned.

More broadly, by thinking critically about access and how institutional forces impact it, we can assess how the values of our civil litigation system have become more utilitarian over time. In a context where there is a movement to restrict litigation, restoring access in civil rulemaking may cabin the impact of that trend. By reframing the values of justice and efficiency with reference to litigants, and less so with reference to the system, perhaps we can get closer to striking a reasonable balance among competing fairness and efficiency concerns, both in the civil litigation system as a whole and the civil rulemaking process as we know it.

