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## Not Dead Yet

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## NOT DEAD YET

RICHARD MARCUS\*

Over thirty years ago, Jack Friedenthal proclaimed a “crisis” in federal rulemaking.<sup>1</sup> Starting about fifteen years ago, this same crisis attitude began to crop up from many sources. In 1988, Congress had intervened in the rulemaking process and made it more open.<sup>2</sup> By 1994, Charles Alan Wright spoke of a “malaise” of the federal rulemaking process and reported that he was “gloomier about the status of the rulemaking process than [he] had ever been.”<sup>3</sup> Professor Mullenix foresaw that the Advisory Committee on Civil Rules might go “the way of the French aristocracy.”<sup>4</sup> A few years later, Professor Walker found “the most serious challenge to the procedural status quo since the adoption of the original Federal Rules in 1938.”<sup>5</sup> Nine years ago, Professor Bone found that “today the court rulemaking model is under siege.”<sup>6</sup>

Although the crisis clamor seems fairly universal among academics, there is some dissonance about the nature of the crisis. Professor Geyh, who worked with the House Judiciary Committee during part of the period of reported crisis,

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\* Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law. This paper was the basis for my remarks at the Association of American Law Schools (AALS) Section of Civil Procedure session during the AALS Annual Meeting in New York City in January, 2008.

Since 1996, I have served as Special Reporter to the Advisory Committee on Civil Rules, and drew to some extent on this experience in preparing these remarks. But these views are mine and not presented on behalf of the Advisory Committee or anyone else.

This piece is significantly based on work that I have published elsewhere. See Richard L. Marcus, *Confessions of a Federal “Bureaucrat”*: *The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103 (2007) [hereinafter Marcus, *Confessions*]; Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L. Q. 901 (2002) [hereinafter Marcus, *Reform*]; Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) [hereinafter Marcus, *Of Babies*].

1. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 676 (1975).

2. See Judicial Improvements and Access to Justice Act, Pub. L. 100-702, § 407, 102 Stat. 4642, 4652 (1988) (codified as amended at 28 U.S.C. § 2073 (2000)); see also *infra* note 41 and accompanying text.

3. Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 9 (1994).

4. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

5. Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997).

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

wrote that there was “a startling transformation of the judiciary’s role” due to the more active role of Congress.<sup>7</sup> Professor Yeazell saw the problem as isolation of the rulemakers, who are now mostly judges, from the users of court services, the lawyers.<sup>8</sup>

The cause of the crisis also may be debated. Professor Geyh attributed it to the “Watergate mentality” of the last thirty years,<sup>9</sup> while Professor Bone thought that it resulted from “the rise of procedural skepticism during the 1970s.”<sup>10</sup> Professor Burbank noted that certain specific amendments—particularly the 1983 changes to Rule 11—created a “poisonous environment” for rulemaking.<sup>11</sup> Professor Resnik perceived a pervasive loss of faith in the whole project of adjudication.<sup>12</sup>

In sum, the topic on which we were invited to comment—federal rulemaking—comes surrounded with a great deal of negativity. As one who has been involved for over a decade in the persisting effort to accomplish things through federal rulemaking, I come before you with a simple message: it’s not dead yet. And I think it’s not about to die.

To support that view, I want to make four points. First, the Big Bang of the 1930s was unprecedented, and we will not see its like again. Second, much of the recent pessimism has resulted from academic dislike of certain constraints introduced in the last quarter century on the central Liberal Ethos of the 1930s revolution; and the result is often a case of the quest for the perfect drowning out the acceptance of the good. Third, the federal rulemaking activity has important structural advantages that will not go away. Finally, there is evidence—particularly the recent E-Discovery rulemaking episode—that shows the federal apparatus is not dead, either as an innovator or as a leader.

### *I. The Big Bang*

We have all been brought up on the notion that the procedural Big Bang happened in the 1930s with the adoption of the Federal Rules of Civil Procedure. As Professor Leubsdorf has pointed out in *The Myth of Civil Procedure Reform*, we may overestimate the significance of that event in terms

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7. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996).

8. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 231 (1998).

9. Geyh, *supra* note 7, at 1167.

10. Bone, *supra* note 6, at 891.

11. Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 227-28 (1997).

12. See generally Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

of changing the practices of courts and the experiences of litigants.<sup>13</sup>

But it is hard to overstate the applause this Big Bang has received from the highest echelon of legal academe. Professor Hazard called the Federal Rules “a major triumph of law reform.”<sup>14</sup> Professor Yeazell said that the Federal Rules “transformed civil litigation [and] . . . reshaped civil procedure,”<sup>15</sup> adding that the Rules were “surely the single most substantial procedural reform in U.S. history.”<sup>16</sup> Professor Shapiro opined that “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.”<sup>17</sup> Professor Resnik found that they even “became a means of transforming the modes of judging.”<sup>18</sup>

More than the Field Code managed in the mid-19th century, the Federal Rules swept the land. Most states adopted procedural codes modeled on the Federal Rules for their own court systems, often copying them virtually verbatim and retaining the same numbering.<sup>19</sup> The Federal Rules even cast a long shadow over those states which did not copy their provisions. California, for example, continues to operate under the Field Code that was originally adopted in 1872, but the application of those code provisions has shifted with the tide of the Federal Rules’ times.<sup>20</sup> Code pleading in California is probably

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13. See John Leubsdorf, *The Myth of Civil Procedure Reform*, in CIVIL JUSTICE IN CRISIS 53 (Adrian A. S. Zuckerman ed., 1999).

14. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989).

15. Yeazell, *supra* note 8, at 233.

16. *Id.* at 248.

17. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989).

18. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 934 (2000).

19. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (examining the widespread copying of the Federal Rules).

20. Although California remains a code state, its courts have adopted the same sort of liberal attitude towards the requirements of the code as the federal courts did after 1938 with regard to the Federal Rules. Thus, for example, we are told that “California’s discovery system is generally less restrictive than the federal courts.” WILLIAM R. SLOMANSON, CALIFORNIA CIVIL PROCEDURE 168 (3d ed. 2008). As the Supreme Court of California said in *Greyhound Corp. v. Superior Court*:

The foregoing code sections, although substantially adapted from the federal rules of discovery, are not copied verbatim therefrom. . . . The importance of those alterations is that almost without exception they were made for the express purpose of creating in California a system of discovery procedures less restrictive than then employed in the federal courts.

15 Cal. Rptr. 90, 98 (Cal. 1961).

less demanding than current practice in the federal courts.<sup>21</sup>

At the heart of this Big Bang was an attitude I have labelled the Liberal Ethos—that suits should be decided on their legal (substantive) merits and that procedure should be a Handmaid in that process.<sup>22</sup> The Handmaid notion was not a new idea in the 1930s. To the contrary, it lay at the heart of nineteenth century reform efforts in England.<sup>23</sup> But as Professor Subrin has pointed out, the Federal Rules pursued the central concept more vigorously and further,<sup>24</sup> particularly in accomplishing a revolution with the introduction of broad discovery.<sup>25</sup>

The combination of relaxed pleading, broad discovery, and deference to jury trial<sup>26</sup> created a procedural arrangement unknown in the rest of the world. Coupled with dramatic developments in American substantive law after World War II—particularly in tort law, but also in statutory enactments—the new

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21. Thus, in keeping with traditional code attitudes, CAL. CIV. PROC. CODE § 425.10(a)(1) (West 2004) requires that a complaint contain “[a] statement of the facts constituting the cause of action, in ordinary and concise language.” But the California courts do not enforce this fact pleading provision with the enthusiasm that was common a century ago. In *Reichert v. General Insurance Co.*, for example, the Supreme Court of California explained:

While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms.

442 P.2d 377, 387 (Cal. 1968). When I was a practicing lawyer in California in the 1970s, it was widely believed that defendants had more success challenging the sufficiency of complaints in federal courts than in state court. Certainly the U.S. Supreme Court’s recent decision in *Bell Atlantic Corp. v. Twombly* shows that the trend is not toward a more demanding attitude in federal court. 127 S. Ct. 1955 (2007); see *infra* text accompanying notes 54-58. For a discussion of the relationship between federal and California pleading requirements, see DAVID I. LEVINE, WILLIAM R. SLOMANSON & ROCHELLE J. SHAPELL, CALIFORNIA CIVIL PROCEDURE 137-53 (3d ed. 2008).

22. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439-40 (1986).

23. See Marcus, *Of Babies*, *supra* note \*, at 780-82 (describing the nineteenth century reform movement in England).

24. See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

25. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

26. We must not forget that for most of the mid-twentieth century the Supreme Court expanded the application of the Seventh Amendment right to jury trial. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 532 (1970) (holding that there is a right to a jury trial in a shareholder’s derivative action even though derivative actions were originally creatures of equity); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959) (holding that a district court may not sequence a trial so that “equitable” issues are tried first when that might foreclose resolution of those same issues by a jury).

American procedure produced a litigation juggernaut unknown elsewhere in the world. In part, this juggernaut responded to a peculiarly American desire for both comprehensive governmental protections from harm and American antagonism toward concentrated governmental power.<sup>27</sup> Whether or not one embraces the private attorney general notion, it became ingrained in a significant proportion of American litigation.

The key point of this familiar terrain for present purposes is that this sort of thing does not happen often. Indeed, it probably does not happen even twice a century. So anyone who wants to compare the present to our past is almost certain to conclude that the present comes up short. And that is a good thing. Those of us who spent our college years hearing applause for the idea of “continuous revolution” have (mostly) concluded in our more mature years that continuous revolution is more likely to be destructive than constructive.

## *II. Discontents of the Present: Academic Unhappiness with Recent Reform*

One reaction to the Big Bang would be that it put in place a new arrangement that should remain untouched, or at least untouched by rulemakers. Intelligent and informed observers continued into the 1980s to urge that the best thing to do would be to leave the Federal Rules alone.<sup>28</sup> Actually, the rulemakers continued to work on their innovations, and a number of changes were made during the 1940s. Indeed, when *Hickman v. Taylor*<sup>29</sup> was pending before the Supreme Court in 1947, the Court also had before it a proposal to amend the rules to provide for treatment of work product.<sup>30</sup> On that occasion, the Court acted by decision rather than by adopting a rule change.

Maybe it would have worked to leave the Federal Rules unamended and to rely on judicial interpretation to supply needed details and evolutionary

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27. See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 15 (2001):

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 political attitudes) that expects and demands comprehensive governmental protections from serious harm, injustice, and environmental dangers—and hence a powerful, activist government—and, second, a set of *governmental structures* that reflect mistrust of concentrated power and hence that limit and fragment political and governmental authority.

28. See Marcus, *Of Babies*, *supra* note \*, at 761 (reporting views of prominent Manhattan lawyer that “[t]he worst thing they ever did for civil litigation was to create a standing committee on the civil rules.”).

29. 329 U.S. 495 (1947).

30. See Richard L. Marcus, *The Story of Hickman: Preserving Adversarial Incentives While Embracing Broad Discovery*, in *CIVIL PROCEDURE STORIES* 307, 313-15 (Kevin M. Clermont ed., 2004).

development. For whatever reason, Chief Justice Warren discharged the Civil Rules Committee in the mid 1950s,<sup>31</sup> and Congress then insisted that there be a committee established to give continuous study to the rules and recommend changes.<sup>32</sup> The Advisory Committee, re-established in the 1960s, adopted changes to Rule 23 in 1966 that contributed to a new revolution—the class action juggernaut.<sup>33</sup> Interestingly, in doing so it arguably overstepped the bounds of its procedure-making authority as those are now conceived, but delicacy on that front was not prominent in the 1960s. As the 1960s closed, the discovery rules also received a makeover that removed whatever constraints had been included in the 1930s.<sup>34</sup>

By 1970, the rulemaking process had reached the apogee of the Liberal Ethos. Building on the foundation provided by relaxed pleading (implemented by the Court's decision in *Conley v. Gibson*<sup>35</sup> in 1957) and the discovery provisions that were further unleashed by the 1970 amendments and strengthened by the 1966 amendments to Rule 23, the new American procedural arrangement stood ready to provide—in synergy with innovations in American substantive law in areas such as products liability, employment discrimination, and environmental and consumer protections—a true litigation juggernaut. All of this met with general enthusiasm in the academy.

The American litigation arrangement was not received with enthusiasm in all quarters, however. One noteworthy quarter is the rest of the world. As Professor Subrin has noted, with respect to discovery, a common foreign reaction to American practices is—“Are we nuts?”<sup>36</sup> Many countries adopted blocking statutes to prevent American discovery from being done within their borders.<sup>37</sup> Although the American system had features that other countries

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31. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1006, at 37 (3d ed. 2002) (reporting that “on October 1, 1956, the Court entered an order discharging the Advisory Committee.”).

32. See *id.* § 1007, at 37-38 (describing reaction to the discharge of the Advisory Committee and passage of a statute that required the Judicial Conference to establish a body to study changes in procedural rules).

33. For discussion of the debates that attended the 1966 adoption of amendments to Rule 23, see John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking*, 24 MISS. C. L. REV. 323, 333-45 (2005). For a discussion of the reaction to the Rule 23 amendments in the courts, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979).

34. See generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998) [hereinafter Marcus, *Discovery Containment*] (chronicling the expansion of discovery to 1970).

35. 355 U.S. 41 (1957).

36. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

37. See Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century:*

found interesting, our jury trial—particularly when coupled with lax American rules on compensatory and, more pointedly, punitive damages—excited astonishment. Thus, when the American Law Institute undertook to design proposed Transnational Rules of Civil Procedure, it left out jury trial and broad discovery, and it consciously rejected relaxed pleading in favor of more stringent fact pleading.<sup>38</sup>

On the domestic front, there was a reaction also. I use the word “reaction” consciously, because the reaction can be described as “reactionary.” That, indeed, has been the commonplace academic reaction to this reaction. The domestic reaction was, not surprisingly, prominent among repeat defendants who felt overburdened by litigation. For any except those convinced that plaintiffs are, as a group, much more likely to advance legitimate positions than defendants, this fact should not be too troubling. Others were troubled, however. Chief Justice Burger and Attorney General Griffin Bell, for example, were prompted by such “defense” reactions to endorse constraints on discovery.<sup>39</sup>

There followed a number of bouts of rule reform—in 1980, 1983, 1993, 2000, 2003, and 2006. These reforms largely involved efforts to constrain or focus litigation based on experience under the wide-open 1970 version of the Federal Rules. At least some of the reforms—such as the 1983 amendment to Rule 11—were quite dubious. But for most, the reaction far outdid the actual change.

The recurrent tenor of academic commentary—as captured in the opening paragraphs of this essay—is disapproval. There seem to be at least two strands to that disapproval. The first might be called process-oriented. Many emphasize that the process of making procedural change has been “politicized.” Beyond a doubt, something of that sort has occurred. In the 1960s, the Reporter was told to keep what he was doing secret until the Advisory Committee was ready to announce proposed changes.<sup>40</sup> By the 1970s, that era

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*Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 153-54 (1999).

38. See AM. LAW INST./INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (Cambridge Univ. Press 2006).

39. See Marcus, *Discovery Containment*, *supra* note 34, at 752-55 (describing the 1976 Pound Conference assurances by Chief Justice Burger that revisions of the discovery rules would be considered, and the role of the Department of Justice, under Attorney General Bell’s leadership, in developing those changes).

40. See Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991):

I have been told by one of my predecessors [as Reporter of the U.S. Judicial Conference Advisory Committee on Civil Rules], the late Al Sacks, that he was instructed to keep his work entirely under wraps until the committee was prepared to make a recommendation. This practice reflected, of course, the



of secrecy was passing, and the 1988 legislation buried it entirely by requiring that Advisory Committee meetings be open and that there be advance notice of what would be discussed.<sup>41</sup> Beginning in the 1990s, the Advisory Committee convened conferences to solicit suggestions for rule changes and reactions to proposed amendments.<sup>42</sup> Throughout, opportunities for interested participants to know what the Committee is considering and to express views has increased.

Besides being what Congress insisted upon, this openness might be seen as a good thing. Indeed, “accountability” is a favored catch-word nowadays, so this process would appear to be desirable because it would provide additional accountability. Yet the process-based critique often seems to regard the “political” consequences of the shift to increased public access to rulemaking as bad. Frankly, it is difficult to credit the process-based criticism as a free-standing one. The basic objection is the second one—by and large, academics don’t like the changes that have been made during the period of openness.

It is beyond doubt that the rule changes that have been made since 1970 have mainly sought to constrain and contain the genie released by the Federal Rules and the changes made before 1970. For those who wholeheartedly embrace the Liberal Ethos, that is a retrograde direction for change. Yet all should appreciate that even the Liberal Ethos must recognize *some* limits; if one appreciates that any change is likely to improve the lot of some and weaken the position of others in this zero-sum game, that feature matters only for those who begin with the presumption that some groups—defendants or plaintiffs, for example—are to be preferred. The rules process does not begin with that presumption, and continues to resist purely self-interested arguments for change.<sup>43</sup>

To my mind, the most striking aspects of the objections to recent rule changes have been (1) that they often seem to focus on the wrong things, and (2) that they often misjudge the things on which they do focus.

Often the critics of rule-change packages focus on features that are less important than others they disregard. For example, in 1993 the proposal to introduce initial disclosure raised an unprecedented ruckus.<sup>44</sup> But by the time

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traditions of judicial institutions accustomed to keeping their adjudicative deliberations to themselves.

*Id.* at 164.

41. See 28 U.S.C. § 2073(c) (2000) (requiring that there be advance notice of meetings, that meetings be open to the public and that minutes of such meetings be maintained and open to the public as well).

42. See Marcus, *Reform*, *supra* note \*, at 917-19 for a discussion of this point.

43. See Carrington, *supra* note 40, at 165 (noting that self-interested arguments get a deaf ear).

44. See Marcus, *Of Babies*, *supra* note \*, at 805-10 (describing the controversy in 1991-93 about initial disclosure).

it was finally adopted, initial disclosure had been watered down and was subject to a local opt-out right that permitted individual districts to decide not to adopt disclosure. Frankly, it was not a big deal, even though it prompted a legislative effort to rescind the change that came within one vote of success. The big deal in 1993 was the package of expert disclosure and discovery provisions, which has had a major impact. Even now the Advisory Committee is studying ways to deal with, and perhaps to constrain, aspects of that discovery change. But there was hardly a peep about expert disclosure and discovery provisions between 1991 and 1993.

Somewhat similarly, between 1998 and 2000 the outcry about the package of discovery rule amendments focused on the minor revision to the scope provision of Rule 26(b)(1). As we have recently been told, this change “has been universally criticized by legal scholars.”<sup>45</sup> Outside the academic sphere, it was also severely attacked. A member of the Standing Committee labeled this change “revolutionary.”<sup>46</sup> Frankly, it seems that this was much ado about almost nothing. The Committee Note about the change emphasized that it was a minor revision.<sup>47</sup> A sensible reaction would be to say, “This is no big deal.” Certainly that is what experience has shown. Thus, Professor Rowe, who argued and voted against the change as a member of the Advisory Committee, soon found that it had made no demonstrable difference in decisions,<sup>48</sup> and federal judges continue to intone that discovery is extremely wide.<sup>49</sup> The big

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45. Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1186 (2005).

46. See Committee on Rules of Practice and Procedure, Minutes of Committee on Rules of Practice and Procedure, June 18 & 19, 1998, at 23, available at <http://www.uscourts.gov/rules/minutes/june1998.pdf>:

One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as “revolutionary.” He said that they would “throw out” the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions.

47. See FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2000 amendment (noting, “The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision.”).

48. See Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13 (2001).

49. See *Breon v. Coca-Cola Bottling Co.*, 232 F.R.D. 49, 52 (D. Conn. 2005) (“The definition of relevance continues to be liberally interpreted even after changes to Rule 26 in 2000.”); see also *Fisher v. Baltimore Life Ins. Co.*, 235 F.R.D. 617, 622 (N.D. W. Va. 2006) (saying that discovery rules are given a broad and liberal treatment); *Anton v. Prospect Café Milano, Inc.*, 233 F.R.D. 216, 218 (D. D.C. 2006) (saying that the term “relevance” is broadly construed).

deal in the 2000 amendments package was its handling of initial disclosure, which was recalibrated to be limited to information the disclosing party might use as evidence, and which was made nationally binding. Although that got the attention of district judges,<sup>50</sup> it received very little attention otherwise.

I have several reactions to these reactions to the rule-amendment experience of recent years. The first is that in this politicized environment almost everything is poisoned by suspicion; the most mundane of changes provoke strident over-reactions from those who suspect a malign hidden agenda.

The second reaction is more important: there has been no real retreat from the core views of the Liberal Ethos. To the contrary, the theme has been to preserve the basic structure but to constrain it somewhat. Arguably, the Alternative Dispute Resolution (ADR) movement of the 1980s could have introduced a new paradigm of conciliation that might have replaced the litigation-oriented Liberal Ethos, but it has not. To the contrary, (except for efforts to undercut class actions with arbitration clauses<sup>51</sup>) the ADR impulse has seemed to weaken in the last decade. Perhaps that is, in part, due to second thoughts among business litigants about the attractions of arbitration. But it would be hard to say that the ferocity of litigation has disappeared, or even abated. The judicial management movement, which has come under much criticism,<sup>52</sup> really looks more like a way to generate some control over the otherwise unfettered latitude of counsel.<sup>53</sup>

A third reaction is important as well: rule changes are not the only way that shifts in direction can occur. Rules are subject to interpretation and enforcement by courts. The most recent Supreme Court term emphasizes that such interpretation can change. For our purposes, the most notable decision is probably *Bell Atlantic Corp. v. Twombly*,<sup>54</sup> which appeared to jettison the statement in *Conley v. Gibson*<sup>55</sup> that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>56</sup> In *Bell Atlantic*, the Court declared that,

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50. See Marcus, *Reform*, *supra* note \*, at 915 (quoting apoplectic objections from judges).

51. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

52. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (arguing that more active judicial management of litigation creates threats to judicial impartiality without producing gains in efficiency).

53. See Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT'L & COMP. L. REV. 3 (2003).

54. 127 S. Ct. 1955 (2007).

55. 355 U.S. 41 (1957).

56. *Id.* at 45-46.

[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.<sup>57</sup>

In part, the Court said that it felt that being demanding about pleading requirements was warranted because of the prospect of broad discovery if the claim was not intercepted before that occurred.<sup>58</sup>

In a related vein, consider *Scott v. Harris*,<sup>59</sup> holding that summary judgment should be granted for the defendant in a suit by a motorist severely injured when police pursuing him rammed his car and caused a single-car accident. The Court's ruling was based on a videotape of the police pursuit that persuaded it that the defendants' decision to ram plaintiff's car was reasonable.<sup>60</sup> The Court found the chase was "a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."<sup>61</sup> Under these circumstances, the Court ruled, plaintiff's assertions that he was in full control of his vehicle did not present a genuine issue, and the Eleventh Circuit's decision affirming the denial of summary judgment for the defendant was wrong:

When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction.<sup>62</sup>

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57. 127 S. Ct. at 1969.

58. *See id.* at 1966-67.

59. 127 S. Ct. 1769 (2007).

60. *Id.* at 1775-76.

61. *Id.*

62. *Id.* at 1776. In dissent, Justice Stevens argued that "[t]his is hardly the stuff of Hollywood." *Id.* at 1783 (Stevens, J., dissenting). He elaborated:

Relying on a *de novo* review of a videotape of a portion of a nighttime chase on a lightly traveled road in Georgia where no pedestrians or other "bystanders" were present, buttressed by uninformed speculation about the possible consequences of discontinuing the chase, eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on

Thus, it may be that the Court will further broaden the authority of judges to intercept weak cases rather than leaving them to jury decision.

In sum, these two decisions underscore the extent to which the actual operation of rules—while heavily influenced by their content—is hardly entirely determined by their content. Particularly for those who might have urged that the Federal Rules not be touched and left to evolve under judicial interpretation,<sup>63</sup> there may be reason for caution. More generally, there is plenty of room for skepticism about politicized hot-button responses to relatively minor rule changes that don't significantly alter the fundamental Liberal Ethos of the rules.

A final reaction is that the academic response of the present seems almost entirely conservative, in the sense that it opposes all change as inimical to the Liberal Ethos. But if leaving the rules unchanged is not a full protection against such developments (as the Court's recent decisions suggest it may not be), it seems odd to use unhappiness with very minor amendments as a ground for losing faith in the rules process. Besides judicial action, the alternative, it must be remembered, is legislative action. Perhaps there are those who see the Private Securities Litigation Reform Act<sup>64</sup> (PSLRA) and the Class Action Fairness Act<sup>65</sup> (CAFA) as such signal improvements on what the Advisory Committee has done that they show the Committee's day has passed. But for

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Georgia roads than we are. The Court's justification for this unprecedented departure from our well-settled standard of review of factual determinations made by a district court and affirmed by a court of appeals is based on its mistaken view that the Court of Appeals' description of the facts was "blatantly contradicted by the record" and that respondent's version of the events was "so utterly discredited by the record that no reasonable jury could have believed him."

Rather than supporting the conclusion that what we see on the video "resembles a Hollywood-style car chase of the most frightening sort," the tape actually confirms, rather than contradicts, the lower court's appraisal of the factual questions at issue. More important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officers' decision to use deadly force to bring the chase to an end was reasonable.

*Id.* at 1781-82.

63. *See supra* text accompanying note 28.

64. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.) (revising pleading standards for securities fraud suits and imposing a discovery stay until plaintiffs have satisfied heightened pleading standards).

65. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (expanding federal-court jurisdiction to prevent plaintiffs from filing class actions in state courts that are allegedly unduly receptive to granting class-action status). *See also* Richard Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1756 (2008).

those who don't see the legislation that way, or who don't revel in the Court's handling of such issues under the current rules, perhaps another look at the existing rules apparatus is in order. At least the minor disappointments some rule changes have produced among academics should be balanced against the prospects of much more aggressive changes that could come from other sources. The adage that the perfect is the enemy of the good may apply here.

### *III. Reasons Why the Federal Rules Will Continue to Be Important*

Professor Oakley tells us, based on an updated review of state courts' adoption of the Federal Rules, that "the FRCP have lost credibility as avatars of procedural reform. Federal procedure is less influential in state courts today than at any time in the past quarter-century."<sup>66</sup> Professor Koppel assures us that "[t]he 'top-down' federal rules model for achieving inter-state uniformity has failed."<sup>67</sup> On top of the widespread academic criticism of the Federal Rules,<sup>68</sup> this erosion of the Rules' following among states may be a further example of the demise of the entire project.

I don't think the project is in its death throes. For one thing, as I will explain below, the Federal Rules have taken the lead on what has been, for the bar, the most prominent litigation topic of the last decade—E-Discovery. Besides the E-Discovery experience, I think there are at least three reasons why the Federal Rules process enjoys advantages that will make it continue to be the biggest game in town, even if it is not as big a game as it was in the past.

First, the federal courts are a nationwide court system, and there is a federal court in every state. No other rulemaking body (unless you count Congress) can control the procedure in courts of more than one state. True, the Conformity Act,<sup>69</sup> and the Process Acts before it, abjured this natural position of leadership by requiring federal courts to adopt some form of conformity with state practice.<sup>70</sup> But so long as the federal courts retain a basically consistent procedural system nationwide, there will be a natural tendency for that system to influence the way the states handle their procedure. As noted above,<sup>71</sup> in California the handling of pleadings under the code pleading statute has evolved to resemble the federal approach, even to exceed the federal approach in laxity.

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66. John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 355 (2003).

67. Koppel, *supra* note 45, at 1173.

68. See *supra* text accompanying notes 39-49.

69. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197.

70. See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1035-42 (1982) (describing experience under the Process Acts and the Conformity Act).

71. See *supra* note 21 and accompanying text.

In some surprising ways, federal procedure has continued to influence the California courts. Thus, a recent article in the legal press reported that CAFA<sup>72</sup> has affected California state judges: “Although the federal law doesn’t apply in state courts, legal experts say California Superior Court judges are following suit and using extra caution before approving coupon settlements.”<sup>73</sup>

This structural advantage will probably be increasingly reinforced by the growing nationalization of at least some forms of law practice. Indeed, the adoption of the Rules Enabling Act<sup>74</sup> was opposed in part on the ground that it would facilitate multistate practices by permitting lawyers from large firms in big cities to walk confidently into federal courts across the land.<sup>75</sup> Certainly “national” practices today have far eclipsed those of seventy years ago, and this development has reinforced the prominence of the procedures of the national court system.

Of course, the states may decline to follow the federal lead. California offers examples of that. Recently, the California Legislature was asked to adopt a class action bill that was said to modify California class action practice to resemble federal practice, and it was rejected.<sup>76</sup> Similarly, some time ago

72. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

73. Rebecca Beyer, *Coupon-Based Settlements Get Tougher*, L.A. DAILY J., May 29, 2007, at 1.

74. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2000)).

75. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2009 (1989). Professor Subrin quotes a West Virginia lawyer who opposed the adoption of the Rules Enabling Act, in part for the following reasons:

[A] firm in a great city may represent a railroad, or an industrial company doing business in many states[;] if the procedure in the Federal Courts is uniform this city firm can, itself, conduct the main parts of the litigation and reduce the local lawyers substantially to filing clerks and advisors on jurors. Uniformity, therefore, increases the influence and importance of the great city firm, having as its head, perhaps, some business man masquerading as a lawyer, with his partners of first and second magnitude, law clerks, process servers, runners, etc.; would correspondingly reduce local practice, local ability and local pride and drive the practice of law further on the downward road from a profession to a business. . . . Uniformity would further augment the importance of large aggregations of men and depress the individual.

*Id.* (citing Letter from Connor Hall to Editor, American Bar Association Journal (Oct. 15, 1926) (on file with Library of Congress, Legislative File 1913-1933)).

76. Assem. B. 1505, 2007-08 Leg., Reg. Sess. (Cal. 2007). This bill would have replaced CAL. CIV. PROC. CODE § 1781 (West 2004 & Supp. 2008) with a new provision and added several new sections to the CAL. CIV. PROC. CODE, including § 383 that tracked FED. R. CIV. P. 23. Gov. Schwarzenegger’s office wrote to the Legislature favoring passage of the bill, noting that because California’s class action statute dated from 1872 it “has largely been

California, by judicial decision, chose to follow the Supreme Court's *Celotex*<sup>77</sup> rule on the showing required of a moving party seeking summary judgment,<sup>78</sup> and the Legislature responded to the objections of plaintiffs' lawyers by amending the summary judgment statute to require at least seventy-five days notice of a motion, thus offsetting somewhat the reduced showing.<sup>79</sup> But if anything, these examples underscore the abiding leadership role of federal procedure.

Second, the federal courts have an institutionalized and highly expert rulemaking apparatus. The Administrative Office of the United States Courts has a Rules Committee Support Office with a professional staff of long experience and high expertise. Each of the five Advisory Committees has a Reporter who has long experience. The Standing Committee on Rules of Practice and Procedure provides leadership and direction. Together, these people have a powerful institutional memory, and increasingly the work product of this institutional activity is available online for any who want to use it. As academics, we know that the federal rulemaking experience has been the topic of many articles. There simply is no similar procedural rulemaking apparatus elsewhere in this country.

One feature of this apparatus that should be emphasized is that it is independent and relatively apolitical. True, it may be said to be more responsive to the judiciary than some would prefer. But the judiciary itself is an independent branch of government and, despite lobbying, the rulemaking process has not displayed anything like the sorts of partisan or otherwise political traits that one would find in Congress or a state legislature.

Third, the federal rulemaking apparatus has access to the Research Division of the Federal Judicial Center (FJC), a unique resource. Access to empirical information is central to effective rulemaking nowadays. Fifteen years ago, Professor Burbank called for a moratorium on further federal rulemaking pending development of an empirical component.<sup>80</sup> For a long time, and

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shaped through an ad hoc approach by court rulings." Letter from Brent J. Jarmisch, Deputy Director of Legislation, Governor's Office of Planning and Research, to Nancy Parra, Assemblywoman, California Assembly (May 4, 2007) (on file with author). In contrast, the bill "builds on the foundation laid in the federal rules." *Id.* On May 7, 2007, a committee of the California Assembly defeated the bill after it was opposed on the ground that it was "anti-consumer." See Cheryl Miller, *Lawmakers Reject New Class Action Rules*, RECORDER (S.F.), May 9, 2007, at 1, 5.

77. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

78. See *Union Bank v. L.A. County Super. Ct. (Demetry)*, 37 Cal. Rptr. 2d 653 (Cal. Ct. App. 1995) (adopting *Celotex*, 477 U.S. at 317, as the rule for California).

79. See CAL. CIV. PROC. CODE § 437c(a).

80. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841 (1993).



increasingly, the FJC has supplied the Advisory Committee with detailed and informative empirical information about the actual functioning of the federal court system.<sup>81</sup> In recent years, the existence of the Case Management/Electronic Court Filing (CM/ECF) system of electronic recordkeeping for the federal courts has meant that much of this research can be initiated online for virtually all federal courts. This facility has enabled the FJC to become even more precise and comprehensive, and therefore helpful to the Advisory Committee. Although some states may make similar efforts, and the National Center for State Courts attempts to develop empirical information, it is unlikely there will be another resource to compare to the FJC's abilities any time soon.

#### IV. A Recent Example—E-Discovery

I said that E-Discovery was the most prominent new issue in American litigation in the last decade. For many academics, that may seem surprising; most law professors have not attended closely to this topic. But lawyers have. Since 2000, there have been about two CLE events per week in this country about E-Discovery.<sup>82</sup> The sums spent on outside vendors of E-Discovery services have soared, and estimates have placed the figure for 2007 at \$2.8 billion.<sup>83</sup> Worries about the costs of this form of discovery and the risk of sanctions for loss of electronically stored information have fueled a new form of practice. Some law firms have E-Discovery departments and there is at least one law firm founded to deal only with E-Discovery issues.<sup>84</sup>

The federal rulemaking process has taken the lead in dealing with E-Discovery.<sup>85</sup> In 1996, the Advisory Committee on Civil Rules launched its Discovery Project, which was designed to survey and address problems with discovery. This effort led the Committee to convene conferences of lawyers to discuss discovery issues. The one new topic that emerged from these conferences was that discovery of electronically stored information was the “big

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81. See Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002).

82. See Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 11 & n.48 (2004) (describing FJC compilation of information on E-Discovery CLE events).

83. See Richard L. Marcus, *E-Discovery and Beyond: Toward Brave New World or 1984?*, 236 F.R.D. 598, 607 (2006).

84. See, e.g., Janet H. Kwun & Karen Wan, *High Stakes for Missteps in EDD*, N.J.L.J., Dec. 31, 2007, at E2 (asserting that “it is unclear to what extent e-discovery can be considered a specialized substantive expertise in the same vein as, for example, patent law”); Jake Wildman, *E-Discovery: Discovering a New Practice*, CALIF. LAWYER, July 2008, at 26 (reporting that some firms have established formal E-discovery practice groups).

85. More detail on the background on the Federal Rules development of a response to E-Discovery maybe found in Marcus, *supra* note 82, at 2-10.

new problem” that nobody had noticed yet. As of 1997, when these reports first began to surface, that was true. The Advisory Committee was not familiar with the problems, much less solutions, and nothing to deal with this form of discovery was included in the package of amendments that went forward in 1998.

Beginning in 2000, the Discovery Subcommittee of the Advisory Committee worked to acquaint itself with the issues raised by E-Discovery and their possible solutions. The Chair of that Subcommittee and I attended a leadership meeting of the ABA Section of Litigation and presided over an “open mike” session concerning E-Discovery issues. Many who buttonholed us during the meeting urged that rule amendments be adopted to emphasize to clients that discovery responses had to include electronically stored information. The Subcommittee enlisted the FJC to do research on the extent and nature of E-Discovery problems. Ken Withers—who had a unique command of these issues—joined the FJC around this time and contributed to its work. The Subcommittee also held two conferences to learn from lawyers (including representatives of lawyer organizations) and “techies” about these issues. The upshot at that time was that the nature of the problems was not clear, and the nature of appropriate rule responses was even less clear. Thus, although the discussion included a list of possible rule changes that might be helpful, no further action was taken.

Beginning in late 2002, the Committee returned its attention to E-Discovery. After reviewing responses to a letter inviting comment from lawyers around the country, the Subcommittee began an arduous drafting effort to try to distill plausible rule responses to these issues. Again, the FJC provided important assistance. After extensive review of these amendment ideas, the Committee convened a major conference on E-Discovery in February 2004 to discuss a range of issues.<sup>86</sup> Drafting on possible amendments began in earnest after that conference, leading to publication of a preliminary draft of proposed amendments in August 2004 and very extensive public comment and hearings through February 2005.<sup>87</sup> The summaries of the public comments and hearing testimony filled about 200 single-spaced pages. Using this input, the Committee returned to several key areas and revised the proposals that had been published for comment. The revised amendments were approved by the Judicial Conference, adopted by the U.S. Supreme Court, and went into effect on December 1, 2006.

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86. Transcriptions of most of the proceedings of this conference were published in the *Fordham Law Review*. See 73 *FORDHAM L. REV.* 23-152 (2004).

87. The sign-ups for the final hearing—in Washington, D.C., in February 2005—were so numerous that an extra half day had to be added to enable the Committee to hear from them all.

The point of this tale is that the multi-year federal effort has provided an unequalled basis for rulemaking. As a result, it has shaped proposed state-court responses. E-Discovery is not the sole preserve of the federal courts. To the contrary, it is increasingly true that business and institutional (and much personal) information is available only from electronic sources. Already, divorce lawyers are honing in on electronic sources for evidence,<sup>88</sup> and personal injury lawyers are likely to wake up to this source of information soon, not the least because medical records are increasingly maintained mainly or only in electronic form. For states, therefore, the same sorts of issues will be important.<sup>89</sup>

How then should the states approach those issues? One answer, of course, would be to follow the federal lead. And that is exactly what has happened in at least two extremely important efforts to design procedures for state courts to use in dealing with E-Discovery. First, the Conference of Chief Justices in 2006 promulgated Guidelines for state courts handling E-Discovery issues, which “should be considered along with the other resources cited in the attached bibliography including the newly revised provisions on discovery in the Federal Rules of Civil Procedure . . . .”<sup>90</sup> The Guidelines themselves repeatedly draw on federal sources. For example:

Guideline 1B, defining “accessible information” is “drawn [from] pending Federal Rule 26(b)(2)(B).”<sup>91</sup>

Guideline 2 on the responsibilities of counsel to be informed on E-Discovery issues “is drawn from the Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas” and also relies on Federal Rule 26(f).<sup>92</sup>

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88. See, e.g., John Simerman, *Lawyers Dig Into FasTrak Data*, OAKLAND TRIB., June 5, 2007, at 1 (describing subpoenas for electronic data on use of payment devices for use of bridges in the San Francisco Bay Area in marital litigation).

89. For example, the Conference of Chief Justices’ Guidelines for E-Discovery, discussed below in text, include the following observation:

Until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions. However, because of the near universal reliance on electronic records both by businesses and individuals, the frequency with which electronic discovery-related questions arise in state courts is increasing rapidly, in all manner of cases.

CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vi-vii (2006).

90. *Id.* at vii.

91. *Id.* at 1.

92. *Id.* at 2.

Guideline 3 on agreements by counsel combines the approaches of the Federal Rule 26(f)(3) and a standard adopted by the U.S. District Court for the District of Delaware.<sup>93</sup>

Guideline 4 on an initial discovery hearing “is derived from Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas.”<sup>94</sup>

Guideline 6 on form of production is based on Federal Rule 34(b).<sup>95</sup>

Guideline 7 on allocation of discovery costs is based on the analysis of a leading federal case.<sup>96</sup>

Guideline 10 on sanctions “closely tracks” Federal Rule 37(f).<sup>97</sup>

The foregoing enumeration does not list all the ways in which the Conference of Chief Justices’ work product builds on or follows the federal lead, but should suffice to make the point.

In 2007, the National Conference of Commissioners on Uniform State Laws (NCCUSL) developed draft Uniform Rules Relating to the Discovery of Electronically Stored Information.<sup>98</sup> The Prefatory Note acknowledges that the Federal Rules are the foundation for these draft Uniform Rules:

[T]his draft mirrors the spirit and direction of the recently adopted amendments to the Federal Rules of Civil Procedure. The Drafting Committee has freely adopted, often verbatim, language from both the Federal Rules and comments that it deemed valuable. The rules are modified, where necessary, to accommodate the varying state procedures and are presented in a form that permits their adoption as a discrete set of rules applicable to discovery of electronically stored information.<sup>99</sup>

The E-Discovery experience depended on and displayed the Federal Rules’ structural advantages. Because the Federal Rules apparatus engages in continuous study of issues affecting litigation nationwide, it may identify salient developments sooner than state courts do. Thus, it focused on E-Discovery more than a decade ago. Because the Federal Rules apparatus includes access

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93. *Id.* at 3.

94. *Id.* at 4.

95. *Id.* at 6.

96. *Id.* at 7 (citing *Zubulake v. UBS Warburg L.L.C.*, 216 F.R.D. 280 (S.D.N.Y. 2003)).

97. *Id.* at 11.

98. See NAT’L CONF. OF COMM’RS ON UNIFORM STATE LAWS, UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2007).

99. *Id.* at 2.

to the FJC, it was able to bring singular expertise to bear on these issues. Because “cutting edge” procedural problems often emerge in federal court, various federal courts were innovating to deal with E-Discovery and could lend that experience to the effort of designing Federal Rule amendments. Because the Federal Rules amendment process involves public comment from across the country, it benefitted from reactions from all parts of the country in refining the ultimate rule amendments. And because those amendments now apply in federal courts in every state, it makes sense for the states to deal with these new issues in a similar way. Both the Conference of Chief Justices and the NCCUSL work product seem to recognize those natural advantages of federal rulemaking.

#### *V. Conclusion—Not Dead Yet*

So the federal rulemaking effort is not dead yet. To the contrary, in the last decade it has provided key leadership in addressing the most prominent new litigation issue, E-Discovery. But the era of Big Bangs is probably past, and that is probably for the best; any who grew up in the Atomic Age should beware Big Bangs. Perhaps it is time, however, for carping academics to realize that the basic core of the Liberal Ethos has not been abandoned or undermined, and also to appreciate that other sources of rules for litigation are not necessarily more sympathetic to their plaintiff-friendly views. We will not have a Golden Age of rulemaking again, but we are not entering the Dark Ages either.