The Other Federal Rules of Civil Procedure

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I. INTRODUCTION

The Federal Rules of Civil Procedure have attracted much general analysis and comment since their adoption in 1938. However, the rich context of common law procedural rules that function in conjunction with the 1938 Rules to determine the actual function of the federal district courts has not yet received any systematic analysis and comment. Among these background rules are, for example, heightened pleading requirements, the burdens of production and persuasion, and the doctrine of res judicata. These Other Federal Rules of Civil Procedure Rules are the subject of this article. My thesis is straightforward: The Other Rules interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules and produce a functioning system which


2. I use the term “1938 Rules” to refer to the Federal Rules of Civil Procedure which became effective September 16, 1938, and remain in effect, as amended, today.


[The] ideas, values, and assumptions that characterized many of the reform movements of the early twentieth century, particularly their widely shared if somewhat varied commitments to science, expertise, efficiency, popular education, democratic government, the rights of labor, the limitation of corporate power, and the use of government to ameliorate the harsh consequences of industrialization.

Id. at 2; see also ALAN BRINKLEY, THE END OF REFORM 9 (1995) (describing progressives as believing “in the interconnectedness of society, and thus in the need to protect individuals, communities, and the government itself from excessive corporate power, the need to ensure the citizenry a basic level of substance and dignity, usually through some form of state intervention.”).
is not progressive in reality but conservative.\textsuperscript{4}

In Part II, I begin to defend my thesis by presenting a series of core illustrations comparing the content of the 1938 Rules with the content of The Other Rules. I begin with Rule 8, probably the most significant 1938 Rule, and describe Rule 8’s broad invitation to access the district court. The key provision is Rule 8(a)(2),\textsuperscript{5} which asks for only a “short and plain statement of the claim,” illustrated by a number of official forms,\textsuperscript{6} many only one sentence in length. In practice, federal courts almost never receive complaints with only one sentence (or even two or three sentences), suggesting, I argue, that judicial hostility to minimal pleading standards has been powerfully influential and has severely limited access. Thus, the effect of Rule 8 is countered by Other Rules governing access to federal courts.

Next, I discuss the proof-testing process as a second illustration. Rule 50 is the central feature of the proof-testing process and provides for judgment against a party if that “party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party with respect to that issue.”\textsuperscript{7} This controlling language and reference to a “reasonable jury” reveals nothing of the burden of production concept which actually determines outcomes under Rule 50 and which in practice almost always favors the status quo. Rule 56,\textsuperscript{8} the Summary Judgment rule, employs the same production burden standard with often decisive results, but Rule 56 makes no mention of the concept. Rule 38, Jury Trial of Right, provides that the right to jury trial “shall be preserved to the parties inviolate,”\textsuperscript{9} but does not describe the burden of persuasion which governs the jury’s function and determines the result in close cases, usually in favor of defendants.

Next, I offer the illustration of preclusion. The 1938 Rules speak of bringing litigation to an end only in vague terms. Rule 41, Dismissal of Action, creates a presumption for “adjudication on the merits,”\textsuperscript{10} an attractive concept to all. Yet serious common law

\textsuperscript{4} I use the term “conservative” simply as an antonym of “progressive.”
\textsuperscript{5} FED. R. CIV. P. 8(a)(2).
\textsuperscript{6} FED. R. CIV. P. App. Form 3-18.
\textsuperscript{7} FED. R. CIV. P. 50(a)(1).
\textsuperscript{8} FED. R. CIV. P. 56.
\textsuperscript{9} FED. R. CIV. P. 38(a).
\textsuperscript{10} FED. R. CIV. P. 41(a)(1); FED. R. CIV. P. 41(b).
preclusion effects flow from involuntary dismissal under Rule 41(b): claim preclusion and issue preclusion are presumed and can validate results that are obviously wrong, most often punishing mistakes by plaintiffs. Finally, I offer the possible counter illustration of discovery. Some might argue that Rules 26-37 offer proof of the progressive character of the 1938 Rules, but, I argue, this tendency is modest, at best. The discovery rules are available only after access to federal court, and any plaintiff advantage is limited by high cost.

In Part III, as background for further defense of my thesis, I briefly review the history of the 1938 Rules. I begin with then progressive Roscoe Pound’s famous 1906 speech to the American Bar Association (ABA) in which Pound argued that a crisis existed in American courts because of archaic procedures. I relate the conservative audience’s consternation with his indictment and, later, the ABA’s adoption of reform in service of conservative goals. I also recall the ultimate and surprising success of that effort when, in 1934, the Roosevelt administration broke with progressive opposition to the ABA proposal and supported passage of the Rules Enabling Act, which authorized the Supreme Court to prescribe civil rules for federal courts, and their eventual adoption in 1938. Finally, I describe the initial praise for the 1938 Rules as well as more recent expressions of disappointment by prominent commentators.

In Part IV, as additional background for defense of my thesis, I briefly review the broad history of the New Deal which was the primary historical context for the 1938 Rules. I begin with a description of the social crisis of the early 1930s, then describe the Roosevelt administration’s reaction to that crisis from 1933 to 1940. I then summarize the early and enthusiastic evaluation of the New Deal record as well as recent and persistent criticism that the rhetoric of the New Deal leaders was not, in fact, realized in action. In Part V, I complete the defense of my thesis by explaining how and why the Other Rules were left unchanged. I draw on both the history of the 1938 Rules and the New Deal to explain that the chain of events which led to adoption of the 1938 Rules mirrored a common pattern of New Deal practice of adopting and enacting earlier conservative proposals. The reason for this practice can be attributed to Roosevelt’s elite background and assumptions, suggesting that the failure to change the Other Rules reflected the elite background of the lawyers who drafted and reviewed the Rules.

Finally in Part VI, I state and apply my conclusion that, indeed, the combined 1938 and Other Rules were, in the beginning
and remain today, not progressive but conservative in effect. My ultimate objective is to encourage classroom and public debate about the relation between procedure and society.

II. THE 1938 RULES AND THE OTHER RULES COMPARED

I now begin to defend my thesis that the actual function of the 1938 Rules is severely modified by the effect of the Other Rules. My argument takes the form of three illustrations which compare the 1938 Rules with the Other Rules as both functioning at three key points in the trial process. I also discuss discovery as one possible counter illustration. I propose to show that, on balance, the 1938 Rules provide little more than a progressive gloss on common law procedure which is burdensome to plaintiffs and dangerously formalistic.

A. Access to Court

For the plaintiff, access is essential to success. Without access, no judicial remedy is possible. On the other hand, defendants typically find themselves ordered to court and unhappy to participate. In this simple way, access is almost always a concern only of plaintiffs. A progressive procedure would surely provide generous access.

1. The 1938 Rules

The 1938 Rules treat the access issue chiefly in Rule 8. Rule 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” a requirement


strikingly illustrated by Forms 3 through 9, the relevant parts of which are only one sentence in length. For example, Form 9 provides: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a vehicle against plaintiff who was then crossing said highway." The words "short and plain," coupled with the series of single-sentence examples suggests an open door for all "entitled to relief." Though Rule 8(a)(2) makes no explicit promise, surely implicit in the rule is a commitment that the federal courts will inquire about the problems of most plaintiffs.

2. The Other Rules

There is, however, much more to the story of access. In fact, very little progressive change was actually realized. Rule 8(a)(2) has not fostered widely available federal judicial inquiry. Instead, heightened pleading requirements which long predated the 1938

rest on these provisions about pleadings." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 470 (6th ed. 2002).


15. Id.

16. Rule 8(a)(1) poses a similar situation. It requires a "short and plain statement of the grounds upon which the court's jurisdiction depends." The "short and plain" language suggests that the requirement can be easily satisfied, though use of the word "depends" implies a modest degree of necessity. The casual reader might conclude, overall, that official inquiry is virtually certain, though a few formalities must be observed. Yet the federal courts have established common law rules requiring strict construction of federal jurisdictional statutes. See, e.g., Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978) (stating that expansion of diversity jurisdiction is justified by "neither the convenience of litigants nor consideration of judicial economy"); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959) (noting the traditional reluctance of the Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes). Also, Rule 8(a)(1) says nothing about justiciability requirements which guard access to federal courts. Standing, ripeness, and mootness are closely related doctrines that, taken together, severely limit access to federal courts. The standing doctrine requires that plaintiffs seeking federal court access have suffered injury in fact, that the injury be caused by the action of the defendant, and that redress of that injury can be accomplished by courts. The doctrine of ripeness requires that plaintiff's injury have already occurred or at least be imminent. Mootness requires that this approximate situation continue throughout the course of litigation. See generally, 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 3531-33 (2d ed. 1984) (discussing the standing, ripeness, and mootness doctrines as they relate to the power of the federal courts).
Rules effectively countered change. In a 1921 article, Walter Wheeler Cook quoted the New York Code’s requirement that a complaint contain a “statement of the facts.” Cook observed that:

These provisions at first sight seem simple, and probably the men who first drew them so believed. That the simplicity is not real, however, becomes clear when one reads the hundreds, not to say thousands, of decisions which have passed upon the question whether in a given case the pleader has “stated the facts” in an acceptable manner.  

The New York Code’s requirement of “statement of facts” was the direct descendent of the famous 1848 Field Code and a national model for reform. The literal language of Rule 8 separated the 1938 Rules from the older Code Pleading System by avoiding any use of the term “facts.” But, the heightened pleading requirements which had plagued the prior reform continued with only minor modification. Rule 8’s near elimination of any meaningful requirement that plaintiffs initially apprise the court of a basis for relief provoked judicial hostility from the very beginning. The forms were the focal point and their sufficiency was speedily rejected. In 1946, Rule 84 was amended to provide that the forms were sufficient. In 1952, the Ninth Circuit Judicial Conference

19. See, e.g., Washburn v. Moorman Mfg. Co., 25 F. Supp. 546, 546 (S.D. Cal. 1938) (“When the facts are simply and concisely stated in lucid fashion . . . the parties will be placed upon proof; otherwise the action fails.”).
20. See, e.g., id. at 546 (declaring insufficient a plaintiff’s complaint modeled directly upon one of the forms, stating that the forms were included “merely to indicate the simplicity and brevity of statement which the rules contemplate”); Employers’ Mut. Liab. Ins. Co. v. Blue Line Transfer Co., 2 F.R.D. 121, 123 (W.D. Mo. 1941) (rejecting a complaint despite acknowledging its “substantial compliance” with the forms because the “forms do not dispense with the necessity, as occasion may require, for a statement of certain details or particulars which would enable the defendant more readily to prepare and file a responsive pleading.”).
21. Fed. R. Civ. P. 84 (“The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.”).
adopted a resolution to amend Rule 8(a)(2) to include a requirement that "the statement shall contain the facts constituting a cause of action." The proposal was rejected by the rulemakers, but judicial hostility continued, often expressed in the identification of whole categories of cases requiring heightened pleading. Although defenders of the Rule had victories, one commentator recently labeled simplified federal pleading a "myth." Christopher Fairman wrote, "from antitrust to environmental litigation, conspiracy to copyright, substance specific areas of law are riddled with requirements of particularized fact-based pleading . . . Sometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine."


24. See Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 109 (S.D.N.Y. 1956) ("The modern 'notice' theory of pleading is not sufficient when employed in a complaint under the anti-trust laws."); Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968) ("To properly state a cause of action for conspiracy under the Civil Rights Acts, the plaintiff must satisfy two pleading requirements: (1) plaintiff must specify with 'at least some degree of particularity' the overt acts which defendants allegedly engaged in; (2) plaintiff must set forth facts showing a purposeful discrimination in the deprivation of constitutional rights."). See also Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring) ("Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal.").

25. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules."); Conley v. Gibson, 355 U.S. 41, 47 (1957) ("The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944) (holding a complaint, written in broken English, sufficient to satisfy Rule 8(a)(2) on the grounds that the complaint identified the transaction in question and a viable legal theory). But see Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984) (arguing that Conley v. Gibson "has never been taken literally.").

26. Christopher M. Fairman, The Myth of Notice Pleading, 45 ARIZ. L. REV. 987, 988 (2003); see also Marcus, supra note 13, at 433 ("Although they rarely
B. Testing the Proof of the Parties

The Anglo-American legal tradition requires parties to provide evidence in support of claims and defenses, conditioning the ultimate outcome of a case on the content of this proof. Quality control is enforced by a series of tests which litigants must meet or suffer loss. While both plaintiffs and defendants face these tests, plaintiffs typically confront many more tests than defendants.

1. The 1938 Rules

The 1938 Rules, which function at the key points of proof testing, say little about the process. The responsibilities and attendant risks are only hinted at in the exceedingly spare language which characterizes Rule 38, Rule 50, and Rule 56. I discuss these rules below in descending order of their potential importance.

a. Motion for Directed Verdict

The original version of Rule 50, then known as “Motion for a Directed Verdict,” and now called, “Judgment as a Matter of Law In Jury Trials,” was elliptical to the point of omitting any mention of proof testing.\(^{27}\) The text of the original version was devoted to peripheral issues, such as the effect of making the motion at a particular point in a trial, the effect of making the motion on the right to a jury, and the formal content of a motion. The current version of the Rule does state at least that a court “may grant a motion for judgment as a matter of law” under the rule.\(^{28}\)

b. Summary Judgment

Rule 56 was originally more informative than Rule 50. Rule 56 recognizes that a motion under the rule might determine the outcome of the case, but there is nothing else of apparent importance. Most of Rule 56 is, like Rule 50, devoted to peripheral


matters such as the effect of a partial grant of summary judgment, the format of evidence submitted under the rule, and the problem of proof not fully developed at the time of the motion. 29

c. Jury Trial

Rule 38, "Jury Trial of Right," provides, "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." 30 The rhetoric is impressive, but the Rule is redundant because the Seventh Amendment is merely affirmed. 31 There is little else in Rule 38. The remainder deals with the requirement that litigants must request a jury trial and the exclusion of "admiralty and maritime claims" from the scope of the Rule. 32 Repeating the pattern of Rules 50 and 56, there is no mention of any "testing" and attendant risks.

2. The Other Rules

The other Federal Rules do establish specific proof testing and chiefly determine actual practice. These rules incorporate risks which are systematically inimical to plaintiffs. Today they are often referred to as the "burden of production" and the "burden of persuasion." At times, both responsibilities have been called "the burden of proof," a practice first identified and discussed in 1890 by James B. Thayer, who established the basic conceptual framework used today. 33 Thayer wrote that in legal discussion the term burden of proof "is used in two ways: (1.) To indicate the duty of bringing forward argument or evidence in support of a proposition, whether at the beginning or later. (2.) To mark that of establishing a

29. FED. R. CIV. P. 56(c)-(g).
30. FED. R. CIV. P. 38(a).
31. The Federal Rules do not grant the right to jury trial in any situation in which it is not otherwise guaranteed. Rule 39 states that "trial of all issues so demanded shall be by jury, unless . . . the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States." FED. R. CIV. P. 39(a).
32. FED. R. CIV. P. 38(c)-(e).
33. See James B. Thayer, The Burden at Proof, 4 HARV. L. REV. 45 (1890) (outlining a brief history of the phrase and attempting to reason out a meaningful and useful definition).
proposition as against all counter-argument or evidence."

a. Burden of Production

The burden of production determines which cases will terminate before verdict. Risk of loss is assigned by substantive law and typically falls to the party seeking to upset the status quo, by definition, usually plaintiffs. Judgment as a matter of law typically follows from a failure to survive a production burden test. Thus, the apparently neutral and incomplete language of Rule 50 actually functions with the production burden to systematically protect the status quo.

Though not mentioned in Rule 56, the burden of production also largely controls summary judgment practice. Participation in

34. Id. at 48.

The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced. It is usually cast first upon the party who has pleaded the existence of the fact, but as we shall see, the burden may shift to the adversary when the pleader has discharged its initial duty. The burden of producing evidence is a critical mechanism in a jury trial, as it empowers the judge to decide the case without jury consideration when a party fails to sustain the burden.

Id. (footnote omitted).

36. The party bearing the burden of pleading a fact will generally bear the burden of production on that issue as well. Id. at § 337, 411. Since plaintiffs must plead all of the essential elements of their cause of action, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.15 (3d ed. 1999), they will generally bear the burden of production on each essential element.

[In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate
the summary judgment process is enforced by application of the burden of production test. A failure to participate and provide the court with a forecast of quality proof will usually result in an adverse judgment. Thus, the production burden’s systematic bias against plaintiffs extends to Rule 56.

b. Burden of Persuasion

Finally, the common law burden of persuasion dominates Rule 38 practice. Trial judges instruct the jurors to resolve close cases against the party assigned the persuasion burden, usually the same party assigned the production burden, the plaintiff. One standard instruction provides:

[Plaintiffs have] the burden in a civil action, such as this, to prove every essential element of [their] claim by a preponderance of the evidence. If [plaintiffs] should fail to establish any essential element of [their] claim by a preponderance of the evidence, you should find for [defendants] as to that claim . . . .

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decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Id.

38. Id. at 256.

The movant has the burden of showing that there is no genuine issue of fact . . . . Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.

Id.


“Establish by a preponderance of the evidence” means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

Id.
C. Closing the Dispute

My third illustration involves res judicata, the doctrine which embodies a common law preference for bringing an end to litigation. This preference can have harsh results, which block argument that Anglo-American civil courts function to determine truth, and instead suggests practical aims.

1. The 1938 Rules

The res judicata preference is invoked by Rule 41, but not discussed. Rule 41(b), "Involuntary Dismissal," provides that most dismissals operate "as an adjudication upon the merits." While the casual reader might applaud the rhetoric of Rule 41(b), the phrase invokes common law rules of preclusion, which chiefly obstruct future action by plaintiffs.

2. The Other Rules

The doctrine of res judicata has been widely accepted in common law countries for several centuries. Alan Vestal estimated that the doctrine has been followed by judges for some 350 years. Today, in the United States, the conventional terms for res judicata are "claim preclusion" and "issue preclusion." Both claim preclusion and issue preclusion can result from the granted Rule 41(b) motion. Claim preclusion broadly prevents related subsequent court action. Issue preclusion, more narrowly, prevents

41. The relevant portion of the rule reads:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Id.

42. Allan D. Vestal, Rationale of Preclusion, 9 St. Louis U. L.J. 29, 29 (1964).
43. Id. at 30.
45. See Restatement (Second) of Judgments, at introduction (1982)
relitigation of issues previously decided.\textsuperscript{46} The inaccuracy of the dismissal cannot be a basis for a second claim.\textsuperscript{47} Brainerd Currie wrote that "the first lesson one must learn on the subject of res judicata is that judicial findings must not be confused with absolute truth."\textsuperscript{48}

\textbf{D. Discovery}

The strongest counter-illustration to my thesis might be the detailed provision for depositions and discovery established by 1938 Rules 26-37. These rules establish, in multiple page provisions, techniques parties may use to collect relevant information from other parties, and expand on a formerly slight equity practice providing a practice unknown at common law. There is a common opinion that discovery in actual function generally favors plaintiffs. The discovery rules might show that the Advisory Committee sometimes writes functionally progressive rules, which might counteract the generally conservative effect of the Other Rules illustrated above. As to this argument, two observations might be helpful. First, the discovery rules are available to plaintiffs only after a civil action is properly commenced.\textsuperscript{49} Thus, the problem of access discussed earlier\textsuperscript{50} stands between plaintiffs and discovery in federal court. Also, the individual plaintiff or small business plaintiff may be faced with overwhelming discovery costs such that any advantage from Rules 26-37 will be blocked by the high cost of employing the process. Thus, the contrary effect of discovery rules is likely moderate and episodic.

\footnotesize{\textsuperscript{46} Id. at § 17.
\textsuperscript{47} Id. at § 17 cmt. a.
\textsuperscript{49} See 4 Charles Alan Wright \& Arthur R. Miller, \textit{Federal Practice and Procedure} § 1053 (3d ed. 2002) ("Under normal circumstances, neither party may initiate discovery prior to commencement of the action.").
\textsuperscript{50} See supra note 11 and accompanying text (discussing access as a concern of the plaintiff).}
III. THE 1938 RULES

As background for the further defense of my thesis, I begin by briefly recalling the history of the 1938 Rules. The story began with a call for progressive reform. This proposal was taken over, modified, and then supported by conservatives and finally adopted and enacted by New Dealers, despite then strong progressive opposition.

A. Crisis in 1906

The 1938 Rules project began on August 29, 1906 in St. Paul, Minnesota at the twenty-ninth annual meeting of the American Bar Association. The specific starting point was a speech, “The Causes of Popular Dissatisfaction with the Administration of Justice,” delivered by Roscoe Pound, the young, progressive dean of the University of Nebraska Law School. As his title suggests, Pound’s personal mission was to report “real and serious dissatisfaction with courts and lack of respect for law which exists in the United States today.” Pound limited himself to civil justice and proposed to determine the causes of this loss of popular support for courts. Although Pound recognized and discussed several causes in all, his analysis of “causes lying in our American judicial organization and procedure” marked the start of the 1938 Rules. Pound called problems of organization and procedure “the most efficient causes of dissatisfaction with the present administration of justice in America.” He labeled the American court system “archaic” with


54. Pound, supra note 52, at 396.

55. Pound, supra note 52, at 399.

56. Pound, supra note 52, at 397.

57. Pound, supra note 52, at 408.
procedure resulting in "[u]ncertainty, delay, and expense.""58 His criticism was general and not focused on federal courts.59 Pound’s oration provoked a stormy debate among conservative ABA delegates.60 They first objected to a proposal to print and distribute Pound’s speech and then objected to a proposal to refer the paper to a standing committee for further study.61 Ultimately, the immediate ABA response was to refer only the subject matter of the Pound speech for study.

B. Response to the Crisis

Pound’s address was, perhaps, the most famous call for American law reform of the twentieth century. But results were slow in coming. Despite the 1906 debate, in 1907 the ABA appointed a special committee to study Pound’s ideas, with Pound himself as a member, and by 1910 this committee asked for and received authority to develop a federal practice act.62 At the time, common law actions in federal courts followed local state procedure, creating obvious problems for lawyers engaged in a national practice. By 1911, an ABA goal of uniform federal procedure began to emerge, and in 1912 the ABA established a Committee on Uniform Judicial Procedure.63 At this time, and well into the New Deal period, the federal courts and, notably, the Supreme Court, were generally conservative in their judicial outlook and friendly to commercial interests, a natural concern for the ABA.64 Ten years later the ABA

58. Pound, supra note 52, at 408.
59. Pound did criticize federal diversity jurisdiction, long a progressive target. Pound, supra note 52, at 411.
60. See, e.g., Andrews, supra note 51, at 56 ("The fundamental idea which ran through that [Pound’s] paper was that the system of procedure as existing in the United States was archaic. I undertake to say, that, on the contrary, it is the most refined and scientific system of procedure ever designed by the writ of man."). Many years later three former presidents of the ABA described the ABA of 1906 as “essentially a gentlemen’s club of very prosperous lawyers.” THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 8 (A. Leo Levin & Russell R. Wheeler eds., 1979).
61. Supra note 51, at 355-65.
62. See Burbank, supra note 1, at 1045-94 (describing the ABA role).
63. Burbank, supra, note 1, at 1049-50.
64. See Purcell, supra note 3, at 14-15 ("By virtue of membership in the ‘national’ judiciary, federal judges seemed to feel a greater responsibility to protect national corporations and to guard against local pressures that might impinge on interstate commerce and the national market.").
included the unification of law and equity as an additional aspect of the plan. This addition was particularly significant because it indicated the likely character of rules which might result from the ABA efforts. At the time, equitable actions in federal courts followed federal equity rules, and these rules had been put to favorable use by conservative interests and were doubtless familiar to ABA members. Obviously, this suggested that any uniform unified rules would likely mirror federal equity rules. For the next decade, the Committee on Uniform Judicial Procedure urged Congress to pass legislation allowing the Supreme Court to prescribe a uniform federal procedure featuring the unification of law and equity. The Committee proposed several different bills to Congress, but none were adopted, largely because Senator Thomas J. Walsh, a progressive from Montana, blocked the ABA’s proposals. Walsh was suspicious of the proposed role for the conservative Supreme Court in the rule making process. Walsh also argued that lawyers who practiced in only one state—a vast majority—might be confused by uniform federal procedure different from local state law. Plainly defeated by Walsh, in 1933 the ABA Committee on Uniform Judicial Procedure disbanded.

Less than a year after the ABA accepted failure of its effort to promote a uniform federal procedure, Congress overwhelmingly approved legislation which directly led to the 1938 Rules. Senator Walsh was President Franklin D. Roosevelt’s choice in 1933 to be


66. The most famous example is Ex parte Young, 209 U.S. 123 (1907), where the Supreme Court recognized the authority of a federal trial court judge in Minnesota to grant a preliminary injunction forbidding the Attorney General of Minnesota from enforcing Minnesota legislation setting railroad freight and passenger rates. The Young case opened the door for conservative federal judges to limit progressive reform expressed in state legislation inimical to established corporate enterprises such as national railroads. See also David E. Lilienthal, The Federal Courts and State Regulation of Public Utilities, 43 HARV. L. REV. 379, 402-20 (1930) (providing a detailed comparison of federal equity procedures and state procedures for review of utility rate making and concluding that the federal procedure “is more effective from the point of view of the complaining utility”).

67. Burbank, supra note 1, at 1048-54.

68. Burbank, supra note 1, at 1063-65.

69. Burbank, supra note 1, at 1048-54.

70. Burbank, supra note 1, at 1048-54.

71. Burbank, supra note 1, at 1094-95.
Attorney General, but Walsh died before he could take office and Roosevelt instead chose Homer Cummings, a liberal Connecticut lawyer.\(^{72}\) On March 14, 1934, Cummings announced to the New York County Lawyers’ Association that he had recently asked Congressional leaders to authorize the Supreme Court to prescribe a uniform federal procedure.\(^{73}\) Perhaps most importantly he said, “I am authorized to say here tonight that this proposed reform also carries the endorsement of President Franklin D. Roosevelt.”\(^{74}\) Within three months the legislation Cummings had requested was enacted by Congress and signed by the President.\(^{75}\) The Rules Enabling Act of 1934 was virtually identical to the last proposal supported by the ABA.\(^{76}\)

At first, the Supreme Court, led by Chief Justice Charles Evan Hughes,\(^{77}\) moved slowly and did little more than ask the Justice Department for assistance in developing a uniform federal procedure. But, after a year of little progress, the Supreme Court changed course and appointed an Advisory Committee to do the work.\(^{78}\) The chairman of the committee was William D. Mitchell who had been Attorney General in the Hoover administration and Solicitor General during the Coolidge presidency. The reporter was Dean Charles Clark of Yale Law School. Clark had followed a family tradition into Republican politics and President Hoover had offered to nominate him to the Court of Appeals for the District of Columbia.\(^{79}\) In addition to Mitchell, there were eight other

\(^{72}\) Subrin, supra note 1, at 969.

\(^{73}\) SELECTED PAPERS OF HOMER CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES 1933-1939, at 182-84 (Carl Brent Swisher ed., 1939).

\(^{74}\) Id. at 184.

\(^{75}\) Ch. 651, 48 Stat. 1064 (1934); see also Subrin, supra note 1, at 970.

\(^{76}\) Burbank, supra note 1, at 1099.

\(^{77}\) Chief Justice Charles Evans Hughes was well known for his conservative reform efforts, a mission chiefly dedicated to employing the federal courts as an agent to block the progressive program. See Fish, supra note 65, at 123, 145 (arguing that both Hughes and his predecessor as Chief Justice, William Howard Taft, employed the rhetoric of progressive reform to render the federal judiciary “less responsive to popular impulses”).

\(^{78}\) Order Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935). The members of the Advisory Committee are conveniently listed and briefly described in Resnik, supra note 1, at 498 n.20, 499 n.24; see also Subrin, supra note 1, at 971-73 (providing an overview of the members’ background and ideology); Jeffrey W. Stempel, Politics and Sociology in Federal Civil Rulemaking: Errors of Scope, 52 ALA. L. REV. 529, 614-15 (2001) (same).

\(^{79}\) Elias Clark, Memories of My Father, in JUDGE CHARLES EDWARD CLARK
practicing lawyers, all engaged in business-oriented practice, and none likely to represent the interests of individuals or their lawyers. In addition to Clark, the Committee included four other academics, all senior faculty members at prominent law schools. On balance, it seems clear that a conservative Supreme Court chose a conservative Advisory Committee.

The Committee held its first meeting June 30, 1935 and submitted its final report to the Supreme Court on April 30, 1937. The Committee report was adopted by the Supreme Court with only minor changes, and the Court forwarded the proposed rules to Attorney General Cummings on December 20, 1937, and he forwarded them to Congress January 3, 1938. An ABA observer of this process wrote, “the Advisory Committee and the Court by no means chose the most advanced or radical rules which were offered to them.”

Congressional approval of the 1938 Rules (by inaction) was clearly not a foregone conclusion, at least to Charles Clark, who made his case for the new Rules in an article published in April

153, 157 (Peniaht Petuck ed., 1991). Clark changed parties during the mid-nineteen thirties. Later, he was nominated by President Roosevelt to the Second Circuit Court of Appeals, prompting his son to comment, “I don’t know my history well enough to assert it as a matter of fact, but he must hold quite a unique place in the annals as a nominee to high judicial office from successive presidents of different parties.” Id. at 159.

80. Subrin, supra note 1, at 972.
81. Subrin, supra note 1, at 971.
82. There can, of course be differences of opinion as to just how conservative the Committee in fact was, but Subrin seems correct as to the practitioner majority. “The firms that had partners on the Committee . . . represented leading banks, insurance companies, industries, railroads, and utilities in their communities and throughout the country . . . [T]here was no one on the Committee who was a spokesperson for the small firm, the small case, or the small client.” Subrin, supra note 1, at 972 (footnote omitted). Compare with Stempel, supra note 78, at 613-17 (arguing that the Committee was more diverse).
83. Burbank, supra note 1, at 1133 n.530.
85. 302 U.S. 783 (1938). Justice Louis D. Brandeis, alone, dissented. Brandeis did not write, nor did any Justice write to concur. Brandeis, as a progressive, had long opposed the plan to have the Court prescribe uniform rules. See Purcell, supra note 3, at 135.
1938. Clark, in his first paragraph, identified the danger that "a conservative bench and bar might pay too much attention to rules" of procedure unless those rules are "continually restricted to their proper and subordinate role." Continuing in that same paragraph, Clark proposed the Federal Rules of Civil Procedure as "a significant reform, involving the due subordination of civil procedure to the ends of substantive justice."

A few pages later, Dean Clark identified his cause with broad efforts to change the social order: "The trend of procedural rules towards undue rigidity is often at variance with a developing substantive law. New political and economic forces are likely to force new relationships between persons, and new governmental attempts to control such relationships, while the process of enforcement becomes ever slower and more cumbersome." Clark continued on a hopeful note, recognizing the same demands "for procedural reform which the political movements of the day show for social and economic reform."

Ultimately, Congress did not act to postpone or alter the proposed civil rules, and they became effective on September 16, 1938. The new rules were a slim body of procedural law, which today seem little more than a gloss on practice which existed before their effective date. To be sure, these rules were uniform and law and equity procedure were unified, but these two changes had little impact on the core conduct of trials and their results and chiefly affected the research work of lawyers.

89. Id.
90. Id.
91. Id. at 300.
92. Id. at 301.
94. This account parallels to some extent G. Edward White’s account of the early years of the American Law Institute. The American Law Institute and the Triumph of Modernist Jurisprudence, 15 LAW & HIST. REV. 1, 1-4 (1997). White, also describing events which took place during the 1930s, argues that the early restatement projects of the ALI can be seen, in part, as an effort to preserve established common law doctrine in the face of a perceived trend toward increasing uncertainty and complexity. Id.
C. Early Evaluation

Praise for the 1938 Rules began even before their effective date. One early commentator wrote, “History has never seen a greater cooperative effort of the bench and bar of a nation for the improvement of judicial procedure than that which we have witnessed in this country during the past three years.”\textsuperscript{95} Another commentator, writing two years after the effective date of the 1938 Rules, was even more effusive, stating “September 16, 1938 will long remain an outstanding date in the chronicles of Federal Jurisprudence. The far-reaching change in Federal civil procedure which was inaugurated in that day . . . completely revolutionized the mode of handling litigation in the Federal Courts.”\textsuperscript{96} After mentioning various aspects of the new rules, he concluded, “The objectives of the new procedure were attained to an extent far beyond the expectations and even the hopes of its most ardent advocates and champions.”\textsuperscript{97} Several years later a third commentator exceeded both of these earlier contributors, calling the new rules “one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law.”\textsuperscript{98} Ten years after adoption of the rules, Charles Clark wrote that “the universal chorus of approval is quite phenomenal.”\textsuperscript{99}

D. New Critics

For the next twenty-five years and more, the 1938 Rules continued to enjoy near iconic status, but some commentators in recent years have expressed significant disappointment.\textsuperscript{100} Perhaps most striking was an essay by John Leubsdorf, The Myth of Civil


\textsuperscript{97} Id.


\textsuperscript{100} I use the term “disappointment” recognizing that critics have stated a number of different objections, varied in detail and importance. Nevertheless, I use disappointment to denote a general negative assessment of the rules, clearly different from the earlier generally positive views.
Procedure Reform. Leubsdorf wrote, "Most lawyers in the United States emerge from law school in the grip of a myth." That myth, according to Leubsdorf, begins with an account of the horrors of common law pleading and moves on to recognize Jeremy Bentham as the torch-bearer of procedural reform. Next, the story relates how "over the opposition of greedy conservative lawyers" first the English and then Americans achieved reform, "which the Federal Rules of Civil Procedure of 1938 consummated." The problem is current, according to Leubsdorf: "Even today, many first-year law students find much of this story in their books or hear it in their civil procedure classes. Most teachers realize that it is an oversimplification, but it furnishes too useful an organizing perspective to discard." The result, according to Leubsdorf, is that "[t]he myth of past reform impedes present reform. If we believe that we have already emerged from darkness into light, we are less likely to seek further illumination." Leubsdorf candidly concluded his introduction: "How false is the myth? I do not know, and doubt that anyone else does either."

Judith Resnik, in her article Failing Faith: Adjudicatory Procedure in Decline, also expressed disappointment with the 1938 Rules. First, she noted that "many in the legal profession now criticize aspects of the rules and demand revision." Resnik wrote

101. Leubsdorf, supra note 1, at 53.
102. Leubsdorf, supra note 1, at 53. The term "quasi-estoppel" refers to a situation in which a party is prevented from asserting, to the disadvantage of another, a right that is inconsistent with a position previously taken by the party. Although Leubsdorf wrote only with respect to the effect of this myth on legal professionals, the impact might spill over on to the general public and result in cultural myths about the threat of civil actions. For example, during the 1980s there was general belief in a litigation explosion which was later shown to not have taken place. See Marc S. Galanter, The Day After the Litigation Explosion, 46 MD. L. REV. 3 passim (1986) (examining aspects of the current discourse about the increasing litigiousness of American Society). Recently, concern about a coming wave of obesity-related civil actions seems to ignore the fact that the most significant obesity suit yet was twice dismissed at the initial pleading stage. Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003); Pelman v McDonald's Corp., No. 02 Civ. 7821, 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 3, 2003).
103. Leubsdorf, supra note 1, at 53.
104. Leubsdorf, supra note 1, at 53.
105. Leubsdorf, supra note 1, at 53.
106. Leubsdorf, supra note 1, at 54.
108. Resnik, supra note 1, at 494.
that "[o]ne need neither endorse all of these criticisms nor accept the empirical validity of the descriptions upon which the criticisms are based to join in a call for review of the Federal Rules."\textsuperscript{109} She complained that "intended as an ample umbrella for federal litigation the Rules are silent about many issues of great saliency today."\textsuperscript{110} She also expressed concern about "the changing rhetoric about the Rules . . . . We have moved from arguments about the need to foster judicial decisions ‘on the merits’ by simplifying procedure to conversation about the desirability of limiting the use of courts in general and of the federal courts in particular."\textsuperscript{111} Unlike Leubsdorf, Resnik offered an explanation for her disappointment. She blamed "failing faith" in the very process of adjudication.\textsuperscript{112}

Stephen Subrin, in his article \textit{How Equity Conquered Common Law: The Federal Rules in Historical Perspective},\textsuperscript{113} also expressed disappointment. Like Resnik, Subrin first noted that "the Federal Rules and adjudication of civil disputes are under attack."\textsuperscript{114} He then expressed concern that "examination of the evolution of the Federal Rules reveals that rules of equity prevailed over common law," and suggested that "this conquest represents a major contributing factor to many of the most pressing problems in contemporary civil procedure."\textsuperscript{115} At a later point Subrin continued:

Aspects of common law procedure and thought, not equity, may be required to help deliver or vindicate rights, now that equity has opened a new rights frontier. Focusing on the historical currents that resulted in the Federal Rules will illustrate what an enormous distance was traveled, how one-sided the procedural choices became, and the problems implicit in those choices.\textsuperscript{116}

\textsuperscript{109} Resnik, \textit{supra} note 1, at 495.
\textsuperscript{110} Resnik, \textit{supra} note 1, at 496.
\textsuperscript{111} Resnik, \textit{supra} note 1, at 497.
\textsuperscript{112} Resnik, \textit{supra} note 1, at 494.
\textsuperscript{113} Subrin, \textit{supra} note 1, at 913.
\textsuperscript{114} Subrin, \textit{supra} note 1, at 911.
\textsuperscript{115} Subrin, \textit{supra} note 1, at 912. A narrower criticism has been offered. \textit{See} Carl Tobias, \textit{Public Law Litigation and the Federal Rules of Civil Procedure}, 74 Fest. Rev. 270, 270 (1989) (arguing that with respect to “public interest litigants, the federal judiciary has accorded them a mixed reception, particularly when applying the Federal Rules of Civil Procedure”).
\textsuperscript{116} Subrin, \textit{supra} note 1, at 913.
For Subrin, "[t]he cure for our uncontrolled system does not require the elimination of equity. It does require that we revisit our common law heritage." 117

IV. THE NEW DEAL

As additional background for defense of my thesis, I now turn briefly to the broad history of the New Deal, which encompassed the most important events of the 1938 Rules project. 118 The story is about the United States’ most serious domestic crisis and the efforts of President Franklin D. Roosevelt and his fellow New Dealers to save the nation.

A. The Situation in 1932

American society faced a dreadful crisis in 1932. Food was often in short supply, and there was evidence of starvation as well as suicide in the face of starvation. 119 Shelter was foreclosed or unavailable, and more than a million young men and women were on the move and homeless. 120 Two out of every five workers were out of a job 121 and wages in some areas had been halved. 122 Several dozen banks failed every week and the total was in the thousands. 123 National income was less than half what it had been in 1929 and net investment was minus $5.8 billion. 124 Although most of the population suffered passively, there were violent incidents focused on both private enterprise and government institutions. 125

117. Subrin, supra note 1, at 1002.
121. Edsforth, supra note 119, at 79.
122. Schlesinger, supra note 120, at 249.
124. Schlesinger, supra note 120, at 248.
125. See Badger, supra note 119, at 19-20 (discussing the worker militancy
B. Response to the Crisis

The person chosen by the American people to respond to this crisis was Franklin D. Roosevelt, elected President in 1932 and inaugurated in March, 1933. He won the election by employing a rhetoric that candidly recognized the existence of a crisis and proposed immediate reform. Roosevelt accepted the Democratic nomination in Chicago by promising “a new deal for the American people,” and during his campaign he urged renewed faith “in the forgotten man at the bottom of the economic pyramid.” Roosevelt identified himself with the progressive tradition, and repeatedly proposed that government must be an agent of change. His stated goal was a new era of progress and prosperity.

Roosevelt acted swiftly after taking office. He called a special session of Congress, and during the famous “Hundred Days” from March 9, to June 16, 1933, Congress enacted a tide of new programs. In March alone, Roosevelt received authority to control the banking industry, reduce the salary of government workers, and establish a Civilian Conservation Corps to provide jobs for thousands of young people. In April, the United States went off the gold standard in an effort to raise stock and commodity

that pervaded the coal and textile industries); see also ROBERT F. HIMMELBERG, THE GREAT DEPRESSION AND THE NEW DEAL 10 (2001) (noting the Bonus Expeditionary Force veterans’ encampment in Washington D.C. to demand payment of their wartime service bonus).

126. LEUCHTENBURG, supra note 120, at 18.


130. Franklin D. Roosevelt, Campaign Address at the Commonwealth Club (Sept. 23, 1932), in PUBLIC PAPERS, supra note 127, at 742, 754-55 (declaring that every man has a right to make a comfortable living and calling for the inauguration of an enlightened administration and formal government to apply restraint in industry and promote the public welfare).

131. See generally Hamby, supra note 123, at 126-29 (describing numerous programs and acts enacted during Congress’s special session).


prices.\textsuperscript{135} In May, Congress established the Federal Emergency Relief Administration to provide federal money to fund local relief efforts,\textsuperscript{136} passed the Agricultural Adjustment Act to pay farmers to reduce production,\textsuperscript{137} and created the Tennessee Valley Authority to encourage development along the Tennessee River and its tributaries.\textsuperscript{138} June brought the United States Employment Service to help people find jobs,\textsuperscript{139} The Home Owners' Loan Corporation to encourage home ownership,\textsuperscript{140} the Glass-Steagall Act to guarantee bank deposits,\textsuperscript{141} and the National Industrial Recovery Act to regulate competition for industry and labor rights for workers.\textsuperscript{142} In 1935 Roosevelt engineered a "Second Hundred Days," which yielded the Works Progress Administration to employ 3 million Americans,\textsuperscript{143} the National Labor Relations Act,\textsuperscript{144} and Social Security.\textsuperscript{145} The last phase of the New Deal from 1937 to 1940 was less eventful than the early years—partly because the enacted program—though helpful, had failed to produce dramatic progress.\textsuperscript{146} But, overall, the New Deal period of 1932-1940 yielded more rapid domestic policy changes than any time in American history, before or since.

\textbf{C. Early Evaluation}

The first reviews of the New Deal were enthusiastic. The leader was Arthur M. Schlesinger, Jr., and he was joined by Eric Goldman, James McGregor Burns, and others.\textsuperscript{147} Schlesinger credited Roosevelt and his associates with ending the social crisis of the 1930s and suggested they wrought "a whole new order of

\addcontentsline{toc}{section}{Notes and References}
\begin{enumerate}
\item\textsuperscript{135} LEUCHTENBERG, \textit{supra} note 120, at 50-51.
\item\textsuperscript{136} Federal Emergency Relief Act of 1933, ch. 30, 48 Stat. 55 (1933).
\item\textsuperscript{137} Ch. 25, 48 Stat. 31 (1933).
\item\textsuperscript{138} Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58 (1933).
\item\textsuperscript{139} Wagner-Peyser Act, ch. 49, 48 Stat. 113 (1933).
\item\textsuperscript{140} Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128 (1933).
\item\textsuperscript{141} Ch. 89, 48 Stat. 162 (1933).
\item\textsuperscript{142} Ch. 90, 48 Stat. 195 (1933).
\item\textsuperscript{143} Exec. Order No. 7034 (May 6, 1935).
\item\textsuperscript{144} Ch. 372, 49 Stat. 449 (1935).
\item\textsuperscript{145} Social Security Act, ch. 531, 49 Stat. 620 (1935).
\item\textsuperscript{146} Himmelburg, \textit{supra} note 125, at 17.
\item\textsuperscript{147} See generally Melvyn Dubofsky, \textit{Editor's Introduction, in The New Deal: Conflicting Interpretations and Shifting Perspectives} vii, viii (Melvyn Dubofsky ed., 1992) (articulating these historians' praise of Roosevelt for saving the United States from depression and totalitarianism).
things." 148 According to Schlesinger, a vast number of American citizens had received benefits delivered by the federal government. He wrote, with respect to the early New Deal, "Franklin Roosevelt's two years in the White House had done much to transform potentiality into actuality." 149 In his book, Rendezvous with Destiny, Eric Goldman described New Deal action as bringing relief "with the swiftness of a summer shower." 150 Goldman continued, "The technological wonders of a World's Fair no longer seemed ironical, and as families roamed around the exhibits, planning when they could buy a Mixmaster or a car with free wheeling, those who were up on the latest movies were whistling 'Who's Afraid of the Big Bad Wolf?'" 151 James McGregor Burns was more cautious, but credited Roosevelt with taking the role of "national father, of bipartisan leader, of President of all the people." 152

D. New Critics

Beginning in 1964 with the publication of William E. Leuchtenburg's book, Franklin D. Roosevelt and the New Deal, 153 and continuing to the present, Roosevelt and the New Deal have received increasingly negative assessments. 154 Leuchtenburg called the New Deal "a halfway revolution." 155 Healthcare was left unchanged, the chronically poor received little assistance, and the situation of African-Americans was little improved. He wrote:

The New Deal achieved a more just society by recognizing groups which had been largely unrepresented—staple farmers, industrial workers, particular ethnic groups, and the new intellectual—administrative class. Yet, this was still a halfway

149. Id. at 511.
150. ERIC F. GOLDMAN, RENDEZVOUS WITH DESTINY 342 (1952).
151. Id. at 343.
153. LEUCHTENBURG, supra note 120.
154. See generally Dubofsky, supra note 147, at viii (comparing Leuchtenburg's less admiring evaluation with earlier commentary and discussing its influence on 1960s revisionist historians).
155. LEUCHTENBURG, supra note 120, at 347.
revolution; it swelled the ranks of the bourgeoisie but
left many Americans—share croppers, slum dwellers,
most Negroes—outside the new equilibrium. 156

Leuchtenburg explained this result, in part, by the character
of Franklin Roosevelt. According to Leuchtenburg, “Roosevelt’s
sense of the land, of family, and of the community marked him as a
man with deeply ingrained conservative traits.” 157 Though
Leuchtenburg recognized that “[n]ot all of the changes that were
wrought were the result of Roosevelt’s own actions or of those of his
government,” 158 he returned to emphasize the importance of
Roosevelt. “Yet, however much significance one assigns the
‘objective situation,’ it is difficult to gainsay the importance of
Roosevelt.” 159

The Leuchtenburg view was extended by others who
concluded that the New Deal was a failure. 160 One example was
Howard Zinn who wrote, “What the New Deal did was to refurbish
middle-class America.” 161 He continued, “Through it all, the New
Dealers moved in an atmosphere thick with suggestions, but they
accepted only enough of these to get the traditional social
mechanism moving again, plus just enough more to give a taste of
what a truly far-reaching reconstruction might be.” 162 Zinn also

156. LEUCHTENBURG, supra note 120, at 347.
157. LEUCHTENBURG, supra note 120, at 336. See also CONRAD BLACK,
FRANKLIN DELANO ROOSEVELT: CHAMPION OF FREEDOM 1-44 (2003) (describing
his family and social background).
158. LEUCHTENBURG, supra note 120, at 337.
159. LEUCHTENBURG, supra note 120, at 337; see also PAUL K. CONKIN, THE
NEW DEAL 1 (Abraham S. Eisenstadt & John Hope Franklin eds., Harlan
Davidson, Inc. 3d ed. 1992) (“The New Deal was an exceedingly personal
enterprise. Its disparate programs were unified only by the personality of Franklin
D. Roosevelt. Every characterization, every evaluation of governmental
innovations from 1933 to 1938 terminates and often flounders in this
personality.”).
160. See DUBOFSKY, supra note 147, at viii (arguing that in the wake of
Leuchtenburg’s evaluation of the New Deal, “[A] reaction erupted among a
younger generation of scholars who saw far less to praise in Roosevelt and his
New Deal.”). Leuchtenburg’s views remain central to New Deal historical
analysis. See William H. Chafe, Introduction, in THE ACHIEVEMENT OF
AMERICAN LIBERALISM: THE NEW DEAL AND ITS LEGACIES xi, xv-xviii (William
H. Chafe ed., 2003) (describing how Leuchtenburg has framed New Deal
scholarship more than anyone else).
162. Id.
explained the New Deal shortfall with reference to Franklin Roosevelt. In the field of economic reform, “FDR’s ideas did not have enough clarity to avoid stumbling from one approach to another.” 163 Zinn continued, “His ideas on political leadership showed the same indecision, the same constriction of boundaries, as did his ideas about economic reform.” 164

Barton J. Bernstein not only labeled the New Deal a failure but also a “conservative achievement” curiously fostered by liberal politics. 165 For Bernstein, the New Deal served to protect business interests and engaged in only very limited redistribution. 166 He offered two prominent examples to support this argument. The first was Roosevelt’s handling of the banking crisis, an emergency so dire that, according to Bernstein, virtually any solution would have been approved by Congress. Nevertheless, Bernstein noted, “To save the system, Roosevelt relied upon a collaboration between bankers and Hoover’s Treasury officials to prepare legislation extending federal assistance to banking.” 167 Bernstein’s second example was Roosevelt’s support of the National Recovery Administration (NRA), which, Bernstein wrote, was based on a failed effort to limit competition. Roosevelt’s NRA revived the scheme and provided legal sanction for business-controlled price fixing in the form of “codes” developed by industry groups. “Placing effective power for code-writing in big business, NRA injured small business and contributed to the concentration of American industry.” 168 Bernstein explained, “Sensitive to public opinion and fearful of radicalism, Roosevelt acted from a mixture of motives that rendered his liberalism cautious and limited, his experimentalism narrow. Despite the flurry of activity, his government was more vigorous

163. Id. at 123.
164. Id. at 123-24.
166. See id. at 2, 6-8, 12-13.
167. Id. at 5. The banking crisis also attracted the attention of William Leuchtenburg who reported that members of Congress found Roosevelt’s proposed legislation “an exceptionally conservative document.” LEUCHTENBURG, supra note 120, at 43.
168. Bernstein, supra note 165, at 6. The NRA example is given similar and extended examination in RONALD RADOSh, THE MYTH OF THE NEW DEAL IN A NEW HISTORY OF LEVIATHAN: ESSAY ON THE RISE OF THE AMERICAN CORPORATE STATE 146 (Ronald Radosh & Murray N. Rothbard eds., 1972). Radosh concluded that the “NRA was conservative.” Id. at 171.
about means than goals, and the goals were more conservative than historians usually acknowledge.\textsuperscript{169}

V. EXPLANATIONS

I now complete the defense of my thesis by explaining how and why, in my view, the Other Rules were left unchanged. The accounts of both the 1938 Rules and the New Deal are essential. At an operational level, the two accounts provide considerable clarity. Barton Bernstein's banking and NRA examples suggest a recurring pattern of New Deal practice. Spurred by the urgency of crisis, the New Dealers often accepted available conservative reforms from earlier times and used Roosevelt's political popularity to make changes that progressives had previously defeated. The 1938 Rules project is yet another example of this pattern. Certainly, Pound's 1909 speech was progressive in character, but shortly after, the ABA leadership apparently realized that Pound's proposals actually presented an opportunity to enhance the interests of ABA members and their clients—provided Pound's ideas were applied to federal courts. Elite lawyers advancing the interests of national corporations would certainly benefit from a uniform federal procedure, a development that would match the uniform federal commercial law in these pre-	extit{Erie} days.\textsuperscript{170} The later addition of the law and equity joinder proposal was a step in the same direction because joinder of a national equity procedure with local common law procedure certainly suggested that the equity rules were likely to serve as a starting point for change. These same rules had proved very useful to national business interests.

The American Bar Association supported change in federal procedure, and, ironically in light of Pound's oration, progressives opposed the ABA plan. The progressives prevailed, and the ABA gave up the fight, leaving a record with carefully drafted legislation


and endorsements. At this point the New Dealers came to power, and Attorney General Homer Cummings was in a hurry, as were his New Deal colleagues, for action. By 1934, Cummings had already persuaded Congress to make major changes in federal criminal law, and he moved on to a civil law project—procedural reform.

Cummings adopted the ABA federal procedural proposal and acted to solve the political problems that had prevented earlier approval of an enabling act. Cummings was successful in a remarkably short period of time, a tribute to Roosevelt’s popularity, but the result suggests that Cummings may not have paid thoughtful attention to the substance of the legislation. The law was exactly the same as the most recent ABA proposal, with authority to write specific rules delegated to the then conservative Supreme Court. The Court appointed an Advisory Committee, President Hoover’s Attorney General was chairman, and led a conservative majority. The result was a set of proposed rules drawn from federal equity procedure and so terse that federal judges could continue much of their conservative practice.

Assuming that this account is accurate, one might ask why the rhetoric of the 1938 Rules is, at points, progressive. The simple answer is, I submit, the prospect of review by Congress. Progressive rhetoric might encourage acceptance by Congress because history made clear that opposition, if any, to the proposed federal rules would come from progressive members of Congress. If the rhetoric were attractive, given the complexity of the subject matter, the chances of success were high. Predictably, there was progressive

171. See discussion supra III.B (examining responses to the proposed changes for federal procedure).
172. See supra note 66 and accompanying text (discussing various proposals for changes in the Federal Rules).
173. See FEDERAL RULES OF CIVIL PROCEDURE, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. 20-21 (1938) (quoting Cummings as saying, “If you will permit me to say so, one of the reasons that I was able to secure the passage of that act was because I am something of a politician.”).
174. But see Richard J. Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 TEX. L. REV. 469, 482-83 (1985) (arguing with respect to legislative veto provisions that “[t]he same set of powerful institutional constraints that forced Congress to delegate a high proportion of its policy-making power to agencies—a crowded agenda, technically complicated and politically controversial issues, and competing demands for constituent service—also inhibited any attempt to engage in systematic and intensive review of agency policy decisions.”) (footnote omitted).
dissent in Congress,¹⁷⁵ and the views of Justice Brandeis and Senator Walsh were strongly recalled,¹⁷⁶ but Cummings prevailed.

With respect to why this sequence unfolded, Leuchtenberg, Zinn, and Bernstein all explain the ultimate conservative character of the New Deal as the result of the personality of Franklin D. Roosevelt. All three agree that Roosevelt’s instinctive acceptance of the American social structure, as he knew that structure, resulted in narrow boundaries for New Deal change. The Other Rules correspond, in the trial court setting, to the larger social structures that Roosevelt accepted without question. Both provide crucial context, the one for trial and result, the other for American social life itself. Whether Roosevelt paid any continuing attention to the 1938 Rules project is, so far as I can determine, unknown. Homer Cummings did, pointedly, announce that Roosevelt had approved the 1934 effort to begin the rules project, and surely the dramatic reversal of fortune experienced by the Rules Enabling Act proposal must be attributed to Franklin Roosevelt, not to Cummings. Also, Cummings and Roosevelt closely collaborated on another famous legal reform venture, the ill-fated Judicial Reorganization Act, intended to “pack” the Supreme Court.¹⁷⁷ The possibility that Roosevelt actually played a role in the 1938 Rules project is intriguing, but without more, cannot be established. Yet, following Leuchtenberg, “It is difficult to gainsay the importance of Roosevelt.”¹⁷⁸

But whether or not Franklin Roosevelt played a personal role in the 1938 Rules Project, the importance of Roosevelt in limiting the New Deal provides insight about the failure to modify the Other Rules. Michael Klarman has persuasively argued in his recent book¹⁷⁹ that “judicial decision making involves a combination of legal and political factors.”¹⁸⁰ He continued that “[b]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”¹⁸¹ But, Klarman cautioned, “The notion that the values of judges tend to reflect broader social mores

¹⁷⁵. 83 CONG. REC. 75 Cong. 3d Sess., 8473-83 (1938).
¹⁷⁶. Id.
¹⁷⁷. Black, supra note 157, at 404-05.
¹⁷⁸. LEUCHTENBURG, supra note 120, at 337.
¹⁷⁹. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004).
¹⁸⁰. Id. at 5.
¹⁸¹. Id.
requires qualification: Though judges live in a particular historical and cultural moment, they are not perfect mirrors of public opinion. Judges occupy an elite subculture, which is characterized by greater education and relative affluence.” 182 Application of Klarman’s observations to Roosevelt’s role in the New Deal plainly suggests another example of influence wielded by an elite subculture to determine national policy. Similarly, the story of the 1938 Rules suggests yet a third example of elite preferences at work. The failure to modify the Other Rules was the work of an elite subculture, which included the American Bar Association, the Supreme Court of the United States, and the Advisory Committee. 183 Thus Klarman’s argument that constitutional law sometimes reflects elite opinion of the time can be extended to civil rules made by members of essentially the same group. 184

VI. CONCLUSION

Appreciation of the Other Rules can lead to a more accurate account of the 1938 Rules. From the very beginning, the effective process instituted September 16, 1938 was conservative in effect. The slim text of the 1938 Rules was located in a traditional context, which was left unchanged and largely unmentioned by the rulemakers. This result was not inevitable since most of the Other Rules could have been included in an expanded version of the 1938

182. Id. at 6.

183. This observation assumes, of course, that the Advisory Committee and the Supreme Court might properly have modified the Other Rules in light of the Enabling Act’s restriction of authority to propose only rules relating to “procedure,” and not “substance.” The exact scope of this authority, as understood before 1938 is uncertain because the legislative history of the Enabling Act is sparse and there was no relevant judicial precedent. The Advisory Committee apparently never developed a general view concerning authority to propose civil rules. See Burbank, supra note 1, at 1132-37 (explaining that none of the published materials of the Advisory Committee suggest that the Committee agreed upon the limitations of the Rules Enabling Act).

184. See White, supra note 94, at 3 (“The composition of the [American Law] Institute, the selection process for its members, the self-conscious links forged in that process between elite law faculties, elite practitioners, and judges, and the identification of the Institute with a project to reshape the common law were efforts to clarify and to reinforce status criteria and status distinctions within the legal profession.”).
Rules, and modified as desired. But this modification did not take place, perhaps because Franklin Roosevelt’s New Deal mission was to restore traditional American society, not to replace it with something new, and probably because the elite group of lawyers who produced the rules likewise did not seek radical change.

If this conclusion is correct, one might ask whether radical procedural change is ever possible? My answer is, yes, provided the process of making rules is shifted from judicial to legislative supervision. The early progressives repeatedly expressed a preference for legislative, as opposed to judicial, policy making as the forum most likely to produce popular change. In 1908 Roscoe Pound wrote:

Formerly it was argued that common law was superior to legislation because it was customary and rested on the consent of the governed. Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular reform. We recognize that legislation is the more truly democratic form of lawmaking.

The result of the 1938 Rules Project suggests that the progressives’ fear of judicial policy making was well founded, suggesting that a legislative forum provides the only opportunity for radical change. Anyone seeking progressive federal rule reform might well first argue that Congress should take back full control of the process.

My answer to John Leubsdorf’s question is clear: The myth of civil procedure reform is false, at least the part about the 1938 Rules. If, as Leubsdorf argues, the myth of past reform impedes present reform, my conclusion suggests that current reform can now be planned free of any illusion that progressive reform was achieved in the 1938 Rules. Moreover, the historical accounts above

185. The possibility of radical change in civil justice is documented in JOHN N. HAZZARD, SETTLING DISPUTES IN SOVIET SOCIETY: THE FORMATIVE YEARS OF LEGAL INSTITUTIONS 396-435 (1960).


187. I express no opinion here or elsewhere about the normative objective of procedural change. This important question has to date received insufficient discussion and analysis.

188. LEUBSDORF, supra note 1, at 54.
and my conclusion strongly support Leubsdorf’s ultimate conclusion that “[t]he most firmly implanted myth of procedural reform may be that we can talk about it as simply an effort to increase judicial efficiency, without talking about our visions of procedural and social justice.”\textsuperscript{189} The current influence of the Other Rules and their effect on the 1938 Rules is largely the result of failure to adequately discuss these visions before and during the rulemaking process. Indeed, this debate should begin in the law school classroom if the myths are to be overcome. Outside the professional setting, my answer to Leubsdorf’s question might serve to dispel cultural myths about the threat of civil litigation.\textsuperscript{190} Judith Resnik’s observation that the 1938 Rules are silent on many subjects seems quite accurate, but incomplete. She does not propose, as I do, that these gaps were filled by the Other Rules, which rendered the functioning system conservative in character. Resnik also noted that rhetoric about the Rules has shifted from better use of the federal system to avoidance of the model altogether. Perhaps a spreading, but unarticulated, perception that the promise of progressive change is at odds with the reality of function has shifted discussion to avoidance.\textsuperscript{191} My general conclusion articulates and supports this perception and thus offers an insight about the interest in avoidance.

Stephen Subrin’s conclusion that the 1938 Rules were a triumph of equity over common law procedure seems correct in the sense that the 1938 Rules were largely drawn from the then existing Equity Rules of 1912.\textsuperscript{192} However, his further assumption that this decision excluded common law influence is contrary to my view that the Other Rules, all common law in origin, continued in effect. My opinion derives logically from the fact the 1938 Rules both prescribed a uniform federal procedure and unified law and equity in a single “civil action.” Although the prescribed uniform rules were drawn largely from equity, the unification of law and equity necessarily brought forward common law procedure, which was neither excluded by the prescribed rules nor otherwise suppressed. The materials in Part III above show that these common law rules do survive. This analysis suggests that Subrin’s disappointment with

\textsuperscript{189} LEUBSDORF, supra note 1, at 67.
\textsuperscript{190} See supra note 102 and accompanying text (discussing a current popular belief in the problematic expansion of litigation).
\textsuperscript{191} Resnik, supra note 1, at 457.
\textsuperscript{192} Subrin, supra note 1, at 986.
the current function of the 1938 Rules might stem, in fact, from the presence rather than absence of an important common law component, the Other Federal Rules of Civil Procedure.