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Congressional Discretion in Dealing with the Federal Rules of Evidence

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CONGRESSIONAL DISCRETION IN DEALING WITH THE FEDERAL RULES OF EVIDENCE

On November 20, 1972, the Supreme Court, pursuant to statutory authority,[1] adopted the Federal Rules of Evidence.[2] The new rules of evidence were not to take effect, however, until ninety days after they had been submitted to Congress.[3] The rules were officially submitted on February 5, 1973, but even before that date they had become the subject of extensive legislative debate.[4] While some attorneys praise the codification of evidence rules as a progressive step,[5] others maintain that certain of these promulgations will have an objectionable impact on the federal judicial system or that the Supreme Court has exceeded its authority to adopt rules of "practice and procedure."[6]

[1] 18 U.S.C. §§ 3402, 3771, 3772 (1970); 28 U.S.C. §§ 2072, 2075 (1970).

[2] The proposed Federal Rules of Evidence [hereinafter cited as FED. R. EV.] are set forth at 41 U.S.L.W. 4021 (1972).

[3] 28 U.S.C. § 2072 (1970) provides in part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right . . . .
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.
>
> All laws in conflict with such rules shall be of no further force or effect. . . .

[4] N.Y. Times, Jan. 6, 1973, § 1, at 14, col. 2. Much of the opposition to the Federal Rules of Evidence centers on the rules defining privileged communications. At a time when state legislatures are inundated with requests by lobbying interests for creation of added privileges for different professional occupations, the Federal Rules of Evidence not only abrogate much of the doctor-patient and marital privileges, but specifically foreclose possibilities for expansion unless the Federal Rules of Evidence are amended. *See* FED. R. EV. 501, 504, and 505 and the notes following.

While some critics are inflamed over these proposals, still others feel the Rules have gone much too far in their creation of a virtually undefined "state-secrets" privilege, which would allow the government either to refuse itself or to prevent others from giving evidence in either a civil or criminal action. FED. R. EV. 509. However, it is beyond the scope of the present article to examine the merits of the particular controversies surrounding the adoption of these rules.

[5] Judge Estes stated that a code of evidence is "of striking value to all trial lawyers and judges in saving time. They provide greater accessibility, brevity, clarity and simplicity, as well as an opportunity to liberalize archaic evidence doctrines." Estes, *The Need for Uniform Rules of Evidence in the Federal Courts*, 24 F.R.D. 331 (1960). *See also* the resolution of the House of Delegates of the American Bar Association adopted March 28, 1958, as noted in 44 A.B.A.J. 1113 (1958).

[6] N.Y. Times, *supra* note 4, at 14, col. 3.

As a result of this controversy, Congress has enacted a measure which defers the effective date of the rules until approved by an Act of Congress.[7] The objections raised reemphasize a problem that has existed ever since Congress granted to the Supreme Court the power to enact rules of "practice and procedure": it is unclear what power Congress possesses to modify rules it considers offensive or beyond the authority of the Supreme Court to adopt. This article focuses on the terms of the applicable rules enabling statutes and examines the various methods by which Congress may respond to the rules.

I. FEDERAL RULES OF EVIDENCE—RULES OF PRACTICE AND PROCEDURE?

A. The Rules Enabling Act of 1934

1. Congressional Intent—The Supreme Court has the statutory power to "prescribe by general rules . . . the practice and procedure of the district courts and courts of appeals of the United States in civil actions."[8] Therefore, to determine whether the Supreme Court has exceeded its authority to promulgate rules in adopting the Federal Rules of Evidence, it is necessary to determine if these rules are rules of "practice and procedure." Because this phrase was first used in this context in the Rules Enabling Act of 1934,[9] one must probe the legislative history and

[7] A bill which would have delayed the rules from becoming effective until the end of the present session of Congress was introduced into the Senate by Senator Ervin on Jan. 29, 1973. S. 583, 93d Cong., 1st Sess. (1973). The Senate passed the measure on Feb. 7, 1973. When the bill was sent to the House, it was revised to provide that the rules not take effect until approved by Congress. 31 CONG. Q. WEEKLY REP. 679 (1973). President Nixon signed the House version of S. 583 on March 30, 1973, 41 U.S.L.W. 2539 (1973). *See* note 60 *infra*.

[8] 28 U.S.C. § 2072 (1970).

[9] Act of June 19, 1934, ch. 651, 48 Stat. 1064 [hereinafter cited as the Rules Enabling Act of 1934] was the first modern-day statute enabling the Supreme Court to promulgate rules of procedure for the district courts. In 1933, Congress enacted legislation providing for adoption of rules of practice and procedure with respect to proceedings in criminal cases after the verdict, out of which came the Criminal Appeals Rules. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904, *as amended,* Act of March 8, 1934, ch. 49, 48 Stat. 399. In 1940, legislation similar to the Rules Enabling Act of 1934 was passed regarding procedure in criminal cases prior to conviction. Act of June 29, 1940, ch. 445, 54 Stat. 688. In 1941, Congress extended the criminal-rule power to proceedings for punishment for criminal contempt of court. Act of Nov. 21, 1941, ch. 492, 55 Stat. 779.

In 1948, all of these Acts were codified in 28 U.S.C. § 2072 and 18 U.S.C. § 3771. Act of June 25, 1948, ch. 646, 62 Stat. 961; Act of June 25, 1948, ch. 645, 62 Stat. 683. Admiralty and maritime cases are included in the words "civil action" in 28 U.S.C. § 2072 as a result of an amendment to that section in 1966. Act of Nov. 6, 1966, Pub. L. No. 89-773, § 1, 80 Stat. 1323. In addition, there now exists a special statute giving the Supreme Court power to make rules in bankruptcy actions. 28 U.S.C. § 2075 (1970). All of the statutes currently in force are very similar in wording to the Rules Enabling Act of

congressional intent underlying the enactment of the 1934 Act to determine the validity of the Federal Rules of Evidence.[10]

There is little doubt that the Rules Enabling Act was intended to give a broad grant of authority to the judicial branch, as evidenced by the fact that the Act provides that all laws in conflict with the court-adopted rules were to have no further effect.[11] This alone, however, does not indicate what constitutes "practice, and procedure." The congressional committee reports prior to enactment of the Rules Enabling Act are of little benefit in determining the scope of authority granted to the Supreme Court.[12] Some indication of the scope of the 1934 Act can be found, however, in the congressional response to the Federal Rules of Civil Procedure. At the time Congress was studying those new rules of

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1934, with the exception of the bankruptcy rules statute, which does not require transmission of the rules to Congress.

The Rules Enabling Act of 1934, which formed the basis for the current Section 2072, read in part,

> That the Supreme Court of the United States shall have the power to prescribe, by special rules, for the district courts of the United States . . . 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 six 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,* . . . [s]uch 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.

Act of June 19, 1934, ch. 651, 48 Stat. 1064.

[10] For more historical background of the Rules Enabling Act of 1934, *see* 1A J. MOORE, FEDERAL PRACTICE ¶¶ 0.501-.504 (2d ed. 1961); Clark & Moore, *A New Federal Civil Procedure I. The Background,* 44 YALE L.J. 387 (1935); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States,* 32 MICH. L. REV. 1116 (1934); Jaffin, *Federal Procedural Revision,* 21 VA. L. REV. 504 (1935).

It should be noted that there is a theory, originally propounded by Dean Wigmore, that the judicial branch and only the judicial branch has the necessary power to promulgate rules of court procedure. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally,* 23 ILL. L. REV. 276 (1928). Two courts have recognized the validity of this approach. Korkman v. People, 89 Colo. 8, 300 P. 575 (1931); Epstein v. State, 190 Ind. 693, 128 N.E. 353 (1920).

Dean Pound interpreted Wigmore as saying that if all power exercisable by government had to be divided into three categories corresponding to the three branches of government, authority to promulgate rules of procedure would be inherently judicial. Pound, *Procedure Under Rules of Court in New Jersey,* 66 HARV. L. REV. 28, 37 (1952). Judge Joiner rightfully pointed out, however, that Wigmore's viewpoint is premised on the rejected political science theory that there is complete and exclusive authority over precisely delineated spheres. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 MICH. L. REV. 623, 629 (1957).

[11] Act of June 19, 1934, ch. 651, 48 Stat. 1064.

[12] Justice Douglas' dissent to the evidence rules, noted at 41 U.S.L.W. 4021-22 (1972), recognizes that the committee reports are of little aid but goes on to conclude that the terms "practice and procedure" exclude rules of evidence.

procedure, the Advisory Committee put the Congress on notice[13] that Rule 43, which governed admissibility of evidence,[14] not only would concern itself with rules of evidence but also would modify the Competency of Witness Act[15] and the Rules of Decision Act[16] with regard to contradiction, cross-examination and competency to testify. The notes of the Advisory Committee were transmitted to Congress and printed as a House document.[17] Partially as a result of the legislature's acquiescence in the changes effectuated by civil Rule 43 despite the unambiguous notice by the Advisory Committee, in 1962, the *Preliminary Study on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts* concluded that Congress thought that the Supreme Court was acting within its authority in including evidence within the Federal Rules of Civil Procedure.[18] Thus, the argument runs, evidence is within the scope of "practice and procedure," and the Supreme Court may promulgate rules of evidence for federal courts.

It is not clear, however, that Congress, by accepting the entire set of rules for civil procedure, implicitly indicated that rules of evidence fell within the scope of the Supreme Court's rule-making power. In fact, it is likely that Congress was not concerned about the evidentiary aspects of one rule out of the entire body of procedure submitted to it. It is entirely possible that general satisfaction with the Federal Rules of Civil Procedure led Congress to approve the rules *in toto*.

Although the legislative history of the Rules Enabling Act itself does not help to define "practice and procedure," the legislative history of similar rule-making enactments is very illustrative. For example, the grant of rule-making authority to the Board of Tax

[13] ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, NOTES TO THE RULES OF CIVIL PROCEDURE 37 (1938).

[14] FED. R. CIV. P. 43 mandates that all evidence shall be admitted which is admissible under the statutes of the Congress, or under the rules of evidence as applied in the federal courts in equity actions prior to 1938, or under the rules of evidence in the state in which the federal court was situated, according to whichever rule or statute favored admissibility.

[15] U.S. REV. STAT. tit. 13, ch. 17, § 358, compiled from the Act of July 16, 1862, ch. 189, § 1, 12 Stat. 588; Act of July 2, 1864, ch. 210, § 3, 13 Stat. 351; Act of March 3, 1865, ch. 113, 13 Stat. 533; Act of June 29, 1906, ch. 3608, 34 Stat. 618 (repealed 1948). The Competency of Witness Act stated that competency of a witness to testify in any civil action would be determined by the laws of the state or territory in which the court was sitting.

[16] 28 U.S.C. § 1652 (1970) (originally enacted as Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 92). The Rules of Decision Act calls for the laws of the several states to be regarded as rules of decision in civil actions in federal courts in cases where the laws apply.

[17] H.R. DOC. No. 588, 75th Cong., 3d Sess. (1938), printed by authority of H.R. Con. Res. No. 47, 75th Cong., 3d Sess. (1938), 52 Stat. 1451.

[18] 30 F.R.D. 73, 101 (1962).

Appeals allowed the Board to adopt rules of "practice and procedure" but specifically exempted from this grant the power to prescribe rules of evidence.[19] This arguably indicates that Congress, when using the phrase "practice and procedure," normally intends that evidence be encompassed within the scope of this phrase. The problem with attaching strong significance to this theory, however, is that a previous rule-making grant to the Board had referred to "rules of evidence and procedure,"[20] and thus the specific exemption contained in the later grant may only have been to emphasize that the law, as it previously stood, had been changed.

The rule-making statute pertaining to admiralty courts provides further insight into the meaning of the phrase "practice and procedure." In the revisor's note to that since-repealed rule-making grant,[21] it was stated that "specific references to 'mode of proof' . . . were omitted as covered by words 'practice and procedure.' "[22] Certainly the rules of evidence constitute one's mode of proof in the trial of any case.[23] Since this rule was codified at the same time as the statutes under discussion,[24] it provides a significant clue as to the congressional intent at the time the rules enabling provision was enacted.

2. Judicial Interpretation—To examine the problem from a different perspective, it is important to see not only how the Congress viewed its own intent in this area, but how the Supreme Court has interpreted the grant of rule-making power. The leading case in this area is *Sibbach v. Wilson & Co.*[25] In that case the plaintiff refused to comply with an order under Rule 35 of the Federal Rules of Civil Procedure to submit to a physical examination,[26] contending that this rule was beyond the authority of the Supreme Court because it affected well-recognized "important" or "substantial" rights. In rejecting this contention the Court held that "[t]he test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy

[19] Revenue Act of 1926, ch. 27, § 907(a), 44 Stat. 107, *as amended,* 45 Stat. 872 (1928). The current provision's reference is to the rules applied in nonjury trials in the United States District Court for the District of Columbia. INT. REV. CODE OF 1954, § 7453.

[20] Revenue Act of 1924, ch. 234, § 900(h), 43 Stat. 337.

[21] 28 U.S.C. § 2073, repealed by the Act of Nov. 6, 1966, Pub. L. 89-773, 80 Stat. 1323.

[22] 28 U.S.C.A. § 2073 (1959), Revisor's Note.

[23] Hopt v. Utah, 110 U.S. 574, 588-89 (1884).

[24] Act of June 25, 1948, ch. 646, 62 Stat. 961.

[25] 312 U.S. 1 (1941).

[26] FED. R. CIV. P. 35 states that where the mental or physical condition of a party is in controversy, the court in which the action is pending may, on a showing of good cause, order him to submit to a physical or mental examination by a physician.

and redress for disregard or infraction of them."[27] Thus, as later paraphrased, if a rule was designed to aid a court in the fair and expeditious administration of justice at a reasonable cost, or if it was predicated on policies assisting a court in functioning, then it was a rule of "practice and procedure" and thus within the power of the Supreme Court to enact.[28] Many commentators have argued that, in light of either the test as paraphrased or the holding in *Sibbach,* rules of evidence are procedural and hence would fall within the rule-making powers of the Court.[29]

In addition, the Supreme Court has on a few occasions indicated that evidentiary practice is procedural in nature.[30] Per-

[27] 312 U.S. at 14.

[28] Joiner, *The Rule-Making Power and the Exertion of Judicial Leadership in the Field of Evidence Reform,* 26 INS. COUNSEL J. 57, 58 (1959).

[29] Degnan, *The Feasibility of Rules of Evidence in Federal Courts,* 24 F.R.D. 341 (1960); Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?,* 26 A.B.A.J. 482 (1940); Joiner, *Uniform Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 MICH. L. REV. 623, 650-51 (1957); Rotwein, *Pleading and Practice Under the New Federal Rules-A Survey and Comparison,* 8 BROOKLYN L. REV. 188, 204 (1938); Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise,* 21 A.B.A.J. 404, 406-07 (1935); Sweeny, *Federal or State Rules of Evidence in Federal Courts,* 27 ILL. L. REV. 394, 398 (1932); Watson, *The Proposed Missouri Evidence Code,* 14 MO. L. REV. 251, 255 (1949).

[30] In Sunderland, *supra* note 29, at 406, Professor Sunderland argues that Mr. Justice Miller approvingly cited in Kring v. Missouri, 107 U.S. 221 (1882), a definition of procedure which included in its meaning whatever is embraced by the three technical terms of "pleading," "evidence," and "practice." 107 U.S. at 231-32. Thus, as the argument runs, there is precedent that "practice and procedure" includes evidence within its scope.

However, it is not clear at all that the *Kring* opinion either favors or disfavors the definition. In *Kring,* the state argued that a change in the law of evidence made retroactive so as to apply to defendant's trial was a change not in the crime, but in criminal procedure, and thus not subject to the *ex post facto* clause of the Constitution (U.S. CONST. art. I, §§ 9, 10). What the Court did hold was that even if evidence be included within a definition of procedure, "a law which is one of procedure may be obnoxious as an *ex post facto* law," for

> "any law which alters the legal rules of evidence, and receives less or different testimony than the law requires at the time of the commission of the offence, in order to convict the offender," is an *ex post facto* law . . . .

107 U.S. at 232, *citing* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). Hence, it did not matter whether evidence was procedural or not.

On the other hand, looking at the trend of Supreme Court decisions in the *ex post facto* area, it may be argued that in reality the Supreme Court has maintained a substance-procedure distinction for determining whether or not retroactive legislation is void as being a violation of the *ex post facto* clause. Furthermore, in developing this distinction, evidence has been classified as procedural, and thus most retroactive changes in the law of evidence will not be void as unconstitutional. In fact, the only changes in evidence that will be found to be *ex post facto* clause violations are those alterations pertaining to the burden of proof necessary for conviction, as for example in *Kring, supra,* where a complete defense against a charge of murder in the first degree was taken from the accused by subsequent legislation. In contrast, as Thompson v. Missouri, 171 U.S. 380 (1897), and particularly the quoted language of Hopt v. Utah, 110 U.S. 574 (1884), found in *Thompson* indicate, " 'regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had. . . .' " 171 U.S. at 386. Thus, in *Thompson,* where the issue was admissibility of disputed hand-

haps the most important such case is *Dravo v. Fabel*.[31] In that case, an action in equity, a state statutory rule pertaining to cross-examination was held not to be applicable to a federal proceeding despite the mandate of the Conformity Act, because that statute specifically exempted equity actions. If rules of evidence were considered substantive, however, the state practice would have been followed, even though the action was in an equity court, as the policies behind the Conformity Act, if not the terms of the Act themselves, would have controlled.[32] Hence, if not in direct holding, then at least by implication, the Supreme Court has indicated that evidence is within the scope of "practice and procedure."[33] It seems, then, in light of legislative history and

writing, the court found that there was no constitutional violation in applying a new statutory guideline to proceedings already underway. *See also* Gibson v. Mississippi, 162 U.S. 565 (1896).

The point is made even more dramatically in Beazell v. Ohio, 269 U.S. 167, at 170 (1925). There the Court noted that while earlier opinions contained expressions that retroactive legislation altering rules of evidence may be violations of the *ex post facto* clause, this type of prohibition was on the kind of change of law, as was the case in Kring v. Missouri, *supra*. However,

> it is now well settled that statutory changes in the mode of trial or in the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. A statute which, after indictment, enlarges the class of persons who may be witnesses at the trial, by removing the disqualification of persons convicted of felony, is not an *ex post facto* law.

269 U.S. at 170–71.

Mr. Justice Stone went on to warn that although there was no hard and fast formula as to what laws were tainted constitutionally, the provision was there to protect substantial personal rights against arbitrary and oppressive legislation, as opposed to changes in remedies and modes of procedure. *Id.* at 171.

Despite temptation to utilize these cases as support for the proposition that changes in laws of evidence are procedural modifications, considerable weight should not be attached to Court opinions in this area. First, though it is important dictum, it was not really a substance-procedure analysis that was involved in these *ex post facto* cases. Rather, it was to give meaning to the classification by Justice Chase in *Calder v. Bull* of changes in the law of evidence being *ex post facto* laws that gave rise to these opinions. The crucial issue really was whether the change would authorize conviction upon less proof than was required when the offense was committed, or whether it was just a change in the regulation of fact presentation to the court.

In addition, as pointed out in Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Laws: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 743 (1967), substance-procedure analysis is largely a phenomenon stemming from the Rules Enabling Act of 1934. Indeed there is no reason to believe that substance-procedure under that Act should necessarily be the same as distinctions made in the *ex post facto* decisions. Thus, albeit persuasive, the evidence is far from conclusive.

[31] 132 U.S. 487 (1889).

[32] *See* Mason v. United States, 260 U.S. 545, 558 (1923). The Conformity Act was embodied in Act of June 1, 1872, ch. 255, 17 Stat. 196 (repealed 1948).

[33] The Supreme Court, in Mills v. Bank of the United States, 24 U.S. (11 Wheat.) 431 (1826), and Doe *ex dem.* Patterson v. Winn, 30 U.S. (5 Pet.) 233 (1831), invalidated rules adopted by lower courts dealing with admissibility of evidence in actions within those courts. However, as the *Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts* points out, these decisions are distinguishable by the absence of any grant of rule-making authority to the lower courts. In addition, such lower court rules would result in a lack of uniformity among federal courts which might have different rules on the same subject. 30 F.R.D. at 103.

Supreme Court decisions, "practice and procedure" covers rules of evidence.[34]

The major argument contrary to this notion maintains that prior to the adoption of the Federal Rules of Civil Procedure rules of evidence were not governed by the Conformity Act, but by the Rules of Decision Act.[35] Because the Conformity Act contained wording similar to the 1934 Rules Enabling Act[36] and dealt with procedure, whereas the Rules of Decision Act dealt with substantive law, the argument proceeds that this indicates that rules of evidence should be treated as substantive rather than procedural rules. Moreover, since Congress has not repealed the Rules of Decision Act,[37] this, according to some, is proof that rules of evidence cannot be adopted by the Supreme Court, for they would then conflict with the mandate of the Rules of Decision Act.

This argument contains several flaws. First, the law of evidence in this field has been very confusing,[38] and although courts have often looked to the Rules of Decision Act,[39] there was good authority to the effect that the Conformity Act was controlling.[40] The conformity or lack of it could be urged under either law, and hence it is inaccurate to conclude that rules of evidence were to be treated only with reference to the Rules of Decision Act. Second, the Conformity Act originally contained a proviso specifically exempting rules of evidence. This proviso was eliminated six years after its enactment.[41] This demonstrates that Congress apparently thought that evidence could be interpreted as coming within the boundaries of that Act, at least at the time of its inception. Finally, as noted, there is nothing to indicate that the

[34] There are some states whose statutes indicate that the authority to promulgate rules of practice and procedure specifically includes rules of evidence. *See, e.g.*, UTAH CODE ANN. § 78-2-4 (1953); WYO. STAT. ANN. §§ 5-18, 19(a) (1957); MD. ANN. CODE art. 26, § 25 (1957). These statutes are modeled after the Rules Enabling Act of 1934.

[35] Wickes, *The New Rule-Making Power of the U.S. Supreme Court*, 13 TEXAS L. REV. 1 (1934).

[36] Section 5 of the Conformity Act (Act of June 1, 1872, ch. 255, 17 Stat. 196 (repealed 1948)) applied to rules relating to "the practice, pleadings, and forms and modes of proceedings in civil cases . . . ," while the Rules Enabling Act of 1934 deals with "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. . . ."

[37] 28 U.S.C. § 1652 (1970).

[38] *See* 5 J. MOORE, FEDERAL PRACTICE ¶ 43.02(2), at 1307-12 (recompiled 1971).

[39] Nashua Sav. Bank v. Anglo American Co., 189 U.S. 221 (1903); Franklin Sugar Refining Co. v. Luray Supply Co., 6 F.2d 218 (4th Cir. 1925); Von Crome v. Travelers' Ins. Co., 11 F.2d 350 (8th Cir. 1926).

[40] Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 F.2d 934 (2d Cir. 1927); Chicago & N.W. Ry. v. Kendall, 167 F. 62 (8th Cir. 1909); Keur v. Weiss, 37 F.2d 711 (4th Cir. 1930); Pure Oil Pipe Line Co. v. Robs, 51 F.2d 925 (9th Cir. 1931); De Soto Motor Co. v. Stewart, 62 F.2d 914 (10th Cir. 1932); Battaglia v. United States, 9 F. Supp. 360 (N.D. Ill. 1935).

[41] *See* 2 J. MOORE, FEDERAL PRACTICE, ¶ 2.04(1), at 319 (2d ed. 1970).

substance-procedure question after 1934 should be determined by problems of statutory construction prior to the Rules Enabling Act.[42]

B. The Erie *Doctrine*

Even if rules of evidence are deemed to be procedural within the context of the rules enabling statutes and thus within the Supreme Court's power to promulgate, the issue remains whether such rules are procedural for purposes of applying the doctrine of *Erie R.R. v. Tompkins*.[43] For if instead rules of evidence are classified as substantive, the *Erie* doctrine would require the federal courts to use state evidentiary rules when dealing with issues grounded in state law,[44] regardless of the existence of federal rules of evidence.

The confusion as to the substance-procedure distinction which followed in the wake of the *Erie* decision[45] seems, however, to have been resolved, favorably to the new Federal Rules of Evidence, in *Hanna v. Plumer*.[46] *Hanna* made clear that the nature of

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[42] Miller, *supra* note 30, at 743.

[43] 304 U.S. 64 (1938).

[44] Although the question of whether state or federal law is applicable in a given case usually arises in the context of the diversity jurisdiction, 28 U.S.C. § 1332 (1970), there are instances in federal question litigation in which the issues at hand are governed by the law of the state under *Erie*. *See* Louisell, *Confidentiality, Conformity, and Confusion: Privileges in Federal Court Today*, 31 TULANE L. REV. 101, 119 n.84 (1956).

[45] In *Erie* itself the Supreme Court held that, except for matters arising under the Constitution or Acts of Congress, the applicable substantive law to be applied in a given case was the law of the state in which the federal court hearing the case sat. 304 U.S. at 78. This meant that federal courts were to determine state-created substantive rights by following state law. It is crucial to note, however, that the federal courts were free to follow their own procedural rules.

In an attempt to facilitate the determination of whether state laws or federal rules were substantive or procedural, the Supreme Court developed an "outcome-determinative" test in Guaranty Trust Co. v. York, 326 U.S. 99 (1945). Literal usage of this test, however, could have led to the result that federal procedural rules were outcome-determinative, and thus inapplicable under *Erie*. Some inroads on the application of the outcome-determinative test were made in Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958). In that case, the Court held that a state rule authorizing a judge to decide the validity of an affirmative defense gave way to a strong federal policy favoring jury decisions in disputed questions of fact. The Court adopted this rule in spite of the fact that the outcome of the case may have been affected by the decision as to whether the issue of immunity from suit was to be decided by judge or jury.

After *Byrd* no one could predict safely what the Court would do with rules of evidence. In 1962, the *Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts* suggested that not only did the Supreme Court greatly modify the outcome-determinative test in *Byrd*, but that that test would not be operative in cases where evidence did not necessarily control the verdict. 30 F.R.D. 73, 114 (1962). For a criticism of this approach, however, *see* Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 289–91 (1962).

[46] 380 U.S. 460 (1965). The context in which *Hanna* arose was a personal injury suit which had been filed in a federal district court under the diversity jurisdiction. Service of process had been made in accordance with civil procedure Rule 4(d)(1), which provides for

federal court rules was to be classified for purposes of the *Erie* doctrine according to the *Sibbach* test.[47] The Court elaborated on this point in the following terms:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleadings in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.[48]

Thus, assuming federal rules of evidence to be valid under the Rules Enabling Act as judged by the *Sibbach* test,[49] the *Erie* doctrine would not prevent their use in federal court, even where a federal evidentiary rule might have a substantive impact upon state policy.[50]

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personal service of a summons or for the alternative of leaving copies at the individual's dwelling house. The service, however, did not satisfy the requirements of the Massachusetts statute governing service upon executors. MASS. GEN. LAWS ch. 197, § 9 (1950), states that an executor shall not be held to answer to an action by a creditor of the deceased unless there was personal service upon the executor (or notice filed in the registry of probate).

[47] The Supreme Court, reversing the judgments of the district and appellate courts, held that the federal rule was applicable. In so holding, the Court indicated that the outcome-determinative test developed in *York* was never intended to serve as the ultimate arbiter, particularly where there was a strong federal policy. The court further noted that the outcome-determinative test was to be used only when there was no federal rule covering the issue at hand. Where, as in the case at hand, there was a federal rule, the rule was to be applied if it was procedural within the meaning of the *Sibbach* test. 380 U.S. at 466-71. *See* notes 25-28 and accompanying text *supra*.

[48] 380 U.S. at 472.

[49] *See* notes 25-27 and accompanying text *supra*. Also, the rules must be constitutional. *See, e.g.*, Schlegenhauf v. Holder, 379 U.S. 104 (1964), holding FED. R. CIV. P. 35 to be constitutionally valid.

[50] In Judge Weinstein's view there are three classes of evidentiary rules. First, there are truth-determining rules, which are designed for all types of litigation and intended to achieve a more truthful result in the judicial process. Examples of these are rules of judicial notice, credibility of witnesses, best evidence, expert testimony, and the like. Second, there are rules that are integrally related to particular substantive rights and require consideration of state policy. Some aspects of presumption rules and rules regarding burden of proof are within this category. Finally, there are evidence rules designed to protect certain extrinsic policy aspects of independent substantive impact. Weinstein classifies here the rules on privileged communications. Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353, 361-73 (1969).

These rules seek to foster certain highly valued relationships (*e.g.*, doctor-patient, husband-wife, and attorney-client) at the expense of gaining what may be helpful evidence in the determination of truth at trial. That is to say, the forum following a particular rule of privilege has weighed the interest of promoting the relationship in question against the interest of obtaining all relevant evidence needed for the determination of truth and deferred to the former. *See* Wigmore's classic definition of a privilege, 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527-28 (McNaughton rev. 1961).

Even though there is some authority indicating that people do not rely on the nuances of privilege in deciding whether to communicate particular thoughts, Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675

II. CONGRESSIONAL ALTERNATIVES IN DEALING WITH VALID BUT OBJECTIONABLE RULES

One of the major deficiencies of the Rules Enabling Act of 1934 is its failure to specify the scope of the requirement in Section 2 of the Act calling for the submission of new rules to the Congress.[51] In the past Congress has not generally been in such disagreement with rules as promulgated by the Supreme Court as to be compelled to action. Only once had Congress even vaguely considered the problem of its authority under the Rules Enabling Act.[52] The attempt to formulate and codify federal rules of evidence, however, has not only been a monumental task but has involved an extraordinary amount of compromise and criticism.[53] While it was clear that there is no requirement under Section 2072 of affirmative congressional action in order for the rules to be-

(1929), the rules of privilege seem to be based on the presumption that they will help to encourage the relationships deemed by the community to be so important as to be privileged. Thus, the Federal Rules of Evidence, by eliminating some privileges, may, in essence, defeat some state policies. Nevertheless, the *Hanna* holding would appear to allow their use in federal court.

But see Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967), where Judge Waterman indicated that rules of privilege were not mere "housekeeping" rules which are "rationally capable of classification as either" substantive or procedural for applying the *Erie* doctrine. Rather, "[s]uch rules 'affect people's conduct at the state of primary private activity and should therefore be classified as substantive or quasi-substantive.' " To have federal rules on privileges would promote the

> fortuitous eventuality of the choice of forum to determine the legal consequences of such primary private conduct undertaken in reliance upon a state-created privilege . . . [and would] alter "the mode of enforcement of state-created rights" in a fashion sufficiently "substantial" to raise the sort of equal protection problems to which the *Erie* opinion alluded . . . .

In the Advisory Committee's Note to FED. R. EV. 501, the Committee answers Judge Waterman's objections. The Committee notes that the appearance of a privilege in a case is quite by accident, and the privilege is called into operation only when the litigation involves something substantially devoid of relation to the privilege. Second, state privileges have traditionally given way in federal criminal prosecutions, and if a privilege is denied in the area of its greatest sensitivity, it is illusory to contend that it is a truly meaningful aspect of the relationship out of which it arises. Finally, there is recognized in the American judicial system a large measure of forum shopping, especially in the area of discovery. Hence, discouragement of forum shopping should not be a talisman either. *See also* Ladd, *Privileges*, 1969 ARIZ. ST. L.J. 555 (1969), cited approvingly by the Advisory Committee's Note to Rule 501.

[51] Act of June 19, 1934, ch. 65, § 2, 48 Stat. 1064. The text of the statute is set forth at note 9 *supra*. Although the current grant of rule-making authority is found in 28 U.S.C. § 2072 (1970), one must look to the Rules Enabling Act of 1934, and its legislative history, for it is the latter statute which formed the basis for the present act. *See* note 9 *supra*.

[52] *See* notes 80-87 and accompanying text *infra*.

[53] *See, e.g., A Discussion of the Proposed Federal Rules of Evidence Before the Annual Judicial Conference, Second Judicial Circuit of the United States*, 48 F.R.D. 39 (1969), where different parts of the rules were criticized and commented upon by various members of the bar. The numerous suggestions made there were then forwarded to the Advisory Committee where the Committee was free to use them as they wished in their subsequent revision.

come effective as they stand,[54] it is not at all clear what action Congress may take under that provision if it objects to a particular rule or rules.

Four basic alternatives would appear to be potentially available to Congress. First, it could delay the rules from becoming effective in order to encourage further study and debate. This was in fact the original tactic chosen by the Senate when initially confronted with the Federal Rules of Evidence.[55] Second, there could be a decision to veto the rules and nullify Supreme Court action. Third, there could be possible legislation either once the rules are in effect or in lieu of their approval to modify the Supreme Court's judgment in the area.[56] Finally, within the realm of the various rule-making statutes there may exist power not only to table the rules but also to amend them directly without subsequent legislation.[57]

What Congress has done with the Federal Rules of Evidence is to exercise the third alternative, *i.e.*, to require affimative action on the seventy-seven rules of evidence, with such changes as it deems necessary, before they can become effective. In considering the rules, the House thought there were "substantial constitutional, other legal, and policy questions to be resolved with respect to the proposed rules before any of them should be permitted to become effective."[58] Confronted with 168 pages of rules and advisory committee notes which required over ten years of study to devise, Congress felt it "should not have to act under the gun."[59] Therefore, as opposed to a mere delay in having the rules become effective, a measure was passed requiring affirmative ac-

[54] The statute calls for the rules to take effect ninety days after submission to Congress. *See* text accompanying note 9 *supra*. Although on its face it is not obvious that Congress need not take affirmative action, that has been the view of both the Congress and the commentators. *See, e.g.*, C. CLARK, CODE PLEADING 44-45 n.129 (2d ed. 1947).

[55] The Senate, on February 7, 1973, originally adopted S. 583 (93d Cong., 1st Sess.), a bill stating that the rules of evidence:

> shall have no force or effect prior to the adjournment sine die of the first session of the 93d Congress except to the extent that they may be expressly approved by such Congress prior to such sine die adjournment.
>
> Sec. 2. That all provisions of law inconsistent with the provisions of the Act are hereby repealed.

[56] *See, e.g.*, S.J. Res. 82, 82d Cong., 1st Sess. (1951), discussed in notes 84-85 and accompanying text *infra*.

[57] Legislation implies passage of a bill by both houses which would then be signed by the President. Since the rule-making power is derived from Congress, direct amendment of the rules might be accomplished without "legislation" by a mere concurrent resolution of both houses. Because the rules are not statutes themselves, but merely enactments pursuant to statute, arguably there need not be a bill or joint resolution signed by the executive in order to modify the Supreme Court's action.

[58] 119 CONG. REC. 4996 (daily ed. Mar. 19, 1973). *See also* H. Rep. 93-52, 93d Cong., 1st Sess. (1973).

[59] 119 CONG. REC. 4996 (daily ed. Mar. 19, 1973) (remarks of Chairman Hungate).

tion by legislation in order for the Federal Rules of Evidence to become effective.[60]

Although the question of how Congress will handle the Federal Rules of Evidence is thus moot, the action taken highlights the fact that the controversy with regard to congressional discretion in dealing with rules promulgated under the rules enabling statute is still very much alive. While this new legislation will not apply to any future promulgations by the Supreme Court,[61] arguably this range of action is already available to Congress under the terms of the rules enabling statute itself. To demonstrate that the new law is not inconsistent with that statute, it is necessary to examine the 1934 Rules Enabling Act, predecessor to today's statutory mandate.

Unfortunately, the committee reports pertaining to the Rules Enabling Act of 1934 give little insight as to what alternatives are meant to be available to Congress.[62] The legislative history underlying the 1934 Act, however, does provide some guidance. It is clear that Section 2 of the 1934 statute, requiring submission of rules to Congress, was introduced in response to a speech by Chief Justice Taft.[63] In that address, Taft acknowledged that procedural reform would involve an increase in judicial power but cautioned that "if the power is abused, it is completely within the discretion—indeed within the duty—of the legislature to take it away or modify it."[64] It is possible that modification in this sense

[60] Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat.—, provides

> That notwithstanding any other provision of law, the Rules of Evidence for United States Courts and Magistrates . . . which are embraced by the orders entered by the Supreme Court of the United States on Monday, November 20, 1972, and Monday, December 18, 1972, shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress.

[61] Mr. Wylie. I believe the point I want to make is, why did not the committee recommend legislation which apply to future recommendations?

Mr. Dennis (a member of the House Judiciary Subcommittee on Reform of Federal Criminal Laws which considered S. 583) . . . [T]o do that we would have to get into the whole matter of the enabling acts, which apply not only to these rules but also to the authority to adopt, for instance, the Rules of Civil Procedure, and the Rules of Criminal Procedure and where the authority of the Court to act is plainer than it is in this field. I may say that the committee did not want at this time to get into that fundamental type of revision.

119 CONG. REC. 4997 (daily ed. Mar. 19, 1973).

[62] Neither are the committee reports on the 1940 Act to regulate procedure in criminal cases prior to conviction of much assistance. Only one report even mentioned that the bill had been changed so as to include the clause calling for submission of proposed rules to Congress. Not a word, however, was written as to the amount of discretion Congress sought to retain. H.R. REP. No. 2492, 76th Cong., 3d Sess. 1 (1940).

[63] Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, 8 A.B.A.J. 601, 47 A.B.A. REP. 250 (1922).

[64] *Id.* at 607, 47 A.B.A. REP. at 268.

could refer merely to amending the legislative grant of authority; yet if that was the intended meaning, then the remark would appear to be superfluous, for it is obviously within legislative prerogative to make changes in statutory law. Furthermore, the emphasis on complete discretion would seem to corroborate the view that the legislature is entitled to amend, veto, nullify, or change procedural rules submitted to them.

Another possible source of information concerning congressional intent might be found in drawing an analogy to the British experience, for one inspiration of the procedural reform in the federal courts was the English precedent.[65] Over fifty years prior to the first modern-day rule-making statute in this country, Great Britain created a Rule Committee which had power to regulate pleading, practice, and procedure in the High Court and Court of Appeals.[66] The British too were concerned about possible abuse of judicial power, and hence the Acts provided that the rules must be "laid before Parliament."[67] The rules go into effect immediately, but may be nullified by order in council or by Parliament.[68] Technically, however, the House must address the Sovereign, who is given discretion in the matter.[69] It might be argued, then, that since Congress used language similar to the British statute, it meant to adopt a similar practice, that is, rules adopted by the Supreme Court are to be considered as a whole, and thus there is no specific amendatory authority. On the other hand, the more plausible view may be that the real concern was simply that rules be submitted to Congress in order to prevent judicial abuse, and in using a phrase similar to the British act little attention was paid to the actual extent of congressional response the legislators intended to retain. Furthermore, a look at the British experience with parliamentary checks on the court's rule-making power reveals that no rule had been so much as annulled prior to the time Congress looked to the British system in writing this country's rule-making statute.[70] Thus, the examination of this counterpart provides little aid in resolving the interpretative difficulty, and there remains no other source of information regarding congressional intent at the time of passage of the 1934 Act.

Since that time, however, the problem has been addressed. In

[65] *See* S. REP. No. 440 pt. 2, 70th Cong., 1st Sess. 18-22 (1928). *See* also Sunderland, *supra* note 10, at 1117.

[66] Higgins, *English Courts and Procedure*, 7 J. AM. JUD. SOC'Y 185, 201 (1924).

[67] Supreme Court of Judicature Act, 1873, § 68(4), 36 & 37 Vict., c. 66; Supreme Court of Judicature (Consolidated) Act, 1925, §§99(5), 100(2), 15 & 16 Geo. 5, c. 49.

[68] Sunderland, *supra* note 10, at 1117.

[69] Higgins, *supra* note 66, at 202.

[70] S. REP. No. 440, *supra* note 65, at 22.

1938, the newly adopted Federal Rules of Civil Procedure were sent to Congress. Several legislators objected to rules which eliminated the concept of conformity to state procedure. As a result, hearings were held in both House and Senate.[71] In the Senate hearings, William Mitchell, former Attorney General and chairman of the Advisory Committee on Rules for Civil Procedure that was appointed by the Supreme Court, testified in favor of adoption. He stated that whether or not amendments to the rules by the Court had to be submitted to Congress, Congress unquestionably had the right to alter the rules by subsequent statutory enactment, despite the clause in Section 2 of the Rules Enabling Act declaring that all laws in conflict with the rules would be of no further effect.[72] His viewpoint was buttressed by the testimony of George Morris, chairman of the House of Delegates of the American Bar Association.[73]

Thus, these two men, important advocates in both the legislative process leading to passage of the 1934 Act and the subsequent promulgation of the rules for civil procedure, supported a reading of the Act that would give to the Congress broad authority to act on proposed rules. It is worth pointing out, though, that it is not clear whether these men meant that Congress could amend directly the rules as promulgated, or whether there would have to be legislation changing a rule after it was passed.[74] Representative Summers, chairman of the House Judiciary Committee agreed with Edgar Tolman, secretary of the Advisory Committee, that rules adopted pursuant to the Rules Enabling Act could not be amended directly.[75] Tolman argued that Congress had the option of suggesting proposed modifications to the Supreme Court or of passing legislation dealing with specific provisions. Nonetheless, this difference in viewpoint goes not to the existence but to the breadth of allowable congressional action.

An additional source of information with reference to the scope of congressional discretion is the report of the Judiciary Committee accompanying the rules in which it was stated, "It should be emphasized that any and all of the rules of procedure are subject to modification or repeal by Congress."[76] Again it is not

[71] *Hearings on S.J. Res. 281 Before a Subcomm. of the Senate Comm. on the Judiciary*, 75th Cong., 3d Sess. (1938); *Hearings on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. (1938) [hereinafter cited as *Hearings on H.R. 8892*].

[72] *Hearings on H.R. 8892, supra* note 71, at 25-26. Since the Rules Enabling Act declared that conflicting laws would be nullified by the rules, the legislative concern was that statutory enactments could be annulled by an amendment to the rules.

[73] *Id.* at 37.

[74] *See* note 57 *supra*.

[75] *Hearings H.R. 8892, supra* note 71, at 67-69.

[76] H.R. REP. No. 2743, 75th Cong., 3d Sess. 3 (1938).

clear, however, whether this comment implied power to amend directly promulgated rules or authority to enact subsequent legislation.

It is also instructive to note how opponents dealt with the rules. In the Senate, a joint resolution was introduced to delay their effective date.[77] More importantly, in the House, Representative Ramsay, who four years earlier had been a member of the Congress that passed the Rules Enabling Statute, introduced a bill to modify the Federal Rules of Civil Procedure.[78] Not only did he seek to cover areas in which the rules said nothing, but the bill also in effect amended Rule 17, dealing with the right of corporations to sue and be sued.[79] Although certainly not conclusive evidence of the congressional intent behind the Rules Enabling Act, this bill is an indication that at least one member of that 1934 Congress felt that this was a permissible method of amending promulgated rules.

A problem similar to the one presented by the Federal Rules of Evidence did arise, however, with the promulgation of Rule 71A of the civil rules, relating to cases involving federal use of the power of eminent domain. The Supreme Court adopted this rule on April 30, 1951, and in accordance with the rules enabling provision[80] submitted it to Congress.[81] Opposition developed in the Senate to subdivision (h) of the rule, which provided for the method of trial in condemnation actions. The thrust of this opposition was that it was preferable to allow trial by jury at the behest of the parties, rather than by order of the judge at his discretion.[82] The report noted, "The committee in its disapproval of Rule 71A does not believe that the rule may be disapproved in part and approved in part and for that reason recommends that the entire Rule 71A be disapproved . . . ."[83]

Rather than merely nullifying the rule in its entirety, the Senate passed Senate Joint Resolution 82,[84] which would have added a new chapter to Title 28 of the United States Code as a replacement for certain provisions of Rule 71A as promulgated by the

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[77] S.J. Res. 281, 75th Cong., 3d Sess. (1938).

[78] H.R. 8892, 75th Cong., 3d Sess. (1938).

[79] Some of the other proposed changes included powers of the judge to comment on the evidence, provisions for appointment of official stenographers, and the use of transcripts of testimony and proceedings.

[80] *See* text of 28 U.S.C. § 2072 set forth in note 3 *supra*.

[81] For the history of FED. R. CIV. P. 71A, *see* 7 J. MOORE, FEDERAL PRACTICE ¶ 71A.01 (2d ed. 1972).

[82] S. REP. No. 502, 82d Cong., 1st Sess. 2 (1951).

[83] *Id.* at 2. *See also* 97 CONG. REC. 7863 (1951).

[84] S.J. Res. 82, 82d Cong., 1st Sess. (1951).

Court.[85] The House declined to take that approach, however, and instead recommended that the effective date of the rule be postponed.[86] In response, the Senate preferred that the rule be vetoed.[87] Nevertheless, despite the fact that both houses felt that the rule as submitted was unacceptable, the fact that they could not agree on a course of action resulted in the rule's taking effect on August 1, 1951.

Although action was not completed pursuant to the original Senate proposal, this is an important precedent which the present Congress should not ignore. The Senate did not feel constrained merely to veto or delay the rules from taking effect. Instead, it assumed the power to legislate directly in the area despite the authority vested in the Supreme Court under the rule-making statute.

An additional helpful legislative expression of policy is the committee report on the codification of Title 28 of the United States Code. There the House recognized that one benefit of broad rule-making power would be the achievement of a uniform mode of procedure.[88] Additionally, vesting such authority in the judicial branch would held to alleviate, at least in part, the necessity of searching for procedural requirements both in acts of Congress and in rules of the courts.[89] Arguably, this second benefit can be accomplished most easily by restricting congressional authority to mere nullification or delay of rule adoption. Indeed, this would be in keeping with Attorney General Cummings' statement cited approvingly in the House report.[90]

Nevertheless, it seems that some respect should be given to the expressed congressional desire for power to amend rules directly.[91] Both these goals can be achieved by recognizing in Congress a power to modify promulgated rules during the ninety-day statutory period by passage of the concurrent resolution rather than requiring resort to full legislation[92] or passage of a stopgap measure, as has occurred.[93] This would allow for direct

[85] Section 2708, which was also included, corresponded to Rule 71A (h), but was changed to contain a previous committee draft of subdivision (h) which had been sent back to the Advisory Committee by the Court for further consideration. *See* 7 J. MOORE, FEDERAL PRACTICE ¶ 71A-32 (2d ed. 1972).

[86] H.R. 739, 82d Cong., 1st Sess. (1951).

[87] 97 CONG. REC. 9003-04 (1951).

[88] H.R. REP. No. 308, 80th Cong., 1st Sess. A169 (1947).

[89] *Id.*

[90] *Id.* Former Attorney General Cummings noted that legislative bodies have neither the time nor the opportunity to inquire objectively into the details of procedure or necessity of amendment. *Id.*

[91] *See* notes 80–87 and accompanying text *supra*.

[92] *See* note 57 *supra*.

[93] *See* notes 58–61 and accompanying text *supra*.

congressional input, but the modifications would affect the rules themselves rather than appear in separate statutes, thus effecting the expressed intent to eliminate dual sources of information with respect to judicial procedure.

Legislative history, then, although far from conclusive, seems to demonstrate that a liberal interpretation of congressional power in this area is justified. Chief Justice Taft's concern with judicial abuse, the statements of the bar at the original hearings on the rules of civil procedure, and the Senate's displeasure with Rule 71A all indicate that Congress intended to retain broad powers under the terms of the original Rules Enabling Act and its subsequent codification.

It appears that such an interpretation is not only justified but necessary in order to effectuate the important policies enveloped within the grant of rule-making authority. There are significant reasons why the Congress should retain its power not only to change by subsequent legislation those rules which it finds objectionable, but also to amend directly the rules as adopted by the Supreme Court.[94]

In *Sibbach,* the Court recognized the value of reserving to Congress the right to review proposed rules before they became effective, and noted that such action is employed to ensure that the rule enacted was within the ambit of the enabling act. It then went on to conclude, "That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found."[95] Since inaction is thus viewed as implying agreement with at least the validity if not the wisdom of the rule, there is an implied responsibility that there be a substantial inquiry into each and every rule as drafted, with the notion that those rules outside the scope of the statute be eliminated.

This concept of congressional duty was again recognized by the Supreme Court twenty years later. In dismissing the *Erie* considerations as not controlling in *Hanna,* the Chief Justice stated that district courts are to apply a federal rule in all cases unless "the Advisory Committee, [the] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."[96]

Thus, the legislature is deemed to have played an important role in the enactment of procedural reform. To claim that its

[94] *But cf.* Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 37-39 (1958).

[95] 312 U.S. at 16.

[96] 380 U.S. at 471 (footnote omitted).

authority is merely to veto or nullify rules is unnecessarily to restrict congressional freedom of action. By maintaining a broad interpretation of legislative power to amend the rules directly, however, Congress would be able to scrutinize the proposed rules and modify them as necessary in a manner consistent with its duty. Otherwise, only by the circuitous routes of nullification followed by legislation or "suspension" of the operation of the rules enabling statute could Congress accomplish its role in formulating judicial procedure.

In addition, rules of "practice and procedure" adopted by the Supreme Court may involve the delicate balancing of societal interests as well as judicial concerns. As has been noted, the grant of authority to the Supreme Court is wide in scope, encompassing rule-making power in all the areas of "practice and procedure" in civil, criminal, admiralty, and bankruptcy actions.[97] Undoubtedly, some rules conceived and formulated in these areas may cause excitement and concern, as the current controversy over the evidence rules demonstrates. This is so especially when the Supreme Court takes bold new steps and forges into areas sorely in need of reform but laden with vested interests.[98] In its zeal for procedural modernization, the Court may overlook certain important concerns.

Indeed, the very reason Chief Justice Taft proposed a congressional check on judicial power was to minimize possibilities of abuse by the Court.[99] As Professor Sunderland noted, it was probably because of initial distrust that the original delegation of power to fuse law and equity contained a clause calling for submission of the rules to Congress.[100] Therefore, by conceding to the legislative branch all of the necessary tools with which to prevent judicial oversight of societal interests, these public concerns will be protected best.

Arguably the option to amend by subsequent legislation is sufficient to achieve protection of societal interests. However, there seems to be no reason to insist on such a circuitous route. Instead, ability to amend promulgated rules directly would maintain flexiblity and judicial expertise while Congress discharged its

[97] *See* note 9 *supra*.

[98] The vested interests include not only the medical profession, where state statutory enactments zealously guard the so-called doctor-patient confidential relationship, but other professionals such as journalists and accountants whose communications will not be shielded from disclosure. For the controversy the new federal rules have raised, *see* notes 4–7 and accompanying text *supra*.

[99] Taft, *supra* note 63.

[100] Sunderland, *supra* note 10, at 1116–17.

responsibility to insure that its policies are preserved and to exercise control over the balancing of societal interests. Thus, the objectives of both the Congress and the Supreme Court would be achieved in an efficient fashion.

III. CONCLUSION

With the Court's adoption of the Federal Rules of Evidence, Congress has found itself in the center of a complex political controversy. Critics have complained that not only are many of the rules themselves objectionable, but that the Supreme Court has exceeded its authority in promulgating rules of evidence. An examination of the rule-making statutes seems to indicate that the terms "practice and procedure" do encompass rules of evidence. Additionally, the *Erie* doctrine provides no ammunition for opponents of the Federal Rules of Evidence, in light of *Hanna*.

Thus, Congress cannot attack the rules on the basis of their validity, but must do so on their merit. Basically, the Congress has four approaches open to it. It can nullify the entire body of rules and send them back to the Court for further consideration; it can delay their effect while Congress itself studies them; it can overrule any or all of the rules and legislate replacements; or it can amend directly the rules as promulgated by the Supreme Court. Recent congressional action clearly demonstrates that Congress has chosen to act on these rules by the use of the legislation, in effect suspending the time period under the rules enabling statute. All four methods, however, are arguably available to deal with unacceptable rules, even without ad hoc legislation. Indeed, such an interpretation is essential to the fulfillment of the goals underlying the rule-making statutes. Under the current statute, however, Congress is restricted to ninety days in which to act, unless it delays the rules from becoming effective. If after contemplating the range of alternatives open to it, Congress still believes its options are limited, or that it should not be restricted by time limitations, then the rule-making statutes should be amended to provide for such broad authority. In this manner, short-term measures will not muddle the rule-making process, and its vitality will continue.

—Stuart M. Lockman