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BOOK REVIEW: Federal Rulemaking

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BOOK REVIEW

FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES. By Winifred R. Brown. Washington, D.C.: The Federal Judicial Center, 1981. Pp. ix, 140.

*Reviewed by Jeffrey A. Parness**

In the 1979 *Annual Report on the State of the Judiciary*[1] Chief Justice Burger called for a fresh look at the entire federal rulemaking process. Following the Chief Justice's lead, the Federal Judicial Center[2] responded with a report by Winifred R. Brown entitled *Federal Rulemaking: Problems and Possibilities.*[3] In a foreward to that report Professor A. Leo Levin,[4] the Federal Judicial Center's director, discouraged any attempt to intiate "a thorough review of the strengths and weaknesses of the process," and advised the author instead to focus "on those aspects of the process that had been singled out for criticism and that might benefit from change."[5] Thus, the stated purpose of this "catalog of criticism" was "to ensure that all views of even potential merit are brought to the attention of policymakers."[6]

Unfortunately, the ensuing report only partially completes its defined mission. Nonetheless, policymakers are likely to give the

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1. Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A. J. 358 (1979).

2. Congress charged the Judicial Conference of the United States with carrying on "a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court," and making recommendations on rule and statutory changes compelled by such study. 28 U.S.C. § 331 (1976 & Supp. III 1979). Congress charged the Federal Judicial Center with recommending to the Judicial Conference cbanges relevant to the "improvement of the administration and management of the courts of the United States," as well as providing research assistance to the Conference and its committees. *Id.* § 620.

3. W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES vi (1981).

4. Professor Levin was an early contributor on the topic of judicial rulemaking. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

5. W. BROWN, *supra* note 3, at vii.

6. *Id.* at 35.

report serious consideration despite several crucial omissions in the report's discussion of federal rulemaking. Moreover, because improvements, or at least changes, in federal rulemaking are likely to be forthcoming, this Review outlines some of the deficiencies in the Judicial Center's report in the hope of prompting policymakers to consider a wider catalog of criticisms.

I.

Brown divides the report into three major parts. The first part examines the existing structure and process by which federal rule changes are now drafted, reviewed, and promulgated.[7] In her discussion of the rulemaking structure, Brown properly focuses on the role of the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference (the Standing Committee), together with its various advisory committees. The advisory committees of the Standing Committee, after all, initiate and institute most of the rule changes made. Brown also briefly discusses the roles of the United States Judicial Conference, the Supreme Court, and Congress. The report's discussion of the rulemaking process likewise centers upon the advisory committees. It gives particular consideration to the role of committee reporters, committee membership, committee meetings, committee notes, and the manner in which the committees receive public input on rule changes under consideration. While this examination of the rulemaking structure and process serves chiefiy as background to the report's later criticism of present rulemaking practices, it also provides information on federal judicial rulemaking that outsiders have found difficult, if not impossible, to obtain.[8] In the report many of us learn for the first time about some of the specific comments and proposals suggested at a 1979 conference on federal rulemaking.[9] The report also contains bits and pieces of information on federal rulemaking gleaned from Brown's search of the files of the Administrative Office of United States Courts.[10]

The second major part of the report presents the problems,

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7. *Id.* at 5-34.

8. The difficulty of locating information on federal judicial rulemaking is not surprising. As Professor Lesnick once noted: "What we know about the method by which rules are drafted and considered comes largely from speeches or articles by judges active in the work of the Judicial Conference." Lesnick, *The Federal Rule-Making Process: A Time for Reexamination,* 61 A.B.A. J. 579, 580 (1975).

9. W. BROWN, *supra* note 3, at ix, 4.

10. *Id.* at 15 n.30, 22 n.50.

criticisms, and proposals for reform of federal rulemaking, paying particular attention to the developments of recent years.[11] Brown bases this presentation on three principal sources: (1) law review articles, mainly by those in academia; (2) Congressional proposals; and (3) Dean Roger C. Cramton's 1979 "think piece" for the Federal Judicial Center, and its reception during a one day discussion.[12] Though these sources provide extensive review of recent proposals for reforming the rulemaking structure and process, they fail to review similar developments in state rulemaking processes. This failure is regrettable since recent state endeavors provide additional insights into the problems of rulemaking and their possible solutions.[13]

Before presenting these criticisms and proposals, Brown offers several troubling observations.[14] First, Brown dismisses many criticisms of the present rulemaking policies because the critics' suggestions are either "fundamental suggestions for change by reallocating authority,"[15] debated and resolved long ago, or proposals for changes that "constitute relatively minor adjustments in the overall process."[16] Of course, reliance on debates of long ago hardly constitutes a "fresh look" at federal rulemaking. Moreover, if one assumes that the current proposals for changes in federal judicial rulemaking call for only minor revisions,[17] one must seriously question whether these proposals satisfactorily address the need for improvement in the rulemaking process. Brown also suggests that the states' emulation of the federal rules "offers eloquent testimony to their fundamental success in achieving fair and effective proce-

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11. *Id.* at 35-102.

12. *Id.* at 2-4.

13. *See, e.g.*, NEVADA RULES ON THE ADMINISTRATIVE DOCKET (adopted June 7, 1978, and amended June 16, 1978); RULE ON PROCEDURAL RULES, ADMINISTRATIVE RULES AND ADMINISTRATIVE ORDERS OF THE NORTH DAKOTA SUPREME COURT (adopted Mar. 15, 1978). *See generally*, C. KORBAKES, J. ALFINI & C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS: A COMPENDIUM (1978); Parness & Manthey, *Public Process and State Judicial Rulemaking*, 1 PACE L. REV. 121 (1980).

14. W. BROWN, *supra* note 3, at 35-36.

15. *Id.* at 35.

16. *Id.* at 36.

17. The assumption that pending proposals call for only minor adjustments is itself quite debatable. *Compare* Hazard, *Undemocratic Legislation*, 87 YALE L.J. 1284, 1290-91 (1978) (finding that most people familiar with procedural law, including Judge Weinstein and Professor Lesnick, generally approve of the national rulemaking process) *with* Wright, Book Review, 9 ST. MARY'S L.J. 652, 653 (1978) (finding much force in the suggestion by Professor Clinton that recent national rulemaking has entered into "controversial, uncharted areas of law" and is likely to create sufficient pressure to generate some congressional response).

dure."[18] Yet one must differentiate rules from rulemaking. While rules resulting in fair and effective procedure constitute evidence of fair and effective rulemaking, the evidence does not necessarily support a conclusion that the entire rulemaking process is fair and effective. Benefits may result from improving the openness of a rulemaking mechanism that already produces rules achieving fair and effective procedure; at the least, the process might utilize democratic principles.[19] State emulation of the federal rules also may cause state inattention to state rulemaking mechanisms, thus causing difficulties during state rule promulgations for which no federal model exists.[20]

The third and most disappointing part of the report attempts to examine critically some of the proposals for changing the federal rulemaking process. The report provides little examination of any proposals regarding the "judicial-legislative relationship,"[21] perhaps because by the time the author reaches her conclusion, she is concerned with only suggestions regarding Judicial Conference action[22]—not suggestions regarding "the entire rulemaking process."[23] The report does examine various proposals to modify the structure of the rulemaking mechanism;[24] these include proposals that would eliminate Supreme Court participation and proposals that would establish an independent Rulemaking Commission. This examination, however, is incomplete, for it fails to weigh the benefits and disadvantages of the particular proposals. Brown's review of the proposals for changes in the federal rulemaking process includes topics such as the timing and extent of public notice of suggested rule changes; the accessability to the public of rulemakers' deliberations on possible rule changes; the opportunity for interested persons to have input into the decisions; the need for more comprehensive comments or notes accompanying significant

18. W. BROWN, *supra* note 3, at 35.

19. Parness & Manthey, *supra* note 13, at 130-31. Other benefits of a more fair and open process include the likelihood that more input will lead to better rules and to increased public acceptance of any rules promulgated. *Id.* at 131-32.

20. State judicial rulemaking authority often extends to areas not subject to federal judicial rulemaking. *See, e.g.*, OHIO CODE OF JUDICIAL CONDUCT (1973) (amended 1979) (judicial conduct); OHIO CODE OF PROFESSIONAL RESPONSIBILITY (1970) (amended 1979) (regulation of the practice of law); VT. STAT. ANN. tit. 4, § 436 (1972) (court boundaries); *id.* tit. 12. App. VIII, A.O. 2 (Supp. 1982) (court boundaries).

21. *See* W. BROWN, *supra* note 3, at 40, 86-102.

22. *See id.* at 134-35.

23. *But cf. id.* at vi (which suggests a need for examination of the entire federal rulemaking process).

24. *Id.* at 108-17.

rule changes; and the need for the establishment and publication of procedures for rule changes. Brown's analysis of these proposals though, like the discussion of the proposals for changes in rulemaking structure, fails to evaluate the advantages and disadvantages of the suggested changes.

The report's failure to critique the proposals it reviews, however, is neither surprising nor disturbing. Indeed, if the report's objective is to initiate a "fresh look" at federal rulemaking, the Federal Judicial Center is wise to wait before committing itself to positions on the judicial-legislative relationship, structure, and process best suited for federal rulemaking. A crucial flaw in the report, however, is its failure to include or suggest additional criticisms of the current rulemaking mechanism. Indeed, the proper authorities will not have the opportunity to examine all views of potential merit if studies such as the Federal Judicial Center report fail to make a comprehensive review of relevant criticism and to identify previously unrecognized problems.

II.

Not only does Brown fail to raise new issues in the rulemaking reform debate, but she fails to address significantly at least four important aspects of federal rulemaking: (1) The continuing vitality of the division between procedural and substantive rules; (2) the relationship between local rules promulgated by individual courts and rules promulgated by the Supreme Court; (3) the de jure and de facto promulgation of procedural rules outside the Rules Enabling Act;[25] and (4) the possible unconstitutionality of the present federal rulemaking processes.

Pursuant to statute, the United States Supreme Court may issue rules of procedure used in civil actions and cases applying admiralty, maritime, and bankruptcy laws.[26] These rules, however, may not "abridge, enlarge or modify a litigant's substantive rights."[27] This restriction on changing substantive rights requires the troublesome distinction between acceptable federal rules affecting the substantive rights of litigants and unacceptable federal rules operating to change the litigants' rights.[28] This distinction between "affecting" and "changing" is necessary because Congress

25. 28 U.S.C. § 2071 (1976).

26. *Id.* §§ 2072, 2075 (1976 & Supp. IV 1980).

27. *Id.*

28. The Supreme Court imposed this requirement in Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

foresaw that "most alterations of the rules of practice and procedure may and often do affect the rights of the litigants," and thus it intended to allow the rules to have "incidental effects" on substantive rights that necessarily attend the adoption of prescribed new rules.[29]

This distinction is not only difficult to apply, but it apparently does not cover all federal rules that the Supreme Court may prescribe. For example, legislative recognition of Supreme Court authority regarding amendments to the evidence rules,[30] rules for the conduct of its own business,[31] and rules in criminal cases and proceedings to punish for criminal contempt of court[32] contains no comparable restriction regarding change in substantive rights. Furthermore, while Congress restricts the Supreme Court's power to prescribe national rules of procedure to those rules that do not change substantive rights, supplementary local court rules apparently operate under no similar restriction.[33] Surely a "fresh look" at the federal rulemaking system requires an examination of the substance-procedure dichotomy, its clarity, and the consistency of its application.

Even assuming the articulation of a more consistent substance-procedure dichotomy capable of easy application, the propriety of maintaining such a dichotomy in contemporary congressional grants of judicial rulemaking authority is questionable. A grant of judicial authority to make rules of court that change certain substantive rights may not constitute an unconstitutional delegation of legislative authority.[34] In fact, substantive rulemaking has occurred already in the federal judicial system with respect to the regulation of the practice of law.[35] Moreover, certain states have expressly provided for judicial regulation of substantive rights

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29. Mississippi Pub. Corp. v. Murphree, 326 U.S. 438, 445 (1946) (relying on *Sibbach*, 312 U.S. at 11-14). For illustrations of how procedural rules affect, if not change, substantive rights, see R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE 75-104 (1979).

30. 28 U.S.C. § 2076 (1976).

31. *Id.* § 2071 (1976 & Supp. IV 1980).

32. *Id.* § 3771.

33. *Compare* 28 U.S.C. § 2072 (1976 & Supp. IV 1980) *with id.* § 2071.

34. Admittedly, the nondelegation doctrine of Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) and Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) may be making a comeback. *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion); *id.* at 664 n.1 (Powell, J., concurring in part), 672-75 (Rehnquist, J., concurring). *But see* Parness, *The Legislative Roles in Florida's Judicial Rulemaking*, 33 U. FLA. L. REV. 359 (1981).

35. *See, e.g.*, SIXTH CIR. R. 6; SIXTH CIR. RULES OF DISCIPLINARY ENFORCEMENT; ELEVENTH CIR. R. 7(c).

in that area.[36] Perhaps an admission that judicially crafted rules change substantive rights should be forthcoming, with an admonition that these rules must arise from a desire to regulate procedure.[37]

Beside the Supreme Court's national rulemaking authority, lower federal courts have statutory and other bases of authority for the promulgation of local rules. These local rules govern local court "practice"[38] or the "conduct of [the court's] business,"[39] and must be consistent with the high court's national rules.[40] Any reexamination of federal rulemaking at the national level must include consideration of the relationship between local rules and national rules. The widespread use of local rulemaking raises questions such as: What rules are best promulgated at the local rather than the national level?[41] What mechanisms will assure that local rules are and remain consistent with national rules?[42] Is the scope of local court rulemaking in some ways broader than that of national rulemaking?[43] The negative impact of local rules on the national rules promulgated by the Supreme Court has been the topic of lively discussion for at least the past few years,[44] and, thus, its ab-

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36. *See, e.g.*, ARK. CONST. amend. XXVIII; OHIO CONST. art. IV, § 2(B)(g); PA. CONST. art. V, § 10(c).

37. Consider civil limitations periods designed to preclude the need for judicial consideration of stale claims, and local trial court rules regarding the prompt disposition of criminal cases. *See* United States v. Furey, 514 F.2d 1098 (2d Cir. 1975).

38. FED. R. CIV. P. 83; FED. R. APP. P. 47.

39. 28 U.S.C. § 2071 (1976 & Supp. IV 1980).

40. *Id.*; FED. R. CIV. P. 83; FED. R. APP. P. 47.

41. Consider, however, certain rules regarding judicial discipline over which national (Judicial Conference) and local (judicial council of a circuit) rulemaking bodies share authority. 28 U.S.C. § 372(c)(11) (Supp. IV 1980). For a view on the abuse of local rulemaking power, see 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3152 (1973) (noting many local rules either are invalid on their face or intrude unwisely into areas that should be dealt with on a national basis by rules made by the Supreme Court).

42. Two distinguished authors have proposed limiting local rules to a few specific areas, or requiring Judicial Conference approval of local rules. *See* C. WRIGHT & A. MILLER, *supra* note 41, § 3152. *But see* Flanders, *In Praise of Local Rules*, 62 JUDICATURE 28, 33 (1978).

43. For a suggestion that the scope of local court rulemaking is broader, see *Proceedings of a Session of the Conference of Metropolitan Chief Judges on Rules and Rulemaking*, 79 F.R.D. 471, 479 (1978) (remarks of Judge Joiner) [hereinafter cited as *Conference*].

44. Earlier comments include Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251 (1967); Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011. More recent comments include *Conference*, *supra* note 43; C. WRIGHT & A. MILLER, *supra* note 41; Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253 (1979); Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A.L. REV. (1981); Weinstein, *Reform of Federal Court Rulemak-*

sence from the Federal Judicial Center's report is quite surprising.

Further, the report fails to address the de jure and de facto promulgation of rules outside the Enabling Act. Regarding certain rules, such as those promulgated by the Director of the Administrative Office of the United States Courts,[45] the omission is not critical. The omission of far reaching court rules found in neither the federal nor the local rules, however, is more serious. District courts[46] and courts of appeals[47] have the authority "in all cases not provided for by rule," for example, to "regulate their practice in any manner not inconsistent with" the prevailing national rules. Likewise, many local courts operate under standing or general orders regarding court procedure, which are not found in the local rules and which are often difficult to obtain.[48]

Moreover, a substantial number of national rules are adopted outside the Enabling Act by congressional action and judicial precedent. Examples of legislatively enacted rules include provisions on venue,[49] interpleader,[50] personal jurisdiction,[51] and perhaps even subject matter jurisdiction.[52] While the constitutionality of congressional rulemaking is beyond dispute, a "fresh look" at federal rulemaking should include an investigation into the continuing need to include substantial numbers of procedural guidelines in both statutory and rule form. After all, one reason Congress passed the Enabling Act was to eliminate "the necessity of searching in two places, namely in the Acts of Congress and in the rules of the courts, for procedural prerequisites."[53] The courts also promulgate rules of procedure outside the Enabling Act by way of judicial decisions which never find their way into formal rules. Examples of these include precedents regarding the prudential aspects of stand-

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ing Procedures, 76 COLUM. L. REV. 905 (1976).

45. *See id.* § 604(e) (1976); *see also id.* § 372(c)(11) (Supp. IV 1980) (rulemaking by the United States Judicial Conference and circuit judicial councils authorized).

46. FED. R. CIV. P. 83.

47. FED. R. APP. P. 47.

48. *Conference*, *supra* note 43, at 481-82.

49. *See, e.g.*, 28 U.S.C. § 1391 (1976) (general venue statute); *cf.* OHIO R. CIV. P. 3 (procedural rule on venue).

50. *See, e.g.*, 28 U.S.C. § 1335 (1976); *cf.* FED. R. CIV. P. 22 (procedural rule on interpleader in addition to the statutory device of interpleader).

51. *See, e.g.*, 28 U.S.C. §§ 1391(e), 2361 (1976) (service of process on nonresidents); *cf.* FED. R. CIV. P. 4(e) (procedural rule on service on nonresidents).

52. *See, e.g.*, 28 U.S.C. § 1332 (1976) (general diversity statute); *cf.* Shapiro, *Diversity Jurisdiction*, 91 HARV. L. REV. 317, 344-45 (1977) (suggesting that rules on subject-matter jurisdiction are procedural).

53. United States v. Furey, 514 F.2d 1098, 1104 n.5 (2d Cir. 1975) (citing U.S. CODE CONG. SERV., 80th Cong., 2d Sess., 5 Legislative History of Title 28 1895, 1896 (1948)).

ing[54] and abstention.[55] Again, a truly fresh look into federal rulemaking should encompass an inquiry into the problems created by maintaining two sources of judicial law on procedure. For example, no opportunity for broad public input exists when courts develop procedural law by precedent, and the difficult determination of which aspects of procedure are best governed by only precedent, by only rule, or by both precedent and rule remains unresolved.

Last, the report does not discuss the implications of the recent Supreme Court decision in *Richmond Newspapers, Inc. v. Virginia*,[56] in which the Court held that the right to attend criminal trials is implicit in the guarantees of the first amendment.[57] While the decision did not create a right to attend civil trials[58] or a right of access to nonadjudicatory judicial functions, its rationale apparently would support a right of access to most judicial rulemaking proceedings. These rationales include "assuring freedom of communication on matters relating to the functioning of government,"[59] aiding the goal of accurate factfinding,[60] and promoting the conviction among the citizenry that "they are governed equitably."[61] The Court's reasoning applies at least as well to judicial rulemaking proceedings as it does to civil trials and, thus, public input into or at least public knowledge of the rulemaking process may rise to the level of a constitutional guarantee. Therefore, many of the current rulemaking procedures that exclude the public may violate the first amendment.[62]

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54. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 513-14 (1975) ("prudential considerations" serve as counsel to a decision on standing); Flast v. Cohen, 392 U.S. 83, 97 (1968) (noting the uncertainty caused by the blend of constitutional requirements and policy considerations in the doctrine of justiciability). For a discussion on the potential abuses in utilizing the present approach to standing, see Varat, *Variable Justiciability and the* Duke Power *Case*, 58 TEX. L. REV. 273 (1980). For a review of some of the problems that arise when the Federal Rules of Civil Procedure are used in standing cases, see Bernstine, *A "Standing" Amendment to the Federal Rules of Civil Procedure*, 50 WASH. U.L.Q. 501 (1979).

55. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). For one recommendation that the abstention doctrine be codified, see AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 48-50 (1969). The study bases its recommendation on the present "uncertainty as to when a state or a federal court is the proper forum for a case." *Id.* at 283.

56. 448 U.S. 555 (1980).

57. *Id.* at 580.

58. Though such an asserted right was not involved, the Court seemed to indicate forthcoming approval of any such later assertion. *Id.* at 580 n.17.

59. *Id.* at 575.

60. *Id.* at 595-96 (Brennan, J., concurring).

61. *Id.* at 594 (Brennan, J., concurring).

62. For a review of the implications of *Richmond* on federal judicial rulemaking, see Parness & Copeland, *Access to Judicial Rulemaking Procedures*, 1982 ARIZ. ST. L.J.

III.

Despite these omissions, the Federal Judicial Center's report on federal rulemaking undoubtedly will receive serious consideration during the forthcoming debates on the mechanisms for promulgating rules applicable to the Article III federal courts. While Chief Justice Burger prompted the report by calling for a "fresh look" at the entire rulemaking process, the Center's response constitutes only a somewhat flawed look at part of that process. If the federal rulemaking system is to receive a "fresh look" and benefit from the examination, the examination of the system must extend beyond the existing procedures utilized by the Judicial Conference, its committees, and the Supreme Court. Brown's report for the Federal Judicial Center fails to do so.

(forthcoming).