2015

Modest Procedural Reform Advances in the U.S.

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VIII. USA

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Two years ago, in this publication, I reported on the controversies that attended ongoing efforts to reform civil litigation in the American federal courts to contain and constrain excessive costs, particularly of discovery.¹ At that time, it was uncertain whether the pending package of rule reforms would be adopted by our Supreme Court, and if so whether the Congress might take action to alter the amendments, as could happen under our statutory scheme. More broadly, it was unclear whether the political polarization that has typified both the legislative and executive branches of the US government would begin to intrude into the process of judicial rulemaking.

This paper follows up on the report of two years ago. At least some clear answers have emerged. The Supreme Court did adopt the amendment package, the Congress did not alter it, and the rule changes went into effect on 01.12.2015. Some suggest that the rule changes will produce big changes in litigation. For example, an article in the magazine of the American Bar Association (ABA) Section of Litigation described the rule changes as “a whole new ballgame,” “a game changer,” and “a paradigm shift.”² Similarly, a prominent American law professor has reacted with an article whose title asks whether the 2015 rule amendments mark the “end of an era.”³ Whether this

¹ Richard Marcus, Procedural Polarization in America? ZZPInt 18, p. 303.
² Kenneth Berman, Reinventing Discovery under the New Federal Rules, 42 Litigation 22 (Spring 2016).
amendment package really produces "a whole new ballgame," or ends "an era" of American litigation is very much up in the air. But it remains true that the rulemaking apparatus is consensus driven, not polarized, and thus resistant to some features of other parts of the American government.

As the American political system heats up again in preparation for another presidential election, it seems that things in that arena may become even more polarized—and perhaps in more directions—than before. As explained below, the procedure reformers have begun developing experimental efforts to take the 2015 amendments another step—pilot projects emphasizing simplified mandatory disclosure regimes. Meanwhile, the rule makers have refocused on another topic that sometimes generates high emotions—class actions.

The outcome of America's political contests is impossible to predict as of this writing. And whether the relative tranquility of procedural developments herald an era of tranquility for American procedural reform is also impossible to forecast. But there surely is no reason at present for dire prophecies.

1. The Unique American Background

As most have known for a long time, American attitudes toward a range of topics have differed from the rest of the world, and not only on the scope of discovery. American rules on pleadings, class actions, recovery of litigation costs, and jury trial are also distinctive if not unique. Together they provide a uniquely claimant-friendly atmosphere for private litigation, which can be justified on a variety of political theories. But with regard to discovery, American procedural reform since 1970 has curtailed some of the untrammeled openness that was installed by amendments to the Federal Rules of Civil Procedure that went into effect in that year.

The recurrent cries of alarm and pain about the scope and burdens of American discovery should be familiar to observers from other countries. They became familiar to participants in American litigation soon after the Federal Rules were adopted in 1938. Barely a decade later, a conference convened under the guidance of the Reporter who wrote the original Federal Rules included a complaint by a big-

4 For background from an American perspective, see Richard Marcus, Retooling American Discovery for the Twenty-First Century: Toward a New World Order, 7 Tulane J. Int'l & Compar. Law 153 (1999) (describing the divergence between American discovery practices and those of other countries, even common law countries).

5 For discussion, see Richard Marcus, Bomb Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?, 107 Nw. L. Rev. 574 (2013) (exploring political theories that would justify retaining the unique claimant-friendliness of American procedure).

firm defense-side lawyer that "[t]he practically unlimited scope of discovery under the federal rules has proved expensive and time consuming beyond any reasonable benefits to be derived from them." It also included the results of a survey of existing practice reporting that "[o]ne of the criticisms is that the expense and time consumed by discovery is out of all proportion to the value. ... If 100 to 150 pages of depositions are reasonable in a tort case worth $20,000, then 100,000 to 150,000 pages would in proportion in a case worth $20,000,000."

In 1983, the Federal Rules were amended to direct the judge to ensure that discovery was proportional, but no major change in practice occurred. Subsequent amendments in 1993 and 2000 sought to bring proportionality to the fore, but actual practice changed only gradually. In 2010, a major conference on contemporary litigation practice confirmed that the concerns that had already emerged sixty years earlier remained important, and added that owing to the explosion of information in the Digital Era they had become worse.

II. The 2013 Amendment Proposals and Reactions to them

The 2013 amendment proposals sought to move proportionality to a more prominent position by making it a feature of the basic scope of discovery. In doing so, it mirrored reforms two decades ago in the UK, which made proportionality a key ingredient in a range of procedural judgments. One might also say that it is hard to find lawyers who overtly favor disproportionate discovery. Instead, the customary argument favoring broad discovery is that it is necessary to enable the party seeking discovery to develop its case, surely a proportionate goal. On some level, an underlying debate might be about a set of values; the importance one attaches to investing resources into pursuing "justice" can color attitudes toward investment in discovery. If justice is a pearl beyond price, the price of very broad discovery seems to be worth paying.

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8 Id. at 137-38 (presentation of William Speck of the Administrative Office of the U.S. Courts).
9 See Marcus, supra note 1, at 308-09.
10 See Fed. R. Civ. P. 26(b)(1), authorizing discovery "that is relevant to any party's claim or defense and proportional to the needs of the case."
12 For discussion of these points, see Richard Marcus, "Looking Backward" to 1938, 162 U. Pa. L. Rev. 1691, 1716-21 (2014).
But the disputes in given cases tend to be about whether more discovery will actually produce useful information. At that point, lawyers must convince judges under the new provisions that their discovery promises evidentiary returns that justify the discovery costs. Judge Wistrich and Professor Rachlinski argue that American lawyers intrinsically resist sensible assessment of this balance: "Litigators thus suffer from a double distortion: they overvalue the additional information and undervalue the costs incurred by the responding party in providing the information. Lawyers also likely do not realize that the additional information might hinder or distort their own judgment." Instead, American lawyers embrace the idea that "more information must be better, without regard for the cost of that information or the need for it."13

This tendency of American litigators ill suits the Digital Age, in which the volume of information has grown hugely and threatens to grow even more hugely in the relatively near future. The consequences for E-Discovery are becoming apparent. Already generating annual revenue of $10 billion in 2015,15 the market is predicted to rise to nearly $22 billion by 2022.16

Already, the notion that "all" information related to specified topics can be located and produced seems often to be implausible. Many companies and governmental entities have digital information in multiple forms and myriad locations. The prevalence of BYOD (bring your own device) policies throughout much of American business means that company information often resides on hundreds or thousands of handheld devices belonging to employees. The expansion of social media activity and reliance on handheld devices means that ordinary Americans have digital information in greater volumes than substantial business enterprises of the mid 20th century possessed. The supposedly imminent arrival of the Internet of Things – a world in which some 75 billion devices regulating and reporting on a wide variety of ordinary activities will probably be linked to the Internet – suggests the potentially massive expansion of this eruption of Big Data.17 At least some in the field regard this prospect as a "defining moment in technology history."18 Some

14 Id. at 606.
17 See Erik Post, Discovering the Internet of Things, Legaltech News, 01.01.2015. Post asserts that already some 10 billion Internet-connected devices such as "fitbits" are in operation, and that Morgan Stanley forecasts that by 2020 there will be 75 billion of them in operation.
18 See Post, supra note 17.
see the 2015 rule amendments as introducing new challenges regarding both data preservation and discovery.\(^\text{19}\)

The main palliative for those trying to find pertinent information is that what is called technology assisted review (TAR) will greatly reduce the cost and delay associated with finding responsive information. Gradually courts have begun to embrace the use of such techniques in the US, and in the UK TAR have been recognized as well.\(^\text{20}\) Proportionality rules may prompt adoption of these methods, but pragmatism probably will have just as much impact as rules on the evolution of practice.

The 2014 report in this magazine\(^\text{21}\) suggested the possibility that the procedural polarization that has gripped Congress might find its way into procedural rulemaking. Certainly the academic reaction to the amendment package hews to those battle lines. Take the recent article cited at the beginning of this contribution. It explores the view that the rule amendment process might become “an effective mechanism for subverting the original vision of the Federal Rules.”\(^\text{22}\) In droves, American academics urged that the changes not be made.\(^\text{23}\) Leaving no stone unturned, American academics even took to the barricades to oppose the abrogation of the rule that adopted “official forms” for pleadings and like filings.\(^\text{24}\)

But the actual changes do not warrant this fierce response. For one thing, after many objections were raised during the public comment period, significant changes were made in the overall package before it was approved. The criteria for determining proportionality were reorganized so that the monetary element did not appear first, and a new factor – “the parties’ relative access to relevant information” – was added.\(^\text{25}\) Because many objected during the public comment process that parties

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\(^{19}\) See Ricci Dipshan, the “Discovery of Things”: How the IoT Affects FRCP, Data Access, Legaltech News, April 21, 2016 (discussing discovery regarding the Internet of things under the amended discovery rules).


\(^{21}\) See Marcus, supra note 1, at 309-17.

\(^{22}\) Steinman, supra note 3, at 8.


\(^{25}\) See Fed. R. Civ. P. 26(b)(1), explaining that proportionality analysis should look to “the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”
seeking discovery should not be required to prove that it was proportional, the
Committee Note accompanying the rule amendment was expanded to recognize
that “the change does not place on the party seeking discovery the burden of ad­
dressing all proportionality considerations.”26 Instead, it recognizes that “[a] party
claiming undue burden or expense ordinarily has far better information – perhaps
the only information – with respect to that part of the determination.”27

Despite these changes, it seems that the rancor resulting from this amendment
experience has not entirely died down. Instead, the academic community seems to
take solace in the idea that major changes are unlikely to emerge from the rules
process. That is, of course, not a bad thing. As I have observed in the past, the “Big
Bang” of procedural reform that resulted from the adoption of the Federal Rules of
Civil Procedure is not necessarily something that each generation should repeat.28

III. The Actual Effect of the 2015 Rule Changes

One thing that rule makers cannot predict, much less control, is the impact their rule
changes will have. Sometimes the impact is much more dramatic than they foresee.
An example of that might be the 1983 amendment to Rule 11 of the Federal Rules of
Civil Procedure, which lead to vigorous litigation and fierce controversy about the
effects of the expanded availability of sanctions for alleged litigation misconduct.29
In 1991, the rule makers responded by inviting suggestions for reform, and in 1993
a number of protections were added to the rule, causing its importance to shrink.

But over-reaction to rule changes is probably less common than under-reaction.
One example is the 2000 change to the scope of discovery, the same rule that was
further revised in the 2015 amendments. The 2000 change was widely and vehe­
mently denounced as “radical” and harmful. But the reality was that it had almost
no actual effect. In part, that may be because lawyers and judges are set in their
ways. In part, that may be because they do not pay nearly as much attention to the
rules (and the ways they change) as those involved in the process. Indeed, a few
years ago I suggested (only partly in jest) that key laments of the rule makers would
include “Judges don’t follow our rules” and “Lawyers don’t read our rules.”30

Perhaps hoping to avoid that outcome for the current rule changes, Chief Justice
Roberts of the US Supreme Court devoted most of his year-end report for the fed­

26 Committee Note to Rule 26(b)(1), 2015 amendments.
27 Id.
“big bang” in American procedure resulting from the 1938 adoption of the Federal Rules,
and forecasting that such momentous changes will not happen a second time).
29 See Stephen Burbank, The Transformation of American Civil Procedure: The Example of
eral judiciary on 31.12.2015, to the amendment package. One thing the Chief Justice seemed to be doing was to try to call attention to the rule changes – to prompt judges and lawyers at least to take note of them. He urged that they are “a major stride toward a better federal court system,” adding that “[t]he amendments may not look like a big deal at first glance, but they are.” In particular, the amended rule on scope of discovery “states, as a fundamental principle, that lawyers must size and shape their discovery requests to the requisites of a case.”

At least some judges are listening. A few weeks after the Chief Justice’s report was issues, one judge began her opinion on a discovery dispute by remarking that “Chief Justice Roberts, in his Year-End Report on the Federal Judiciary, noted that the most recent amendments to the Federal Rules of Civil Procedure were intended to: (1) encourage greater cooperation among counsel; (2) focus discovery ... on what is truly necessary to resolve the case; (3) engage judges in early and active case management; and (4) address serious new problems associated with vast amounts of electronically stored information.”

Surely some look with enthusiasm on the prospect that the 2015 rule changes will do what the Chief Justice endorsed. An article in a magazine for corporate general counsel began: “Recent amendments to the Federal Rules of Civil Procedure can be real game changers with regard to limiting the scope and cost of discovery.” Another magazine for general counsel devoted an entire section to discussing the potential effects of the rule changes. Even the Wall Street Journal chimed in with an article entitled “Businesses Win Lawsuit Curbs with New Rules.” Though that prospect may be anathema to some, it might strike the Journal as good news.

Some have already reported to the Advisory Committee about the perceived effects of the recent amendments. In April, 2016, one organization warned that “absent further action to educate the bench and bar, the Committee’s robust effort -- more than five years of work ... – may be at risk of suffering the same fate as those that

32 Id. at 9.
33 Id. at 5.
34 Id. at 7.
36 B. Jay Yelton, Rule Amendment Encodes Proportionality, Today’s General Counsel, 30.03.2016.
come before.\footnote{Lawyers for Civil Justice, An Early Look at How Courts Are Interpreting and Applying the 2015 Amendments to the Federal Rules of Civil Procedure, dated April 8, 2016, and submitted to the Advisory Committee on Civil Rules.} Some judges may be continuing to use precedent that was originally adopted under rule provisions that have been changed or removed. Another commentator found that even though the amendments removed the rule language many regarded as authorizing discovery so long as it was “reasonably calculated to lead to the discovery of admissible evidence” – rule language consciously removed by the 2015 amendments – some judges seemed to continue to regard that as defining the scope of discovery.\footnote{See John Barkett, the First 100 Days (or so) of the 2015 Civil Rules Amendments at 6-13 (citing cases), available at www.frcpamendments2015.org/uploads/5/8/6/3/58636421/barkettfirst100days.pdf, last visited June 2, 2016.}

Early returns are a risky basis for making long term forecasts; however, so it remains uncertain whether, even with the Chief Justice’s exhortations, this set of rule changes will cause “real” change.

IV. Moving toward a Culture Change?

From some perspectives, the central concern is not mainly about rules, but about the “culture” of legal practice in the US. Many have regarded that practice as excessively adversarial, and found that behavior in discovery reflected that excessive adversarial zeal. Chief Justice Roberts suggested as much when he said that rule changes are not enough: “The success of the 2015 civil rules amendment will require more than organized educational efforts. It will also require a genuine commitment, by judges and lawyers alike, to ensure that our legal culture reflects the values we all ultimately share. . . . The test for plaintiffs’ and defendants’ counsel alike is whether they will affirmatively search out cooperative solutions, chart a cost-effective course of litigation, and assume shared responsibility with opposing counsel to achieve a just result.”\footnote{Annual Report, supra note 31, at 10-11.}

At least some in the bar appreciate that the amended rules support a “cultural” challenge. Thus, the Chair of the ABA Section of Litigation wrote that the main question is whether the bar will step up to this challenge: “The hope is for a true ‘culture shift’ toward active management by the courts and cooperation by the parties. Whether that shift will occur is the most important question we face, and the answer will determine the amendments’ true impact.”\footnote{Lawrence Pulgram, The Discovery Rules Have Changed -- But Have We? 42 Litigation 18, 20 (Spring 2016).}

Excessive adversarial behavior in American litigation has been decried for over a century. Roscoe Pound denounced it in his famous 1906 speech to the American Bar Asso-
ciation urging procedural reform.\textsuperscript{43} But changing “culture” is surely more challenging than changing rules, and cultural change is likely to be much more gradual. As we have seen,\textsuperscript{44} experience with past rule changes does not make big changes in behavior seem guaranteed this time. Although judges’ somewhat frequent invocation of the Chief Justice’s annual message may suggest that some judges are making serious efforts along this line,\textsuperscript{45} it will probably take more to produce widespread changes in lawyer behavior.

V. Further Steps – Pilot Programs as Harbingers?

But the Chief Justice did not contemplate that the rule changes would be the final effort. Instead, he exhorted: “I encourage all to support the judiciary’s plans to test the workability of new case management and discovery practices through carefully conceived pilot programs.”\textsuperscript{46}

Work has already begun on pilot programs along these lines, and it may bear more aggressive fruit than the recent rule amendments. At its April 2016 meeting, the Advisory Committee was presented with an ambitious agenda of plans for encouraging voluntary civil litigation programs to be adopted by individual federal district courts.\textsuperscript{47} The report cites the 2015 rule amendments and observes that “additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects.”\textsuperscript{48} With that in mind, a Subcommittee of the Advisory Committee explored the innovations used in a number of courts – both state and federal – and concluded that two pilot projects should be implemented.

\textit{a) Mandatory Initial Discovery Pilot Project}

The first pilot project builds on a provision already in the national rules, but that provision has a rather unhappy history. 25 years ago, the Advisory Committee proposed a rule requiring “initial disclosure” of certain “core information” without the need for formal discovery requests. This proposal provokes uproar.\textsuperscript{49} Eventually, a

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\textsuperscript{43} See Roscoe Pound, the Causes of Popular Dissatisfaction With the Administration of Justice, 29 Reports of the A.B.A. 395 (1906).
\textsuperscript{44} See Part I supra.
\textsuperscript{45} A Westlaw search in mid 2016, for example, identifies at least a dozen district court decisions citing the Chief Justice’s report during the first three months of 2016.
\textsuperscript{46} Annual Report, supra note 31, at 9-10.
\textsuperscript{48} Id. at 441.
\textsuperscript{49} For a description of this uproar, see Richard Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 Brooklyn L. Rev. 761, 805-12 (1993)
\end{footnotesize}
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less aggressive rule was adopted, and individual federal district courts were explicitly permitted to opt out of it. This lack of uniformity led to making the initial disclosure rule mandatory nationwide in 2000, but also to limiting it to information the disclosing party would use to support its case. Unfavorable information would not need to be disclosed.\textsuperscript{50} Even so, the national rule also permitted the parties to decide not to do any initial disclosure, and authorized the judge to order that it would not be employed in a given case even if some parties wanted to use it.

The proposed pilot program is considerably more aggressive. It does not allow the parties to opt out (although the court can relax the initial disclosure requirement based on the parties’ stipulation to that effect), and requires the parties to provide information “as to facts that are relevant to the parties’ claims and defenses, whether favorable or unfavorable, and regardless of whether they intend to use the information in presenting their claims or defenses.”\textsuperscript{51} It further directs that if such information emerges after initial disclosure, a supplemental disclosure must be made within 30 days.\textsuperscript{52} Failure to disclose is a ground for sanctions.\textsuperscript{53}

The potential bite of this regime is indicated by the following directive: “List the documents, electronically stored information (‘ESI’), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party’s claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things … . For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them.”\textsuperscript{54}

This is obviously an ambitious potential program. Whether it will move forward cannot be predicted with confidence. A quarter century ago, Justice Scalia (joined by Justices Souter and Thomas) dissented from adoption of a less aggressive disclosure regime in the Federal Rules: “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

\textsuperscript{51} April 2016 agenda book, supra note 47, at 443 n. 2.
\textsuperscript{52} Id. at 444 n. 5.
\textsuperscript{53} Id. at 445 n. 10.
\textsuperscript{54} Agenda book, supra note 47, at 445.
new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side.”

b) Expedited Procedures Pilot

The other proposed pilot project seeks to achieve a goal that has long been attractive but defied judges who seek to enlist lawyers and parties to support their effort. The effort is to provide expedited trials after abbreviated discovery. Over recent decades, individual federal judges have offered to guarantee nonjury prompt trials for simple cases if the lawyers and parties would agree to expedited and simplified discovery and abjure summary-judgment motions.

The idea was good – that the costs of “full scale” discovery and motions for summary judgment actually exceeded the cost of simplified pretrial preparation and a trial with time limits on both sides for presenting their cases. The recurrent problem was that the judges got almost no takers. So the programs went begging.

One possible explanation for the failure of these programs to attract participation was that lawyers are exceedingly conservative professionals who were loath to experiment with new ways of resolving disputes. They may have feared that bad outcomes would lead to claims by their clients that they were guilty of malpractice for agreeing to “short cut” justice.

Another (somewhat less persuasive) explanation is that clients themselves insisted on doing things the “normal” or “full preparation” way. This explanation is less persuasive because much research shows that the people most interested in having a trial are clients. For lawyers, trials are a wearing and risky business. For judges, they sometimes involve a great deal of work (though often not much more than summary judgment motions). Perhaps clients who expect to lose at trial would resist a program that ensures an early trial. They might even favor using discovery as a delaying tactic to prevent a case from reaching trial. But it remains true that most clients claim to be favorably inclined toward getting their “day in court” and less enamored of contemporary American discovery.

The proposed pilot program would replace the efforts of individual judges to obtain voluntary participation with a program that would apply to most civil cases in a participating district. The method would include prompt case management conferences with the presiding judge, firm caps on the amount of time allowed for discovery, prompt resolution of discovery disputes by telephone conferences, judicial commitments to decide all dispositive motions within 60 days of submission, and setting firm trial dates.


56 The program would not apply to “cases decided on an administrative record with no trial.” Agenda materials, supra note 47, at 448.

57 See id.
There is nothing revolutionary in this program; it involves using tools that have been in the rules for decades. But the goal would be for each participating district to ensure trial dates in 90% of civil cases within 14 months of case filing, and produce a 25% reduction in the number of categories of cases in that district that are decided more slowly than the national average.58 “[T]his project seizes on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to make its case at trial.”59

c) Prospects for adoption of pilot projects

It is not possible presently to forecast whether the pilot projects will be adopted or implemented. For one thing, the announced plan is for them to be done district court by district court, and getting support from all the judges in a given district may often prove to be difficult.

Perhaps one could gauge the prospects of success for the pilot projects in tandem with the prospects for success from the recent rule amendments. On the one hand, if the amendments actually eliminate wasteful discovery and prompt more vigorous judicial oversight of civil litigation, that development may make the need for undertakings like the pilot programs recede. On the other hand, the success of the amendment package might usher in a new judicial attitude that would make the adoption of pilot programs more attractive.

VI. Further Reforms for American Class Actions?

If discovery is the American litigation characteristic most reviled elsewhere, the American class action may rank second in that hierarchy. Indeed, as Professor Walker observed several years ago during a conference in Moscow: “US-style class actions have become a flashpoint for debate over group litigation and the collective redress regimes emerging around the world. Everyone wants to develop better ways for consumers and others who suffer loss from mass harms to receive compensation …. But everyone, at least outside the United States, seems also to agree that they do not want to adopt US-style class actions in their systems.”60

The “modern” American class action has now reached its 50th birthday – it was created by the 1966 amendments to Rule 23 of the Federal Rules. It seems that the

58 See id.
59 Id. at 449.
American rule makers were uncertain then about whether their new creation would become important, but it surely has. That explains in part the adverse reaction of the rest of the world.

Since 1966, class action developments (perhaps one can call them “reforms”) have come from three sources.

a) Case law

As amended in 1966, Rule 23 was a relative spare roadmap for handling class actions, and the courts had to fill in the interstices with decisional law. Initially, it seemed that the federal courts were sometimes too free with use of the device, and that freewheeling use of Rule 23 produced something of a backlash to curtail its use. During the 1980s and 1990s, the “new thing” in class action litigation was the mass tort class action, and in the late 1990s the Supreme Court put a damper on the use of this device.

Since 2010, the US Supreme Court has decided a substantial number of class-action cases. Although some might be called plaintiff-side victories, more often they favored defense-side views. In the words of one US district judge, the result was: “Going forward, the clear directive to plaintiffs seeking class certification - in any type of case - is that they will face a rigorous analysis by the federal courts, will not be afforded favorable presumptions from the pleadings or otherwise, and must be prepared to prove with facts - and by a preponderance of the evidence - their compliance with the requirements of Rule 23.”

Although some speculate that the death of Justice Antonin Scalia in early 2016 might change these “facts on the ground,” that is surely speculation at present.

61 For a review of these developments, see Arthur Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,” 92 Harv. L. Rev. 664 (1979).


63 For an introduction to several of these decisions, see Mary Kay Kane, The Supreme Court’s Recent Class Action Jurisprudence: Gazing into a Crystal Ball, 16 Lewis & Clark L. Rev. 1015 (2012).

b) Legislation

Rule 23 emerged from the rulemaking process, itself authorized by the Rules Enabling Act.\textsuperscript{65} Congress can change or countermand the work product of the rulemaking process, and sometimes it has. There has been one such episode affecting class actions, and another proposal is presently before Congress.

Class Action Fairness Act: Passed in 2005, this legislation expanded federal-court jurisdiction to include many more class actions asserting claims under state law.\textsuperscript{66} It also imposed some specific limitations on the procedures in class actions, such as requiring that state attorneys general be given notice of proposed settlements affecting the citizens of their states\textsuperscript{67} and placing limitations on "coupon settlements."\textsuperscript{68} The legislation was viewed by some as an effort to curtail the authority of state courts to authorize "nationwide" class actions, in part responding to indications that the rules process could not by itself deal effectively with such problems. This Act generated considerable concern and academic controversy.\textsuperscript{69}

Proposed Fairness in Class Action Litigation Act: In 2015, proposed legislation was introduced in the US House of Representatives that would limit class certification by providing: "No federal court shall certify any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives."\textsuperscript{70} The ABA has opposed this legislation on the ground that it "would severely limit the ability of victims who have suffered a legitimate harm to collectively seek justice in a class action lawsuit."\textsuperscript{71} The US Chamber of Commerce and various business entities have supported the legislation on the ground that it would "help stop the rampant abuse of the class actions procedures."\textsuperscript{72}

Such legislative efforts often raise issues about whether Congress should defer to the rulemaking process. Thus, the ABA also objected to this proposed legislation on the ground that it "would circumvent the time-proven process for amending the

\textsuperscript{65} 28 U.S.C. 2071-74.
\textsuperscript{66} See 28 U.S.C. 1332(d).
\textsuperscript{67} See 28 U.S.C. 1715.
\textsuperscript{68} See 28 U.S.C. 1712.
\textsuperscript{69} For extensive discussion of this statute, see Symposium, Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005, 156 U. Pa. L. Rev. 1439-2160 (2008).
\textsuperscript{70} H.R. 1927 2(a).
\textsuperscript{72} Letter dated Jan. 6, 2016, from US. Chamber Institute for Legal Reform and 14 other groups to the members of the US House of Representatives.
Federal Rules of Civil Procedure established by Congress in the Rules Enabling Act. 73

c) Rulemaking initiatives

Rulemaking has again focused on class actions. In 2011, the Advisory Committee on Civil Rules established a Rule 23 Subcommittee, which spent several years examining a variety of contemporary class-action issues. This outreach included attending meetings with about a dozen bar groups and convening a full-day conference on its own with participants from the bench and bar.

Eventually, the Committee developed a package of proposed rule amendments, largely focused on the process of reviewing proposed settlements of class actions. These include (1) expanded requirements for disclosures in support of such settlements before members of the class are notified of the settlement proposal; (2) more focused clarification of the criteria a court should employ in deciding whether to approve a proposed settlement and certify a class for that purpose; (3) clarification about what class members who object to a proposed settlement must provide the court in support of their objections; and (4) requiring class action objectors who object to a proposed settlement to obtain court approval before they can be paid for dropping their objections or appealing from the approval of the settlement. 74

Under the established schedule for such matters, this package will be subject to public comment from 15.08.2016 to 15.02.2017, and then the Advisory Committee will reflect on the public comment and determine whether to proceed with the changes to the rule. It is not possible at this time to predict what the Committee will then do.

VII. Concluding Projections

As in most countries, procedural reform in the US is an ongoing project. Although most countries may have a relatively unified method of developing procedural reforms, in the US there are multiple possible sources of change. The federal rule makers are a very important one, but hardly the only one. Congress and the Supreme Court can play an independent role, and have done so repeatedly in recent decades. And the courts of the various American states can break new ground on their own, because they are not limited by federal law in creating innovative procedural arrangements.

73 ABA letter, supra note 71.
74 See agenda book, supra note 47, at 96-107. In addition, the Committee has placed two issues "on hold" – pick-off offers by defendants seeking to moot a class action by paying the individual plaintiff the entire amount he or she would be able to recover, and the question of "ascertainability," dealing with how confident the court must be that it will be able to identify all the class members at the time it certifies the class.
Meanwhile, presidential politics will continue to heat up until the election in November, 2016, and the prospect is for more vitriol and polarization, perhaps within political parties as well as between them. Particularly against this backdrop, the rule-making process presents a contrast because it continues to incline toward consensus and gradualism. From the perspective of the rest of the world, that gradualism may appear to be unduly cautious and unlikely to bridge the gulf between the procedural reality in other nations and the US. But from the American perspective, measured gradualism has considerable advantages over abrupt changes in direction. Perhaps a major culture change is too much to expect from the 2015 rule amendments, but the increased emphasis on proportionality may nudge US discovery a little distance toward the operating reality of the rest of the world. Only time will tell.