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Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform

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REFLECTIONS ON THE "CHIMERA" OF A UNIFORM CODE OF STATE CIVIL PROCEDURE: THE VIRTUE OF VISION IN PROCEDURAL REFORM

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I. INTRODUCTION

In 2005, I made the unorthodox assertion that the initiative in procedural reform has passed from federal rulemakers to the states, which have been increasingly assertive in experimenting with rules that deviate from the federal model. I proposed that "the next great wave of procedural reform in American civil justice emanate from the states themselves in the form of a national code of state civil procedure."[1] This national code would be the product of a new rulemaking process in which the states collaborate through a national rulemaking body to produce "a better national civil procedure than the Federal Rules now afford,"[2] informed by empirical data developed through a system of coordinated and controlled rules experimentation in state courts.

I conceded then that the "goal of a national code of state procedure may seem utopian."[3] And, indeed, this vision has understandably been met with considerable skepticism by a few federal rulemaking insiders, most notably Professor Richard Marcus, a Special Reporter to the Civil Rules Advisory Committee, who adjudged it to be "something of a chimera."[4] In evaluating the plausibility of my proposal, Professor Marcus brings over a decade of real-world experience "la-

* Professor of Law, Western State University College of Law; J.D., Harvard Law School; A.B., City College of New York. My proposal for a uniform code of state civil procedure was one of the unifying themes of a Symposium on State Civil Procedure hosted by Western State University College of Law in spring 2007. This Article was inspired by the comments of those scholars who participated in that Symposium. Particularly helpful were the views expressed by Professors Richard Marcus, Stephen Burbank, Stephen Subrin, and Thomas Main, who participated in the panel on the Role of State Courts and Procedure in Interstate Litigation.

1. *See generally* 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 (2005).

2. *Id.* at 1165.

3. *Id.* at 1251.

4. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 192 (G. & C. Merriam Co. 1981) (defining "chimera" as "an unrealizable dream"); Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 105 (2007) ("Unless

bor[ing] in the vineyard of federal procedural reform as Special Reporter to the Advisory Committee on Civil Rules."[5] His procedural world view is a pragmatic one, that of a self-described academic scrivener to the Advisory Committee. Although a prominent academic himself, he professes to be skeptical of the practical contribution of scholarly schemes to advance procedural reform. His vigorous critique has spurred me to reflect more thoughtfully on the practical value of vision in procedural reform during a time of intense controversy over the current state of American procedure. This Article explores the value of vision and procedural theory, as well as the role of the legal academy, in constructing a new paradigm of procedure better adapted to current pressures that challenge the American procedural system.

Until the mid-1970s, state courts looked to the Federal Rules of Civil Procedure (FRCP or Federal Rules) as the gold standard of procedure and replicated them at "a nearly constant rate . . . from 1949 to 1975, a twenty-six-year period in which the number of replica jurisdictions rose from four to twenty-three."[6] The adoption of the Federal Rules in 1938 marked a watershed[7] in American procedural reform "that 'transformed civil litigation [and] . . . reshaped civil procedure' and therefore were 'surely the single most substantial procedural reform in U.S. history.'"[8] The FRCP embodied the radical vision of a group of prominent academics and practitioners—described by Professor Marcus as a "Band of Experts"[9]—who, in the words of Dean Charles Clark of Yale, Reporter of the Supreme Court Advisory Committee that drafted the original Federal Rules, had to "follow their dream and leave compromises to others."[10] The framers' vision, which Professor Marcus calls the Liberal Ethos of procedure,[11] fea-

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all can agree on how to resolve those basic value choices, the vision of a perfect procedural system is something of a chimera.").

5. Marcus, *supra* note 4, at 103.

6. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 358 (2002–2003).

7. Marcus, *supra* note 4, at 104 (referring to "the watershed of the adoption of the Federal Rules of Civil Procedure in 1938").

8. Richard L. Marcus, *Modes of Procedural Reform*, 31 HASTINGS INT'L & COMP. L. REV. 157, 167 (2008) (alterations in original) (quoting Stephen Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229, 248).

9. Marcus, *supra* note 4, at 112.

10. Marcus, *supra* note 8, at 167 (quoting Charles C. Clark, *The Federal Rules of Civil Procedure, 1938–58*, 58 COLUM. L. REV. 435, 448 (1958)).

11. Marcus, *supra* note 4, at 106 (describing the "1930s federal vision of procedure, as packaged today" as "a Handmaid to ensure 'accurate' substantive outcomes by broadening access to court (loosened pleading rules), expanding access to information (broad discovery), and limiting judicial resolution of cases (expanding the application of the seventh amendment)"). *See also*

tured relaxed pleading rules and liberal discovery, along with expanded judicial discretion, all of which was designed to force procedure to "step aside so that cases could more easily be decided on the merits."[12]

The Liberal Ethos reached its "apogee" in 1970.[13] Since then, the Federal Rules have come under attack with cries of discovery abuse, excessive cost and delay, and litigiousness,[14] though some writers have criticized these attacks as mere "crisis rhetoric."[15] The "eclipse of the Liberal Ethos"[16] has been accompanied by the politicization[17] and

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Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) ("Sobered by the fate of the Field Code, Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labelled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.").

12. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944, 986 (1987) ("[P]rocedure was to step aside and let the substance through. In short, judges were to have discretion to do what was right."); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 714 (1993) ("The Federal Rules of Civil Procedure . . . provided for an open model of adjudicatory procedure stressing simplicity, liberal pleading, broad discovery, and a preference for substance over form; the primary mission was the just resolution of disputes.").

13. Marcus, *supra* note 4, at 106 (referring to 1970 as the "apogee of the Liberal Ethos of procedure").

14. Subrin, *supra* note 12, at 911–12 ("Now the Federal Rules and adjudication of civil disputes are under attack. Among the key targets are discovery abuse, expense and delay, excessive judicial power and discretion, excessive court rulemaking, unpredictability, litigiousness, an overly adversarial atmosphere, unequal resources of the parties, lack of focus, and formal adjudication itself.").

15. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494–95 (1986) ("Critics claim that the federal courts are in 'crisis' . . . ."); Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57, 72 (1994) ("The Profession Has Fallen Under the Spell of Crisis Rhetoric and a Corresponding Rush to Reform").

16. Marcus, *supra* note 4, at 109 (noting "the extent to which the Liberal Ethos is in eclipse").

17. *See, e.g.*, Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 855 (1991); Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 228 (1997) (noting that, by the end of the 1980s, "[m]embers of Congress were . . . accustomed to lobbying by interests opposed to or favoring proposed amendments and thus were encouraged to view rules of procedure as a magnet, if not for constituent interests, then for special interests"); Stempel, *supra* note 12, at 669 ("America's political actors have increasingly become involved in matters of litigation procedure."); Stempel, *supra* note 15, at 72 (referring to the rulemaking process leading to the 1993 amendments as "political horsetrading"); Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 184 (2007) ("[J]udges, and legislatures for that matter, under the more conservative political landscape of the last thirty years, have through such techniques as demanding more rigorous pleading, reducing discovery both in scope and amount, and expansive use of summary judgment already limited the alleged gains of plaintiffs under more expansive procedure.").

balkanization[18] of federal procedure and by a loss of faith in the "court rulemaking model" itself, which has been criticized as politically unaccountable.[19] Ironically, the perceived abuses that were said to flow from the 1938 vision of simplified procedure and expanded judicial discretion, intended to promote decisions on the merits, led to a series of federal rules amendments[20] and procedural statutes[21] that gave even more discretion to judges to manage, rather than adjudicate, cases. This expanded discretion restricted, rather than improved, litigant access to formal adjudication of disputes on the merits by emphasizing the judge's case management role—case disposition through settlement, summary judgment, and the like—at the expense of the court's traditional adjudicatory role.[22] Professor Marcus positively portrays this amendment activity as a "cautious retreat from some of [the original vision's] most aggressive features over the past third of a century" resulting from "cautious action by our current Band of Experts, operating in an atmosphere that . . . gives them a good deal less latitude than the Framers had in the 1930s."[23] Critics of this "retreat"

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18. *See, e.g.*, Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 615 (2002) ("The growing balkanization of federal civil procedure has received considerable critical commentary.").

19. Professor Bone states:

> The ideal of nationally uniform procedural rules promulgated by the Supreme Court after consideration by expert committees—commonly known as "court rulemaking"—has been the cornerstone of civil rulemaking in the federal courts since adoption of the Rules Enabling Act in 1934. Yet today the court rulemaking model is under siege. Many critics question the democratic legitimacy of what they see as a politically unaccountable process, and call for more public participation and an expanded legislative role. . . . The level of discontent is unprecedented in the sixty-five year history of federal rulemaking in the field of civil procedure.

Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888–89 (1999).

20. *See* Stempel, *supra* note 12, at 674–88.

21. *See, e.g.*, Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737; Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4.

22. Subrin, *supra* note 12, at 989. Further, Subrin notes,

> Case management and alternative dispute resolution enthusiasts have largely given up on trying to bring cases to the merits . . . . To the extent that advocates of case management, settlement, or alternative dispute resolution give up on law application, they are giving up on the essence of adjudication. Ironically, their attempt to remedy the flaws in judicial dispute resolution rejects the major function that courts perform.

Id.; *see also* Stempel, *supra* note 12, at 718 ("Many were favorably inclined toward the notion that a restricted adjudicatory procedure would reduce some of the problems of delay, cost, inconsistency and litigation growth—or at least it could not hurt."); Resnik, *supra* note 15, at 529–30 ("As federal judges self-consciously shift roles from adjudicator to case-manager to settler, as judges call for the increased use of summary judgment and for other quick solutions, judges demonstrate their own sense of the marginal utility—and perhaps of the futility—of full-blown adjudication.").

23. Marcus, *supra* note 4, at 119–20.

have taken a less charitable view of the "flurry of Civil Rules amendments,"[24] characterized by one commentator as "excessive tinkering" with the Federal Rules[25] and by another as reflecting a "failing faith"[26] in the framers' vision of simplified procedure as facilitating case adjudication on the merits.[27]

Contributing to the decline in influence of the Federal Rules model, many states have refused to follow the federal lead,[28] assuming greater responsibility for their own procedure. As Professor Oakley observed in a 2002 update of his comprehensive survey of national conformity of state procedure with the Federal Rules, "the FRCP have lost credibility as avatars of procedural reform," and, further, "[f]ederal procedure is less influential in state courts today than at anytime in the past quarter-century."[29] Oakley concludes: "It is the Federal Rules that appear to have moved away from the states, rather than vice versa."[30] States have also become more innovative in rulemaking, experimenting with a variety of civil rules reforms.[31]

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24. Stempel, *supra* note 15, at 64 ("The 1980s and 1990s have seen a relative flurry of Civil Rules amendment activity . . . .").

25. *Id.* at 77.

26. Resnik, *supra* note 15, at 505 (referring to the drafters' "'faith' . . . in adjudication as the essence of fair decisionmaking, and in fair decisionmaking as essential for legitimate government action").

27. *Id.* at 497 ("We have moved from arguments about the need to foster judicial decisions 'on the merits' by simplifying procedure to conversations about the desirability of limiting the use of courts in general and of the federal courts in particular."); Subrin, *supra* note 12, at 986 ("Proponents of the Enabling Act and the Federal Rules wanted procedure to step aside so that cases could more easily be decided on the merits. But now that we have lived under the Federal Rules, it is apparent that we have moved away from this goal.").

28. *See* Koppel, *supra* note 1, at 1184–88. For example, as of 2004, forty-three states declined to adopt the amendment to FRCP 26(b), which contracts the scope of discovery from subject matter relevance to claims and defenses relevance. ("Selected Discovery Reforms in Federal and State Jurisdictions.") As noted by Professor Marcus, one notable exception to state reticence to follow the federal lead is in the area of e-discovery. Marcus, *supra* note 4, at 120 (citing Conference of Chief Justices, Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information (Aug. 2006); National Conference of Commissioners on Uniform State Laws, Uniform Rules Relating to the Discovery of Electronically Stored Information (draft, Mar. 8, 2007)).

29. Oakley, *supra* note 6, at 355.

30. *Id.* at 359 (Reflecting on the reason why many states have refused to replicate recent federal rules amendments, Oakley believes that "not all the 'newest' federal rules are 'the best'" and that "the states have elected to abstain from experimenting with dubious 'new ways' of adjudicating civil actions . . . .").

31. Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 647 (2002) ("While many states continue to follow the model of the Federal Rules, others are experimenting with innovations that follow quite different paths. These developments may be the harbinger of a future procedural regime, changing the traditional roles of both attorneys and judges."). For an illustration of the diversity of procedural experimentation in the area of civil discovery, see Koppel, *supra* note 1, at 1210–46.

State court divergence from the Federal Rules has produced a complex procedural landscape[32] at variance with the vision of the proponents of the Rules Enabling Act that state procedure across the nation would eventually coalesce around uniform federal rules.[33] This ferment of experimentation on the state level has created a problem as well as an opportunity. Disuniformity in state procedure poses problems for parties who litigate in multiple jurisdictions and encourages litigants to forum shop for procedural advantage with the potential for unfairly affecting substantive outcomes.[34] On the upside, procedural innovation across state jurisdictions has created an opportunity to improve procedure by providing a rich, untapped medium for empirical research. Unfortunately, these experiments in procedural reform have not been evaluated empirically to determine their effectiveness in achieving their goals,[35] nor, like the Federal Rules amendments, have these state reforms been guided by a coherent vision.

I have proposed that this innovative energy emanating from the states be channeled, nurtured, and sustained through a national rulemaking process "that promotes cooperation and collaboration among state judicial systems in experimenting with procedural change and in formulating uniform rules of state civil procedure informed by the resulting empirical data."[36]

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32. Moskowitz, *supra* note 31, at 613 ("Analysis of the changes in the discovery provisions of the fifty state rules of civil procedure over the past fifteen years reveals a very complex situation.").

33. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2026 (1989) ("To those who advocated federal rules, intrastate uniformity was to result from the modeling by state supreme courts of state procedure on federal.").

34. *See, e.g.*, Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1423–24 (1992) ("Procedural choices that enhance complexity and disuniformity can foster particular values and serve specific interests. Accumulating evidence suggests that many practitioners and their clients, especially those with significant resources and information, have increasingly capitalized on numerous tactical advantages that growing balkanization affords."); *see also* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 777–78 (1995) (referring to the fragmentation of the federal discovery rules, and noting that "[t]he diversity of practice is troubling, because discovery most assuredly is a practice that affects substantive rights and litigation outcomes"). For the effect of procedural variation among state courts on forum shopping and the attendant risk that "similarly situated litigants may be treated differently and, as a result, unfairly," see Koppel, *supra* note 1, at 1191 (quoting AMERICAN LAW INST., COMPLEX LITIGATION PROJECT 1-2, § 4.02, at 51 (Tentative Draft No. 3 1992)).

35. *See* Koppel, *supra* note 1, at 1209–10.

36. *See id.* at 1166.

Professor Marcus approaches this vision with the sober skepticism[37] and pragmatism of one who has participated in three major reform efforts as Special Reporter to the Advisory Committee on Civil Rules[38] and, therefore, understands the hard realities of the rulemaking process. Marcus asserts that the era of "stirring procedural visions"[39] that impact procedural reform has passed;[40] that the so-called "Golden Age of Federal Rulemaking"[41]—during which academics like Charles E. Clark could imagine a new procedural vision and implement that vision in a code of procedure that revolutionized the practice of civil litigation[42]—was an historical anomaly "deeply tied to unusual mid-20th century historical circumstances"[43] that will never come again. In Marcus's words, "one who hopes that these circumstances can be recreated, or will come again, is likely to be disappointed."[44]

Professor Marcus contends that the intense debate over competing "first principles"—the basic value choices to be furthered by procedure—and the well-documented politicization of procedure[45] make it "nearly impossible to imagine that various states could be persuaded

37. Marcus, *supra* note 4, at 104 (expressing "skepticism about the prospects of a national drive to propound . . . uniform and innovative state-court procedural reforms").

38. *Id.*

39. *Id.* at 119 (referring to "stirring procedural visions" in connection with the Golden Age of Federal Rulemaking).

40. Marcus, *supra* note 8, at 169 ("The days of breakthrough reforms from the expert group is over in America.").

41. Marcus, *supra* note 4, at 119 (referring to the "Golden Age of Federal Rulemaking"); *see also* Bone, *supra* note 19, at 897–99 ("The 1950s and 1960s were, in short, the golden age of court rulemaking.").

42. Subrin, *supra* note 12, at 961 ("Clark became a civil procedure teacher, code procedure treatise writer, and, in 1929, Dean of the Yale Law School. In 1935, he was appointed Reporter of the Supreme Court Advisory Committee that drafted the Federal Rules. With justification, Clark has been called the 'prime instigator and architect of the rules of federal civil procedure.'").

43. Marcus, *supra* note 4, at 119.

44. Professor Marcus comments:

> For those who remain transfixed by the Golden Age of Federal Rulemaking, replacing it with a Golden Age of State Procedural Reform may be transfixing also. But the explanation for the triumph of the federal model seven decades ago is a complicated thing, perhaps deeply tied to unusual mid-20th century historical circumstances. One who hopes that these circumstances can be recreated, or will come again, is likely to be disappointed. To the contrary, if one concludes that the Golden Age of Federal Rulemaking has been tarnished beyond recognition by malign forces during the Curmudgeon Age that followed it, one should reflect on why that happened.

Id.

45. *See supra* note 17; *see also* Marcus, *supra* note 4, at 112 (citing "the recurrent comments about the 'politicization' of procedural reform" to support his view that "well-meaning experts" might differ on first principles).

to submit to the directives of a single multistate Band of Experts."[46] In his words:

> [U]ntil all (or almost all) can agree on the pertinent application of first principles, the vision of procedural uniformity is likely to encounter debate about the provision of the uniformity. . . . Unless all can agree on how to resolve those basic value choices, the vision of a perfect procedural system is something of a chimera.[47]

Notwithstanding that the framers who implemented their groundbreaking vision of federal procedure were led by academics, Professor Marcus, a self-styled "scrivener"[48] to the Advisory Committee, appears to take a dim view of academics who "dream of perfection, and have the freedom to develop and endorse 'perfect' schemes."[49] He concludes that the vision of a uniform state procedure is just another impractical scholarly dream: attractive academically, but implausible.[50] Further, he (correctly, in my view) points out that empiricism alone cannot solve the dilemma of choosing among competing procedural values; "at most it limits the number of viable choices to be made on some other ground."[51]

Although Professor Marcus and I view the possibilities of procedural reform through very different lenses, his penetrating critique raises several fundamental issues about the nature, direction, and limits of procedural reform that demand attention, especially the relevance, or (in his view) irrelevance, of grand procedural visions to guide American procedural reform into the future. A fundamental premise of this Article is that the time for stirring procedural visions—for imagining a new procedural paradigm that meets today's challenges to the American civil justice system—is over only if we think it is. This Article considers the practical value of vision to reorient the focus of the rulemaking process from *ad hoc* adjustment of the existing Federal Rules model through periodic amendments to the FRCP[52] that respond to special interests to pursuit of the public interest in a fair adjudicative system that works in today's litigation environment. It explores the practical role of theory, interacting with empiricism, in

46. Marcus, *supra* note 4, at 113.

47. *Id.* at 105–10.

48. *Id.* at 104 ("Reporters are ultimately scriveners.").

49. *Id.*

50. *Id.*

51. *Id.* at 114.

52. Professor Laurens Walker uses the term "incrementalism model" to describe the rulemaking process in which "[p]olicymaking becomes a series of small adjustments and avowedly temporary 'fixes.'" *See* Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 475 (1993) (quoting Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 399 (1981)).

providing a framework for crafting a coherent set of procedural rules that are regarded as legitimate because they advance the purpose of adjudication.

Numerous commentators have recently decried the Federal Rules' movement away from the framers' goal of facilitating formal adjudication of cases "on the merits" toward the goal of rapid case disposition through non-adjudicatory means like judicial case management, settlement, and alternative dispute resolution (ADR).[53] In reaction to the politicization of procedure,[54] and the accompanying temptation to succumb to the Legal Realist view[55] that procedure is little more than a function of substantive law[56] and the political process,[57] some critics have observed a "decline in the valuation of procedure"[58] itself. As noted by Professor Bone: "Many critics today reject the idea that civil

53. *See, e.g.*, Resnik, *supra* note 15, at 497 ("We have moved from arguments about the need to foster judicial decisions 'on the merits' by simplifying procedure to conversations about the desirability of limiting the use of courts in general and of the federal courts in particular."); *id.* at 556 ("I urge that we resist the effort to translate judicial exhaustion into rules or practices that devalue adjudication but offer no constrained decisionmaking procedure to take its place."); Subrin, *supra* note 15, at 986 ("Proponents of the Enabling Act and the Federal Rules wanted procedure to step aside so that cases could more easily be decided on the merits. But now that we have lived under the Federal Rules, it is apparent that we have moved away from this goal."); *id.* at 989 ("To the extent that advocates of case management, settlement, or alternative dispute resolution give up on law application, they are giving up on the essence of adjudication. Ironically, their attempt to remedy the flaws in judicial dispute resolution rejects the major function that courts perform."); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 30 (2003) ("When we reconsider traditional conceptions of judging, we see that some of the most important controversies in civil procedure today arise not because judges preside over new types of disputes, but rather because judges too often have failed to structure their new responsibilities in a manner that reflects their traditional adjudicative role.").

54. *See, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1734 (2004) (referring to recent congressional "substance-specific" procedural legislation, the author warns: "The climate for ideological and interest group politics with respect to procedure today recalls the mid-1990s. That is not good news.").

55. Stempel, *supra* note 12, at 668 ("Legal Realism revolutionized the [legal] profession's thinking about law, making it virtually impossible for thoughtful lawyers to regard litigation procedure and policy as completely divorced from the politics of substantive outcomes.").

56. Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 515 (2006) ("Substance now dominates procedure.").

57. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 321 (2004) ("We are tempted to sacrifice procedural fairness on the altar of substantive advantage."); Burbank, *supra* note 54, at 1713–14 (noting that "'real procedure' is hard to find" and referring to "the demise of the power of the procedure/substance dichotomy"). For an account of the politicization of procedure nationally and on the state level in California, see Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 471–87 (1997).

58. Resnik, *supra* note 15, at 541 (referring to "a decline in the valuation of procedure" as one of several possible explanations for "[t]he decline in faith in adjudication"); Tidmarsh, *supra* note 56, at 516–17 ("Today in the academy, procedure is often a second-class subject, thought to be a practically oriented matter devoid of insight and unworthy of sustained thought. . . . [W]e must recover a sense of the importance of procedure.").

process is normatively independent of substance."[59] The retreat by federal rulemakers from "adjudication as the essence of fair decisionmaking"[60] has left a conceptual or theoretical vacuum which crisis rhetoric, procedural lobbying by special interests[61] to gain strategic litigation advantage,[62] and tweaking the rules[63] has failed to fill. To fill this vacuum, a cadre of legal scholars is rediscovering the practical value of procedural theory in designing a fair procedural system. Reclaiming the role of theory in rulemaking by exploring the conceptual or theoretical underpinnings of American adjudicative procedure is a *sine qua non* for a coherent approach to rulemaking.[64]

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59. Bone, *supra* note 19, at 889.

60. Resnik, *supra* note 15, at 505 (referring to the drafters' "'faith' . . . in adjudication as the essence of fair decisionmaking, and in fair decisionmaking . . . as essential for legitimate government action"). Professor Tidmarsh descibed such decision making as "our present schizoid efforts at incremental procedural reform—in which we simultaneously entrust more power to judges and pursue ever more detailed procedural codes." Tidmarsh, *supra* note 56, at 515.

61. *See, e.g.*, Mullenix, *supra* note 17, at 801-02.

62. See *supra* note 57 and accompanying text concerning the politicization of procedure.

63. Tidmarsh, *supra* note 56, at 587 ("Reform without theory is likely to be pragmatic, incremental, and above all political—as those in power tweak the rules slightly in one direction or another."). "Today our system faces pressures and challenges across numerous fronts, and modest tweaking of this rule or that doctrine cannot address the system's fundamental crisis." *Id.* at 516. The recent restyling amendment to the federal rules is an example of the kind of minor rules alteration that does not seek to improve adjudication. As one scholar notes,

> Yet the restylists have set themselves a goal that is at once insufficiently ambitious and overly difficult. Unlike prior reformers, they do not seek to create a better procedure. Unlike those who brought us the original Federal Rules of Civil Procedure, they do not seek to supersede preexisting statutory procedures. To the contrary, the restylists attempt to completely rewrite the Federal Rules of Civil Procedure while leaving the law of procedure the same as it was before their reform.

Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 156 (2006); *id.* at 178 (Hartnett, a participant in a group project to evaluate the proposed restyled rules, expresses his "fear that adoption of the restyled rules may make it harder for more substantial reform to be made—and despair that the restyling may ultimately stand as the best that this generation accomplished in procedural reform.").

64. Tidmarsh, *supra* note 56, at 570 ("But a fourth and final difficulty infects modern American procedure: lack of vigorous theoretical attention. . . . What are the driving forces or ideas behind procedure? What theoretical concepts make it tick? Procedural law is undertheorized."); Subrin, *supra* note 12, at 992 ("The alternative to Clark's and Pound's wholesale acceptance of equity as a basis for procedural rules is a reconsideration of some of the theoretical underpinnings of the Federal Rules."). Leubsdorf notes the importance of procedural vision: "The most firmly implanted myth of procedural reform may be that we can talk usefully about it as simply an effort to increase judicial efficiency, without talking about our visions of procedural and social justice." John Leubsdorf, *The Myth of Civil Procedure Reform*, *in* CIVIL JUSTICE IN CRISIS 53, 67 (Adrian A.S. Zuckerman ed., 1999); *see* Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 489 n.11 (2003) ("noting that . . . there is no developed body of literature on procedural justice, and also noting that procedure scholars do not attempt to elaborate detailed theories of fairness and often 'leave their ideas about fairness implicit'" (citing LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 228 n.6 (2002))). Bone further notes that his article "develops properties that any coherent and attractive theory of procedural fairness must include." Bone,

This Article contends that bold procedural ideas are unlikely to result from the federal rulemaking apparatus as currently constituted. Further, it proposes a new national rulemaking body in which the states, working in collaboration with procedural scholars, judges, and practitioners and supported by rigorous empirical study, can develop a new paradigm of adjudication that will provide the framework for drafting a model code of state civil procedure towards which the states, and conceivably the federal courts, will gravitate. Part II examines the relevance of vision in developing "a procedural system geared to our circumstances."[65] Part III.A explores the practical value of theoretical work in moving the rulemaking process toward a consensus on first principles.[66] Part III.B examines the appropriate role of empiricism in evaluating whether a proposed rule achieves its intended objective and in providing a counterweight to excessive political influence.[67] Part III.C explains how theory and empiricism interact to develop a coherent set of normative principles of formal adjudication that furnish the framework for a code of state procedure.[68] Finally, Part IV advocates an expanded role for academics in a new rulemaking process—not as mere scriveners, but as experts trained in theoretical and empirical analysis—and Part IV then contends that a new multistate rulemaking body, rather than the federal Civil Rules Advisory Committee, would be better positioned to imagine and implement a new procedural vision for American civil justice.[69]

II. THE VISION THING[70]: THE RELEVANCE OF "BIG IDEAS"[71] TO PROCEDURAL REFORM

The "failing faith" in "adjudication as the essence of fair decisionmaking,"[72] chronicled by Professor Resnik in the mid-1980s, has deepened into a loss of faith by today's rulemakers in the power of

supra, at 491; Resnik, *supra* note 15, at 546 ("[T]he adjudicatory mode offers some theory of its own limits, of what counts as permissible and impermissible adjudication. . . . [W]e need to articulate the goals we hope to accomplish by structuring systems for the processing of disputes, and then to pay careful attention to the implementation of those goals.").

65. Tidmarsh, *supra* note 56, at 573; *see infra* notes 70–156 and accompanying text.

66. *See infra* notes 174–223 and accompanying text.

67. *See infra* notes 224–244 and accompanying text.

68. *See infra* notes 245–264 and accompanying text.

69. *See infra* notes 265–284 and accompanying text.

70. "[President George H.W.] Bush also suffered from his lack of what he called 'the vision thing,' a clarity of ideas and principles that could shape public opinion and influence Congress." United States Senate: Art & History, http://www.senate.gov/artandhistory/history/common/generic/VP_George_Bush.htm (last visited Apr. 27, 2009).

71. Tidmarsh, *supra* note 56, at 571 (lamenting that "[t]oday 'big' ideas have receded as a critical determinant of procedural rules").

72. Resnik, *supra* note 15, at 505.

transformative ideas to effect procedural change. Rulemakers who have become accustomed to "tinkering"[73] with the Federal Rules, often responding to political cross-currents,[74] may consider it naïve to imagine bold procedural visions.

Professor Marcus views the current era of rulemaking as one of diminished expectations for procedural reform and predicts that those with loftier aspirations are likely to be disappointed because the 1938 Golden Age of the Federal Rules that launched the Liberal Ethos vision of procedure was a fortuitous historical accident.[75] In his view, academics who pursue a new procedural vision are, in effect, impractical dreamers who "have the freedom to develop and endorse 'perfect' schemes,"[76] which have virtually no chance of taking root in the real world. His use of the metaphor "dream of perfection"[77] to describe reform proposals like mine is suggestive of a kind procedural "brooding omnipresence in the sky"[78] reminiscent of the long-discredited nineteenth century transcendental jurisprudence that informed Justice Story's opinion in *Swift v. Tyson*.[79] Contrary to Professor Marcus's take on my proposal, I am not advocating a *perfect* procedure but, rather, the practical pursuit of a *better* procedure. As in the early twentieth century, American civil procedure is at a watershed, chal-

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73. Stempel, *supra* note 15, at 77 ("I generally agree with those who have criticized the past fifteen years as a time of excessive tinkering with the Civil Rules . . . ."); Tidmarsh, *supra* note 56, at 587.

74. *See, e.g.*, Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 580–81 (2001) (commenting that the federal civil rules advisory committee recommended the amendment that narrowed the scope of discovery, despite the lack of empirical support for the amendment, "largely because of the political preferences of the leadership of the American College of Trial Lawyers and the ABA Litigation Section").

75. Marcus, *supra* note 4, at 119. According to Marcus,

> For those who remain transfixed by the Golden Age of Federal Rulemaking, replacing it with a Golden Age of State Procedural Reform may be transfixing also. But the explanation for the triumph of the federal model seven decades ago is a complicated thing, perhaps deeply tied to unusual mid-20th century historical circumstances. One who hopes that these circumstances can be recreated, or will come again, is likely to be disappointed.

Id.

76. *Id.* at 104.

77. *Id.*

78. Guaranty Trust Co. v. York, 326 U.S. 99, 113 (1945) (Rutledge, J., dissenting).

79. 41 U.S. 1 (1842).

lenged by pressures[80] that require re-imagining the vision of the fundamental characteristics of our system of adjudication.[81]

A. *Vision is Critical to Procedural Reform: American Procedure at a Watershed*

The window for great ideas that transform procedure has not closed; rather, as observed by Professor Tidmarsh, the pressures and challenges American procedure faces "make our procedural system ripe for reimagining."[82] Tidmarsh has recently issued an "imaginative call to action"[83] for rulemakers and academics to "imagine a procedural system capable of responding to the pressures of the present and the future,"[84] urging us to "step back from the details of our present schizoid efforts at incremental procedural reform."[85] In his view, vision is not merely an idle dream of "continuous springtime,"[86] but rather a critical necessity if "the American litigation system . . . is to remain viable."[87] Tidmarsh, observing that "Americans are avoiding the litigation system in unprecedented numbers,"[88] warns that time to develop a new paradigm is running out for American procedure,[89] which "has been slow to respond" to "competitive pressures" of "globalization[90] and the rise of alternative dispute resolution."[91] He makes a forceful case for imagining "new ideas" without which "none

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80. *See* Tidmarsh, *supra* note 56, at 576. Tidmarsh describes the pressures to which rulemakers have reacted without clear direction:

> Instead, we tossed upon the ocean, buffeted in the 1980s by concerns for inefficiency and by disaffection with the sharp practices of a lawyer-driven, costly, and dilatory litigation system. Political pressures to reform procedure to achieve short-term policy objectives blew in during the 1990s. Transnational pressures and the concern for the "vanishing trial" brought water into the boat in the 2000s. . . . We cannot—or at least have not—imagined a fresher and better approach to procedure.

Id.; *id.* at 540 ("Competitive pressures create the most pressing concerns for the American litigation system. Competition comes from two principal sources: globalization and the rise of alternative methods of dispute resolution.").

81. Resnik, *supra* note 15, at 526 n.140 ("It may well be that our current understanding of 'adjudication' will not last the century, and that subsequent commentators will understand a different configuration of activities as belonging to courts.").

82. Tidmarsh, *supra* note 56, at 517.

83. *Id.* at 515.

84. *Id.* at 590.

85. *Id.* at 515.

86. Marcus, *supra* note 4, at 104.

87. Tidmarsh, *supra* note 56, at 540.

88. *Id.* at 548.

89. *Id.* at 517 ("Some of the pressures on the system will not wait another century before exploding. The time for clear-eyed critique and for imagination about the next procedural moment is now.").

90. *Id.* at 542 (noting that "[g]lobal dissatisfaction with the American procedural system is well known"); *see also* Marcus, *supra* note 4, at 108 ("All but the most intrepid advocates of

of the other pressures that our procedural system faces can be resolved" and views the "lack of vigorous theoretical attention" as a failing that "infects modern American procedure."[92]

As mentioned previously, procedure and the rulemaking process have become intensely political as special interest groups lobby rulemakers, seeking to tilt the litigation playing field for strategic advantage. According to Professor Burbank's sober appraisal of the outlook in federal rulemaking: "The climate for ideological and interest group politics with respect to procedure today recalls the mid-1990s. That is not good news."[93] Recognition of the power of procedure to advance substantive agendas has eroded the concept of procedure as "normatively independent of substance," and, as a consequence, "court rulemaking has moved toward a legislative model and away from the traditional model based on reasoned deliberation and expertise."[94] Acknowledgment that procedure is inherently not neutral[95] does not lead inexorably to the conclusion that procedure does not have an independent conceptual existence apart from substance and that the rulemaking process is, therefore, inherently political.[96] Rather than surrender to the inevitability of political wrangling over procedure as the only rulemaking mode,[97] rulemakers can strive

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American exceptionalism might also take seriously the incredulity of the rest of the world at the importance of unrestrained private initiative [in] the American litigation system.").

91. Tidmarsh, *supra* note 56, at 540, 579–80 (noting that "our procedural imagination must find ways to reach across the litigation-ADR divide, and to merge the best of both systems").

92. *Id.* at 570.

93. Burbank, *supra* note 54, at 1734. "A clear-eyed view that is informed by precedent and history leaves little doubt that Congress holds the cards and that the questions of moment are, therefore, whether, when, and after what process of consultation, it should play them." *Id.* at 1678.

94. Bone, *supra* note 19, at 889.

95. Burbank, *supra* note 54, at 1734 (referring to "a world in which the myth of the neutrality of procedure has been exploded"); Bone, *supra* note 19, at 954 ("The critics [of the court rulemaking model independent of political accountability] are correct in one respect: there is no clear normative divide between procedure and substance.").

96. But see Professor Burbank's pessimistic appraisal of the "current political climate" in federal rulemaking that suggests to him "that past proposals about federal rulemaking or federal procedural lawmaking as a whole, including my own, are hopelessly academic and/or hopelessly naive." Burbank, *supra* note 54, at 1742. In rejecting the "synoptic model of seemingly objective, noncontroversial, technical problem-solving . . . [w]here society is divided on goals, assumptions or valuation," Professor Stempel recommends broader public participation in the federal rulemaking process, advocating the "civil republican model" of rulemaking in which "the political community engages in deliberation in which the citizenry attempts to arrive at a shared conception of the 'common good' and to make administrative rules designed to foster that common good." Stempel, *supra* note 12, at 751–52.

97. Bone, *supra* note 19, at 889 ("Because procedure has substantive effects and involves controversial value choices, critics argue, rulemaking is 'political' and therefore legitimate in a democracy only with broad public participation and accountability.").

to reorient the process toward pursuit of the public interest[98] by focusing on creating a new procedural paradigm that advances the purpose of adjudication and that serves to guide the rulemaking process. Otherwise, "[r]eform without theory is likely to be pragmatic, incremental, and above all political—as those in power tweak the rules slightly in one direction or another."[99] Drawing on the profound impact of Roscoe Pound's vision on American procedure in the twentieth century, Professor Tidmarsh urges that "big ideas" should, once again, be the "critical determinant of procedural rules."[100] Professor Bone explains that ideas can reorient court rulemaking from reconciling competing special interests to serving the public interest, and to restore legitimacy to the court rulemaking process: "Ideas have power in the political process notwithstanding the force of raw interest. Armed with a persuasive justification of their role, court rulemakers can make it more difficult for Congress to justify intervention."[101]

To illustrate his point about the difficulty of reconciling competing procedural values, Professor Marcus cites the wide international divide between the civil law and common law traditions and the exceptionalism of American procedure compared to the rest of the world.[102] Professor Tidmarsh also points to the exceptionalism of American procedure to warn that international pressures on American procedure threaten to isolate it. But, contrary to Marcus, Tidmarsh believes that creative imagination can work to bridge this divide.[103] He sug-

98. Discussing the influence of ideology and interest group politics on congressional rulemaking for the federal courts, Professor Burbank comments: "[I]f we sincerely desire progress in the public interest, rather than personal, partisan, or institutional advantage, we must proceed with respect for others and for our traditions, and with humility." Burbank, *supra* note 54, at 1678.

99. Tidmarsh, *supra* note 56, at 587; *see also* Stempel, *supra* note 15, at 77 ("I generally agree with those who have criticized the past fifteen years as a time of excessive tinkering with the Civil Rules . . . .").

100. Tidmarsh, *supra* note 56, at 571.

101. Bone, *supra* note 19, at 919.

102. Marcus, *supra* note 4, at 107–08.

103. Tidmarsh, *supra* note 56, at 547–48. Tidmarsh explains:

> If American rulemakers believe, as I do, that it [is] important not to desert the United States on a remote island, they must begin to build bridges toward other procedural systems. To do so, we must develop a clear understanding of the procedural pieces we must preserve, the pieces on which we should compromise, and the pieces we must jettison—and we must do so now, before events on the global stage overtake our system.
>
> . . . [T]he American procedural system is facing competitive pressures on the domestic front at least as great as those likely to emerge on the international front. Americans are avoiding the litigation system in unprecedented numbers, either choosing not to resolve disputes at all or relying on pre-litigation alternative forms of dispute resolution such as arbitration, mediation, settlement, and other hybrid processes.

Id. He also notes, "Our present system responds poorly to the emerging needs of the transnational order." *Id.* at 552; *see also* Jay Tidmarsh, *Unattainable Justice: The Form of Complex*

gests that "[a]n ambitious effort might be to seek a merger not just of litigation and ADR, but of litigation, ADR, and the procedural norms of other countries,"[104] cautioning, however, that such a project would require "immense imagination."[105] I suggest that multistate collaboration on uniform state rules could also address the need for American state procedure to build a bridge to the international legal community. In an era of accelerating globalization, state court systems cannot afford to spawn divergent procedural rules unmindful of the impact of procedural differences on litigation that is not only national but transnational in scope.

B. Reclaiming the Value of Procedure

Procedure is critically important because it advances the purpose of adjudication—"what an adjudicatory system should be,"[106] its "fundamental nature"[107] or "logic"[108]—which Lon L. Fuller, a leading theorist of Legal Process jurisprudence in the 1950s and 1960s, called the "forms of adjudication."[109] Fuller's Legal Process jurisprudence is being rediscovered today by a new generation of procedural scholars who strive to develop a coherent vision of adjudication that fits the current conditions of civil litigation and—in an era of expanding judicial discretion—that defines the legitimate exercise of judicial discretion and its limits.[110] As Tidmarsh explains: "Fuller's article [*The Forms and Limits of Adjudication*[111]] attempts to derive the fundamental form of adjudication, to determine the procedural features that best advance that form, and to establish the limits of that form."[112] The goal of rulemaking is to design procedures—through

Litigation and the Limits of Judicial Power, 60 GEO. WASH. L. REV. 1683, 1811–12 (1992) [hereinafter Tidmarsh, *Unattainable Justice*] (Tidmarsh's normative analysis of adjudication leads him to conclude that "[n]othing in the form of adjudication requires adversarial process. . . . The jury is still out on the wisdom of adversarial procedure.").

104. Tidmarsh, *supra* note 56, at 580 (emphasis omitted).

105. *Id.*

106. Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1731.

107. *Id.*

108. Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995) (referring to "Fuller's life-long effort to uncover the logic of adjudication").

109. *See* Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1726–42.

110. *Id.* at 1817 (referring to Tidmarsh's "form of complex litigation [as] provid[ing] . . . a coherent perspective from which the future of procedural reform can be viewed"); Bone, *supra* note 64, at 491 (referring to Bone's development of "properties that any coherent and attractive theory of procedural fairness must include").

111. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller wrote the article in 1959, but it was not published until after his death in 1978. *See* Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1726–42.

112. Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1726–27.

"reasoned deliberation rather than interest accommodation"[113]—that best advance the fundamental goals of the enterprise of providing justice.[114] As Professor Bone explains, Fuller posited that there were "'natural' principles of social ordering [that] guided the process of designing effective institutional structures,"[115] that "adjudication had its own distinctive purpose and natural ordering,"[116] and that "human beings could discover the ordering principles for any institutional setting [including a judicial system]."[117] Fuller linked "the necessity of connecting practical problems of rule design with broadly theoretical and normative questions about the nature of civil adjudication."[118]

Since the 1970s, there has been a "decline in the valuation of procedure"[119] as the Federal Rules have, through a series of amendments, retreated from formal adjudication. During this period, scholars considered Fuller's work obsolete,[120] eclipsed by Professor Abram Chayes's public law theory,[121] which defends judges' new, nontraditional role as case "managers"[122] who preside over "public law" litiga-

113. Bone, *supra* note 19, at 899; Fuller, *supra* note 111, at 366 (defining adjudication as "a device which gives formal and institutional expression to the influence of reasoned argument in human affairs").

114. Bone, *supra* note 108, at 1286 ("[I]n one essay, Fuller described the purpose of adjudication as seeking the end of 'justice.'").

115. *Id.* at 1283.

116. *Id.* at 1301; Fuller, *supra* note 111, at 357.

117. Bone, *supra* note 108, at 1292.

118. *Id.* at 1275.

119. Resnik, *supra* note 15, at 541 (referring to "a decline in the valuation of procedure" as one among several possible explanations for "[t]he decline in faith in adjudication"); *see also* Tidmarsh, *supra* note 56, at 516–17 ("Today in the academy, procedure is often a second class subject, thought to be a practically oriented matter devoid of insight and unworthy of sustained thought. . . . [W]e must recover a sense of the importance of procedure . . . .").

120. *See* Molot, *supra* note 53, at 118 ("When Lon Fuller's classic article *The Forms and Limits of Adjudication* appeared in the *Harvard Law Review*, many scholars already considered it to be outdated. If it was not outdated then, most scholars consider it outdated today.").

121. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (observing the emergence of a new model of public law adjudication which is very different from the traditional model).

122. *Id.* at 1284 (noting that, among the features of the public law adjudication model that distinguishes it from the "traditional model," "[t]he judge is the dominant figure in organizing and guiding the case . . . [and m]ost important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation."). According to Resnik:

> Several commentators have identified one kind of lawsuit—the "public law litigation' or "structural reform" case—in which federal judges have assumed a new role. In these cases, judges actively supervise the implementation of a wide range of remedies designed to desegregate schools and to reform prisons and other institutions. Some commentators have questioned the legitimacy of judges' dominance in what is now generally acknowledged to be a "new model of civil litigation."

Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377 (1982).

tion like civil rights class actions in the 1960s and 1970s.[123] Fuller believed that this kind of litigation, which he called "polycentric,"[124] exceeded the limits of adjudication.[125] Whereas under the form-over-substance regime of legal formalism inherited from English common law "procedure had dominated substance,"[126] now the reverse is true. The Legal Process premise that procedure has a normative existence conceptually separate from substance has yielded to the neo-Realist view that procedure is effectively a function of substantive law.[127]

Legal Process theory—and with it, "procedure"—are making a comeback. Several procedural scholars are reclaiming the relevance of Fuller's theories of adjudication to address contemporary litigation challenges,[128] including the rise of mass tort litigation that Professor Chayes did not anticipate.[129] Bone tells us that "[p]roceduralists today have much to learn from a serious study of Fuller's work."[130]

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123. Molot, *supra* note 53, at 29. For a discussion of the expansion of public law litigation and its effect on the federal rules, see Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 602 (2005) ("Not only did the Rules invite 'private attorneys general' to bring lawsuits on behalf of groups to enforce public norms, but its approach was mirrored in a smorgasbord of other mechanisms.").

124. Fuller, *supra* note 111, at 394–404.

125. *See* Molot, *supra* note 53, at 36 n.18; *see also* Fuller, *supra* note 111, at 398 ("If problems sufficiently polycentric are unsuited to solution by adjudication, how may they in fact be solved? So far as I can see, there are only two suitable methods: *managerial direction* and *contract* (or reciprocity).").

126. Tidmarsh, *supra* note 56, at 515–16.

127. *See* Bone, *supra* note 108, at 1277 ("Since the 1970s, Legal Process has been attacked for elevating procedure over substance, for worrying too much about who should make decisions and too little about what decisions should be made."). *See also* Bone, *supra* note 19, at 889 ("Many critics today reject the idea that civil process is normatively independent of substance . . . ."); Stempel, *supra* note 12, at 668 ("[T]he profession has become more chronically active and more 'political' in its activity. . . . Legal Realism revolutionized the profession's thinking about law, making it virtually impossible for thoughtful lawyers to regard litigation procedure and policy as completely divorced from the politics of substantive outcomes.").

128. *See* Bone, *supra* note 108, at 1277 (noting that "[i]nterest in Legal Process is on the rise today"); Molot, *supra* note 53, at 34 ("[W]hen it comes to deciding how judges should structure their assigned tasks, Fuller's traditional model of adjudication not only remains relevant, but may ultimately be more powerful than even he himself envisioned."); *id.* at 35 n.17 (noting that "some scholars see Fuller's Model as a useful one for civil procedure scholarship generally"); Resnik, *supra* note 123, at 597 ("[T]he distinctive elements of adjudication as a form of 'social ordering' to be contrasted with other forms, such as contracts and elections (to borrow Lon Fuller's categories), are diminishing."); Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1734–54 (drawing upon Fuller's normative theory of adjudication to develop a normative definition of complex litigation).

129. Molot, *supra* note 53, at 29–30 (noting that Chayes "failed to anticipate and 'capture the dynamics of modern mass tort litigation,' which came to dominate the litigation landscape in the 1980s and 1990s" and that "scholars have challenged the academy to develop yet another new model of litigation, one that can guide judges in mass tort litigation as well as in public law class actions").

130. Bone, *supra* note 108, at 1275.

This renewed scholarly attention to adjudicative procedure and its theoretical underpinnings[131] is largely motivated by a concern that the judicial system has strayed too far from its core function of formal adjudication and that the triumph of equity over law in the Federal Rules has ceded too much discretionary authority to the court. In Professor Subrin's words:

> To the extent that advocates of case management, settlement, or alternative dispute resolution give up on law application, they are giving up on the essence of adjudication. Ironically, their attempt to remedy the flaws in judicial dispute resolution rejects the major function that courts perform.[132]

Subrin suggests a return to theoretical basics of procedure to remedy the abuses of too much undisciplined[133] and unfocused judicial discretion.[134] Citing Fuller, he asserts that "it is resolving disputes through reasoned and principled deliberation, based on rules, that is at the heart of adjudication"[135] and that predefined procedures provide the methods for vindicating substantive rights.[136]

Other academics apply Fuller's normative adjudication theory to current procedural issues. These academics seek to discover a principled approach to procedural reform that "resurrect[s] an old judicial role to cope with new litigation problems."[137] Their resurgent interest in procedural theory reflects a concern about procedural legitimacy and limits of the principled exercise of judicial discretion.[138]

Bone's theoretical work addresses the legitimacy of the rulemaking process, which "depends on what rulemakers are supposed to do when

131. *See* Subrin, *supra* note 12, at 992 ("The alternative to Clark's and Pound's wholesale acceptance of equity as a basis for procedural rules is a reconsideration of some of the theoretical underpinnings of the Federal Rules.").

132. *Id.* at 989.

133. *Id.* at 982 ("Because equity wanted the whole picture, without boundaries, in its search for a more perfect answer, it was, in essence, undisciplined. Both recent trends to amend the federal Rules as well as the developments in alternative dispute resolution have emerged, at least in considerable part, in response to the chaos.").

134. *Id.* at 993 (referring to the belief of Professor O.L. McCaskill, a critic of Clark's vision, that "procedure was necessary to help deliver the substantive law through its confining, focusing, and defining functions").

135. *Id.* at 988.

136. *Id.* at 1001–02 ("The momentum toward case management, settlement, and alternative dispute resolution represents, for the most part, a continued failure to use predefined procedures in a manner that will try, however imperfectly, to deliver predefined law and rights.").

137. Molot, *supra* note 53, at 33.

138. *See* Solum, *supra* note 57, at 189 ("For adjudicative procedure to perform its action-guiding function well, procedures and their outcomes must be regarded as legitimate sources of authority for officials, third parties, and litigants."); Molot, *supra* note 53, at 32 ("When judges ignore these features of their traditional adjudicative role they strain the boundaries of their institutional abilities.").

they make procedural rules, and that in turn depends on what a system of procedural rules is supposed to accomplish."[139] He posits that procedural legitimacy does not depend on "public participation and interest group compromise" but on "principled deliberation . . . anchored to a theory of procedural law."[140] Professor Bone contends that procedure is not a mere appendage of substantive law and the political process but is instead a function of "natural ordering principles for adjudication."[141]

Tidmarsh, another academic who has "recover[ed] a sense of the importance of procedure,"[142] draws upon Fuller's normative theory of adjudication to derive a formal definition of complex litigation. His formal analysis of complex litigation's essential attributes aims at the practical goal of circumscribing the limits of the principled exercise of judicial discretion: "Proposals that transgress the normative (and therefore inviolable) attributes of adjudication are not legitimate solutions in adjudicatory system . . . ."[143]

Also motivated by a concern over procedural legitimacy,[144] Professor Lawrence Solum recently offered "a fully articulated and defended theory of procedural justice for a system of civil adjudication."[145] The first step in developing his theory is to ask: "what is procedure?"[146] Professor Jonathan Molot, who attributes most of the controversy over civil procedure today to the tendency of judges to "stray from [their traditional] role,"[147] also uses Fuller's normative model of adjudication to define the limits of judicial discretion.

C. A Renewed Belief in the Power of Great Ideas

Skepticism about the power of vision to transform procedure can be something of an occupational hazard for academics who serve on rulemaking committees. Professor Marcus relates that his "decade-long experience" as Special Reporter to the Advisory Committee on

139. Bone, *supra* note 19, at 954–55; *see also* Stempel, *supra* note 15, at 75 (referring to "the fairly self-conscious Advisory Committee's decision to attempt a political compromise in rulemaking, a compromise linked more to segmentation of opinion in the legal profession than to any logical construct").

140. Bone, *supra* note 19, at 954–55.

141. Bone, *supra* note 108, at 1299.

142. Tidmarsh, *supra* note 56, at 517.

143. Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1750.

144. Solum, *supra* note 57, at 189 ("For adjudicative procedure to perform its action-guiding function well, procedures and their outcomes must be regarded as legitimate sources of authority for officials, third parties, and litigants.").

145. *Id.* at 183.

146. *Id.* at 191.

147. Molot, *supra* note 53, at 29–30.

the Civil Rules "has tempered [his] original aspirations about the federal reform effort" and that he has "certainly come to revise [his] views of the potential—for good or bad—of federal procedural rulemaking."[148]

Like Professor Marcus, I have served for several years as the lone (and first) academic on the Civil and Small Claims Committee of the California Judicial Council as an advisory member. I joined the committee with the hope that the primary rulemaking power for California state courts could be shifted from the legislature, where it still resides, to the Judicial Council, where it belongs.[149] Through my years of service on this committee, I was fortunate to witness the down-to-earth realities of procedural rulemaking concerned with intricate details of court administration rather than grand visions of procedural reform. It is, therefore, with an awareness of the limitations of the existing rulemaking model—short on big ideas and empirical data—that I propose that states pool their resources to do the kind of theoretical and empirical work that needs to be done.

Professor Tidmarsh has sounded the alarm that American civil justice system is in "fundamental crisis"[150] and that time is running out for another great reform movement.[151] He notes that "[g]reat reform movements require the fuel of a pressing social need, the oxygen of optimism, and the spark of a great idea."[152] Tidmarsh is one of several commentators who have urged that a pressing need for great ideas is upon us.[153] What is missing is the oxygen of optimism.

Rulemakers need a change of attitude about the transformative power of vision: a renewed optimism about, and faith in, the power of great ideas to effect great procedural change and a rulemaking process that promotes, rather than stunts, the development of great ideas through interplay between theory and practice.[154] Inspired by the example of Roscoe Pound, whose vision shifted the American procedural paradigm in the twentieth century, Professor Tidmarsh urges that

148. Marcus, *supra* note 4, at 104.

149. *See generally* Koppel, *supra* note 57.

150. Tidmarsh, *supra* note 56, at 516.

151. *Id.* at 517 ("Some of the pressures on the system will not wait another century before exploding.").

152. *Id.* at 587.

153. *See, e.g.*, *id.* at 516 ("Today our system faces pressures and challenges across numerous fronts, and modest tweaking of this rule or that doctrine cannot address the system's fundamental crisis."); Bone, *supra* note 19, at 889 ("The level of discontent is unprecedented in the sixty-five year history of federal rulemaking in the field of civil procedure."); Molot, *supra* note 53, at 29 ("Litigation is changing so rapidly that even new models of judging designed to update traditional ones have quickly become outdated.").

154. *See infra* notes 157–173, 245–264 and accompanying text.

grand visions—"big" ideas[155]—can still fuel great reforms movements. He analogizes Pound's 1906 speech before the American Bar Association and his subsequent activity to the Hellenic era of ancient Athenian culture, during which "a brilliant new idea dawns; innovation, excitement, and reaching beyond known modes of discourse and structure abound."[156] But Pound's vision was realized through the Rules Enabling Act's creation of an advisory committee of academics and practitioners who were inspired by this vision. Profound power emanates from both the belief that a new Hellenic era in procedural reform is possible in our time and acting accordingly.

III. Of Theory and Empiricism in Procedural Reform

Professor Marcus comments that my proposal for uniform state rules is implausible because, in the current politicized procedural environment, it is impossible to achieve consensus on procedural first principles.[157] Marcus asserts that even well-meaning experts—i.e., academics—have irreconcilable differences over fundamental procedural values[158] and that more empirical research in rulemaking cannot resolve those differences over basic values.[159] He portrays academics as impractical dreamers whose perfect schemes are not "designed to work in the actual world of American litigation."[160]

The Liberal Ethos paradigm of the framers has indeed fragmented. Over the past thirty years, special interest groups continue to clash over procedural goals, lobbying rulemakers both in the advisory committee and Congress to tweak the rules that govern civil litigation to

155. Tidmarsh, *supra* note 56, at 571 ("Today 'big' ideas have receded as a critical determinant of procedural rules.").

156. *Id.* at 575.

157. Marcus, *supra* note 4, at 110 ("Until all (or almost all) can agree on the pertinent application of first principles, the vision of procedural uniformity is likely to encounter debate abut the provisions of the uniformity."); *see also id.* at 105 ("Unless all can agree on how to resolve those basic value choices, the vision of a perfect procedural system is something of a chimera."); *id.* at 113 ("But as debates about first principles gain momentum, this vision is often hard to defend. In an era when those debates are intense, it is nearly impossible to imagine that various states could be persuaded to submit to the directives of a single mulitstate Band of Experts.").

158. *Id.* at 112. Stephen Subrin identifies "ten different [procedural] values and goals in the United States:

> (1) resolving and ending disputes peacefully; (2) efficiency; (3) fulfilling societal norms through law-application; (4) accurate ascertainment of facts; (5) predictability; (6) enhancing human dignity; (7) adding legitimacy and stability to government and society; (8) permitting citizens to partake in governance; (9) aiding the growth and improvement of law; (10) restraining or enhancing power.

Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 Tul. J. Int'l & Comp. L. 139, 140 (1999).

159. Marcus, *supra* note 4, at 114.

160. *Id.* at 113.

gain strategic litigation advantage.[161] As discussed earlier, in lieu of pursuing a new paradigm of adjudication, federal procedure has retreated from adjudication. Professor Bone observes that "[i]t is not at all uncommon to find the merits of rule proposals debated in terms of a largely ad hoc balance of process values, such as judicial economy, outcome accuracy, substantive norm enforcement, participation, and legitimacy."[162] On the state court level, rulemakers are going their separate ways in rules reform.[163] In short, rules are amended without benefit of a "coherent perspective" on procedural reform.[164] Marcus concludes from this procedural chaos that "the vision of a perfect procedural system is something of a chimera."[165]

Other more optimistic academics, like Bone and Tidmarsh, urge that it is not only possible, but critically necessary that rulemakers strive to develop a new procedural vision to provide the framework for a coherent approach to procedural reform. Drawing upon Fuller's jurisprudence, they suggest that what is required to "guide coherent procedural rulemaking"[166] is theory that, in Tidmarsh's words, "can guide us into the future."[167]

But theory must be grounded in practice, which requires more rigorous empirical study than currently informs rulemaking. A common criticism leveled at the series of amendments to the Federal Rules during the last twenty years is the dearth of empirical data to support the need for these amendments and to evaluate their efficacy. Professor Marcus himself has written:

> An empirical element is intrinsic to much rulemaking, but often it is difficult to develop an adequate empirical base—a topic that has received increased academic attention in recent years. As a general matter, the Federal Rules of Civil Procedure have been drafted without the benefit of detailed empirical input.[168]

As conceived by Fuller and Bone, empiricism and theory should interact with each other in an incremental, trial-and-error process, to de-

161. Mullenix, *supra* note 17, at 801 ("[P]artisan law reformers have abandoned the judicial arena as the forum for achieving social change, and instead are focusing legal reform efforts on the rules and the rulemaking process. Sensing the demise of judicial activism, social reformists have shifted strategy to the rulemaking process.").

162. Bone, *supra* note 108, at 1322.

163. *See supra* notes 28–31 and accompanying text.

164. Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1817 ("[F]orm provides a coherent perspective from which the future of procedural reform can be viewed.").

165. Marcus, *supra* note 4, at 105.

166. Bone, *supra* note 108, at 1322 ("The need for theory to guide procedural rulemaking may seem obvious, but proceduralists today do not always appreciate its implications.").

167. Tidmarsh, *supra* note 56, at 587.

168. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 778 (1998).

sign a code of procedural rules that enables adjudication "to further its purpose well."[169]

Building on the work of Fuller and Bone, I propose a rulemaking process that incorporates both theoretical work and empiricism, interacting with each other,[170] to develop a new model of state procedure that might also serve as a model for Federal Rules reform. In this way, the rulemaking enterprise proceeds from a non-partisan, public interest perspective that focuses on developing a more effective adjudication system.[171] As Bone explains:

> With a reasonably coherent idea of what they are supposed to do—something that has been missing since the demise of the traditional justification—rulemakers should be able to transcend narrow self-interest, engage in reasoned deliberation, and avoid the public choice trap. . . . [C]lear rulemaking norms can support development of professional standards, which in turn can constrain the rulemaking process and guide it in the direction of the public interest.[172]

The goal here is not to create "perfect" procedural reform, nor to divine the "perfect procedural system,"[173] handed down by a latter-day Solon to state courts, but rather to develop a *better* procedural system based on a normative theory of adjudication—not the shifting sands of political compromise.

A. The Practical Relevance of Theory to Procedural Reform

Professor Marcus suggests that there is an inherent disconnect between procedural theory and practice and that theory is a luxury that academics have the time to indulge in their ivory towers. He explains why "academic Reporters can't call the shots" in rules advisory committees: "These rules are designed to work in the actual world of American litigation and not a perfect world as conceived by academic proceduralists."[174]

The reality, however, is that a core of procedural scholars is rediscovering the critical relevance of theory to the practical work of effec-

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169. Bone, *supra* note 108, at 1299.

170. *Id.* at 1285.

171. Professor Stempel offers an alternative approach to nonpartisan rulemaking through a process of political consensus which he calls the "civic republican" model, whereby the political community engages in deliberation in which the citizenry attempts to arrive at a shared conception of the "common good" and to make administrative rules designed to foster that common good. *See* Stempel, *supra* note 12, at 752.

172. Bone, *supra* note 19, at 925–26; *see also* Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1817 ("[F]orm provides a coherent perspective from which the future of procedural reform can be viewed.").

173. Marcus, *supra* note 4, at 105.

174. *Id.* at 113.

tive rulemaking. Many of these procedural theorists draw inspiration from Fuller's work. As Professor Bone comments: "If there is a single message to take from Fuller, it is that sound institutional design requires careful attention to institutional theory."[175]

Theory can provide a path toward resolving basic value choices by balancing,[176] or ordering, basic value choices. In Professor Tidmarsh's words, theory provides "guideposts that determine the skeleton of the procedural system" and "provide a sense of purpose and direction for the rules we use."[177] It can reconcile differences over first principles and could conceivably narrow the gap between the American procedural system and the rest of the world by focusing on the norms—the essential elements—of adjudication.

Fuller believed that "adjudication had its own distinctive purpose and natural ordering principles."[178] By "natural ordering principles," Bone explains that Fuller meant "practical principles" that were "'natural' only in the sense that they arose from the nature of the task."[179] Fuller proposed that, through reasoned deliberation, "human beings could discover the ordering principles for any institutional setting,"[180] including adjudication. Bone's theoretical work is inspired by Fuller's view that

> [t]here is no way to know which values should count or how those values should be balanced unless one has a more general understanding of what the institution of adjudication is supposed to do and how its goals fit within the broader system of political and social institutions of which it is a part.[181]

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175. Bone, *supra* note 108, at 1275.

176. *See* Tidmarsh, *supra* note 56, at 573 (referring to the need to "reexamine the balance of foundational principles of civil procedure"). According to Robert Bone:

> The need for theory to guide procedural rulemaking may seem obvious, but proceduralists today do not always appreciate its implications. It is not at all uncommon to find the merits of rule proposals debated in terms of a largely ad hoc balance of process values, such as judicial economy, outcome accuracy, substantive norm enforcement, participation, and legitimacy.

Bone, *supra* note 108, at 1322. Bone also describes Fuller's thoughts on balancing values:

> A set of values and a balancing metaphor are not enough. There is no way to know which values should count or how those values should be balanced unless one has a more general understanding of what the institution of adjudication is supposed to do and how its goals fit within the broader system of political and social institutions of which it is a part. And this kind of understanding requires theoretical work at a much more sophisticated level than the dispute-resolution/public-law dichotomy.

Id. at 1322–23.

177. Tidmarsh, *supra* note 56, at 570–71.

178. Bone, *supra* note 108, at 1301–02.

179. *Id.* at 1291.

180. *Id.* at 1292.

181. *Id.* at 1322.

For Bone, balancing competing values through rough consensus, which characterizes the efforts of official rulemakers like the federal Advisory Committee, is a mistake.[182] The key to a legitimate rulemaking process is to engage in rational deliberation that

> aim[s] to construct a reasonably coherent set of principles that both fits current practice and also justifies that practice as the best it can be given what it is. . . . Throughout this process, the interpreter's goal is to construct a set of legal principles that justif[ies] the practice as a reasonably coherent and morally attractive whole.[183]

Professor Solum's theory of procedural justice, which purports to offer an ordered "relationship between accuracy, cost, and participation," inspires the power of theory to order competing values.[184] Solum is concerned that subordinating procedure to substantive law "sacrifices procedural fairness on the altar of substantive advantage."[185] He concludes that "[p]rocedure without justice sacrifices legitimacy."[186] Theory places the legitimacy of procedure on a firmer foundation than rough political consensus.

Professor Tidmarsh warns that "[w]e remain mired in a procedural no-person's land"[187] where procedure "is not deeply theorized as an independent value system"[188] and is, therefore, by default, amended periodically in response to short-term pragmatic and political considerations of the moment,[189] unguided by a theoretical blueprint. Consequently, American procedure is not responding productively to the challenge of ADR, which he views "as a rebellion against the undesirable consequences of modern procedural rules, in the same way that

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182. Bone, *supra* note 64, at 551–52. According to Bone:

> [I]t is a mistake for official rulemakers, like the Advisory Committee charged with drafting the Federal Rules of Civil Procedure, to rely on rough consensus as a mark of fairness. A justification based on consensus rests ultimately on some form of hypothetical consent and thus has no greater moral force than the ex ante argument. Nor does it work for rulemakers to imagine themselves as bargaining agents and the committee process as a bargaining game conducted behind a veil of ignorance.

Id.

183. Bone, *supra* note 19, at 941.

184. *See* Solum, *supra* note 57, at 305–07. According to Solum:

> Accuracy, cost, and participation must all play a role in a theory of procedural justice. But if such a theory is to be sufficiently specific to do actual work as a standard against which a system of procedure can be measured, then the relationship between accuracy, cost, and participation must be ordered and articulated.

Id. at 305.

185. *Id.* at 321.

186. *Id.*

187. *See* Tidmarsh, *supra* note 56, at 574.

188. *Id.* at 575.

189. *Id.* at 587 ("Reform without theory is likely to be pragmatic, incremental, and above all political—as those in power tweak the rules slightly in one direction or another.").

equity was a rebellion against the undesirable procedural effects of the common law system."[190] A new procedural paradigm is urgently needed to "merge our present legal procedure with the 'new equity': the disputes that are resolved through alternate methods of dispute resolution."[191] Academics, judges, and attorneys must "reexamine the balance of foundational principles of civil procedure when it discusses how to handle this point or reform that matter."[192]

American procedure is also not responding to the challenge of globalization as American exceptionalism threatens to isolate the American civil justice system internationally. Pound was concerned about the adverse consequences of procedural disuniformity among the states, which at least share a common legal tradition. Tidmarsh perceives that globalization takes the issue of procedural uniformity "to a heightened level [because] . . . [t]oday, transnational commercial ventures bring into contact procedural regimes that differ at the foundational level."[193] Again, theory is the key that will enable rulemakers to "develop a clear understanding of the procedural pieces we must preserve, the pieces on which we should compromise, and the pieces we must jettison."[194] Putting "our procedural imagination"[195] to work to develop a new procedural theory might not only bridge "the litigation-ADR divide, and . . . merge the best of both systems,"[196] but could, in the long term, bridge the international divide between common and civil law traditions by "seek[ing] a merger not just of litigation and ADR, but of litigation, ADR, and the procedural norms of other countries."[197]

Professor Molot also espouses the practical utility of theory to "move beyond simply weighing the tradeoffs that surround new judicial practices and develop a framework to help us decide which costs are worth bearing and which are not."[198] Like Tidmarsh and Bone, Molot uses Fuller's normative theory of adjudication as "a useful lens through which to evaluate contemporary controversies."[199] Molot urges that rulemakers adopt "a pragmatic attitude about the usefulness of abstraction and generality in legal thinking."[200] He adds:

190. *Id.* at 578.
191. *Id.* at 577.
192. *Id.* at 573.
193. *See* Tidmarsh, *supra* note 56, at 540.
194. *Id.* at 547–48; *see also supra* note 103.
195. Tidmarsh, *supra* note 56, at 579.
196. *Id.* at 579–80.
197. *Id.* at 580 (emphasis omitted).
198. Molot, *supra* note 53, at 42.
199. *Id.* at 43.
200. Solum, *supra* note 57, at 234.

"Though pragmatic considerations sometimes counsel against highly abstract, large-scale theories, they do not always so counsel. The only way for a pragmatist to judge the value of a theory of procedural justice is to put it to work and see if it pays."[201]

The theme that theory should be utilized to provide a coherent balance of procedural values informs Professor Subrin's argument that equity's complete triumph over common law "has caused us to forget the essence of civil adjudication."[202] Subrin attributes many of the perceived failings of the Federal Rules to an imbalance in the procedural system dominated by equity in the form of judicial discretion.[203] He stresses the importance of traditional theory[204] to "help balance equity's creativity with the common law's historic quest to deliver predefined rights."[205] Like Bone and Molot, Subrin suggests that we rediscover the "historic purpose" and the "essence of civil adjudication,"[206] which is to "enabl[e] citizens to have their legitimate expectancies and rights fulfilled."[207] He urges us to rediscover the "common law virtues of form and focus [that] are necessary to help us develop methods that can realize our rights."[208]

In addition to providing a blueprint for a coherent approach to procedural reform and a path to achieving an appropriate balance between judicial discretion and formal adjudication, theory provides the momentum for the next great procedural reform movement. Returning to Professor Tidmarsh's combustive metaphor of procedural reform that "[g]reat reform movements require the fuel of a pressing social need, the oxygen of optimism, and the spark of a great idea," theory, he emphasizes, "create[s] the optimism and spark[s] the reform."[209] Tidmarsh puts normative theorizing to work in developing a normative definition of complex litigation as a yardstick to measure

201. *Id.*

202. Subrin, *supra* note 12, at 1001.

203. *Id.* at 975 ("Many of the paths we are currently exploring to deal with civil litigation—increased judicial management, alternative dispute resolution mechanisms, and emphasis on settlement—also tend to ignore the underlying problems inherent in a procedural system so heavily based in equity procedure.").

204. *Id.* at 992 ("The alternative to Clark's and Pound's wholesale acceptance of equity as a basis for procedural rules is a reconsideration of some of the theoretical underpinnings of the Federal Rules.").

205. *Id.* at 974–75.

206. *Id.* at 1001.

207. *Id.*

208. Subrin, *supra* note 12, at 1002.

209. Tidmarsh, *supra* note 56, at 587.

the legitimate exercise and limitations of judicial discretion in complex litigation.[210]

Although the theoretical exploration of each of these procedural scholars arrives at different normative destinations, they all share the conviction that intensive theoretical work of reasoned deliberation is an ongoing process that must continue. In Bone's words,

> Rulemakers must . . . do the hard constructivist work of building step-by-step morally attractive fairness principles from settled practice rules and norms.
>
> In the end, proceduralists who care about fairness have to think much harder about what fairness means for procedure. . . . Nothing less is at stake than a coherent and normatively defensible system of civil adjudication.[211]

I propose that this "hard constructivist work" be undertaken, as it was in the heyday of federal rulemaking,[212] by a committee of "experts"[213]—prominent procedural scholars, judicial representatives of state courts, and practitioners—working together to develop the theoretical foundations of a new procedural paradigm that builds bridges, not only across the United States, but across international boundaries as well. This enterprise was urged by Professor Tidmarsh[214] and commenced by the ALI/UNIDROIT[215] transnational civil procedure project. This procedural paradigm would provide the framework[216] for developing a uniform code of state civil procedure that could serve as model for federal procedural reform "adequate to today's needs."[217] Interstate procedure uniformity was a goal of the proponents of the

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210. *See generally* Tidmarsh, *Unattainable Justice*, *supra* note 103.

211. *See* Bone, *supra* note 64, at 552.

212. *See, e.g.*, Bone, *supra* note 19, at 897–99 (describing the process of federal court rulemaking from 1950–1970 as involving "reasoned deliberation rather than interest accommodation," which "helped to support the legitimacy of the process despite the absence of political accountability").

213. *Id.* at 891 (defending "the core elements of the court rulemaking model—nationally uniform rules made by the court through a centralized rulemaking process relying on expert committees").

214. Tidmarsh, *supra* note 56, at 547–48.

215. "The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organization with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States." UNIDROIT: An Overview, http://www.unidroit.org/dynasite.cfm?dsmid=84219 (last visited Apr. 27, 2009).

216. Molot, *supra* note 53, at 118 ("Fuller's description of the traditional judicial role remains important because it provides a sorely needed conceptual framework with which to analyze contemporary procedural problems."); Tidmarsh, *supra* note 56, at 570–71 (referring to the need for "guideposts that determine the skeleton of the procedural system" that "provide a sense of purpose and direction for the rules we use").

217. *See* Tidmarsh, *supra* note 56, at 571 (criticizing the current state of American procedure: "We no longer have a theory of procedure adequate to today's needs.").

1934 Rules Enabling Act, who expected that the states would adopt an enlightened federal model of procedure.[218] Minimizing interstate procedural diversity remains an important goal as state and international boundaries become increasingly irrelevant to international commerce and dispute resolution. Normative theory—determining the essential attributes of adjudication—does not vary from state to state[219] and should provide the foundation for a uniform state procedure code.

Some argue, however, that variations in local culture, legal or otherwise, as well as the predilection of judges to "adjust the procedure to fit their needs and personalities,"[220] make the vision of procedural uniformity implausible. This view underplays the power of procedure to shape legal culture; lawyers and judges seem to adapt rather quickly to procedural changes once they get used to them.[221] A bridge that could link state procedural systems, which at least bear "a family resemblance to each other,"[222] would not be nearly as long as

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218. *See, e.g.*, Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 320 (2001) (noting the expectation behind the rules Enabling Act that "the Federal Rules would be so enlightened and simple that intra-state uniformity would follow naturally as states voluntarily adopted the federal model"); Subrin, *supra* note 33, at 2026.

219. *See* Bone, *supra* note 19, at 931 ("[I]t is unclear that local conditions vary all that much in ways relevant to the design of efficient procedural rules."); Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 946 (1996) (observing that local federal court rules reflect "differences in the styles and values of particular judges" rather than "variations in local conditions"); Chemerinsky & Friedman, *supra* note 34, at 784 (arguing that local custom may explain "why local rules do exist than why they should"); *id.* at 792 ("[T]he trends we observe [relating to local rules in federal court] are all the more disturbing because they are occurring without careful consideration, or as a matter of political compromise unrelated to the goals of a functioning procedural system.").

220. *See* Subrin, *supra* note 17, at 186–87 (citing Marcus, *supra* note 4, at 117). In Marcus's article, he states:

> Judges are not bureaucrats in America (as they are more likely to be in other countries), and they don't readily toe the line set by central authorities, even if those authorities are also judges acting as rulemakers. For those seeking uniformity this is a drawback; whether the independence of American judges has produced other offsetting advantages could be debated. There is certainly a good case to be made for that independence. So long as it exists, it seems unlikely that a code will produce complete uniformity . . . .

Marcus, *supra* note 4, at 117.

221. Subrin, *supra* note 17, at 187. Subrin continues:

> So far as the local culture argument goes, it seems to me that local cultures change and procedural rules . . . over time influence that culture. . . . The fact that lawyers and judges tend to end up liking whatever procedures they have learned to operate under leads me to believe that local cultures can change.

Id.

222. Tidmarsh, *supra* note 56, at 540; *id.* at 539 n.119 ("For the most part, . . . the variations [among state procedural rules] lie at the edges; the basic process—relatively liberal pleading and

bridges that would link procedural systems internationally. The divide between the American procedural system and those of the rest of the world appears to be narrowing, making the prospect of bridging that divide, through the development of international procedural norms, appear less chimerical.[223]

B. *The Importance of Empiricism in Procedural Reform*

A common criticism aimed at federal rules reform over the past twenty years has been the lack of sufficient empirical information to inform federal rulemaking.[224] As noted earlier, criticism about discovery abuse, cost and delay in litigation, and litigiousness[225] led to a series of amendments that marked a retreat from the "open courts model"[226] of the Federal Rules that reached its height in 1970.[227] In

joinder, pretrial discovery and management, single (often jury) trial—is roughly comparable in all states.").

223. *See* Subrin, *supra* note 158, at 144 ("Does the procedural evolution in the United States—the movement towards a more restrained and circumscribed litigation process that places limits on a more wide-open, flexible system—suggest intelligent possibilities for international procedural norms?"); Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3, 29 (2003) (noting that some countries "may be gravitating toward developments in litigation that make it more like America's . . . [a]nd lawyers in some countries are gaining some tools that resemble the ones American lawyers have long had to pursue their cases. . . . [I]n Japan there is now some opportunity to do discovery. Some urge that civil law systems will soon have to include some discovery in their menu of procedural offerings."); *id.* at 29–30 (noting that American procedure's movement toward "greater judicial control over proceedings" makes it appear that "America is falling in line with the rest of the world," though "there is likely still to be a gulf between the reality of the American lawyer and the experiences of lawyers elsewhere").

224. Subrin, *supra* note 17, at 179 (commenting on "the dearth of empirical support for the attempts to reign in American civil litigation"); Burbank, *supra* note 17, at 248 ("It should not be too much, however, to expect credible evidence that supposed problems in fact exist—and are not the stuff of 'cosmic anecdotes'—before amending the Federal Rules or passing federal legislation."); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1155 (1996) ("A fund of basic information about the working of our legal institutions, of a sort that we take for granted in discussions of the economy, or health care, or education, simply does not exist."); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986) ("Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing."); Michael I. Sovern, *Proposed Revision of New York Civil Practice*, 60 COLUM. L. REV. 50, 81 (1960) ("Much of the difficulty stems from our lack of a systematized body of knowledge on the effects of procedural devices."); Stempel, *supra* note 12, at 741 ("[W]e can and should demand a bit more proof of a need for change before the rulemaking process clicks into gear."); *id.* at 744 ("Congress should provide sufficient funds to support field study, case study and other empirical research on problematic areas and possible amendments to the Rules."); *id.* at 752 (recommending "more solid research about and testing of reform proposals without attaching to them arbitrary numeric values").

225. *See* Subrin, *supra* note 12, at 911.

226. Stempel, *supra* note 12, at 720–27.

response, many academics criticized the paucity of empirical support for these rule changes, particularly those that restricted access to civil discovery.[228] Two Senior Researchers at the Federal Judicial Center observed that "the debate over discovery reform [in the 1990s] has proceeded largely, but not entirely, with reference to salient personal experiences and not with benefit of empirical evidence."[229] Anecdotes and political rhetoric have filled the knowledge vacuum created by the dearth empirical information.[230] Most recently, the Advisory Committee recommended the scope-narrowing amendment to the discovery rules, despite the lack of an empirical case for the amendment, "largely because of the political preferences of the leadership of the American College of Trial Lawyers and the ABA Litigation Section."[231]

Fortunately, empirical input in the federal rulemaking process has been headed in the right direction in recent years.[232] During the past decade, federal rulemakers have frequently relied on the Federal Judi-

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227. *See supra* note 6 and accompanying text. Marcus comments:

> Beginning more than a third of a century ago, critics of the federal-court system challenged [the] combined operation [of loosened pleading rules, broad discovery, and expanding the application of the Seventh Amendment], and since then there have been repeated efforts to scale back on aspects of the federal procedural regime that was installed by Federal Rule amendments culminating in 1970, which was the apogee of the Liberal Ethos of procedure.

Marcus, *supra* note 4, at 106.

228. *See* Koppel, *supra* note 1, at 1202–05 (summarizing scholarly criticism of "the dearth of empirical data to justify, and to evaluate the efficacy of, federal rule changes, particularly in civil discovery").

229. Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 787 (1998).

230. *See* Koppel, *supra* note 57, at 475–78 (chronicling the politics of federal procedural reform in the 1990s). For a discussion of the pervasive influence of politics on rulemaking, see generally Stempel, *supra* note 74.

231. Stempel, *supra* note 74, at 580–81.

232. *See A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 699 (1996) ("Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed."). According to Subrin:

> An important part of the story of modern American civil procedure is our growing body of empirical data, only sometimes examined by would-be reformers, and sometimes misused, but increasingly becoming a part of the public debate. The accusations of frivolousness in American civil litigation, of abuses of discovery and over-discovery running rampant, of excessive punitive damages, of run-away and incompetent juries, and the claims of efficiency gains through mediation and arbitration have all been softened or moderated by contrary evidence that is beginning to have some impact on the dialogue.

Subrin, *supra* note 158, at 148; *see also* Marcus, *supra* note 4, at 113 (citing the excellent "work product of the Research Division of the Federal Judicial Center"); Burbank, *supra* note 17, at

cial Center for empirical data "in identifying problems and making policy choices."[233] Professor Burbank predicts that "[t]here is hope for the future," citing the inauguration of the Administrative Office of the U.S. Courts' new electronic case management and electronic case files system for the federal courts,[234] which could prove to be an additional resource for the empirical research community. One legal commentator proclaimed in 2008: "The time is ripe for empirical studies of the legal system."[235]

But empirical input into rulemaking falls wide of the mark. The promise of the Administrative Office's (AO's) new electronic data gathering system is tempered by the reality that "the AO's agenda is determined by others and that it is not primarily a research-oriented agenda"[236] and that "the AO's data needs are more limited than the needs of the research community."[237] Professor Marcus tells us that "the version of empiricism that the federal rulemakers have adopted hardly fits the model of pristine social science."[238] Federal rulemakers rely upon a "'collaborative' method of gaining an appreciation of a subject of possible concern"[239] through meetings with groups of practitioners invited to share their experiences. According to Marcus,

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242 ("The judiciary also has come to recognize the value of seeking empirical data before formulating new or amended Federal Rules. It has not been consistent in that regard, however . . . .").

233. Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 582 (2004).

234. *Id.* at 581.

235. Elizabeth Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies,"* LAW & CONTEMP. PROBS., Spring 2008, at 17, 34. Chambliss explains:

> With the explosion in information technology, data sources on the legal system are improving in quality and accessibility. Compared with just a few years ago, researchers today can easily access original data sets. For example . . . academic researchers can obtain data ranging from the RAND studies of jury verdicts in California and Chicago, to the Wisconsin Civil Litigation Research Project's data, to the Federal Judicial Center's archives of all federal court cases. A major goal of [the Journal of Empirical Legal Studies] is to make these and other worldwide data sets more widely known and used.

Id. (alteration in original).

236. Burbank, *supra* note 233, at 582.

237. *Id.* at 589.

238. Marcus, *supra* note 4, at 115.

239. *Id.* Marcus notes:

> The Advisory Committee convenes a meeting with a handpicked group of lawyers who represent diverse experiences and viewpoints and discusses the issues that appear to be involved. These sessions can be extremely valuable in focusing and informing Committee analysis, but they hardly provide the sort of empirical information that most who stress empirical input favor.

Id.

"'armchair empiricism' is alive and well in rulemaking."[240] Finally, notwithstanding the ferment of rules experimentation on the state court level, empirical assessment is virtually nonexistent.[241]

Empiricism is a critical component of any rulemaking process that purports to design a procedural system that serves the public interest rather than special interests. A strong empirical element can provide a counterweight to excessive political influence on rulemaking.[242] By providing "a common fund of data that cuts across national boundaries and languages,"[243] empiricism can play a crucial role in bridging the gap between American procedure and the rest of the world. The process of state collaboration on a uniform state procedural code, which I propose, incorporates a vigorous empirical component that would employ a system of coordinated, controlled field experiments

240. *Id.* at 115–16 (citing as an example an of "armchair empiricism" "lawyers' reports [to the Committee] about what is happening in litigation"); Chemerinsky & Friedman, *supra* note 34, at 792 (commenting that "judges may overvalue anecdotes and opinions about reform and be insufficiently attentive both to social science process and to the needs of court users").

241. *See* Burbank, *supra* note 233, at 577 (commenting that "reliable data on state court litigation appear hard to find"); Marcus, *supra* note 4, at 116 & n.57 (Citing his work with the California Judicial council "to develop reliable empirical information about the frequency and nature of class action litigation in California state courts," Marcus relates that "even securing basic information about existing California class action practice has proved a great challenge."); Koppel, *supra* note 1, at 1209 ("I am not aware of any empirical study of recent state discovery reforms other than those implemented on a pilot basis. In Arizona, one of the leaders in aggressive discovery reform, no empirical assessment of the Zlaket Rules has been undertaken during the nine years these rules have been in effect."); Tobias, *supra* note 18, at 629–30 (referring to empirical evaluation of the Zlaket Rules: "Minimal empirical data currently exist because the Arizona Supreme Court has undertaken no formal attempt to study the impacts of the recent reforms generally, while baselines for comparing the effects of discovery devices' application have yet to be established specifically.").

242. *See* Walker, *supra* note 52, at 464, 476–77 (contending that an empirical approach to rulemaking, a "comprehensive rationality model," would "halt the politicization of the rulemaking process" and would "distinguish Advisory Committee work from legislation"); Marc Galanter et al., *How to Improve Civil Justice Policy*, 77 JUDICATURE 185, 230 (1994). Galanter states:

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

Galanter, *supra*, at 230.

243. Subrin, *supra* note 158, at 148 ("Empiricism, particularly in the international context, may have the advantage of beginning to provide us with a common fund of data that cuts across national boundaries and languages.").

that harnessed the haphazard rules experimentation currently underway in state jurisdictions.[244]

C. *The Synergy Between Theory and Empiricism*

Professor Marcus, noting the limits of empirical inquiry, comments that empirical input in the rulemaking process cannot answer fundamental questions about procedural values which he refers to as "first principles."[245] Although Marcus acknowledges that "sensible use of empirical information is a critical and prominent feature of federal rulemaking,"[246] he cautions that "at most it limits the number of viable choices to be made on some other ground."[247] He also doubts the plausibility of achieving the kind of empirical rigor that would "fit[ ] the model of pristine social science."[248]

But I do not contend that empiricism, by itself, will determine normative choices. Lon Fuller's theory of adjudication posited that, through an ongoing process of interaction between theory and practice, rulemakers could strive to develop more precisely the norms of adjudication that provide the framework for designing procedural rules.[249] Although Fuller offered only a vague starting point for this

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244. Koppel, *supra* note 1, at 1206–10; Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67; *see also* Marcus, *supra* note 4, at 115 (concerning the origins of the proposal for controlled experiments). For a picture of what a system of controlled experimentation might look like at the federal level painted by a Senior Researcher at the Federal Judicial Center, see Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1197–1204 (2002). According to Willging:

> [M]oving from the rhetorical calls for experimental research into the reality of implementing experimental research demands an operational mechanism for suggesting, reviewing, implementing, and monitoring rule-based experiments. Such a mechanism needs to be created at a national level and to have expertise in rulemaking. With appropriate authority from Congress and assistance from the FJC and the Administrative Office of the United States Courts, the Standing Committee could serve those functions. In a common-law fashion, the Committee would develop expertise in identifying appropriate subjects for experimentation, establishing means of randomly selecting courts to participate, reviewing proposed research designs, selecting control groups, setting time limits on the experiments, and reviewing the data. Such a mechanism could draw on infrequently-used experimental research tools that can enhance our knowledge of the impact of proposed rules on litigants, attorneys, and courts.

Id. at 1204. *But see* Burbank, *supra* note 17, at 248 ("[I]t would usually be too much—take too much time and too much money—to expect, much less to require, controlled experimentation or other rigorous empirical work at the local level before adopting an innovation at the national level.").

245. Marcus, *supra* note 4, at 113.

246. *Id.* at 114.

247. *Id.*

248. *Id.* at 115.

249. *See, e.g.*, Lon L. Fuller, *The Needs of American Legal Philosophy*, in THE PRINCIPLES OF SOCIAL ORDER 249, 259 (Kenneth I. Winston ed., 1981). According to Fuller:

process, defining the purpose of adjudication as "seeking the end of justice,"[250] he envisioned a process that moves from a vague to a more concrete understanding of the norms of adjudication:

> I have already expressed my conviction that adjudication, as a means for organizing human relations, can be discussed intelligently even though we are unable to define with precision its assumed end, namely, justice. I have also suggested that we can arrive at a better understanding of the aim we call justice if we discuss critically the various means by which it is imperfectly realized.[251]

Professor Bone, interpreting Fuller's concept of this interplay between setting tentative goals and empirical feedback[252]—between ends and means—explains:

> Like purpose and practice, ends and means were in a state of constant interaction and flux. One might start by formulating a tentative end, choose a means to pursue that end, and then reinterpret and revise the end as one pursued the means. Indeed, one might even reconceive the end as a means to some new end or the means as an end for some other means. . . . To illustrate, Fuller was fond of observing how people can write complicated rules for a game without having a clear grasp of the end they hope to achieve or a generally accepted view of the value of playing the game.[253]

According to Professor Bone, Fuller believed that the interplay between theory and practice involved a reasoning process that "combined elements of pure induction—observing facts and testing hypotheses about those facts—and pure deduction—tracing out the logical implications of agreed premises."[254] Empiricism provides "that practical experience with a system of adjudication in operation [which] is essential to understanding the institution on an abstract level."[255]

Professor Subrin, like Fuller, believes that consensus on a single set of procedural goals is not a *sine qua non* for empirical inquiry to have a salutary impact on rulemaking. Addressing Marcus's point about

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> Often the best way to conduct the process of choice is to start with a vaguely conceived end and then to begin at once considering what means might be devised for the attainment of that end. In this way we learn not only how desirable the end really is, but we also often attain in the process a clarification of what it is we are aiming at; the obscurity of the end begins to clear up as we consider the various things that might be done to achieve it.

Id.

250. Bone, *supra* note 108, at 1286 (internal quotation marks omitted).

251. Fuller, *supra* note 249, at 263.

252. Bone, *supra* note 108, at 1287 ("[F]eedback was critical to Fuller's understanding of the relationship between purpose and practice.").

253. *Id.* at 1285 n.36.

254. *Id.* at 1305.

255. *Id.* at 1320.

the limits of useful empiricism—that there is no agreed benchmark by which to measure a "just or fair result"[256] because people differ on "first principles"[257]—Subrin suggests that a "more realistic approach to testing a given procedural rule or procedural system would be to acknowledge that civil litigation is not a science and that mechanical jurisprudence (find facts, apply law, have just result) does not describe what happens or what should happen."[258] He explains: "If certain rules, or combinations of rules, show gains in reduced time and/or expense, while not reducing or by adding to a sense of legitimacy and justice, then, it seems to me, this is worth knowing."[259]

Subrin proposes an empirical project that I believe illustrates a practical application of Fuller's concept of interaction between theory and practice by juxtaposing Subrin's "dream" of a "simplified procedure"[260]—his intuition or theory that "simplified procedure would be salutary for many, and perhaps most, civil cases"[261]—with his dream of "useful empiricism" utilized to test components of his proposed simplified procedure. He describes the link between these "twin dreams," in terms reminiscent of Fuller's work, as an "interplay of a hypothetical simplified procedure with potential empiricism."[262] Subrin also acknowledges that the empirical studies he proposes are imperfect, but adds, in terms that suggest the synergy between theory and practice: "No study is perfect, all have flaws; but most studies can teach us something, frequently something we didn't know to ask at the onset."[263] His concluding thoughts might well have resonated with Fuller:

> While getting the definitive answer of the impact of a cluster of simplified rules, or any one of them, is probably beyond any one research study, *learning more about how these rules work in particular*

256. Subrin, *supra* note 17, at 185.

257. Marcus, *supra* note 4, at 113 (explaining that empirical information does not eliminate the need to make "'first principles' judgment calls").

258. Subrin, *supra* note 17, at 186.

259. *Id.*

260. *Id.* at 189 (defining "simplified procedure" as including "more detailed pleading, mandatory disclosure, limitations on discovery, reduced individualized judicial case management, discovery time limits, and fixed, firm, trial dates").

261. *Id.* at 173.

262. *Id.* at 177. For another practical application of Fuller's concept of the interplay between "formal theory" and "empirical observations" in arriving at a formal definition of complex litigation to determine the appropriate use of judicial discretion in complex litigation, see Tidmarsh, *Unattainable Justice*, *supra* note 103, at 1757 ("If the formal theory and the empirical observations match, then we will have found a common theme uniting the seemingly disparate manifestations of complexity.").

263. Subrin, *supra* note 17, at 192.

situations should help us make more informed judgments about procedural choices that bear on justice, however reasonably defined.[264]

IV. A NEW RULEMAKING PROCESS FOR A NEW PROCEDURAL PARADIGM

It is unlikely that a new procedural vision will emanate from the federal rulemaking process. Sustained theoretical work, the province of academics, is unlikely to be forthcoming from a federal advisory committee, where judges far outnumber academics and lawyers, or from Congress, where politics drives rulemaking.

Academics have not exercised the influence of the "Band of Experts" in federal rulemaking circles since the 1930s, when five law professors sat with nine practitioners on the original Supreme Court Advisory Committee and radically reshaped the contours of American procedure.[265] Two of the members were former judges.[266] Today seven out of thirteen members, including the chair, are judges, comprising about half of the membership of the Committee on Rules of Practice and Procedure. Four lawyers represent the practicing bar. Only two "members" are academics, if one includes the reporter, whose role Professor Marcus describes as that of a scrivener. Two other professors serve as advisors and consultants.[267] Of the membership of the Advisory Committee on Civil Rules, eight out of fifteen are judges, four are lawyers, and two are law professors, if one includes the reporter. Two other academics are advisors and consultants (one of whom is Professor Marcus).[268] The Judicial Conference membership consists entirely of judges.[269] Professor Marcus, drawing on his firsthand experience as a reporter to the federal rules Advisory Committee, confirms that the judges and lawyers who make up the Committee today would not be receptive to grand, academically inspired visions "of continuous springtime."[270]

Though federal rulemakers have increasingly turned to the Federal Judicial Center for empirical data to inform their decisions, empirical

264. *Id.* at 192 (emphasis added).

265. Subrin, *supra* note 12, at 971 ("Clark, Sunderland, and three other law professors from elite law schools were joined by nine lawyers, most of whom were associated with what was then considered large firm practice or were active participants in the ABA, and, in most cases, both.").

266. *Id.* at 972.

267. U.S. Courts, Committee on Rules of Practice and Procedure, Chairs and Reporters (July 1, 2008), http://www.uscourts.gov/rules/Members_List_07_2008.pdf.

268. *Id.*

269. U.S. Courts, Judicial Conference of the United States (June 2008), http://www.uscourts.gov/Press_Releases/2008/JCMems_June08.pdf.

270. Marcus, *supra* note 4, at 104.

research falls far short of rigorous studies that meet social science standards.[271] And, as noted previously, judges and practitioners tend to be "armchair empiricists"[272] who are "resistant to empirical data."[273] Professor Yeazell asserts that judges are no longer as in touch—on a firsthand basis—with how procedural rules work in practice as they were in 1938, and that they "are better at judging than they are at rulemaking."[274] He explains:

> Today, most procedural events happen outside the view of the Article III judges who dominate rulemaking—in depositions, settlement negotiations, and in magistrate judges' chambers. This invisibility renders judges blind to the workings and possible consequences of some procedural rules. It may have the further effect of inducing more confidence than is justified about those practices that occur within the judicial range of vision.[275]
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> . . . .
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> . . . Almost perversely, we ask judges today to take an increasing role in shaping procedural rules, just as we have removed the bulk of procedure from the range of judicial vision.[276]

Yeazell proposes a two-step rulemaking process that removes judges from the drafting process, which would be "dominated by lawyers," confining the role of judges to approving the final result.[277]

In connection with the fragmentation of the federal rules in the 1990s, Erwin Chemerinsky also expresses reservations about a federal rulemaking process that is dominated by judges who "may overvalue anecdotes and opinions about reform and be insufficiently attentive both to social science process and to the needs of court users."[278] In his view, "good rulemaking . . . may require decisionmakers other

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271. *Id.* at 115. Referring to "recurrent proposal[s] . . . for controlled experiments with possible rule changes," Marcus notes:

> The FJC has never had this sort of latitude in formulating studies. So one who endorses empirical information as the basis for immunity from 'political' interference with the work product of the Band of Experts cannot fully embrace any existing model of rigorous studies of this sort of which I am aware.

Id.

272. *Id.* at 114–15.

273. Chemerinsky & Friedman, *supra* note 34, at 792.

274. Stephen Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 252.

275. *Id.* at 232; *id.* at 241 ("Over the last fifty years, the Rules have removed more and more of day-to-day procedure from judicial sight. Judges accordingly have less ability to assess the operation of rules of civil procedure than they did sixty years ago. Discovery and settlement dominate contemporary American civil practice.").

276. *Id.* at 242.

277. *Id.* at 238–39.

278. Chemerinsky & Friedman, *supra* note 34, at 792.

than judges, who may overrule their expertise in procedural reform, and discount the skills of other professionals."[279]

Academics, however, are uniquely positioned by training and inclination to engage in the hard work of constructing normative procedural theory. While the legal academy has been reluctant to embrace empirical scholarship,[280] there is a "growing enthusiasm for Empirical Legal Studies (ELS) within law schools."[281] The burgeoning "ELS brand"[282] of empiricism within the legal academy aspires to a "model of pristine social science" that Professor Marcus says federal rulemakers have not embraced. One commentator recently noted that "ELS is well positioned to serve as a voice of authority in public-policy debates, and as a counterweight to political lobbyists in the market for data."[283]

The multistate rulemaking process I propose would incorporate normative theory interacting with rigorous empiricism to develop a new procedural paradigm that will provide the framework within which a national code of state procedure would be crafted.[284] Procedural scholars would join with practitioners and judges representing state judicial systems around the country. Supported by a staff of ex-

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279. *Id.* at 792 n.157.

280. *See, e.g.*, Chambliss, *supra* note 235, at 31. Chambliss also notes:

> Legal academics feel about empiricism the way that most men feel about housework: they are extremely glad that someone else does it. Moreover, despite their statements of the high regard they place upon it, they are neither going to start doing it themselves nor do they particularly want to pay for it.

Id. at 36 (quoting J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 969 (1996)); *see also* Robert G. Bone, *The Empirical Turn in Procedural Rule Making: Comment on Walker (1)*, 23 J. LEGAL STUD. 595, 612 (1994) ("[D]espite recent interest in empirical work in procedure, most legal academics still tend to shun empirical research . . . .").

281. Chambliss, *supra* note 235, at 22. According to Chambliss:

> ELS "arguably" is the next big thing in legal intellectual thought. Since 2004, law schools have seen the emergence of the Journal for Empirical Legal Studies (JELS), the Conference on Empirical Legal Studies (CELS), the Society for Empirical Legal Studies (SELS), and the ELS blog. The number of law-review articles reporting and referencing empirical research has grown, and top law schools are establishing special centers for empirical research. In 2006, the American Association of Law Schools (AALS) devoted its annual meeting to the topic of empirical scholarship. The same year saw the first "ELS Ranking" of law schools.

Id. at 22–23.

282. *Id.* at 31. Chambliss notes:

> The ELS brand is organized around the term "empirical," with its hard-nosed connotations of complexity and precision. Its brand of Empirical, with a capital "E," refers primarily to research methods—specifically quantitative, statistical, and experimental methods. (This is in contrast to the generic definition of empirical, meaning "based on observation or experience.")

Id.

283. *Id.* at 24.

284. For an elaboration of my proposal, see Koppel, *supra* note 1, at 1246–51.

perts in empirical research, they would develop a new model of state procedure that addresses the challenges of litigation as it is practiced today and that could—in a kind of role-reversal—influence federal rulemakers. The rulemaking model of collaboration among the academy, bench, and bar has proven successful over the years in producing, through a process of reasoned deliberation, the Restatements, Principles, and Model Rules of the American Law Institute that provide a measure of coherence and uniformity to American law.

V. CONCLUSION

As the globalization of commerce and information[285] continues to pressure American procedure to respond effectively to global challenges to American exceptionalism,[286] the parochialism and rules variation that mark much of civil procedure across state jurisdictions become more anachronistic. Professor Marcus doubts the likelihood that states will adopt a uniform code of state procedure because of the unlikely prospect that they can agree on basic value choices. I propose that a new rulemaking process designed to develop a fully articulated normative theory of adjudication, grounded by rigorous empirical testing, can provide a path toward resolving basic value choices. Such a theory, derived from adjudication's purpose as that is revealed through a process of reasoned deliberation, should not vary according to the divergent legal and political cultures of Texas, Vermont, or any other state.[287]

Professor Marcus incorrectly refers to my vision as a dream of procedural perfection[288] and complete uniformity[289] which are, of course, unattainable. This characterization of my proposal is a "straw man." I am not proposing a set of perfect procedural rules, but rather a col-

285. Tidmarsh, *supra* note 56, at 540 ("Today, transnational commercial ventures bring into contact procedural regimes that differ at the foundational level.").

286. *Id.* (referring to "globalization and the rise of alternative methods of dispute resolution" as the "two principal sources" of "[c]ompetitive pressures [that] create the most pressing concerns for the American litigation system"); *id.* at 542 ("Global dissatisfaction with the American procedural system is well known. On numerous fronts, American procedure is exceptional, standing far outside the mainstream of procedural regimes."); *id.* at 552 ("Judged by the number of transnational and domestic parties that, before or after entry, ultimately opt out of the American litigation system, dissatisfaction with the American procedural system runs high. Our present system responds poorly to the emerging needs of the transnational order.").

287. Marcus, *supra* note 4, at 110 ("[I]t is hard to imagine that Texas and Vermont are going to march arm-in-arm into the same procedural sunset.").

288. *Id.* at 104 ("Academics dream of perfection, and have the freedom to develop and endorse 'perfect' schemes.").

289. *Id.* at 117 (referring to the independence of judges as an impediment to rules uniformity: "So long as it exists, it seems unlikely that a code will produce complete uniformity, even within a single judicial system.").

laborative effort by the bench, bar, and legal academy to move toward a less political, more public-interest oriented process of rulemaking that, in Bone's words, "build[s] a set of general principles rule by rule, just as judges build the principles of the common law case by case."[290]

It is unlikely that the current composition of the Federal Rules committee is willing or able to do this theoretical and rigorous empirical work. The current federal rulemaking model, with broadened public participation, and frequent congressional interference, has become too politicized to embark on a project of bold procedural reform. Those who have labored in the trenches of federal procedural rulemaking appear to be resigned to political wrangling over procedure and limited aspirations for procedural reform.[291] Professor Mullenix predicts that "the inevitable politicization of the Civil Rules Advisory Committee foreshadows the decline of that body's role in procedural rule-drafting. . . . [T]he partisan rule reformers eventually will abandon the Advisory Committee and take their causes to other rulemaking bodies, namely the congressional committees with federal rulemaking oversight."[292]

A fresh rulemaking approach and apparatus are required to leverage several promising phenomena: the newly-emergent willingness of states to experiment with rules that deviate from the FRCP, the rediscovery of theory as an essential component of procedural reform, and the emergence of the ELS movement within the legal academy. By pooling their rulemaking resources in a collaborative effort at procedural reform, the states will be best positioned to write the next chapter in the evolution of American procedure.

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290. Bone, *supra* note 19, at 941. Bone also notes:

> By focusing on actual disputes, the process of adjudication brought the abstract into productive relation with the concrete. Courts learned about the specifics of context at the same time as they reasoned about the implications of general principle.
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> This connection between theory and practice is evident in Fuller's description of the reasoning process in adjudication. Fuller believed that adjudicative reasoning combined elements of pure induction—observing facts and testing hypotheses about those facts—and pure deduction—tracing out the logical implications from agreed premises.

Bone, *supra* note 108, at 1305.

291. Marcus, *supra* note 4, at 104 ("Anyone who has performed this scrivener role through major reform efforts—and I have participated in three—is likely to be defensive about both the process and the results."); *id.* at 119 ("Perhaps a decade of working on federal procedural reform has truncated my appreciation of stirring procedural visions . . . ."). Professor Burbank notes:

> The "current political climate" and the pessimism it naturally engenders about the future of inter-branch relations in general put the problems of federal procedural lawmaking in humbling and depressing perspective. They may also suggest that past proposals about federal rulemaking or federal procedural lawmaking as a whole, including my own, are hopelessly academic and/or hopelessly naive.

Burbank, *supra* note 54, at 1742.

292. Mullenix, *supra* note 17, at 801–02.