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### *Symposium: The Revolution of 1938 Revisited: The Role and Future of the Federal Rules*

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## Justness! Speed! Inexpense! An Introduction to The Revolution of 1938 Revisited: The Role and Future of the Federal Rules

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JUSTNESS! SPEED! INEXPENSE!  
AN INTRODUCTION TO *THE REVOLUTION OF 1938*  
*REVISITED: THE ROLE AND FUTURE OF THE*  
*FEDERAL RULES*

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After taking effect in 1938, the Federal Rules of Civil Procedure (Federal Rules) have had a rather amazing seventy-year run. Their adoption fundamentally transformed the landscape of federal procedure. Out went the era of conformity to oftentimes inflexible and technicality-bound state court practice.<sup>1</sup> In came the era of uniform federal procedures modeled after flexible equity practices.<sup>2</sup> But it was not just federal practice that was transformed. Since 1938, the core tenets of the Federal Rules—including notice pleading, liberal amendments, and liberal discovery—have exerted a strong influence on the state-court procedural landscape as well.<sup>3</sup> As the original rulemakers had

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\* President's Associates Presidential Professor, University of Oklahoma College of Law. Unlike the selected presenters, I did not earn my participation in this symposium; the privilege of introducing the symposium papers is mine solely because I served as Chair of the Association of American Law Schools (AALS) Civil Procedure Section for 2007. Since 2005, I have served as a member of the Advisory Committee on Civil Rules. In this introduction, I speak only for myself and not for the Section or for the Advisory Committee. Thanks go to Ed Cooper and Tom Rowe for reading a draft of this paper. Any errors or heresies that follow are, of course, mine and mine alone.

1. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1039 (1982) [hereinafter Burbank, *REA*] (describing practice under the Conformity Act of 1872).

2. See Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 922 (1987).

3. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986); see also David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989) ("The Federal Rules have not just survived; they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial

anticipated,<sup>4</sup> the Federal Rules ended up setting something of a national model for court procedures. Of course, not all states have adopted that model, and even in states that have done so generally the state rules can vary significantly in certain areas.<sup>5</sup> But any such variations are inevitably compared to the Federal Rules and judged against them.

Seventy years is a long time, maybe even a lifetime. I don't mean to make a eulogy. The Federal Rules remain in effect, and indeed just emerged from a badly-needed makeover.<sup>6</sup> But all eras end. And for (at least) the past three decades, both the Federal Rules and the federal rulemaking enterprise have been beset with criticism.<sup>7</sup> Some have suggested that the status of federal rulemaking as a reform leader reached its zenith years ago and has since suffered from a long decline.<sup>8</sup> Is it really possible that we have seen, or are presently witnessing, the end of an era?

That question sets the stage for the topic the Executive Committee selected for the 2008 Annual Meeting Section Program. Proceeding from the recent

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procedure.”).

4. See Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 307 (1938); see also Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2005-06 (1989).

5. See Oakley & Coon, *supra* note 3, *passim* (listing degree of conformity for each state); see also John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2002) (finding that the trend was against conformity as the states failed to adopt the more recent amendments to the Federal Rules).

6. See FED. R. CIV. P. 1 advisory committee's note (discussing purpose and principles of the Style Project). Not everyone agreed that the makeover was needed, or a good idea. See, e.g., Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155 (2006). I think the project was important and that its long-term net benefits will be substantial. But that's a question that can't be fully answered for another ten years at least, and even then the assessment will necessarily be impressionistic given that most of the costs and benefits will not be tracked and that many of them—e.g., improved understanding—will defy measurement in any event.

7. Professor Marcus chronicles a representative swatch of these criticisms in his contribution. See Richard Marcus, *Not Dead Yet*, 62 OKLA. L. REV. 299, 299 (2008) [hereinafter Marcus, *Not Dead Yet*]. For a more detailed discourse on the rulemaking “crisis,” see Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 908-12 (2002) [hereinafter Marcus, *Reform*].

8. See, e.g., Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1173 (2005) (arguing that the “top-down” model of procedural reform has failed to achieve the goal of national—including inter-state—uniformity); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801-02 (1991) (tracing “demise” of federal rulemaking to the 1988 Judicial Improvements and Access to Justice Act, which “politicized” rulemaking by granting the public access to the rulemaking process).

criticisms of the Federal Rules and federal rulemaking, and following up the suggestion that both are past their prime, the Executive Committee issued a Call for Papers on the following topic: “*The Revolution of 1938 Revisited: The Role and Future of the Federal Rules.*” We broadly defined the topic as questioning whether the Federal Rules and the federal rulemaking process were still equipped to lead rules reform in the United States.<sup>9</sup> Alternatively put, if one accepted that the Federal Rules had been leading the way for the last seventy years, what was the outlook for the next thirty years? From an impressive group of submissions, the Executive Committee selected three papers for presentation at the annual meeting. They are introduced here in the order in which they were delivered at the AALS program.

Professors Rex Perschbacher and Debra Lyn Bassett lead us off with their paper titled *The Revolution of 1938 and Its Discontents*.<sup>10</sup> Directly taking on the challenge posed in the Call for Papers, they assess the current state of rulemaking and conclude that the Federal Rules developed in 1938 were a product of their time and that their “moment” is over.<sup>11</sup> To be precise, Perschbacher and Bassett contend that while the 1938 rules perfectly captured the yearning of that era to refocus on getting to the merits, they now chafe

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9. The full text of the Call for Papers read:

70 years ago, the Federal Rules changed the landscape of civil litigation. Procedure in the federal courts became uniform and adopted a flexible, notice-based model that contemplated liberal access to discovery. Over time, most states followed suit. Some have called this the Golden Age of Rulemaking.

What will the next 30 years of rulemaking look like? What should they look like? From pleading standards to discovery to summary judgment practice, there is no shortage of critics of the federal model. And, increasingly, questions are raised about the extent to which state practice should continue to follow the lead of the Federal Rules. States might adopt different practices out of a belief that the state and federal courts hear different types of cases and are designed to do different things. States might adopt different practices in a spirit of local experimentation, supplementing or even displacing the federal rulemaking process as the leader in innovation and reform. Or, states might simply depart from the Federal Rules model out of a belief that the federal model proceeds from flawed first principles. Different models of judicial federalism could support very different conclusions about the proper interaction between state rulemaking and federal rulemaking.

2008 Annual Program, *The Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, FALL 2007 NEWSLETTER (Ass’n of Am. Law Sch. Section on Civil Procedure), Nov. 2007, at 1, available at <http://www.aals.org/documents/sections/civilprocedure/CivProSectionaalsnewsletterfall2007.pdf>.

10. Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 62 OKLA. L. REV. 275 (2008).

11. *Id.* at 275.

against the modern obsession with case management and judicial efficiency.<sup>12</sup> As Perschbacher and Bassett see it, the Revolution of 1938 ended when the dominant litigation value stopped being to advance disputes to the merits fairly (and efficiently) and turned into “ending litigation at all costs.”<sup>13</sup> Perschbacher and Bassett invoke the imagery of the French Revolution, equating the transformation of the Federal Rules with the Thermidorian Reaction,<sup>14</sup> in which Robespierre fell victim to his own guillotine after taking his revolutionary ideals and bloody tactics too far for the tastes of the masses. In this metaphor, it is the spirit of the 1938 rules that loses its head, only instead of suffering a swift and public execution the spirit of the 1938 rules has been gradually and quietly deposed by a thirty-year change in attitude.

In large part, Perschbacher and Bassett’s article is a valediction, one in which they bid a sad farewell to the litigation values that they saw as forming the heart of the 1938 rules. This sentiment is most clearly expressed in a paragraph in which they contrast the way that litigation was perceived in 1938 with the way it is perceived today. In 1938, they assert, the original drafters viewed litigation as a positive and worthwhile endeavor; thus, the goal of the original drafters was to *facilitate* litigation by removing the technicalities that plagued code pleading, as well as by adding a liberal discovery scheme.<sup>15</sup> In contrast, Perschbacher and Bassett perceive a very different attitude towards litigation today—namely, that litigation is a bad thing, such that the dominant goal is to find ways to minimize our investment in litigation<sup>16</sup> and resolve those cases that do get litigated as quickly and cheaply as possible.<sup>17</sup>

Perschbacher and Bassett’s article is not a call to arms. Given their fondness for the values underlying the 1938 rules, one might have anticipated a clear call to reinstate the 1938 regime and usher in a return to the good old days. Instead, Perschbacher and Bassett explore a number of reasons why a return to the 1938 rules is unlikely. Principally, they chronicle how the federal judiciary and the federal docket have changed since 1938, metamorphosing from a relatively small cadre of 179 district judges with roughly 100,000 pending cases to now comprise 667 district judges with 320,000 pending cases.<sup>18</sup> They also point to a stark change in what the judges do: whereas 22.3% of cases reached trial in 1938, a mere 1.3% did so in

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12. *Id.* at 276-77.

13. *Id.* at 276.

14. *Id.* at 275.

15. *Id.* at 292; *see also id.* at 285-86.

16. *Id.* at 286-91 (discussing the rise in private adjudication modes like arbitration and rent-a-judge).

17. *Id.* at 286, 292.

18. *Id.* at 278-79.

2006.<sup>19</sup> Perschbacher and Bassett also carefully develop the thesis that 1938 presented a kind of perfect storm of reform factors, including the contemporaneous development of the modern Erie Doctrine and its preference for vertical uniformity rather than horizontal uniformity in substantive law.<sup>20</sup> While not expressly stated, the implication is that the conditions required to return to the 1938 values simply don't exist in today's world of larger courts, crowded dockets, and managerial judges.<sup>21</sup> Later in the paper, Perschbacher and Bassett discuss Congress's increasing meddling with federal procedure.<sup>22</sup> This discussion suggests a fear that any attempt to retreat from active case management would prompt Congress to intervene in ways that prevent the 1938 values from retaking the throne or, worse yet, that crown an even worse regime than the efficiency-driven system that developed during the past thirty years.

Whatever the reason, Perschbacher and Bassett stop short of calling for another revolution—one that would reinstate the deposed 1938 rules regime. While they briefly raise the prospect that a “tweaking” or “updating” might be enough to save the spirit of the 1938 rules,<sup>23</sup> they do so tepidly and without conviction. In the end, their paper seems more of a resigned farewell than a rallying cry. And as a farewell, it has a ring of finality—sounding more “adieu” than “au revoir”—suggesting their belief that the spirit of the 1938 rules is not merely in exile, but rather is gone for good.

Professor Marcus interrupts the processional, declaring that the Federal Rules are *Not Dead Yet*.<sup>24</sup> Indeed, due principally to the structural advantages of national-scope reform activities<sup>25</sup> and the resource wealth that has accumulated around the federal rulemaking enterprise,<sup>26</sup> Marcus proclaims that the Federal Rules have been endowed with a hardiness far beyond that of most septuagenarians. Citing the recent E-Discovery amendments as evidence, Marcus suggests that there is reason to believe that the Federal Rules—and the

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19. *Id.* at 279.

20. *Id.* at 279-84.

21. Professor Marcus makes a similar point in his paper, noting that the conditions that gave rise to (or at least gave fuel to) the “Big Bang” of 1938 are unlikely to occur again any time soon. See Marcus, *Not Dead Yet*, *supra* note 7, at 303. For related commentary linking the Revolution of 1938 with the principles underlying the New Deal, see Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272-80 (1997).

22. Perschbacher & Bassett, *supra* note 10, at 292-93.

23. *Id.* at 277.

24. Marcus, *Not Dead Yet*, *supra* note 7.

25. *Id.* at 311-13.

26. *Id.* at 313-14 (discussing the support provided by the Rules Committee Support Office and the Federal Judicial Center).

federal rulemaking process—are in a period of renaissance rather than retreat.<sup>27</sup> (Marcus might also have cited to the recent cooperation between Congress and the Judicial Conference to create Federal Rule of Evidence 502.<sup>28</sup>) Federal rulemaking may have its limits,<sup>29</sup> but within those limits Marcus sees more reason for hope than despair.<sup>30</sup>

More fundamentally, Marcus contests the idea that the “good old days” of 1938 ever left us. In particular, Marcus questions the view that the discovery and case management reforms since 1983 have retreated from the “Liberal

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27. *Id.* at 314-18.

28. In the past, a number of commentators have complained of a lack of meaningful cooperation between the rulemakers and Congress. See Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 222 (1997) [hereinafter Burbank, *Implementing Procedural Change*]; Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996). Newly enacted Federal Rule of Evidence 502 reflects the sort of inter-branch cooperation that these critics hoped to see. During the development of the E-Discovery rules, one of the consistent concerns voiced by litigants was the cost and time consumed by privilege review of electronic documents. See *Need for Change Balanced by Deliberate Pace: An Interview with Judge Lee H. Rosenthal*, THIRD BRANCH (Admin. Off. of the U.S. Courts, Washington, D.C.), March 2008, <http://www.uscourts.gov/ttb/2008-03/article01.cfm>. The E-Discovery amendments included changes to Rules 16(b) and 26(f) to spur litigants to think about ways of addressing the issue. See FED. R. CIV. P. 16, 26 & advisory committee's notes. And Rule 26(b)(5) was amended to create a mechanism for litigants to alert the other parties when they had made an inadvertent disclosure of privileged material and to place a hold on the use of that material until a court ruled on the questions of privilege and waiver. But the Civil Rules Advisory Committee made no attempt to alter any of the underlying law of privilege or waiver, due to Rules Enabling Act limits and concern that the topic might properly lie with the Evidence Rules Advisory Committee. See 28 U.S.C. § 2074(b) (2000) (“Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.”). Thus, the need for further reform remained. See S. REP. NO. 110-264, at 1-3 (2008). At the behest of the House Judiciary Committee Chair in 2006, the Judicial Conference tasked the Evidence Rules Advisory Committee with developing a proposal to address privilege and waiver. See Letter from Lee H. Rosenthal, Chair, Committee on Rules of Practice and Procedure, to Senator Patrick J. Leahy and Senator Arlen Specter (Sept. 26, 2007), available at [http://www.uscourts.gov/rules/Hill\\_Letter\\_re\\_EV\\_502.pdf](http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf). The proposal was forwarded to the Senate and proposed as Senate Bill 2450. See S. 2450 110th Cong. (2007). The Bill passed both houses of Congress and was signed by the President on September 19, 2008. See 154 CONG. REC. S8373-01 (2008); see also 154 CONG. REC. H7817-01 (2008) (presentation in House, including Statement of Congressional Intent). The cooperative process used to develop and implement Federal Rule of Evidence 502 follows a path suggested by Professor Burbank among others. See Burbank, *Implementing Procedural Change*, *supra*, at 249; Burbank, *REA*, *supra* note 1, at 1195 n.775.

29. In other writing, Professor Marcus has cautioned people against expecting modern rulemaking to produce the types of dramatic breakthroughs and reforms associated with the 1938 revolution. See Marcus, *Reform*, *supra* note 7, at 943-44.

30. Marcus, *Not Dead Yet*, *supra* note 7, at 318.

Ethos” embodied by the 1938 rules.<sup>31</sup> Marcus agrees that the discovery and case management reforms since 1980 represent a pullback from the most liberal pretrial practices. But according to Marcus, these were a retreat not from the 1938 rules or their underlying values but from reforms in the 1960s and 1970s that removed even the minimal discovery limits contained in the original 1938 rules.<sup>32</sup> Marcus argues that, while the reforms since 1980 have empowered judges to control lawyers, the Federal Rules remain loyal to the notions of notice pleading and liberal discovery. Thus, what the critics of the changes since 1980 are actually upset about is not that the 1938 values have been discarded, but that the 1970s movement to even more liberal discovery did not stick.<sup>33</sup>

If Marcus is right, perhaps that makes the reference to the Thermidorian Reaction all the more apt, albeit with a small tweak. When Robespierre was guillotined on the evening of 10 Thermidor, year 2 (July 28, 1794), it was not because of any backlash to the ideals of the French Revolution, often denoted by the slogan “Liberté! Egalité! Fraternité!” Rather, it was a reaction to the Reign of Terror that had taken place under Robespierre’s control of the Committee of Public Safety. Marcus’s point is that the reforms since 1980 were a reaction to what he calls the “apogee” of the Liberal Ethos, which occurred not in 1938 but in 1970.<sup>34</sup> If that is the case, then Professors Perschbacher and Bassett may well be correct to characterize the reforms since 1980 as a type of Thermidorian Reaction, but in this version the role of Robespierre is played by the forces of discovery unleashed during the 1970 apogee (with a guest appearance by the 1966 amendments to Rule 23 as St. Just). There are certainly those who saw (and still see) “unbridled discovery” as its own Reign of Terror.<sup>35</sup>

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31. *Id.* at 305-06.

32. *Id.*

33. *Id.* at 308.

34. Professor Subrin similarly identifies 1970 as the “apex” of the “spirit of extensive attorney latitude” in discovery. See Subrin, *supra* note 4, at 2022.

35. Most trace the beginnings of the backlash against discovery to Chief Justice Burger’s remarks at the 1976 Pound Conference, where he noted “widespread complaints” of the misuse and abuse of pretrial procedures. See The Honorable Warren E. Burger, *Keynote Address*, 70 F.R.D. 79, 95-96. See generally Griffin B. Bell et al., *Automatic Disclosure in Discovery – The Rush to Reform*, 27 GA. L. REV. 1, 8-11 (1992) (discussing criticisms of the discovery process); Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. LAW. REV. 747, 753-68 (1998) (chronicling multiple rounds of “discovery containment” efforts that followed Chief Justice Burger’s remarks). For a hot-off-the-presses call for another round of discovery reform to address the costs of E-Discovery and other issues that are claimed to have “broken” the discovery system, see Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (Aug. 1, 2008), available at <http://www.actl.com/AM/Template.cfm?Section=>



In the final paper in this symposium, *Making Effective Rules: The Need for Procedure Theory*, Professor Robert Bone looks to the future of federal rulemaking and challenges us to rethink how we make and evaluate the Federal Rules.<sup>36</sup> In 1938, the prevailing view was that procedure and substance were separate, such that the drafting of procedural rules was seen as a matter of technical expertise rather than policy. From the so-called “Handmaid” viewpoint,<sup>37</sup> it was only natural that court rules would be drafted by procedural experts and designed to advance procedural values like maximizing flexibility or minimizing delay and cost.<sup>38</sup> But today, Bone argues, now that we see clearly the interconnection between procedure and substance, the original “procedural values” justification for the design of the rules is no longer convincing or sufficient. Worse yet, Bone asserts, no other norms or values have developed to fill the void. The result, Bone contends, is that the Advisory Committee, lacking any compass to guide it, has developed a habit of sidestepping the hard questions by deferring to consensus or, where no consensus can be had, by drafting general rules that leave the hard questions to trial judge discretion.<sup>39</sup>

Bone seeks to fill the void. He asserts that the federal rulemakers must develop normative metrics drawn from “core features of litigation practice” to assess future rule changes.<sup>40</sup> And to do that, Bone argues, the rulemakers must directly confront the relationship between substance and procedure.<sup>41</sup>

Bone begins with the premise that whatever else rules should strive to do, they must strive to yield “quality” outcomes, with quality defined as conformity to the substantive law.<sup>42</sup> In other words, “good rules” will yield correct legal outcomes. While that may seem substance-neutral on the surface, Bone explains that the quest for quality outcomes leads inevitably to value questions that depend on the underlying substance. First, because we do not insist that rights be enforced regardless of cost, outcome quality must be

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36. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 62 OKLA. L. REV. 319 (2008) [hereinafter Bone, *Making Effective Rules*].

37. See Clark, *supra* note 4, at 304, 306.

38. Bone, *Making Effective Rules*, *supra* note 36, at 323.

39. *Id.* at 326-27.

40. *Id.* at 320.

41. Bone’s full thesis is broader than I describe here. He also argues that the rulemakers must directly confront the role of settlement and the value of participation. *Id.* at 334-40. While these areas are worthy of their own examination, I have focused on his comments regarding the substance-procedure relationship both because they comprise the bulk of his argument and because I think they strike closest to the heartland of ascertaining the role of the rulemakers.

42. *Id.* at 329.

defined—at least in part—by how well a rule enforces the policies underlying those rights in the absence of full enforcement.<sup>43</sup> Thus, Bone says, the rulemakers must identify the policies that the substantive law seeks to promote. Second, because outcome errors are inevitable, procedural rules must seek to minimize the worst types of errors.<sup>44</sup> And to avoid the worst errors, Bone says, the rulemakers must place relative values on different substantive rights to know how to distribute error risks away from the rights that we consider most important.<sup>45</sup> In summary, while Bone agrees that the pursuit of outcome quality can justify procedural rules, he cautions that any meaningful justification based on outcome quality is not substance-neutral because it still requires the rulemakers to consider substantive values in at least two ways: (1) to determine what makes an outcome a “quality” outcome; and (2) to distribute error risks according to the relative importance of the underlying substantive values. Bone then argues that once one starts looking for justification in substantive values, it is no longer tenable to cling to the principle of rule trans-substantivity.<sup>46</sup> Thus, the case for substantive justification becomes, at least in some sense, the case for adopting substance-specific rules.

Professor Bone’s thesis is provocative on several levels. If nothing else, his vision of an Advisory Committee actively engaged in identifying substantive values, assessing their relative importance, and striving to write rules that maximize the most important values is sure to provoke a wide range of responses. Those of us who have had the good fortune to be involved in the rulemaking process probably should resist any temptation to take Bone’s proposal as a vote of confidence in our abilities. In earlier work, Bone has examined whether Congress or a centralized rules committee would be better suited to perform such a task, and he concluded that it was the committee.<sup>47</sup> But that conclusion is perhaps more accurately seen not as a vote of confidence for the Advisory Committee but as a vote of no confidence in Congress. Needless to say, even if one agrees that a centralized rules committee could do the task better than Congress, that does not lead to the conclusion that a centralized committee could perform the task easily or well.<sup>48</sup>

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43. *Id.* at 331-32.

44. *Id.* at 332-33. For a more complete discussion of this approach, see Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 935-37 (1999) [hereinafter Bone, *Process of Making Process*].

45. Bone, *Making Effective Rules*, *supra* note 36, at 332.

46. *Id.* at 333-34.

47. See Bone, *Process of Making Process*, *supra* note 44, at 938.

48. The Advisory Committee’s ability to fulfill that role may be just the tip of the iceberg. While the Advisory Committee bears the frontline responsibility for considering amendments, it does not have the authority to enact anything. Rather, its proposals are forwarded up the

The task Bone envisions would be daunting, even for the “giants” of rulemaking from the past. And the idea that the current members of the Advisory Committee (giants or not) would undertake that effort is likely to be as frightening to some observers as it is tantalizing to its proponent.

Bone’s proposal is provocative in yet another sense—it provokes renewed and serious consideration of a number of questions that go to the heart of rulemaking under the Rules Enabling Act. Without meaning to limit what those questions might be, I briefly explore four of them in the following discussion. These thoughts are not offered as an exhaustive critique (and certainly not as a criticism), but rather to give some content to my claim of “provocation.”

*First.* Bone’s proposal raises a fundamental question about the role of the rulemakers. Specifically: what is the job Congress gave them? As readers of this symposium will already know, the rulemaking process exists as an exercise of power delegated from Congress via the Rules Enabling Act.<sup>49</sup> So what exactly is it that Congress asked the Court to do? Starting with the text of the original Rules Enabling Act, Congress described the job this way: “to prescribe, by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.”<sup>50</sup> Of course, Congress added this proviso: any such rules “shall neither abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>51</sup>

The text of the original Rules Enabling Act says rather little about what *norms* the rulemakers should advance through the Federal Rules. Most discussions of the Enabling Act focus on the *scope* of the delegation; they are attempts to define the boundaries of permissible rulemaking, as set either by the grant of rulemaking power or the limiting proviso.<sup>52</sup> Our focus here,

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approval process to, respectively, the Standing Committee on Rules of Practice and Procedure, the United States Judicial Conference, the United States Supreme Court, and Congress. See Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1671-75 (1995) (describing rules amendment process). It is not immediately apparent to me what role any of these other entities would have in (1) making the substantive policy choices Bone envisions; or (2) scrutinizing the Advisory Committee’s proposals for fidelity to those choices.

49. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941). It is unnecessary here to consider arguments regarding whether the courts possess inherent authority over certain aspects of rulemaking. See, e.g., Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1472-82 (1994) (discussing extent to which court rulemaking power is an exercise of delegated versus inherent power).

50. Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934).

51. *Id.*

52. Depending on one’s view, that proviso may take back some of the rulemaking authority granted in § 2072(a), or it may simply restate and emphasize a limit inherent in § 2072(a). Compare Burbank, *REA*, *supra* note 1, at 1107-08 (limiting proviso is “surplusage”), with John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718-19 (1974) (grant and

however, is to identify rulemaking criteria *within* the Enabling Act limits. (I will return later to what traditional *Erie* jurisprudence might have to say about this topic.)

In this context, the only drafting directive in the original Rules Enabling Act is the instruction that the rulemakers proceed “by general rules.” While this language seems inexorably to lead us into the debate about substance-specific rules,<sup>53</sup> I need not rehearse that debate here. As scholars on both sides of the question have noted, both the legitimacy and the wisdom of substance-specific rules are likely questions of degree.<sup>54</sup> That is to say, one can accept that the Federal Rules can and should have specialized provisions for *some* matters, while still articulating generally applicable rules in the main. It therefore seems sufficient for these purposes to note that the enterprise proposed by Bone assumes (he might say, “positively yields”) an unspecified number of new substance-specific rules. Whether one sees the end result as consistent with the text of the Rules Enabling Act would then likely depend on just how many—and perhaps also on which kinds of—substance-specific rules would emerge from the process Bone envisions. Beyond that question, however, the text of the Rules Enabling Act yields no normative directives for drafting the Rules.

If we go beyond the text of the 1934 Rules Enabling Act, we might find other clues about what rulemaking norms Congress might have had in mind when it tasked the Court with crafting the Federal Rules. One can find in the legislative history of the Rules Enabling Act—Professor Burbank’s “antecedent period of travail”—evidence that the proponents of court rulemaking expected the rulemakers to focus on writing rules that would be simpler to follow, reduce cost and delay, and promote the resolution of cases

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limiting proviso operate separately). *See generally* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. (forthcoming Nov. 2008) (discussing different approaches to reconciling the grant in subsection (a) with the limiting proviso of subsection(b)), available at <http://ssrn.com/abstract=1121946>.

53. Compare Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074-87 (1989) and Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244-47 (1989), with Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732 (1975) and Subrin, *supra* note 4, at 2048-51.

54. *See* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846 (1993) [hereinafter Burbank, *Ignorance*]; Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 778-79 (1993) [hereinafter Marcus, *Of Babies*].

based on the merits rather than technicalities.<sup>55</sup> That is how the Supreme Court characterized the mission in *Sibbach v. Wilson & Co.*, its first case to discuss the Enabling Act, commenting that “the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.”<sup>56</sup>

This is where Bone attempts to forge a new conceptual path. Accepting that “justness” is a valid goal, Bone argues that the rulemakers cannot measure “justness” without treading into the realm of substantive values. To put it in Bone’s terms, because perfect “justness” is not obtainable, courts must attempt to maximize the justness that is realistically attainable by maximizing the attainment of the values underlying substantive law and by minimizing error costs in the substantive areas deemed most important. One could hardly quarrel with Bone about whether that is one way of measuring justness. Perhaps it might even be the optimal way. But is that what Congress was envisioning when it delegated rulemaking authority to the Court? Nothing like that appears in either the text of the Rules Enabling Act or the record from the “antecedent period of travail.” Even accounting for changes in vocabulary between that era and our own, one finds little to suggest that Congress equated the goal of justness in the rules with a rulemaking process driven by normative metrics, the policy values underlying substantive laws, or the distribution of error costs according to the rulemakers’ beliefs about which substantive laws were most important.

*Second.* Regardless of what Congress thought in 1934, one must consider whether subsequent developments have altered or clarified the task assigned to the rulemakers. As Bone explains, we no longer live in a world that accepts the Handmaid model of procedural rules. Perhaps Congress’s views about rulemaking have changed as well. But while Congress has amended the Rules Enabling Act several times since 1934, the picture does not seem to have changed. For example, while the Rules Enabling Act was altered when it was incorporated into title 28 as part of the 1948 revision of the judicial code, none of those alterations suggest any change to the rulemakers’ mission.<sup>57</sup> Of course, the most significant development in the life of the Rules Enabling Act occurred when Congress re-authorized it in 1988. Yet even if we focus on Congress’s intent in 1988, there is good reason to believe that Congress was

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55. See Burbank, *REA*, *supra* note 1, at 1067 (Sutherland Bill); *id.* at 1085 n.298 (Senate Report on Cummins Bill).

56. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

57. See Burbank, *REA*, *supra* note 1, at 1103-04. The same conclusion holds for the various technical amendments made to the Rules Enabling Act during this period. *Id.*

at least as attached—if not more so—to the view that the rulemakers stick to procedural values and not venture into substantive concerns.<sup>58</sup>

One more piece of evidence is worth noting. In 1956, the Supreme Court discharged the Advisory Committee created under the 1934 Act.<sup>59</sup> Two years later, Congress reconstituted the Advisory Committee scheme by moving it to the Judicial Conference of the United States.<sup>60</sup> By statute, Congress directed the Judicial Conference to “carry on a continuous study of the operation and effect of the general rules of practice and procedure” and to make recommendations to the Supreme Court.<sup>61</sup> Thus, “[t]he Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference.”<sup>62</sup> The Act transferring the frontline responsibility for rulemaking from the Court to the Judicial Conference expressly directs the Judicial Conference to recommend “[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”<sup>63</sup> Here too, there is nary a whisper about normative metrics, maximizing the policy values underlying different substantive laws, or the distribution of error costs away from the rights deemed by the rulemakers to be the most treasured or fundamental.

*Third.* Bone’s proposal raises important questions about the relationship between our “Erie” jurisprudence and rulemaking. Bone emphasizes that, unlike the original drafters, modern procedural thinkers no longer believe that

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58. See Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s* “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1030-35 (quoting H.R. REP. NO. 422, 99th Cong. 21 (1985)) (noting strong sentiment in House Report that policy choices “extrinsic to the business of the courts” be left to Congress, but recognizing that the Senate record was less clearly supportive of that view).

59. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1006 (3d ed. 2002).

60. See *id.* § 1007.

61. 28 U.S.C. § 331 (2000).

62. McCabe, *supra* note 48, at 1659. The process actually begins two stages earlier. The individual Advisory Committees—there are five: Appellate, Bankruptcy, Civil, Criminal, and Evidence—are generally responsible for fielding suggestions and developing proposed amendments. The Advisory Committees forward their proposals to a Standing Committee on Rules of Practice and Procedure, which considers them initially for permission to publish for comment and later for approval. Proposals that are approved by the Standing Committee are then forwarded for consideration by the Judicial Conference. For a more detailed description of the rulemaking process, an excellent summary is available at the Federal Rulemaking website at <http://www.uscourts.gov/rules/proceduresum.htm>. See also McCabe, *supra* note 48, at 1671-75.

63. 28 U.S.C. § 331.

there is a clear line between substance and procedure.<sup>64</sup> Indeed, it is now generally accepted that one cannot draft rules based on the so-called procedural values without exerting some tug or pull at substance.<sup>65</sup> For many years, one of the vexing questions for procedural scholars (and judges, of course) has been to try to determine how much of an impact the Federal Rules may have on substance before they are found to exceed the rulemaking authority conferred by the Rules Enabling Act.<sup>66</sup> So Bone is surely right that modern views on the ephemeral line between substance and procedure say something about the rulemaking enterprise. And one important manifestation lies in determining the outer limits of rulemaking power.

But does it also speak to rulemaking *within* the Rules Enabling Act limits, and if so, how? The “Erie” scholarship noted above seeks to map the outer limits of rulemaking power, whereas Bone’s thesis urges the rulemakers to develop normative, substance-attentive standards for choosing rule content from among the options located within the Enabling Act limits. In other words, Bone sees the difficulties in the substance-procedure relationship not just as a basis to cabin rulemaking, but to inform it. Those are very different questions that might best be kept separate. One can accept that the absence of any clear divide between substance and procedure makes it difficult to define the outer boundaries of court rulemaking without also accepting that Congress has directed the rulemakers—in the pursuit of “justness”—to attempt to determine and weight the policy choices animating the substantive laws that the rules will be used to enforce.

*Fourth.* Finally, Bone’s proposal prompts us to consider whether the Rules Enabling Act strikes the right note in terms of delegated authority. Underlying Bone’s thesis is, I think, a belief that the traditional procedural values are not sufficient to justify or guide rulemaking and that therefore rulemakers *ought* to work from a different set of instructions—one that includes some of the normative principles he suggests.<sup>67</sup> Within as-yet undefined delegation limits, Congress certainly might see fit to pass a new Rules Enabling Act along those lines. But let’s not be too hasty to toss aside the traditional procedural values.

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64. Bone, *Making Effective Rules*, *supra* note 36, at 325. The original drafters seem at least to have been aware of the emerging scholarly thinking on the ephemeral nature of the line between substance and procedure. See Burbank, *REA*, *supra* note 1, at 1136.

65. See Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1314-15 (2006).

66. See, e.g., Burbank, *REA*, *supra* note 1, at 1128; Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 287; Ely, *supra* note 52, at 722-27.

67. Bone, *Making Effective Rules*, *supra* note 36, at 333.

Rulemaking that flows from our Rule 1 ideals—the just, speedy, and inexpensive administration of the law—is not without its benefits.<sup>68</sup> As all three of our presenters noted, Congress is well aware of its power to legislate procedure directly and has become more active in doing so.<sup>69</sup> A uniform rule designed to promote efficiency and accuracy creates a clear baseline against which Congress can superimpose—by substantive or procedural legislation—the types of substantive concerns Bone raises.<sup>70</sup> Indeed, I suspect that to be the type of dynamic that Congress envisioned when it re-authorized the Rules Enabling Act in 1988. And, of course, there is the persistent (and, I think, substantial) risk that overt consideration of substantive policies might erode the credibility of the rulemaking process while, ultimately, serving only to invite even greater meddling by Congress.<sup>71</sup>

At the risk of being selectively anecdotal, it also bears mentioning that modern rule-drafting and rulemaking bodies continue to invoke the norms of justness, speed, and efficiency. The American Law Institute recently approved certain parts of the Principles of the Law of Aggregate Litigation, including a section titled, “General Principles for Aggregate Litigation.” As presented in April, section 1.03 provided:

- Aggregation should further the pursuit of justice under the law by:
- (a) promoting the efficient use of litigation resources;
  - (b) enforcing substantive rights and responsibilities;
  - (c) facilitating binding resolutions of civil disputes; and

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

69. See also Marcus, *Reform*, *supra* note 7, at 940.

70. The recently-approved parts of the Principles of the Law of Aggregate Litigation offer this support:

A policy of pursuing justice under the law efficiently also creates stable and appropriate expectations within legislative bodies. These bodies must expect routine, expeditious, and improving enforcement of the laws they enact. If and when they desire something other than this, they can, within broad limits, design new, generally applicable procedures themselves and require their application. Or, knowing how courts enforce laws and not wanting particular laws to be enforced in the usual way, Congress may establish special procedures intended to better serve its policies.

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 cmt. a, at 50 (Tentative Draft No. 1, 2008). For a recent example of federal legislation that creates special procedural rules designed to address perceived enforcement problems in a specific substantive area, see the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C. §§ 77-78).

71. See Carrington, *supra* note 53, at 2074-79; Geyh, *supra* note 28, at 1222-23; Marcus, *Reform*, *supra* note 7, at 939-40.



(d) facilitating the accurate and just resolution of civil disputes by trial and settlement.<sup>72</sup>

Though there are differences, these general principles bear a strong relation to the goals Professor Bone attributes to the original drafters and memorialized in Federal Rule 1.<sup>73</sup> A more direct example is found in New South Wales's Civil Procedure Act of 2005. In a section titled "Overriding purpose," the Act states: "The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings."<sup>74</sup> While these few modern equivalents certainly do not establish that a procedural values approach is the only possible approach, or even the best possible approach, they do illustrate that the procedural values approach remains viable in the minds of many even in a world enlightened about the impact of procedure on substance.

All of this is not to say that rulemaking must lash itself to the mast of procedural values, cutting itself off from all other considerations lest they prove too tempting. Ignorance in the content of rulemaking is surely as great a sin as ignorance in the allocation of rulemaking power.<sup>75</sup> Nor is there any reason to operate in a "procedural values bubble"; nothing about a procedural values-driven approach precludes either the awareness or the consideration of complementary norms. What I do mean to say, though, is that the quest to define "good" rulemaking must begin by recognizing that it is within Congress's power to define what "good" means. And in determining how Congress might have defined "good"—either in 1934 or today—one must account for the historical evidence and policy reasons that would support a finding that Congress envisioned rules designed to promote a more traditional view of the so-called procedural values.

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After seventy years, and in light of the criticisms raised during the past few decades, the current health of the federal rulemaking enterprise is a fair matter for debate. So too is its future. Important questions remain to be answered regarding the success of rulemaking today and the path that rulemaking will follow in the next thirty years. The symposium contributions of Professors Perschbacher and Bassett, Marcus, and Bone provide valuable insights into these questions and are sure to stimulate and inform the continuing dialogue.

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72. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (Tentative Draft No. 1, 2008). In response to comments from the floor, the Reporters indicated they would revise this section to emphasize the enforcement of rights *in accordance with law*. *Id.*

73. See Bone, *Making Effective Rules*, *supra* note 36, at 323-24.

74. Civil Procedure Act 2005 (NSW), Subsection 6, 56.

75. *Cf.* Burbank, *Ignorance*, *supra* note 54.

In this Introduction, I have indulged the reference—first made by Professors Perschbacher and Bassett—to the French Revolution and the Thermidorian Reaction. Such conceits can turn quickly to silliness, but I find myself drawn back to it when I think about the rallying cry of the French Revolution: “Liberté! Egalité! Fraternité!” To the extent the Federal Rules of Civil Procedure have a rallying cry, it is found in Rule 1 and it is this: “Justness! Speed! Inexpense!” While these terms are not to be found in the text of the Rules Enabling Act, they are, as Professor Carrington has noted, the “aims of that movement” and an “expression of an ideal.”<sup>76</sup> And as guideposts for rulemaking, they are ideals which “in the main ha[ve] been faithfully observed by the rulemakers over the years.”<sup>77</sup>

One is unlikely to hear those ideals shouted from the barricades these days. Indeed, in the eyes of some, they may be a construct made weary by time and familiarity.<sup>78</sup> Yet I think they remain a powerful call. Who doesn’t want their procedural system to produce just results quickly and cheaply? If there is agreement among our contributors, it may be that the future of federal rulemaking depends not on finding new ideals but on fidelity to the ones we have (though of course they vary in how they define and assess fidelity). I hope it is not too glib to say that, if the rulemaking enterprise should fail in the next thirty years, it won’t be for lack of an inspiring slogan.

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76. Carrington, *supra* note 66, at 300.

77. See WRIGHT & MILLER, *supra* note 59, § 1008.

78. See Marcus, *Of Babies*, *supra* note 54, at 813.