2008

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Author: Richard L. Marcus
Source: Hastings International and Comparative Law Review
Citation: 31 HASTINGS INT’L & COMP. L. REV. 157 (2008).
Title: Modes of Procedural Reform

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Modes of Procedural Reform

By RICHARD L. MARCUS

I. Introduction

During what has been called the "Golden Age of Rulemaking," giants trod the soil of rulemaking. Drawing from the legacy of Jeremy Bentham, David Dudley Field, and Roscoe Pound, a small band of drafters created the Federal Rules of Civil Procedure in the late 1930s and changed the American procedural landscape. Their reforms included completing Field's effort to bury technical pleading requirements and adopting a revolutionary set of discovery provisions. More recently, the federal rulemakers' 1966 revision of the class action rule has had at least revolutionary consequences, sometimes in the teeth of what the rulemakers said they wanted to do.

As the above description of the most dramatic American experience illustrates, procedural reform can be an exhilarating thing. Because procedural reform appears to be an unending effort in many countries, it seems worthwhile to reflect on the modes of achieving such reforms, for that arguably could affect the content of the reforms. This paper focuses primarily on the American experience to offer a tentative initial inquiry into whether there is a connection between the modes and the nature of procedural reform. The ultimate question is whether the idea merits further comparative study.

At the outset, the paper offers some general observations about different modes of procedural reform and the considerations that

* Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law. This paper was delivered at the XIII World Congress on Procedural Law in Salvador, Brazil, on September 20, 2007, and included in the booklet prepared for that Congress. Some of this analysis is also used for different purposes in Richard Marcus, Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reforms, 35 Wm. St. L. Rev. ___ (forthcoming 2008).

would seem to bear on whether they meet with success. These general observations suggest, at least in the abstract, some consequences that would seem to flow from adopting one or another form for reform.

The paper then turns to how the American experience fits into the models initially presented. It first sketches the evolution of reform efforts in American procedure from the mid 19th to the mid 20th century, and then focuses particularly on the experiences of the past generation, partly from the perspective of an insider in the procedure reform process. That experience shows that American procedural reform has been achieved in different ways at different times, and that the recent period has seen a marked shift to legislative action from immediately previous generations, when the pathbreaking changes were made by expert groups like the one that produced the Federal Rules of Civil Procedure.

From that American experience, the paper reflects on a limited comparative analysis, drawing briefly on the reform experiences of three other countries—England, Germany, and Japan. On balance, it finds, there is no strong reason to think that the mode of procedural reform is crucial to the content or speed of reform in the U.S., leaving for further work the question whether other systems support a different conclusion.

II. Typology Of Modes Of Procedural Reform

As with any other type of reform, procedural reform could be sought in a number of different ways. A despot, for example, could simply command changes in procedure as with any other changes. But it does not seem that any modern system of procedure was significantly shaped by despotic action, so that model does not merit consideration as a serious mode for actual reform. A number of others do seem worthy of consideration, and it is possible to offer some speculations about their possible inclinations. In addition, it seems worthwhile to reflect on some additional factors that could bear on the emergence of one or another mode of reform in a given society.

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2. Since 1996, I have served as Special Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States. That committee is the body that generates and evaluates proposed amendments to the Federal Rules of Civil Procedure.
A. Development By The Judiciary

From the common law tradition, it seems natural to imagine that procedure would be developed by judges, because all "law" was developed by judges. In the famous words of Maine, English substantive law "has at first the look of being gradually secreted in the interstices of procedure." Of necessity, courts could devise and refine procedures for handling all sorts of cases. Indeed, the American procedural historian Millar surmised that common law developments would begin with procedure and gradually subordinate it to substantive law:

Ever do we see that procedure has been the major element, substantive law the minor in the growth of the legal order, and that procedure has been signally procreative of the substantive rule. But in our law, as elsewhere, the trend of development diminishes the place of procedure and enlarges that of substantive law. . . . It is an inevitable process and ends with inversion of the early relationship between the two sets of rules. Procedure remains a necessity, but men come to the understanding that the true role of procedure is an ancillary one. In the household of the law procedure ceases to be the materfamilias and is now the handmaiden.4

Indeed, the chief framer of our Federal Rules used a similar metaphor for his reforms – the "Handmaid of Justice."5

How would judges likely handle reforms for this handmaiden? One might anticipate that judges would be reluctant reformers of the procedures they themselves had designed. Indeed, in the common law tradition, all legal reform by court decision has tended to be gradual. Even though procedure was supposed to be the handmaiden to achieving substantive justice, it would seem unlikely that judges would embrace revolutionary breakthroughs. The English experience provides some support for this view. Thus, when pleading niceties began to be regarded as interfering with achieving justice on the merits in the late 18th and early 19th century, the first effort at reform came through judicial action. Eventually, this effort produced the Rules of Hilary Term, the first English rules of court to have the force of law.6 These procedural reforms worsened the problem by

3. HENRY JAMES SUMNER MAINE, EARLY LAW AND CUSTOM 389 (1907).
magnifying the exacting pleading standards that had caused the problem, as exemplified in Crogate’s Case and satirized in the Dialogue in the Shades.\textsuperscript{7} Partly due to that disappointing experience with procedural reform by judges, the English mode of reform shifted to legislative action (discussed next).\textsuperscript{8}

Besides conservatism, one might expect judicial reforms to be tailored to the self-interest of judges. Thus, judges might be expected to embrace reforms that would maximize their freedom of movement and disregard the interests of both litigants and lawyers when those interests interfered with their own discretion.\textsuperscript{9}

\textbf{B. Legislative Development}

If one wants to pry the levers of procedural reform out of judges’ hands, the legislature is a likely force to accomplish that objective. Certainly the 19th century English experience seems consistent with that view; after the failure of the Rules of Hilary Term, Parliament stepped in with a series of Judicature Acts that made fundamental changes in the procedure in English courts. At least the legislature would not be hamstrung by judicial conservatism or by judges’ desire to reduce the burdens on them and thus serve their self-interest.

But legislatures would suffer from other problems. First, they are not as familiar with the problems as judges, and might make mistakes in diagnosing those problems or formulating solutions to them. One might therefore expect more frequent “mistake” reforms that would backfire. Second, legislatures are more likely than judges to succumb to pressure from special interest groups. Procedural rules of Hilary Term were the first rules of court to have the force of law.

7. See George Hayes, Crogate’s Case: A Dialogue in Ye Shades, reprinted in 9 A History of English Law 417-31 (W.S. Holdsworth ed., 1926). This parody was a scathing attack on the strictness of the pleading requirements of the Rules of Hilary Term. One of the most famous rulings under those rules was in Crogate’s Case, holding that Crogate had no right to proceed because of violation of the rules. The parody is a conversation in Heaven between the ghost of Crogate and a Baron Surrebutter, supposedly a representative of Baron Parke, who was a moving force behind the rules.

8. Another reason for the shift to legislative action in England seems to have been the conservatism of the bar. See Edson R. Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725, 739 (1926) (“Early in the struggle it became perfectly clear that the delegation of the control of procedural technique to the legal profession was a policy which was socially unsound.”).

can be of interest to such groups, so that a legislature may ornament a procedural code with a myriad of special provisions to benefit one or another of these groups. Compared to this possibility, the risk of some self-dealing by judges designing procedures may seem rather benign.

C. Leaving Procedure to the “Experts”

Because procedure seems dry and technical, there is an argument that it should be designed (and reformed) by experts. Their study could usefully identify difficulties with the way current procedures are operating, and might even provide reliable methods of evaluating substitute procedures. At least in some Western European countries, it seems, such expert groups are given substantial authority to generate procedural codes that are then adopted by legislatures. This method might avoid the self-interest problem of leaving the design of procedures to judges, and the interest group problem of leaving the design to legislatures.

The “expert” approach could have the additional advantage (from the perspective of a group of professors) of giving substantial authority in designing procedural reform to professors. Who else would have the time for the study needed to develop and evaluate procedural reforms? It may be that Japan provides an example of this approach. Thus, we are told that “it is not likely that a court confronted with a question of how to interpret a section of the Code—including a section of the Code of Civil Procedure—would refer back to legislative reports or debates. More likely relevant for Japanese courts . . . are the opinions of scholars in the field and bureaucratic experts (many of whom may have served on the study group that gave rise to that law).”

Certainly Japan is closer to this model than the United States: “The opinions of professors who have spent their entire careers in analyzing the Codes are more significant [in Japan] than the opinions of professors in the United States.”

Indeed, some others have seen this sort of technique as a method to break the logjam of procedural reform. It may be that England provides a model, with Lord Woolf having been tasked in the 1990s to design a radical new procedural model and given authority to design substitute methods. These reforms “represent the greatest shake-up

11. Id. at 165.
in civil procedure since the 1870s.”12 And yet even these radical reforms may not have gone far enough, and another delegation to experts may be needed in England. Thus, Lord Justice Brooke urges there that “the time must surely soon be coming when three, four, or five wise people are mandated to consider the whole of our present arrangements for controlling and apportioning the costs of litigation, because we cannot go on for much longer as we are.”13

Yet one would have to be cautious about leaving everything to the experts. To whom are they accountable? Should important social institutions like courts depend for their design on what might be academic fashion or even whim? Should court procedures be designed by those who do not use them (and may even lack experience in using them)?

D. Borrowing

Yet another way to accomplish procedural reform is to borrow aspects of another procedural system, or perhaps the entire system from another country. The possibility of that sort of borrowing is, of course, a focus of much comparative scholarship. When it is done, one introduces the fruit of another system’s modes of procedural reform from outside the recipient system.

Perhaps the leading example of such borrowing is Japan. Lacking an organized court system in the mid-19th century, Japan imported one. First, it looked to France, but later in the 19th century its focus shifted to Germany, and Japan adopted a procedural system modeled on the German procedure code.14 That borrowing can be compared to the unsuccessful American attempt to impose features of the American adversary system when the United States was the occupying force after World War II. That effort, although it made some changes, ultimately did not produce a longstanding shift in Japanese procedure, which returned in significant ways to the pre-war model.15

E. Bottom-Up v. Top-Down Reform

Another consideration is whether procedural reforms are

14. See Goodman, supra note 10, at 67 (“the Code of Civil Procedure was virtually a Japanese translation of the German code”).
15. See id., chp. 4.
accomplished in what might be called a centrally planned manner, or left to local innovation and on-the-ground creativity. The difference between civil law and common law countries might suggest that the former are more likely to adopt a centrally directed mode and the latter more likely to adopt a dispersed technique. Indeed, it might even be said that the common law method is inherently a bottom-up approach, since it looks to the decision of individual judges (initially, at least, by first-level judges) to establish and modify precedents. But at least some counterexamples exist; it is said, for example, that England has a governmental structure singularly dominated by the central government.

III. Themes in American Procedural Reform

The American experience has included reform efforts exhibiting all of the above characteristics, and has embodied varying amounts of devotion to bottom-up as opposed to top-down reform efforts.

Initially, U.S. procedure was based on borrowing, or one might better call it inheritance, from England. The American colonies adopted legal systems modeled on the common-law arrangement in England. But from an early date, the American systems began to diverge. For example, by 1796 the United States Supreme Court ruled that the prevailing party usually could not recover its attorney fees from the loser because “the general practice in the United States is against it.” England, of course, adopted the loser-pays rule found in most of the rest of the world. In the United States, the right to jury trial was enshrined in the Constitution and extended by judicial decision through the 19th and 20th centuries, while in England use of juries in civil cases atrophied in the 19th century.

More significant for our purposes, however, is the fact that –
from the start – the United States had a variety of judicial systems larger than in most countries, and as a result a variety of procedural systems. Each state had its own judicial system, and it was only somewhat grudgingly that the federal government was even authorized to create a federal judicial system.\textsuperscript{21} For the first century and a half of its existence, the United States had a singularly weak central government, although the Civil War somewhat expanded federal power.

In procedure, the U.S. method was particularly diffuse. States were free, in their court systems, to adopt reforms of whatever character they found congenial. And the federal courts followed the states’ lead. By statute, from 1789 until the Federal Rules of Civil Procedure were adopted in 1938, federal courts were to conform their procedure to that prevailing in the state courts. This parallelism meant that local lawyers did not have to learn a different set of procedures to handle cases in federal court, but it also meant that procedural reform could only be accomplished at the state level.\textsuperscript{22}

The big American movement for procedural reform was known as the Field Code. This effort had aspects of borrowing and was accomplished by legislative action. The borrowing included innovations resembling those introduced around the same time in England by the Judicature Acts, such as an effort to shed the rigidities of common-law pleading. At the same time, it drew its strength from the more general codification movement, which sought to replace judge-made common-law rules with codes of substantive law adopted by legislatures. This movement reached its greatest strength in the American west (in California, for example), but the procedural code was also adopted in Field’s home state of New York.

Although it depended on legislative adoption, one might best locate the Field Code as a version of the “expert” strategy in procedural innovation. It was sparked by David Dudley Field, an extremely successful New York lawyer who threw his energies into

\textsuperscript{21} The Constitution creates a Supreme Court, and authorizes Congress to establish lower federal courts. This provision was a compromise between those who thought that the existence of a federal court system would intrude too much on the power of the states and the view that a federal court system was essential. The first Congress established a federal court system, so there has been one for the entire life of the country.

\textsuperscript{22} It should be noted that Congress did adopt, over the years, a number of procedural statutes that applied in federal court and displaced state provisions on the subject. Nonetheless, this patchwork did not form anything approaching a procedural code.
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the codification movement, and particularly the procedural code.\textsuperscript{23} Besides the English reform effort, Field drew on his own extensive experience as a lawyer. Ultimately he had to persuade state legislatures to adopt his codes, but his expertise was the driving force behind them.

Although the Field Code sought dramatic innovations in American procedure, its force was sometimes blunted because it depended on legislative action. In many places the code came to be festooned with provisions sought by special interests. And the judiciary resisted some of its path-breaking innovations. For example, in 1910 the Wisconsin Supreme Court lamented "[t]he cold, not to say inhuman, treatment which the infant Code received from the New York judges."\textsuperscript{24} Judicial resistance to the reforms of the Field Code might indicate that – at least in America – truly effective procedural reform could come only with the concurrence of the judiciary, even if it did not emerge from the judiciary in the first place. The conservative effect of judges would not be entirely overcome by imposition from without.

The major watershed in American procedural reform in the 20th century was the adoption in 1934 of the Rules Enabling Act.\textsuperscript{25} That legislation was the culmination of a long political gestation.\textsuperscript{26} The Act authorized the Supreme Court to promulgate rules of "practice and procedure" for the federal courts that would supplant the state-court practices that had previously been applied in federal court as well. Congress gave no significant consideration to the content of these rules, and the Supreme Court entrusted the drafting to an expert group consisting of leading lawyers and professors, with the principal drafting responsibilities given to two professors – Charles Clark of Yale and Edson Sunderland of Michigan. There were no judges on this committee.

This effort was a striking example of the "expert" method of producing procedural reform. One goal was somewhat uncontroversial, of course. That was to produce a single procedural

\textsuperscript{24} McArthur v. Moffet, 128 N.W. 445, 446 (Wis. S. Ct. 1910).
\textsuperscript{25} See 28 U.S.C. § 2072.
code for all the federal courts to supplant the multitude of state codes that had previously applied. But the drafters did not limit themselves to a workmanlike homogenization of the varying state-court practices. Instead, despite their Establishment credentials, they undertook aggressive reforms.

Unsatisfied with the rigorous pleading decisions that American courts had continued to employ even after adoption in many places of the pleading provisions of the Field Code, the drafters accepted Clark's urging to adopt very relaxed pleading standards. These reforms – which became known as “notice” pleading – were initially resisted vigorously by the lower courts, but a 1957 Supreme Court decision in favor of relaxed pleading put those efforts at rebellion largely to rest.

Even more strikingly, the drafters of the Federal Rules adopted a revolutionary package of discovery procedures. Borrowing features of discovery from a variety of state and foreign practices, Sutherland cobbled together an overall package that had never had a parallel anywhere. Unlike the pleading rules, this package received almost immediate acceptance in the federal courts.

This experience is also a striking example of top-down procedural reform. “The original Rules are a strong example of centralization at the federal level.” Not only did the Federal Rules become a nationwide procedural code for the federal courts, they also became a model for procedures in many state-court systems. About half the states adopted procedural codes modeled on the Federal Rules. And in those that did not revise their procedural rules to correspond to the Federal Rules, the interpretation of the existing state-court procedures evolved towards the views embodied in the


29. It must be recognized that the lower courts' enthusiasm for more exacting pleading requirements in at least some cases has never really gone away. See Christopher M. Fairman, The Myth of Notice Pleading, 45 AZ. L. REV. 987 (2003).


Federal Rules. California, for example, continues to have Field Code pleading rules, requiring fact pleading. Yet the actual decisions of California state courts embody more relaxed pleading than the “notice pleading” decisions of federal courts.

In sum, the Federal Rules of Civil Procedure became “a major triumph of law reform”\(^\text{33}\) that “transformed civil litigation [and] . . . reshaped civil procedure”\(^\text{34}\) and therefore were “surely the single most substantial procedural reform in U.S. history.”\(^\text{35}\) As noted above, “they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges and scholars who worry about and live with issues of judicial procedure.”\(^\text{36}\) It is even said that they “became a means of transforming the modes of judging.”\(^\text{37}\)

For our purposes, the salient point is that this transformation was accomplished by a top-down initiative from a group of experts assembled to create new code without any particular directive on what the new code should be. Perhaps that mode of reform is the one most likely to produce striking breakthroughs. There is at least some evidence that the self-confidence of the academics involved in this project contributed to its pathbreaking nature. Thus the chief Reporter, Dean Charles Clark (the animating force behind the shift to “notice pleading”), explained two decades after the rules went into effect that “reformers must follow their dream and leave compromises to others.”\(^\text{38}\)

The reformers continued their pathbreaking efforts for several decades after the original adoption of the rules. In the 1960s, they revised the class action rule in a way that equipped it to become a vehicle for a variety of innovative litigation initiatives of the 1970s, 1980s, and 1990s.\(^\text{39}\) Also during the 1960s, they further expanded


\(^{35}\) *Id.* at 248.


discovery, removing the relatively weak brakes on full-scale discovery that had been included in the 1938 rules.  

Altogether, then, the American experience of the mid 20th century suggests that breakthrough reforms in procedure could be accomplished by entrusting a group of experts – under academic leadership – with authority to pursue their dreams. That group was permitted to operate with quite striking freedom from oversight. Indeed, for a time it evidently insisted that its work remain entirely secret until its completed product was ready for public view. 

But it is at least debatable whether this reform arrangement was the principal explanation for the breakthroughs that occurred. Other changes in society – economic and political – reinforced the direction in which the procedural reforms were moving. Increasingly, litigation became the agent for implementing public norms at the initiative of private litigants, which was not something that the rulemakers of the 1930s necessarily foresaw. This distinctively American substitute for the bureaucratic enforcement of public norms found in most other industrialized nations may have reached its ideal implementation through the combination of lax pleading standards and broad discovery, which enabled the citizenry to enforce the norms themselves through lawsuits. Thus, it came to be that, in America, broad discovery was viewed as almost a constitutional entitlement of litigants and recalibration of that discovery as imperiling the

41. See Paul D. Carrington, The New Order in Judicial Rulemaking, 75 JUDICATURE 161, 164 (1991) (stating that the Advisory Committee Reporter during the 1960s “was instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation”).
42. Thus, Professor Hazard observes that “[t]his relationship between civil justice and social justice was not anticipated in 1930. The social wrongs whose remediation is assisted by the Federal Rules in the present era had not then appeared in the civil litigation agenda.” Hazard, supra note 33, at 2246.
43. This is the explanation given by an American political scientist for reliance on private litigation in this country:
American adversarial legalism, therefore, can be viewed as arising from a fundamental tension between two powerful elements: first, a political culture (or set of popular attitudes) that expects and demands comprehensive governmental protections from serious harm, injustice and environmental dangers – and hence a powerful, activist government – and, second, as set of governmental structures that reflect mistrust of a concentrated power and hence that limit and fragment political and governmental authority.

enforcement of mandates from Congress.  

So attributing the dramatic nature of these reforms entirely to the mode used to accomplish them seems misguided.

IV. The New Reality of American Procedural Reform

The days of breakthrough reforms from the expert group is over in America. It may be that aggressive reform has been reborn in England with the work of Lord Woolf. Lord Woolf's reforms were enshrined in the new Civil Procedure Rules adopted in 1998. In Professor Zuckerman's words, these rules "transformed English civil procedure" by making "radical departures" leading to a "new procedural code." Professor Andrews is similarly emphatic, referring to "Lord Woolf's bulldozers." To some extent, these bulldozers consciously followed an American trail; the new English rules embrace judicial management of litigation that resembles the American model. But the emerging English reality seems to move beyond the American model in a number of ways. For our purposes, the key point is that Lord Woolf's dramatic reform of the entire English system of civil litigation stands in stark contrast to the relatively halting activity of the American rulemakers in the same period.

A. Rulemakers Stop Acting as a Band of Experts

In the United States, it might be said that the demise of the old model was a product of its success. By the 1970s, a clamor arose to curtail the liberality of the procedural model produced in the previous 35 years for reform. In 1976, a conference attended by the Chief Justice upbraided broad discovery and lax pleading for producing a litigation outburst that had harmful results. At much the same time, the 1966 expansion of the class action was provoking vigorous attack on that procedural device.
Meanwhile, the whole enterprise of rulemaking by experts had come under attack. In the late 1960s, the same model had been adopted to develop a set of evidence rules for the federal courts. As with the work on the civil procedure rules in the 1930s, this new project was assigned to an expert committee under the leadership of an academic Reporter. When offered for adoption, that set of rules contained a number of controversial elements. Some of its provisions irritated the Department of Justice, the federal prosecutorial agency. Its privilege provisions contained features viewed as sins of commission and of omission. The most pertinent sin of omission was deleting the venerable doctor-patient privilege, which the framers of the evidence rules concluded no longer served a purpose. The American Medical Association, a powerful lobby, thought otherwise. These rulemakers’ most pertinent sin of commission was including a vigorous executive privilege rule. These rules arrived in Congress at the height the Watergate scandal (in which President Nixon relied heavily on executive privilege to resist inquiries by Congress) so something that seemed to fortify Nixon’s arguments was not received with open arms. The consequence was that Congress refused to permit the evidence rules to go into effect and rewrote many of them, ultimately adopting the evidence rules as a statute. Congress also directed that no privilege rules could thereafter be adopted through the rulemaking process.50 It seemed that there was a shift toward legislative procedural reform.

To some academic eyes, this development produced a crisis. Professor Friedenthal feared the loss of rulemaking as “a means of obtaining meaningful and necessary reform of antiquated procedural rules that can otherwise be altered only through legislation” because such improvements could not be obtained through legislation “in the face of opposition from trial attorneys.”51

These developments certainly produced a change in the mode of activity by the rulemakers. Contrary to the earlier secrecy of their activities, they began courting public input. In 1978, for the first time, the Advisory Committee on Civil Rules held public hearings on

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proposed rule amendments.\textsuperscript{52} And the makeup of the rules committee itself began to change. In the 1930s, there had been no judges on the committee that drafted the original Federal Rules of Civil Procedure, but by the 1980s and 1990s, the committee was dominated by judges. Thus, it came in a sense to include aspects of another model of reform—reform by judges, albeit judges specially deputized to pursue these reforms in a committee setting.

Congress began to assert itself regarding rulemaking also. In 1988, it revised the Rules Enabling Act to require that the rules committee conduct all their business in public, and requiring both public hearings and public commentary on any proposed changes to rules.\textsuperscript{53} And Congress on occasion acted to change provisions of the Federal Rules of Civil Procedure without deferring to or even awaiting the official rulemakers.\textsuperscript{54} In 2007, the Supreme Court adopted a stringent standard for pleading under the PSLRA.\textsuperscript{55}

But the rulemakers were not entirely cowed by these developments. To the contrary, they undertook a number of aggressive rule changes that were smoothly adopted. In 1983, they adopted a new discovery provision that required judges to refuse discovery in situations in which it was disproportionate.\textsuperscript{56} At the time, the academic Reporter for the rulemaking committee described this change as producing “a 180 degree shift” in the orientation toward broad discovery.\textsuperscript{57} But for a long time, this rule change seemed to produce no actual change in practice. More dramatic effects followed the adoption in 1993 of a requirement that all expert witnesses provide detailed written reports on pain of possibly being denied

\textsuperscript{52} See Marcus, \textit{supra} note 40, at 758 n.58.
\textsuperscript{53} See 28 U.S.C. § 2073.
\textsuperscript{54} A prime example is the amendment of Fed. R. Civ. P. 35 in 1988 to broaden the classes of people who could perform physical or mental examinations. Reportedly, this change was made at the behest of a powerful judge who had a relative who was not authorized to conduct such examinations under the old rule but was authorized under the amended Rule. \textit{See} Carrington, \textit{supra} note 41, at 165. Eventually, the rulemakers further changed the rule to expand the classes of people who could perform examinations.
\textsuperscript{55} See \textit{Tellabs, Inc. v. Makor Issues and Rights, Ltd.}, 127 S.Ct. 2499 (2007) (holding that, to qualify as “strong” under the statute, a complaint must set forth allegations that make an inference of scienter “at least as compelling or reasonable as any opposing inference of nonfraudulent intent”).
\textsuperscript{56} See Fed. R. Civ. P. 26(b)(2).
leave to testify at trial. That change engendered no controversy at the time it was enacted, but has produced a very large number of decisions applying its provisions.

Other changes provoked great controversy. In 1983, the rulesmakers responded to concerns about abuse of litigation by fortifying Rule 11 of the Federal Rules of Civil Procedure, which makes a lawyer’s signature on a paper filed in court a certification of its bona fides. This amendment produced a huge reaction in short order; by 1988 a prominent judge reported that “Rule 11 has become a significant factor in civil litigation, with an impact that has likely exceeded its drafters’ expectations.” There was very broad concern that the rule was being used disproportionately frequently against civil rights plaintiffs and skewing the stakes and results of civil litigation. The Advisory Committee responded by issuing an unprecedented “call” for commentary on Rule 11, and later proposing amendments to soften the rule’s impact. Even those changes provoked objections; Justice Scalia of the Supreme Court dissented from the change on the ground that the amendments “would render the rule toothless.”

An even greater brouhaha erupted in 1993 when the rulemakers tried to introduce a somewhat dramatic new concept into the discovery arena – that litigants should be required at the outset of litigation to turn over certain “core” materials without awaiting a formal discovery request. This might not seem a particularly revolutionary concept, since the Supreme Court had ruled 30 years before that prosecutors had such a duty in regard to exculpatory material they obtained. And introducing disclosure might usher in a new age in which heavy reliance on formal discovery could abate, perhaps resembling English practices. But the proposal provoked “a

63. See Brady v. Maryland, 373 U.S. 83 (1963) (requiring the prosecution to provide the defendant with any exculpatory material it obtains).
64. See Wauchop v. Domino’s, 143 F.R.D. 199, 200 (N.D. Ind. 1992) (“Some observers of civil litigation believe that discovery rights will be taken from lawyers within the next decade or two, to be replaced by a system of standard disclosures.”).
flood of objections unprecedented in fifty plus years of rulemaking.\footnote{Ann Pelham, \textit{Judges Make Quite a Discovery: Litigators Erupt, Kill Plan to Reform Federal Civil Rules}, \textit{Legal Times}, Mar. 16, 1992, at 1.}

After some hesitation, the rulemakers proceeded with a revised initial disclosure rule that permitted individual courts to opt out of the new requirement, but even that provoked a dissent from Justice Scalia, who opined that it conflicted with the duties of an American lawyer never to turn over anything that might harm the client without a proper demand from the other side.\footnote{Justice Scalia's points were as follows:}

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decision maker. By placing upon lawyers the obligation to disclose information damaging to their clients - on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment - the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side.\footnote{Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 511 (1993) (Scalia, J., dissenting).}

Seven years later, the disclosure obligation was further limited, but made nationally binding over the anguished objections of federal district judges who wanted to retain their local arrangements rather than defer to directives from Washington.\footnote{For a sampling of those reactions, see Marcus, \textit{supra} note 1, at 915.}

Over this time, the rulemakers have become more tentative about their authority to make dramatic changes. At the same time, their top-down model has been weakened. In part that has been due to legislation, as described below. But beyond that, the rulemakers have come increasingly to embrace national procedural reforms based on local innovations. The most significant example of that activity is the case management movement, which originated in a number of metropolitan district courts in the 1960s and 1970s and was enshrined in the national rules in 1983. Other examples point up the relative weakness of the national set of rules. In a number of instances, local provisions that could well be described as impermissible because they deviated from the national rules became the basis for changing the national rules themselves.

At the same time, another feature of rulemaking has emerged that might flow from the model of judge-made procedure outlined in Part II - an increased emphasis on leaving matters to the discretion of judges. One could argue that judges would prefer rules that simply leave procedural decisions up to their sense of fairness. And to a
considerable extent, recent rulemaking has come to rely on judicial discretion in lieu of spelling out in the rule exactly how the issues involved should be handled. But the matters so handled in most instances are inherently subject to individual calibration, such as the occasion for exceeding the numerical limits now imposed on certain forms of discovery, or the amount of time to be allowed for various pretrial preparatory activities in individual cases.

Altogether, then, the expert, top-down model of rulemaking reform that seemed so vital in America in the middle of the 20th century has been replaced by a more cautious approach. This is not a bad thing; repeated revolutionary changes are likely to be counterproductive, and some constraint on the high-water version of freewheeling American litigation that existed in the 1970s seems entirely warranted, particularly where it is implemented by judges who more actively supervise the use of the litigation machine they preside over. At the same time, the initiative for aggressive reform seems to have shifted to Congress.

B. An Emboldened Congress Experiments With Procedural Reform

For most of its existence, Congress took almost no interest in procedural reform. For a century and a half, it directed that federal judges apply state procedures without taking much interest in what those procedures were. In 1934, it adopted the Rules Enabling Act, which delegated authority to the Supreme Court to promulgate nationwide rules of procedure for federal courts. Although it directed that these rules could not alter "substantive" rights, it gave no significant consideration to what the rules might contain. Then, for about forty years under the Rules Enabling Act regime it deferred to the procedural reforms produced through the centralized, expert, and secretive committee method.

That indifference has disappeared. In recent years, members of Congress have regularly introduced legislation to change the rules, or to provide directives by statute for matters governed by rule. For some, this implies that the rulemakers are right to circumscribe their activities; one scholar has argued that "the increasing reach of


Congress' procedural legislation ... expand[s] the scope of matters to be considered 'substantive' within the meaning of the [Rules Enabling Act]."  

Whether there should be some limit on the authority of Congress to legislate matters of procedure might be debated; some urge that the Congress should respect the rulemaking process and refrain from legislating about procedure unless invited to do so by the rulemakers. But the reality is that legislative initiative has expanded, and the possibility of dramatic change by legislation now seems more pronounced than the prospect of such change by rulemaking. The three experiences described below, however, show also that those who seek dramatic procedural breakthroughs via legislation are often disappointed, and sometimes confounded by features of what is enacted.

i. The Civil Justice Reform Act (CJRA)

In 1990, Congress passed the Civil Justice Reform Act (CJRA).  

This legislation was aimed at curtailing the cost and delay of civil litigation in the U.S. It directed each of the 94 U.S. district courts in the nation to convene an advisory group to design procedures for the district to achieve these objectives, thus embracing via nationwide legislation a bottom-up approach to procedural reform. It also directed these local groups to consider certain principles of reform, chief among them judicial management of litigation. At least in part, the legislation signified dissatisfaction with the rulemaking process. The principal aide to the bill's chief sponsor in the Senate, for example, decried the "near mystical reverence of the rulemaking authority exercised by the Judicial Conference."  

Taken to its full extent, this legislative initiative could have had a profound impact on procedural reform in the United States. In the words of Prof. Mullenix, Congress was "fomenting a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure."  

Some suggested that the Federal Rules themselves were no constraint on the reform initiatives of local advisory groups acting pursuant to the


statute, but gradually this view was deflated.\textsuperscript{74} Despite misgivings, it seems that the process “fostered a healthy dialogue between the bench and bar.”\textsuperscript{75} Overall, it is probably fair to say that the work product of the local advisory groups was rather modest.\textsuperscript{76} In general, these local groups were either headed by judges, or at least under the control of members of the local bar. They were not devices by which the general population was loosed to revise the procedural system. Due to this structural reality, these local groups were likely to be cautious in their changes.

Moreover, this chapter closed more with a whimper than a bang. Congress also directed that the CJRA be closely studied, and a very thorough effort was undertaken by the Rand Corporation.\textsuperscript{77} This study produced very modest conclusions about the value of the case management reforms introduced by local groups empowered by the CJRA. Although this judicial activity appeared to produce a significant reduction in the duration of litigation, it also seemed to increase the cost of litigation by forcing parties in some cases to do more in a short time frame than they would have done without being impelled toward action by judicial time limits. The only practice the Rand study would endorse was imposition of a short time for completion of discovery, which it found accelerated the completion of litigation without increasing its cost. Even this conclusion was challenged by a later study by the Federal Judicial Center.\textsuperscript{78}

When Congress adopted the CJRA, it included a “sunset” provision directing that the Act would cease to apply after seven years, and the CJRA advisory groups thus retired into the sunset in 1997, and the legislation lapsed. It had few enduring effects. To a small extent, the later amendment of the initial disclosure provisions of the Federal Rules to eliminate local opt-out provisions was based


\textsuperscript{77} See \textit{James S. Kakalik, ET AL., AN ANALYSIS OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1997).}

on insights from the CJRA experiment.¹⁷ Perhaps the overall experience of local procedural activism has paid some dividends. But a decade after this experiment ended little more remains of what was put in place by the CJRA.

As a model for procedural reform of the “bottom-up” variety, and also as a variant of the “expert” panel technique, then, the CJRA is extremely inconclusive. But it was not a very vibrant effort in either sense, given the short duration and ambiguous powers of the local reformers.

ii. The Private Securities Litigation Reform Act (PSLRA)

As noted above, by the 1970s a number of critics in the U.S. had focused on the interaction of relaxed pleading and broad discovery in enabling some kinds of suits. The idea of a “strike suit” had been around for quite a while, but it gained new currency in that period. And possibly the most prominent example of strike suits from the 1980s and early 1990s was the securities fraud class action. Some thought that these suits were routine responses to a fall in stock prices, whatever the actual reason for the fall in prices. To some extent, the strengthening of Rule 11 should have responded to these concerns, but that fortification of Rule 11 was partially retracted by amendments in 1993. At the same time, the growing importance of high-tech companies, particularly those in Silicon Valley, seemed to present more and more vibrant opportunities for aggressive litigation brought in hopes of rich settlements by lawyers who did not have substantial concerns about the merits of the claims they were asserting.

Whatever the merit of these criticisms as perceived by academics,¹⁸ they came to have significant political force and in 1995

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¹⁷ See supra text accompanying notes 63-67 for discussion of the initial disclosure controversy.

¹⁸ Thus, Professor Alexander argued that in securities fraud suits the merits of the case seemed to have no significant bearing on the amount of settlements, and that all cases settled. Although one would think that the settlement amount would vary according to the merits, she found that such suits were invariably settled for about the same percentage of the alleged loss, a circumstance she attributed to risk aversion among defendants, the availability of insurance to fund settlements, and the unwillingness of plaintiff lawyers to risk a trial. “With adjudication before trial unavailable as a practical matter and adjudication at trial a virtually unthinkable alternative, settlement becomes a foregone conclusion.” Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 567 (1991). For a contrasting view, see Joel Seligman, The Merits Do Matter, 108 Harv. L. Rev. 438 (1994) (questioning Alexander’s conclusions).
Congress adopted the Private Securities Litigation Reform Act (PSLRA) to respond to the criticisms. President Clinton vetoed the PSLRA, but Congress re-passed the bill over his veto with great alacrity.

To a considerable extent, the PSLRA addressed substantive matters of securities law about such matters as liability for projections of business success. But central features of the legislation ran counter to the permissive provisions of the Federal Rules of Civil Procedure. Thus, rather than permitting “notice” pleading, which even the Federal Rules abjured for fraud cases,\(^8\) the statute requires that complaints contain great specificity and “state with particularity facts giving rise to a strong inference that the defendant acted with [fraudulent intent].”\(^8\) Taking account of the importance of discovery, it also provides that a plaintiff can have no discovery until the complaint had survived a motion to dismiss under the stringent pleading standards,\(^8\) providing that the federal court could stay discovery efforts in parallel state-court litigation that might “circumvent” the stay in federal court.\(^8\)

In this way, the PSLRA sought to substitute for the Federal Rules’ attitude toward initiating a lawsuit a view more symptomatic of the rest of the world. It thus represented a dramatic shift in general attitude from the breakthroughs of the Federal Rules sixty years before, accomplished through a highly-political legislative effort rather than the “expert” method used to create the Federal Rules’ breakthrough in the first place.

The lower courts have been vigorous in enforcing the PSLRA’s requirements. Although some courts that had already been quite demanding in assessing complaints thought that their former demanding attitude was sufficient, others that had been permissive have taken the Act to demand stringency.\(^8\) A particular bone of contention has been whether the plaintiff must name all sources of information – including insiders in the company – that form the basis for allegations in the complaint. The wrangling over these issues has

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81. See Fed. R. Civ. P. 9(b) (requiring that allegations of fraud be made with particularity).
83. 15 U.S.C. § 78u-4(b)(3)(B) (“all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss”).
85. The leading example is In re Silicon Graphics, Inc., Securities Litigation, 183 F.3d 970 (9th Cir. 1999).
produced a wealth of new caselaw. The lower courts have also been vigilant in preventing judges from permitting discovery before the complaint survives an attack based on the stringent new pleading requirements.

Some foresaw a dramatic decline in the effectiveness of private enforcement of the securities laws as a result:

[The Reform Act is likely to allow only the more flagrant and obvious cases of securities fraud to proceed past a motion to dismiss, while being overinclusive in its elimination of cases where it is more difficult to identify, and therefore to plead, fraud. Presumably, the [federal Securities and Exchange Commission], with its limited resources, pursues the flagrant and obvious cases of securities fraud. Arguably, however, the more difficult to identify frauds are precisely the ones that the plaintiffs who function as private attorneys general pursue.... Because the plaintiffs lack access to the information the Reform Act requires them to plead at the motion-to-dismiss stage, however, the strict application of the heightened-pleading standard is likely to result in unredressed fraud.

At the same time, one could see a silver lining in the new requirements for plaintiffs:

Though lax pleading requirements made the nuisance value of a suit much more difficult to address through pretrial motions, it must also be understood that the Reform Act's heightened pleading standard credentials suits that survive pretrial motions so that [they] will have greater settlement value than such suits had on average before the Reform Act.... [C]ounsel should feel more confident in the case after satisfying the new pleading requirements than the counsel who had previously had to know less and plead less to withstand a challenge to the pleadings.

As might be expected from these diverse comments, the actual impact of the PSLRA was hard to gauge. Although some may have

86. See 2 HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 29 (2004 ed.) (providing over 140 pages of analysis of the interpretation of the PSLRA' pleading standards).
87. See SG Cowen Securities Corp. v. U.S. Dist. Ct., 189 F.3d 909 (9th Cir. 1999) (holding that the district court may not permit discovery that will enable plaintiffs to uncover facts sufficient to satisfy the Act's pleading requirements).
expected that there would be a dramatic decline in the frequency of securities fraud suits, there was a mild decline followed by an increase. And the settlement value of suits soared in the early 21st century, although there has been a drop-off recently. But the probable reason for these results is not that the procedural reforms had no effect so much as that the changing economic times and the uncovering of enormous frauds perpetrated in the frenetic years of the technology boom meant that there was much more to sue about and larger damages to collect. Nonetheless, this result shows that even a dramatic procedural reform may not have a dramatic real-life effect.

iii. The Class Action Fairness Act of 2005 (CAFA)

Besides lax pleading and broad discovery, the other procedural innovation introduced by the Federal Rules that became a bane to corporate America was the class action. Although defendants began in the 1980s to employ the class action to resolve large number of mass claims with some frequency, the use of the device in consumer-type situations drew growing criticism. This criticism focused particularly on state-court class actions that asserted claims on behalf of nationwide classes, or classes made up of claimants from many states. In part, this was a result of the likely application of the law of the forum state to transactions happening elsewhere, where one could argue that those engaged in transactions in other states had no meaningful way to foresee that their conduct would be measured by the standards of the state in which the suit was filed. But a greater

90. See, e.g., Lindsay Fortado, Banner Year for Securities Class Action Settlements, Nat. L.J., March 14, 2005, at 4 (reporting that in 2004 settlement amounts in securities fraud class actions hit a record total of $5.5 billion); Warren R. Stern & Sarah E. McCallum, The Private Securities Litigation Reform Act: Ten Years After, 38 REV. SEC. & COMMOD. REG. 89, 94 (2005) (“on an annual basis, more cases have been filed after the Act than before”); Michael Perillo, Did the Private Securities Litigation Reform Act Work?, 2003 U. ILL. L. REV. 913 (2003).

91. In 2006, securities class action filings fell off, and some said that the Sarbanes-Oxley legislation had caused companies to exercise greater care in reporting their financial results. See, e.g., Nathan Koppel, Legal Bear-Stock Class-Action Market, Wall St. J., Feb. 7, 2007, at A15. Others cautioned, however, that the annual drop seemed cyclical, meaning that the level of filings would rise again. See Pamela A. MacLean, Class Action Decline in '06 May Not be a Trend, Nat. L.J., Jan. 8, 2007, at 6.

92. A leading example was Avery v. State Farm Mut. Auto. Ins. Co., 746 N.E.2d 1241 (Ill. Ct. App. 2001), in which the trial court in Madison County Illinois — often labeled a “plaintiffs' paradise” — certified a nationwide class of insureds challenging State Farm’s practice of saving money on repairs by specifying use of replacement parts that were cheaper than the replacement parts produced by the manufacturer. The trial court
concern was that plaintiff lawyers would carefully file such nationwide class actions in a state court in a county that was highly favorable to class action plaintiffs. These localities became known as "plaintiffs' paradise." On occasion it seemed that there was a close relationship between the elected state-court judges in these localities and members of the plaintiffs' bar, who were major contributors to these judges' campaigns. Because it was often possible to file such a class action wherever any member of the class resided, these cases came to offer what was known as "universal venue," giving plaintiff lawyers easy access to plaintiffs' paradise jurisdictions.

The favored solution to this problem, from the defense perspective, was to have the cases heard by federal courts. At first blush, this may seem odd. The Federal Rules, after all, were the source of the expansion of class action practice due to the rulemakers' 1966 amendment of the class action rule. And the relaxed pleading and broad discovery features of American litigation were also derived from the Federal Rules breakthrough reforms. But federal judges are not only part of the nationwide federal judicial system, they are appointed for life and do not stand for election. Beyond that, there may have been some feeling that federal judges – most of them appointed by Republican presidents – would be more sympathetic to defendants' concerns than some state-court judges. And the federal rules concerning what evidence could be used in court – particularly expert evidence – may have been viewed as more favorable by defendants. As a consequence, plaintiff lawyers had attempted to configure their suits to prevent them from being removed to federal court, often by making sure there was a local defendant who would defeat diversity of citizenship, which was required for cases based on state law to be in federal court.

At the same time, it is important to note that the possibility of aggressive state-court measures in class actions contained the possibility of disrupting the operation of the federal-court systems. There were certainly examples of federal class action proceedings that had seemingly been undermined by conflicting rulings by state-court judges in competing class actions. Sometimes, after a federal judge decided that class certification should not be allowed, a state-court judge would permit a class action in virtually identical applied Illinois consumer law to the entire nationwide class even though State Farm's practice was reportedly legal, or even required by law, in a number of other states. The suit initially produced a judgment for more than $1 billion, which was reversed on appeal.
circumstances. Similarly, on occasion a state-court judge would approve a proposed class-action settlement that a federal judge had earlier found inadequate or unfair. These problems had caused the federal rulemakers to try to devise rule amendments that would insulate federal class-action proceedings against such disruption, but eventually it seemed that these efforts went beyond the rulemakers’ authority. One possible solution would be to modify removal jurisdiction and expand the authority of federal courts to enjoin state-court actions. But under the Rules Enabling Act the federal rulemakers could not make such changes. As a result, they announced that some changes by Congress could be helpful in addressing the problems they were unable to solve themselves.  

The solution proposed in Congress was the Class Action Fairness Act (CAFA), signed into law in early 2005 and designed to permit more class actions to be filed in or removed to federal court. At the same time, an effort was made to guard against removal of class actions primarily of interest to the state in which they were filed. There are certainly a number of technical issues to raise with these provisions, but for our purposes it may be enough to conclude generally that “it seems unlikely that many class actions can be crafted by class action attorneys to stay in state courts.” There was intense opposition to this bill from certain plaintiff interests, and this conclusion about the effect of the Act seems to mean that the defendant interests largely achieved their goal.

But CAFA is a mixed bag from the perspective of defense interests. Along with the jurisdictional change, the Act also includes provisions about scrutiny of settlements that may inhibit some deals that defendants may wish to make. In recent years, some consumer class actions have been resolved by what are called “coupon settlements” – defendant provides class members with a coupon good for a discount on further purchases of the product or service that gave rise to the suit in the first place. That is a painless (even profitable,  

93. See letter from Leonidas Ralph Meacham, Sec’y, Judicial Conf. of the United States, to Orrin G. Hatch, Chair, Comm. on the Judiciary, United States Senate (March 26, 2003), reprinted in 149 CONG. REC. S12876-77 (daily ed., Oct. 20, 2003).

94. For a discussion of these issues, see Edward F. Sherman, Class Actions after the Class Action Fairness Act of 2005, 80 Tulane L. Rev. 1593 (2006). The focus is on such matters as how one determines whether more than two-thirds of the class members are from the forum state, and how one decides whether a “primary defendant” is “local.” For a discussion of the statute’s jurisdictional policy, see Richard Marcus, Assessing CAFA’s Stated Jurisdictional Policy, 156 U. Pa. L. Rev. ___ (forthcoming 2008).

95. See Sherman, supra note 94, at 1597.
perhaps) way for defendants to settle cases. CAFA frowns on coupon settlements. A court may approve a coupon settlement only on finding after a hearing that it is adequate.\textsuperscript{96} Perhaps more significantly, the attorney's fee for the lawyers who brought the suit may only be based on the value of the coupons that members of the class actually redeem, not all coupons that are granted to the class.\textsuperscript{97} Since one objection to coupon settlements is that the coupons are often of little or no value to the class members, this could be a telling change.

In addition, CAFA requires that local or state authorities be notified of any proposed settlement and allowed to object on behalf of residents of their states.\textsuperscript{98} This requirement is at least a headache for settling parties, since the Act delays approval of any settlement until 90 days have elapsed after the notice is given. It also raises the possibility that a state attorney general or other official – perhaps motivated in part by the desire to gain favorable publicity – can object, thereby holding up the approval of the settlement and perhaps causing the court to disapprove it. Although there is little early indication that state attorneys general are using this authority,\textsuperscript{99} the introduction of this wild card hardly furthers the defense agenda.

And it is not clear that the advantages defense interests sought to obtain from having cases in federal rather than state court will turn out often to be very valuable. Unless federal judges are more favorable to defense interests than state-court judges, the Act seems an ambivalent blessing for defendants. The overall effect of the Act is still unknown, but early returns suggest that it will have a limited effect on outcomes. The Federal Judicial Center undertook comparative research on state and federal court handling of class actions to try to discern how a shift to federal court would change outcomes. The results make CAFA's likely effects seem very modest:

Our data, however, lend little support to the view that state and federal courts differ greatly in how they resolve class actions. For

\textsuperscript{96} 28 U.S.C. § 1712(e).
\textsuperscript{97} 28 U.S.C. § 1712(a).
\textsuperscript{99} See Peter Geier, State AGs Eschew CAFA Review, Nat. L.J., Oct. 23, 2006, at 5 (reporting that there has been only one instance in which a state attorney general made use of the opportunity to object that CAFA provides). But see Julie Kay, Miami Judge Rejects Settlement in Sharper Image Class Action, S.F. Recorder, Oct. 15, 2007 (reporting that 36 state attorneys general had opposed proposed settlement).
example, state and federal courts were equally unlikely to certify cases filed as class actions. Both state and federal courts certified classes in fewer than one in four cases filed as class actions. Although state courts approved settlements awarding more money to the class than did federal courts, that difference was a product of the size of the class; individual class members on average were awarded more from settlements in federal courts than in state courts. 100

CAFA has been called “the most significant change in class action practice since the federal class action rule was amended in 1966,” 101 and there was certainly a very loud controversy about it when it was adopted. Nonetheless, it seems as though this procedural reform will produce very modest effects.

V. Reflecting On the Importance of Modes of Procedural Reform

All in all, this brief canvas of U.S. procedural reform indicates that the mode for accomplishing it has only modest importance. The strongest argument for treating the mode of reform as highly important is the original adoption of the Federal Rules in 1938. That breakthrough event is consistent with what one might expect from a band of technocratic “experts” given a relatively free hand to devise a new procedural arrangement. Accepting that characterization, however, does not necessarily lead to the conclusion that the mode of reform was a critical component in the extent of reform. Some suggest that a key aspect of that reform effort was that it cam during America’s New Deal under President Franklin Roosevelt in the 1930s, a time when many features of American life were first subject to direction by “expert” groups convened by the federal government. The procedural reforms can be viewed as simply another example of that more general phenomenon. 102 And the magnitude of those reforms could be viewed as resulting as much from social and political conditions of the period as from the method by which they were designed.

Other aspects of U.S. experience are consistent with the typology

100. Thomas E. Willging & Shannon R. Wheatman, Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?, 81 NOTRE DAME L. REV. 591, 599 (2006). Of more than 600 cases on which the researchers obtained information, for example, “[n]o judge rejected a class settlement.” Id. at 605.
101. Sherman, supra note 94, at 1593.
102. See, e.g., Walker, supra note 31.
at the outset. Legislative development of codes – particularly in state legislatures – has often included myriad features serving the desires of special interests. The federal rulemaking apparatus, now dominated by judges does show a tendency to enhance judicial discretion, but it generally is not responsive to special interests.

But the generalizations are too broad. The federal rulemakers continue to make some aggressive changes, although their efforts with Rule 11 in 1983 and with initial disclosure in 1993 may have produced more harm to the rulemaking effort than help to the judicial system. Congress, meanwhile, has sometimes been something of a wild card. The adoption of the CJRA certainly injected an unexpected and potentially centrifugal ingredient into the national rules process by licensing 94 local reform bodies. The PSLRA represented, at its heart, a rejection of two major thrusts of the Federal Rules breakthrough – relaxed pleading and broad discovery – but its effects have not been cataclysmic in the area where it applies, and it only applies to a very small (though important) fraction of federal court litigation. The more recent adoption of CAFA, while it provoked huge amounts of bombast, seems unlikely to have what observers from outside the United States would call a major effect on handling of class actions. And it responded in a sense to an endorsement from the rulemakers for reforms like these to solve problems they had not been able to solve by rule amendment.

A tentative conclusion, therefore, is that the U.S. experience offers little support for the view that America's remarkable procedural features result from its peculiar methods of achieving procedural reform. This part therefore offers some more general reactions concerning procedural reform that seem relevant without regard to the mode of reform. This tentative conclusion can be amplified with consideration of recent reform efforts in England, Germany, and Japan.\footnote{103}

One seeming constant is the urge to reform. This urge appears to persist even when there is no crisis with the way things are. We are told, for example, that some say that German civil justice is working too well, and that "its relatively low cost and high efficiency are actually fostering litigation and causing citizens to resort too readily

103. For a recent consideration of the insights to be gleaned for an American from study of the procedural arrangements of these countries, see Richard Marcus, Putting American Procedural Exceptionalism Into a Globalized Context, 53 AM. J. COMP. L. 709 (2005).
to the courts.” Yet we are also told that German reforms adopted in 2002 are “the single most important revision since the original [code] of 1877,” and that this change is designed to achieve “a fundamental reform” of the code. In particular, the German introduction of an obligation to produce documents has been called “close to revolutionary.”

That one might initiate a procedural revolution without a procedural crisis is a striking notion. As I have noted elsewhere, the American experience is that crisis rhetoric is frequently employed to justify reform efforts. Certainly the recent English experience flows from a perceived crisis. Lord Woolf’s initial report catalogued manifold serious and harmful problems of English procedure that could undercut English prominence in commercial matters. That crisis explains the willingness of the English to undertake the revolutionary changes embodied in the CPR. In Japan, in contrast, there seems to be a relatively constant concern about the need to improve the procedural system but no evidence of crisis. If anything, the greatest difficulty presented in Japan is that the legal profession has until recently been undervalued, and the judiciary has been too insulated from the tasks of actual lawyers. Both financial changes and the development of a new form of legal education in Japan (modeled on American post-graduate law schools) may alleviate that concern.

In the United States also, the atmosphere of crisis seems often to be overstated. For example, one hears repeatedly that American discovery is out of control and inflicts disproportionate costs on litigants. Yet careful studies of discovery in American courts do not support those assertions. In 1997 the Federal Judicial Center did a study of discovery in recently-closed cases and found that the median cost of discovery was about 50% of the total litigation cost and about 3% of the amount at stake in the litigation. Most surveyed lawyers thought that the amount of discovery in their cases was about right.

A 1992 study of five state courts by the National Center for State

106. Id. at 76.
107. See Marcus, supra note 76, at 762-67 (describing the crisis mentality attending American reform efforts).
Courts made similar findings. To some extent, the rest of the world might discount these studies (which relied on surveys of lawyers) on the ground that American lawyers are so inured to discovery that their opinions are reliable. But the complaints about a discovery crisis also come from American lawyers, so that objection loses some force.

Indeed, some objections—whether phrased in crisis terms or not—seem almost eternal. One is delay. A recent book, for example, is devoted entirely to delay in civil litigation. In the United States, concerns about delay have persisted for years and prompted major efforts to increase the pace of litigation. The enduring question, however, is how one determines what constitutes delay. Litigation is a complicated and difficult undertaking. There is much reason to suspect that most disputes do not reach court in the United States, despite its reputation for litigiousness, so one would think the same is true in other countries. In Japan, for example, we have been told that litigation has been viewed as a last resort, so the winnowing effect of nonlitigation resolution should be stronger and the cases that get to court more contentious. In Germany, as noted above, there is a concern that it is too easy to get a case into court, but 1996 statistics show that nearly half of cases filed in local courts were disposed of within three months of filing.

How then to approach concerns about delay? The right starting point, it would seem, is some consideration of the amount of effort and time needed to accomplish the tasks needed to reach a resolution. The simpler and more abbreviated those tasks, the stronger the argument for concern that they take considerable time. And there is also a question of priorities; in the U.S., for example, criminal cases take priority over civil cases. That seems a reasonable principle, but it is likely to "delay" civil cases somewhat. The solution would be to add court resources, but as in Japan additional resources have not been provided in the U.S. for speeding up resolution of civil cases even though there is pressure to reduce delay. The question how long

113. See Murray & Sturner, supra note 104, at 19.
114. See GOODMAN, supra note 10, at 196.
cases should take to reach resolution cannot probably be answered wholesale, but until it is determined how long they should take it is difficult to become overly concerned about most objections based on "delay."

The other perennial bugaboo of civil litigation is cost. A starting point is to recognize that resolution of civil cases is going to cost something; somebody will want to be paid to accomplish the necessary tasks. One way of reducing that cost is to reduce the number of tasks, or to assign them to others. The whole question of party control or judicial control of the conduct of litigation is inevitably connected to costs. If, for example, tasks presently assigned to the parties' attorneys (with high billing rates) are reassigned to court personnel (with lower civil service salaries), there could be savings, but at a potential cost in delay (assuming overloaded court staffs) and also in the ability of parties to direct the preparation of their cases.

Reforming matters so basic as these is a challenge that should await a crisis. Perhaps Lord Woolf's reforms in England promise something revolutionary by requiring broad application of a central principle of proportionality for all litigation activities. The proportionality principle is directly addressed to balancing the costs with the needs of litigations. The principle is that the pursuit of the pearl of justice must take account of the price. Lord Woolf's idea of adopting patterns for the various litigation tracks provides a suitable general starting point. And English judges retain latitude to modify as needed, with an overall expectation that they will be less forgiving about delays than in the past. All the same, one suspects that the expenditures on litigation in this party-centered system will still exceed the costs that the German system permits, with its relatively strict schedule of costs.

Despite invocation of the rhetoric of revolution, the recent changes in the German and Japanese systems seem considerably less aggressive. Indeed, the American experience suggests that the rhetoric of revolution may be employed to defeat changes that hardly would produce major shifts. For example, in 2000 the Federal Rules of Civil Procedure were amended to narrow the scope of discovery slightly to anything "relevant to the claim or defense of any party."\footnote{Fed. R. Civ. P. 26(b)(1).} From the perspective of the rest of the world, this is extremely broad, but in the United States the change was denounced as
"revolutionary." But the charge suggests that heated nature of procedure reform in the United States.

This sort of bluster is commonplace in discussions of procedural reform in the United States. As we have seen, the reforms wrought by CAFA look to be relatively unimportant. But the amount of ink spilled and hot air expelled over that legislation was remarkable. Similarly in other circumstances where the actual reform was really quite modest. One way of explaining this behavior is to recognize that the public participation invited for American procedural reform excites the participants to indulge in overblown rhetoric. Another is that overstatement about the harm that would result from change is an antidote for crisis rhetoric about the need for reform.

There does not seem to be a similarly explosive aspect to procedure reform – whether modest or major – in England, Germany, or Japan. The changes wrought by Lord Woolf in England, in particular, look well beyond what likely could now be accomplished by the rulemakers in the United States. In this country, the Federal Rules of 1938 accomplished revolutionary things, especially in expanding discovery, but current rulemaking efforts are extremely cautious by contrast (and despite being labeled “revolutionary”). As a consequence, I concluded several years ago that major reform would not come from the American rulemaking process. Although, as we have seen, some legislation in Congress has made more aggressive changes in certain areas, that also has been spotty and episodic. Overall, American procedural reform since 1938 has been decidedly evolutionary, and not significantly revolutionary. The major breakthrough in the rules during the past quarter century – the one emulated by Lord Woolf – was case management. But that arose "from the ranks" because it was introduced by judges in metropolitan districts and added to the national rules only because of that local success. It was not, then, a genuine initiative of the national rulemakers.


117. See Thomas D. Rowe, Jr., A Square Peg in a Round Hole? The 200 Limitation on the Scope of Federal Civil Discovery, 69 Tenn. L. Rev. 12 (2001) (finding that the rule change had very modest effects in actual decisions).

118. See supra text accompanying notes 96-100.

119. See Marcus, supra note 1.
Even aggressive reforms often fall flat. One has only to remember the American effort to impose proportionality on discovery. Introduced in 1983 as a “180 degree shift” in attitude toward discovery, the amendment “created only a ripple in the caselaw.” Changing rules is easier than changing actual conduct of lawyers and judges, and often results in unforeseen problems that require further changes in rules. Thus, we are informed that, in England, “[e]ach major reform of procedure has sought to simplify the process of commencement and reduce its formal requirements.” In Japan, reforms adopted in 1996 to introduce some information exchange failed because they had no enforcement mechanism. Even where there is a will, there may not be a way to change actual practice.

VI. Conclusion – Room For More Study?

Perhaps Professor Leubsdorf had a point when he wrote of the “myth” of civil procedure reform. Although this myth is popular among law professors, and therefore prevalent among the bar (which is made up of their former students), there is, he suggests, no solid evidence that reform has actually made any difference. Accordingly, Leubsdorf proposes “a counter-myth”: “[T]he great reforms had little or no impact on the speed or cost of the average civil action.” Despite this seeming nihilism, he affirms that “many procedural changes do make many differences, some good and some bad,” but quickly adds that “it is hard to tell what changes will make what difference.” Indeed, it seems that some Americans who have favored procedural reforms to affect substantive results – as was attempted in the PSLRA – may be losing faith in this technique.

120. See supra text accompanying note 57.
122. Zuckerman, supra note 13, at 125.
123. GOODMAN, supra note 10, at 285.
125. Id. at 63.
126. Id. at 65.
127. Id. at 66.
128. See Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 VA. L. REV. 471, 505 (2005): Placing procedural limits on tort litigation has been quite popular of late, ranging from new scientific admissibility rules, to mandatory arbitration, to
This paper began with an affirmation of the pathbreaking importance of the 1938 adoption of the Federal Rules of Civil Procedure, and explored the American experience as a way of evaluating whether the mode of procedural reform is important to its content or effect. Despite Leubsdorf’s pessimism, I continue to think that this is a subject worth pursuing because I think that procedural changes do make differences. But the simple-minded hypotheses about how modes and content might correlate suggested in Part II seem not to fit America’s recent reality as described in Part IV even if they are consistent with the longer-term experience sketched in Part III. Accordingly, one is left with the grab-bag of considerations suggested in Part V based on some reflection on the experiences of a few other countries in addition to the United States.

For the future, the question is whether further study would yield insights or more mottled shades of gray. And if that is the prospect, whether the study itself is worthwhile.
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