A Comprehensive Reform for Federal Civil Rulemaking

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Introduction

Controversy about federal civil rulemaking has reached unprecedented levels. The dispute is centered both on the epic problems of sanctions under Rule 11 and the proposal to add a duty of

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disclosure to the traditional discovery provisions of Rule 26. Most significant, the debate encompasses fundamental questions about the viability of the current scheme of federal civil rulemaking. Congress delegated the task of rulemaking to the Supreme Court in 1934 and added a role for the Judicial Conference in 1958, but an Advisory Committee on Civil Rules, dominated by federal judges, exercises vast discretion over rulemaking. In practice, the Advisory Committee determines policy. The future of this design, however, is in doubt.

The original Rule 11 required that at least one attorney of record (or an unrepresented party) sign every pleading, and provided that the signature of an attorney (but not a party) on a pleading certified "that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." The sanctions that the rule provided for violation were striking pleadings and, for attorneys, "appropriate disciplinary action." The rule remained in this form until 1983, when it was substantially

(Supp. 1991) (listing 31 law review articles that criticize amended Rule 11 and the sanctions resulting from it); id. at F3-F35 (listing general law review articles related to Rule 11 and sanctions resulting from amended Rule 11).


4. Seeinfra text accompanying notes 79-87.

5. See infra text accompanying notes 71-110.

6. See infra text accompanying notes 79-87.
amended.\textsuperscript{9} The changes extended the coverage of the rule,\textsuperscript{10} tightened the certification provision,\textsuperscript{11} and most important, added a strong sanction provision which applied to both parties and attorneys. The sanction provision specified that a sanction “may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney’s fee.”\textsuperscript{12}

The 1983 amendment transformed Rule 11 into a fountain of litigation and criticism. During the first two years under the new version of Rule 11, there were 233 reported district court cases involving sanctions,\textsuperscript{13} and by 1989 there were approximately 1000 reported opinions involving sanctions and probably thousands more not reported.\textsuperscript{14} One critic described this development thus: “Welcome to the new ‘Era of Sanctions,’ where the main question before the federal courts may soon shift from ‘are you right?’ to ‘are you sanctionable?’”\textsuperscript{15}

The Advisory Committee’s note explaining the 1983 change\textsuperscript{16} contains no description of alternatives, and no references to empirical research.\textsuperscript{17} According to Professor Steven Burbank,

\begin{quote}
[T]he amended rule was avowedly an experiment. The Advisory Committee knew little about experience under the original rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the benefits and cost of sanctions as a case management device.\textsuperscript{18}
\end{quote}

A major proposed revision of Rule 11 has been approved by the
Judicial Conference which agreed to transmit the revision\(^\text{19}\) to the Supreme Court for review.\(^\text{20}\)

Controversy has also centered around recent proposals by the Advisory Committee to change civil-discovery practice drastically by establishing a duty to disclose by parties shortly after suit is commenced.\(^\text{21}\) The version the committee circulated for comment created a duty to provide to other parties, without discovery requests, a broad range of information which "bears significantly on any claim or defense."\(^\text{22}\) During the development of this proposal, Professor Linda Mullenix learned about similar disclosure practices required by local rules in a few district courts and did a preliminary telephone sampling of views about the requirements.\(^\text{23}\) As she later reported,

[T]here is virtually no empirical study of the current practice of such informal discovery, the efficacy of such experiences, or the result of informal discovery. There also is no literature describing the types of cases in which lawyers elect to use informal discovery, whether the attorney discusses this choice with the client, or the extent to which opposing counsel cooperates. There are no analyses of the use of these methods and the relative ease in obtaining information needed for adequate trial preparation. There has been neither empirical research assessing the efficiency and cost savings achieved through informal discovery methods, nor any assessment of attorney and client satisfaction with informal discovery.\(^\text{24}\)

According to Mullenix, her informal, preliminary survey discovered problems "well worth additional investigation and thought before the Advisory Committee promulgates a new, universal informal discovery rule that would apply to every civil case in federal court."\(^\text{25}\)

The Advisory Committee did not undertake further investigation\(^\text{26}\) and, instead, approved the change for publication and comment.\(^\text{27}\) The proposal was then vigorously criticized: Nearly 200 individuals and organizations offered opinions on the disclosure amendment, and all but a handful were negative.\(^\text{28}\) One critic reportedly argued that the proposed change would effectively end


\(^{20}\) Id.

\(^{21}\) See Mandatory Pretrial Disclosure, supra note 2.


\(^{23}\) See Mullenix, supra note 2, at 808. During this time, Professor Mullenix served as a Judicial Fellow at the Federal Judicial Center. Id. at 795.

\(^{24}\) Id. at 810 (footnote omitted).

\(^{25}\) Id. at 820.

\(^{26}\) Id. at 808 (stating that Mullenix presented her research to the Advisory Committee); id. at 816 n.114 ("The author reported these preliminary comments and suggested that further study be undertaken . . . The Committee declined the suggestion for further study of practice under the local rules.")

\(^{27}\) See id. at 816 n.114.

\(^{28}\) See Mandatory Pretrial Disclosure, supra note 2.
public-interest litigation \(^{29}\) and another stated that the proposal required mind reading by attorneys.\(^{30}\) Yet, after the comment period, the Advisory Committee voted, with only one dissent, to go ahead with the basic change.\(^{31}\) The proposed disclosure addition to Rule 26 has also been approved by the Judicial Conference which also agreed to transmit the addition to the Supreme Court for review.\(^{32}\)

The most important aspect of both the 1983 revision of Rule 11 and the proposal of a Rule 26 disclosure requirement is the striking illustration that both the revision and the proposal offer of the vast discretion exercised by the Advisory Committee. The Committee evidently had very little reliable information about the likely effects of the changes, which, in turn, suggests that the decisions were made chiefly on the basis of personal experience, opinion, and intuition. I cannot say that these decisions were made on the basis of speculation, but I can state with certainty that the structure of the committee at the time of both changes would have permitted speculation or virtually any other basis for action. In familiar policymaking terms, the Committee’s power of free decision can be described as “discretion,” and it is virtually complete in this situation. Although the 1983 amendment and the disclosure proposal were published and the public was given an opportunity for comment prior to adoption by the Committee,\(^{33}\) this opportunity means little. The decision process after the participation phase is virtually free of all constraints.

The furor over current Rule 11 sanctions and Rule 26 disclosure threatens judicial control of civil rulemaking, and the expertise of federal judges may be lost as a major asset in this process. The debate about the merits of judicial rulemaking is an old one,\(^{34}\) and I will not rehearse it, except to say that, in my view, the merits of judicial rulemaking far outweigh the demerits, largely because trial

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30. Id. Although Pelham reported that the committee had decided not to go forward with the proposed amendment, the committee later adopted a slightly revised amendment. See infra text accompanying note 31.
31. Randall Samborn, Defying Prediction, Advisory Panel Keeps Mandatory Disclosure Proposal, Daily Rep. for Executives (BNA) No. 78, at A-1 (Apr. 22, 1992); Samborn, supra note 2, at 12 (“[T]he committee nearly unanimously agreed to requirements somewhat narrower than those in the published draft. The panel finally settled on requiring disclosure of ‘discoverable information relevant to disputed facts alleged with particularity in the pleadings.’”).
32. See Preliminary Report, supra note 19, at 8.
33. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE at vii (1983) [hereinafter 1983 PRELIMINARY DRAFT] (presenting proposed amendments and inviting written comment); see also 1991 PRELIMINARY DRAFT, supra note 22, at vii (same for 1991 amendments).
and appellate judges typically bring great expertise to the task. In the specific case of civil rulemaking, trial judges participate in far more trials than attorneys, and appellate judges review these same trials for error. This expertise is a sound starting point for the task of rulemaking. The chief alternative is legislative rulemaking, an alternative that diminishes the pertinent knowledge of the rulemaker. At best, the initial work might be done by legislators who are also attorneys, but enactment would almost certainly be left to a majority of legislators with no expertise at all. Executive participation in rulemaking has essentially the same shortcoming: Judicial expertise will be diminished or lost as an asset. By passing the Rules Enabling Act of 1934, Congress correctly determined that judicial expertise should be the foundation of civil rulemaking in federal courts.

Yet, it is clear that the foundation of judicial expertise is not inevitable, because Congress has the constitutional authority to make court rules and may revoke delegation of that authority to the Supreme Court and the Judicial Conference; the Court itself has consistently referred to its rulemaking authority as delegated from the Congress. This constitutional doctrine has current importance, because some commentators have plausibly predicted that Congress may preempt the judicial role. For example, Linda Mullenix has said that the current situation invites a political response, observing that, “the inevitable politicization of the Civil Rules Advisory Committee foreshadows the decline of that body’s role in procedural rule-drafting.” Paul Carrington, Reporter for the Advisory Committee from 1985 until October 1992, noted that, “if Congress is responsive, as is its wont, to every faction in the United States that detects a possible stake in a proposed amendment to the rules, the rulemaking tradition is doomed to disintegrate.”

Direct evidence demonstrates that both Congress and the President are willing, perhaps eager, to participate. Congress has reversed a forty-year-old practice of leaving civil rulemaking entirely to the Supreme Court (and the Judicial Conference) and has already directly amended some federal civil rules. This change in practice began in 1980, when Congress amended Rule 37 by repealing

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36. U.S. Const. art III, § 2, cl. 2.
37. Wayman v. Southard, 6 U.S. (10 Wheat) 311, 313 (1825) (affirming congressional authority to regulate proceedings of lower federal courts); Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941) (acknowledging congressional power to delegate “to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States”).
38. See Mullenix, supra note 2, at 801, 855.
39. Id. at 801. Mullenix suggests that politicization is “inevitable” because the current procedure invites early public participation which is likely, Mullenix argues, to dismay interested parties who will then seek congressional intervention. Id. at 801-02.
subsection (f), which had prohibited courts from awarding expenses and fees against the United States for failure to cooperate in discovery.\textsuperscript{42} The change was part of the "Equal Access to Justice Act"\textsuperscript{43} which, according to the House Report, was intended in part, "to diminish the deterrent effect of seeking review of, or defending against, governmental action."\textsuperscript{44} The Senate Report referred specifically to Rule 37 and stated that, "the change simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties."\textsuperscript{45} Neither report discussed the end of the forty-year-old rulemaking practice.

In 1983, Congress amended Rule 4, which controls the issue, form, and service of process.\textsuperscript{46} The Supreme Court had sent to Congress a series of proposed changes to the rule,\textsuperscript{47} and Congress postponed the effective date of the amendments\textsuperscript{48} to consider alternatives.\textsuperscript{49} Eventually, Congress did pass a bill that, according to its sponsor, sought "to effectuate the policy of relieving the Marshals Service of the duty of routinely serving summonses and complaints."\textsuperscript{50}

In 1988, Congress amended Rule 35\textsuperscript{51} to allow psychologists to carry out mental examinations which previously could be done only by psychiatrists or psychologists who were also physicians.\textsuperscript{52} When this change was first considered in 1987, Congress took no action on the proposal out of "deference to the Rules Enabling Act,"\textsuperscript{53} noting that "[i]t would be appropriate for the Judicial Conference’s Advisory Committee on Civil Rules to address whether Rule 35(a) should be amended to include licensed or certified psychologists."\textsuperscript{54}
Yet, the next year Congress made the change to Rule 35(a)\textsuperscript{55} with no mention of the Committee.\textsuperscript{56}

The President has no established constitutional role in civil rulemaking, but interest in developing a role is evident. In August 1991, the President's Council on Competitiveness published an "Agenda for Civil Justice Reform in America,"\textsuperscript{57} which included, among other proposals, suggestions to amend several civil rules.\textsuperscript{58} An accompanying "Memorandum for the President,"\textsuperscript{59} signed by Vice President Dan Quayle, stated that "overuse and abuse of the legal system impose tremendous costs on American society."\textsuperscript{60} To remedy these asserted problems, the report presented twenty-two specific recommendations. Six of these recommendations include proposals to amend the Federal Rules of Civil Procedure, specifically Rules 11, 26, 37, 56, and 68.\textsuperscript{61} Essentially, the proposed amendments are intended to increase settlement, encourage the exchange of information, promote summary judgment, and encourage the use of sanctions. On October 23, 1991, President George Bush signed an executive order directing government attorneys in federal court to comply with guidelines based on the Council's agenda for reform.\textsuperscript{62} Several of these guidelines require government attorneys to practice largely as if proposed civil rule changes had already been enacted.\textsuperscript{63}

The vast discretion exercised by the Advisory Committee invites

\begin{itemize}
\item \textsuperscript{55} See supra note 51 and accompanying text.
\item \textsuperscript{56} In addition to these three rule changes, Congress also amended Rule 17 and Rule 71A. Both of these amendments, however, appear to be minor. In the case of Rule 17, the Supreme Court had proposed several amendments intended to gender-neutralize the rules. The Court intended to strike the gender specific phrase "with him" in Rule 17, but the amendments as transmitted failed to include the change, and Congress corrected the apparent oversight. 133 CONG. REC. 16,904 (1987) (analysis submitted by Rep. Glickman). The amendment to Rule 71A corrected an apparent punctuation error by adding the appropriate apostrophe to "taking of the defendants' property." See Anti-Drug Abuse Act of 1988, 102 Stat. at 4402. Although obviously not controversial, even these changes fit the pattern of increased congressional action.
\item \textsuperscript{57} President's Council on Competitiveness, Agenda for Civil Justice Reform in America (1991) [hereinafter Agenda for Reform].
\item \textsuperscript{58} Id. at 11, 16-22, 25.
\item \textsuperscript{59} Id. at i.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} See id. at 1-22, 25.
\item \textsuperscript{62} Exec. Order No. 12,778, 3 C.F.R. 359 (1992).
\item \textsuperscript{63} For example, government attorneys are now required to "make reasonable efforts to agree with other parties mutually to exchange a disclosure statement containing core information relevant to the dispute." Id. at 361. This requirement is similar to a Council recommendation which would "require disclosure of "core information" " by amending Rule 26. Agenda for Reform, supra note 57, at 16. Similarly, government attorneys must, before asking a court to resolve a discovery dispute, "attempt to resolve the dispute with opposing counsel," and if agreement fails and a motion is filed, "represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances." See Exec. Order No. 12,778, supra note 62, at 361. A second Council recommendation provides: "Before requesting that the court resolve a discovery dispute, counsel should be required to certify that they have conferred with their opponent and, despite good faith negotiations, are unable to agree upon a resolution." Agenda for Reform, supra note 57, at 18. The Council suggests an additional amendment to civil rule 26 to accomplish this change.
\end{itemize}
these actions by Congress and the President, as the controversy generated by the still-unfolding Rule 11 and Rule 26 episodes illustrates. A process of civil rulemaking which in practice gives near absolute discretion to the Advisory Committee is legislative in character, which leaves civil rulemaking susceptible to direct congressional participation and presidential activism. The process the Advisory Committee employs invites the view that no deference is due the Committee by elected lawmakers, because Committee members are permitted to act approximately as if they were elected officials. Action by Congress and the President appears to be just more of the same kind of policymaking.

Paul Carrington has suggested that an appropriate response to the politicization of civil rulemaking would be formation of a group to lobby Congress on behalf of the product of the current process. "It would be the primary function of this group to organize and orchestrate efforts to protect the rules in Congress and to provide a constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act." According to Carrington, such a group would meet for a few hours annually with the Advisory Committee chair and reporter, and might "enlist the services of a part-time staff, presumably a law teacher, who could be assigned a professional duty to monitor events and alert members to brewing issues." I believe that Paul Carrington’s proposal is not adequate to preserve a dominant judicial role. In this Article, I argue that further politicization of the process should be avoided by sharply limiting the discretion of the Advisory Committee, thus clearly differentiating the role of the Committee from the role of elected officials. This change should, of course, also be accomplished in a way that not only preserves the benefits of judicial control but, if possible, also enhances the quality of policymaking. Although the foundation of judicial expertise should be retained, there is much room for improvement.

64. See supra notes 1-2 and accompanying text.
65. See Carrington, supra note 40, at 166. Carrington described the structure of the proposed group as follows:
I imagine a fairly large committee, perhaps as many as a couple dozen persons having not only an interest in the rules, but also a substantial presence in the American Bar Association and other bar organizations such as the American College of Trial Lawyers; and perhaps those local organizations who have a tradition of concern with law reform issues, such as the Association of the Bar of the City of New York.

Id.
66. Id.
67. Id. In Carrington’s view, such a group should not ordinarily furnish advice (as a group) to the Advisory Committee. He explained, “My reason for this suggestion is that a group having adopted a position with respect to a particular proposal would be less able to lend institutional support when a different proposal is promulgated by the Supreme Court.” Id.
After briefly describing the process of civil rulemaking in Part I of this Article, in Part II, I examine the problem of curbing discretion in the exercise of congressionally delegated power, a familiar problem in administrative law. In Part III, I draw on these modern administrative law sources to propose a major revision in the way federal civil rules are adopted or amended. In brief, I propose that the Supreme Court establish by order general requirements for civil rulemaking providing that the Advisory Committee, (1) shall make rules based on adequate information; (2) shall not make rules unless the potential benefits to society outweigh the potential costs; (3) shall pursue objectives chosen to maximize the net benefits to society; (4) shall, among alternatives, choose the alternative involving the least cost to society; and (5) employ priorities with the aim of maximizing the aggregate net benefits to society. I further propose that these requirements be monitored by requiring the Advisory Committee to prepare analyses of all major rule changes and submit those analyses to the Director of the Federal Judicial Center for review and approval (or rejection) before the change is proposed for publication and public comment. An analysis should include, (1) a description of the potential benefits of the rule; (2) a description of the potential costs of the rule; (3) a determination of the potential net benefits of the rule; and (4) a description of lower cost alternative approaches and an explanation of why they could not be used. This suggestion is modeled on Executive Order No. 12,291,68 which establishes similar requirements for federal agency rulemaking and provides for monitoring and enforcement by the Director of the Office of Management and Budget.

More broadly described, this reform proposes that the Advisory Committee be required to abandon the "incrementalism" model of rulemaking69 and adopt the synoptic model well known in administrative law as "comprehensive rationality."70 This reform by the Supreme Court would likely preserve the central judicial role in civil rulemaking and also improve the future quality of civil justice. I close by pointing out in Part IV that this reform would change the rationalistic and intuitive philosophy of civil rulemaking which has prevailed for most of this century, and replace it with an empirical approach to policymaking.

I. Civil Rulemaking

A brief review of the discretion accorded the Advisory Committee is necessary to understand the current situation and to make useful comparisons with developments in administrative law. There are three distinct periods in the history of civil rulemaking: 1934-56,

70. Id. at 396-99, 409-28 (describing the four-step "comprehensive rationality" approach to decisionmaking).
1958-88, and 1988 to the present. During each of these periods, the Committee was controlled by somewhat different structures. My focus is on mandatory provisions—not informal procedures that the Committee may have employed from time to time—because my purpose is to accurately describe the discretion of the Committee. The committee's own procedures indicate how discretion has been employed, but those internal procedures do not indicate the scope of accorded discretion, which, I have argued, is essential to understanding the Committee's current status.

A. The Initial Period: 1934-56

On June 19, 1934, Congress approved the Rules Enabling Act, which provided that the Supreme Court "shall have the power to prescribe, by general rules, for the district courts . . . practice and procedure in civil actions," and permitted the unification of law and equity under those rules. The statute said nothing about how the Court should exercise this delegated power. On June 3, 1935, the Court entered an order titled, "Appointment of Committee to Draft Unified System of Equity and Law Rules," but the order did not establish any process for drafting and proposing rules. Acting within this very broad discretion, the Committee produced the original Federal Rules of Civil Procedure, which the Court adopted on December 20, 1937, and which became effective September 16, 1938. On January 5, 1942, the Court designated the original Advisory Committee a continuing body "to advise the Court with respect to proposed amendments or additions to the Rules of Civil Procedure." This brief order did not limit the discretion of the Advisory Committee, and, indeed, did not even provide a definite tenure for Committee members. On October 1, 1956, the Court discharged the continuing Committee, ending the first period of Committee organization.

Although the Advisory Committee's discretion during the initial period appears to have been nearly absolute, some might contend

71. Although not a focus of this Article, the Committee's use of accorded discretion might productively be analyzed from the perspective of public choice theory. See generally JAMES M. BUCHANAN & ROBERT D. TOLLISON, THEORY OF PUBLIC CHOICE (1972) (discussing public choice theory and various applications of it).
73. Id.
77. See id.
that the lack of mandatory Committee process was not important, because the Supreme Court retained review power over the committee. Little evidence exists, however, that this review power has ever constituted a significant limit on the Committee. Charles Clark, the reporter for the original Committee, claimed that Court supervision in the early period was significant, but he conceded that the Court did “leave details to . . . ‘the informed judgment’ of the [Advisory] Committee.”79 James W. Moore, Clark’s assistant in the original drafting project,80 and later himself a Committee reporter,81 believed that the Court “can only devote a minimal amount of time and energy to rulemaking.”82 Justices Hugo Black and William Douglas once observed: “The only contribution that we actually make [to rulemaking] is an occasional exercise of a veto power.”83

It is true that the Court occasionally has rejected proposals of the Advisory Committee, particularly, according to Dean Jack H. Friedenthal, during the initial period of civil rulemaking:84 “Although the Justices generally deferred to the Committee’s expertise during that period, they at least read and, when appropriate, rejected proposed alterations.”85 Friedenthal, however, concluded in 1975 that review by the Court was, on balance, not effective.86 “[T]he members of the Court, no matter how busy they might be, must spend some time independently reviewing the substance of rules before approving them. Had they done so in the past, the obvious errors . . . would not, in all likelihood, have been overlooked.”87 There is no recent evidence or present claim that the Court has effectively participated in civil rulemaking.

B. Establishing the Role of the Advisory Committee: 1958-88

Action by Congress in 1958 began a second period of Committee

81. 2 MOORE’S FEDERAL PRACTICE ¶ 1.02a, at 1-14 n.1 (2d ed. 1992).
82. Stephen N. Subrin, Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. Pa. L. Rev. 1999, 2027 n.140 (1989) (paraphrasing 1 MOORE’S FEDERAL PRACTICE ¶¶ 0.511-0.512 (1st ed. 1959)); see MOORE, supra note 81 (“It is clearly not possible for the United States Supreme Court to undertake this task at the grass roots level; the Court will be left with no time to decide cases.”).
84. Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 STAN. L. REV. 673, 676-77 (1975). The Committee’s most significant rejection came in 1956 when the Court turned down the Committee’s proposal and discharged it. Id.
85. Id. at 677 (footnotes omitted).
86. Id. at 685-86.
87. Id. at 685.
organization. Worried about the "void in rulemaking procedure," which resulted from the discharge of the continuing Committee, Chief Justice Earl Warren, Justice Tom Clark, and Chief Judge John Parker designed a replacement. Their concept was accepted by Congress and embodied in an act passed July 11, 1958. The 1958 legislation required the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." Any changes "shall be recommended by the Conference from time to time to the Supreme Court." The statute, however, did not address how the Conference should carry out the task. The Conference responded to the 1958 legislation by creating a "standing committee on Rules of Practice and Procedure" and "five advisory committees," including one on "practice and procedure in civil cases." The Advisory Committees were charged to "carry on a continuous study of the operation and effect of the rules of practice and procedure" and propose changes "to the Judicial Conference through the standing Committee on Rules of Practice and Procedure." No process was established for the advisory committees, but they were urged to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." For the next twenty-five years, the Conference added nothing to the procedures of the Committee. Then, because of "confusion and occasional criticism," the Standing Committee developed a statement of "procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure," which it described as a codification of

89. See Baker, supra note 83, at 327.
90. Id. at 328.
94. Id.
96. Id.
97. Id. The Standing Committee on Rules of Practice and Procedure of the Judicial Conference is commonly referred to as the "Standing Committee."
98. Id. at 7. Although slight, this statement is apparently the first external effort to control the function of the Advisory Committee.
100. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, PROCEEDINGS FOR THE CONDUCT OF THE BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE (1983) [hereinafter
evolved practice. This development was reported to the Judicial Conference in 1983, and the procedures were published that same year. The statement described only minimal constraint. For example, the rules provided that, "an Advisory Committee shall normally conduct public hearings on all proposed rule changes after adequate notice." The statement also provided that the hearings be recorded and a transcript prepared that "shall be available to the public," but the statement did not provide for public attendance at Committee meetings. Some might, of course, contend that review by the Standing Committee on Rules of Practice and Procedure and by the Judicial Conference itself amounts to an important limit on Advisory Committee discretion, but there is no evidence to suggest that either the Standing Committee on Rules of Practice and Procedure or the Conference have, by the review process, limited the discretion of the Committee. The Standing Committee has modified Advisory Committee action on only a handful of occasions, and the Judicial Conference itself has taken even less action.

C. The Current Procedures: 1988 to the Present

The current procedures stem from The Judicial Improvements and Access to Justice Act of 1988, which added several constraints on Advisory Committee action. The statute requires open

PROCEDURES FOR THE CONDUCT OF BUSINESS] (These procedures were first published in 1983 PRELIMINARY DRAFT, supra note 33. They are now published by the West Publishing Company annually as amended in Federal Rules of Civil Procedure.).


102. PROCEDURES FOR THE CONDUCT OF BUSINESS, supra note 100.

103. Id. at x.

104. Id. at x-xi.

105. Since the time of its inception in 1958, the Standing Committee has made only four minor changes to the Advisory Committee's proposed rules. See JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 67 (1983); JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 71 (1969); JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 40 (1962); JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (1960). In addition, the Standing Committee made minor changes in the current proposed amendment to Rule 11. Ann Pelham, Federal Court Watch, LEGAL TIMES, June 29, 1992, at 6. The Standing Committee obviously did not consider the changes substantial, because under the current process, a substantial change would require republication and further opportunity to comment. PROCEDURES FOR THE CONDUCT OF BUSINESS, supra note 100, at xi.


meetings with prior notice sufficient to permit "all interested persons to attend,"\textsuperscript{108} and "a written report explaining the body's action, including any minority or other separate views."\textsuperscript{109} The Judicial Conference responded in 1989 by changing its statement of procedures for advisory committees\textsuperscript{110} to conform to the legislation. These changes amount to very modest limits on the Committees' discretion. It is true that public participation is guaranteed, and an explanation of completed action is promised, but none of these procedures bear on the choice of policy itself—indisputably the crucial event.

\section*{II. Controlling Discretion}

Although the flourishing of federal bureaucracy and the development of administrative law are comparatively recent aspects of American government,\textsuperscript{111} the problem of controlling the exercise of congressionally delegated authority has been a perennial concern of administrative law since the 1920s. In 1923, Ernst Freund wrote in his pioneering study that, "the most important point in the development of administrative law is the reduction of discretion."\textsuperscript{112} In 1934, Frederick Blachy and Miriam Oatman completed a study of administrative law for the Brookings Institution addressing these questions: "[W]hat limitations should be imposed upon the use of . . . discretion? By what authority should limitations be imposed?"\textsuperscript{113} In 1969, Kenneth Culp Davis published a book-length study of discretion,\textsuperscript{114} and a few years later, Richard Stewart demonstrated that the account of administrative law at first denied and then confronted the reality of agency discretion.\textsuperscript{115} Christopher Edley wrote in 1990 that, "the sense that . . . discretion must be controlled continues to animate administrative law,"\textsuperscript{116} and in 1991,
Glen Robinson described "the challenge of a modern government" to be "how it directs and governs its bureaucracy." The response of administrative law to this concern has varied considerably since the 1920s, surely reflecting differing values and social contexts. At first, the principal device employed to check discretion was the "delegation doctrine." Although the Supreme Court had recognized early the power of Congress to delegate its authority within some limits, during the late 1920s the Court began to spell out the legal meaning of the limitations. The delegation doctrine achieved its greatest prominence during the early New Deal when the Supreme Court employed the doctrine to invalidate major aspects of the New Deal program. Then, with little warning, the Court virtually abandoned the delegation doctrine. Since 1936, no majority opinion of the Court has employed the doctrine to hold congressional action unconstitutional. The reasons for the Court's inconsistent use of the doctrine remain debatable, although commentators have suggested that the brief period of dramatic use of the doctrine represented "a temporary judicial hostility toward centralized national regulation."

In 1933, even before the brief preeminence of the delegation doctrine, Congress began preliminary work to create other means to

117. ROBINSON, supra note 111, at 1.
118. Id.
119. The brief description which follows should not suggest linear development in this rich and complex subject. For my purposes, an outline will provoke useful comparisons with the development of federal civil rulemaking and suggest the source of analogy for designing reform.
120. See generally Peter H. Aranson et al., A Theory of Legislative Delegation, 68 CORNELL L. REV. 1, 1-17 (1982) (detailing the history of the delegation doctrine). The authors point out that, "the delegation doctrine is more precisely labeled the 'nondelegation' doctrine, because it theoretically constrains congressional transfers of authority." Id. at 7. They continue by explaining that the Supreme Court generally has demonstrated reluctance to employ the doctrine in administrative law, but, during the early 1930s, the doctrine achieved brief prominence in administrative law because the Court employed the doctrine as a brake on the New Deal programs. Id. at 7-10.
121. See United States v. Grimaud, 220 U.S. 506, 522 (1911) (permitting the secretary of agriculture to make rules for the management of forest reservations); Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 387 (1813) (permitting the President to prohibit trade with certain nations by proclamation).
122. See J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (sustaining a delegation of power when Congress delegated "an intelligible principle to which the person or body authorized . . . is directed to conform"); Aranson et al., supra note 120, at 7-8.
123. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935, and holding that a delegation of power to private individuals with adverse interests is not permitted); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating the remainder of the National Industrial Recovery Act as used in this case, the Court ruled that a statutory delegation of power must include restrictions which are adapted to the regulated activity); Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (overturning Section 9(c) of the National Industrial Recovery Act "because Congress has declared no policy, has established no standard, has laid down no rule").
124. See Aranson et al., supra note 120, at 10. The doctrine, however, has not disappeared. "The Court sometimes refers to the doctrine, for example, when interpreting broad statutes, using it in support of an otherwise tenuous effort to narrow statutory construction." Id. at 12.
125. Id. at 10.
curb agency discretion. The task was arduous and conflicted, and the eventual result was the delphic Administrative Procedure Act of 1946. The APA divided administrative law into two discrete parts: adjudication and rulemaking. In this context, "adjudication" refers to case-by-case decisionmaking, and "rulemaking" refers to establishing standards for future conduct. For adjudication, the APA provided conventional procedures such as notice and a hearing before a comparatively independent officer.

Within the rulemaking category, there is an important distinction between "formal" and "informal" rulemaking. Formal rulemaking is triggered when a statute requires rulemaking to be based on a record made at a hearing. Informal rulemaking exists in the absence of such a requirement. The actions of the Advisory Committee on Civil Rules are comparable to informal rulemaking: Standards are established for future conduct; no statute requires a

128. See Richard A. Merrill, Introduction to Administrative Law Symposium, 72 Va. L. Rev. 215, 216 (1986) (describing a key aspect of the APA as "delphic" because of the Act's broad language). Merrill concluded that, "[t]he APA has at the very least served a liturgical purpose, providing the vocabulary for the discovery of principles of operation that take into account the growth of federal regulation, heightened expectations of accountability, and the needs of efficient administration." Id.
129. See Shapiro, supra note 127, at 453. Shapiro also mentions a "third part of administrative law" which, he said, "included everything the government did that was neither adjudication nor rulemaking." Id. at 454. The APA established no procedures for this category. Id.
130. Id. at 453. The statute defines adjudication as "agency process for the formulation of an order." Administration Procedure Act, 5 U.S.C. § 551 (1988) [hereinafter APA]; cf. Kenneth C. Davis, Administrative Law Treatise 4-15 (2d ed. 1978) (criticizing the APA definition of adjudication and suggesting it be amended to be more in line with "established usage": "a decision on an issue that has developed between two opposing parties, one of whom may be the government or an agency or an officer").
131. See Shapiro, supra note 127. The statute defines rulemaking as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551 (1988); cf. Davis, supra note 130 (criticizing the APA definition of rulemaking and suggesting that the definition of "rule" be revised).
133. See Peter L. Strauss, An Introduction to Administrative Justice in the United States 104 (1989). Informal and formal rulemaking are not explicitly distinguished from one another within the APA, although § 553 suggests the distinction implicitly. Marshall J. Berger, The APA: An Administrative Conference Perspective, 72 Va. L. Rev. 337, 347 (1986) ("The APA requires that agency decisionmaking be conducted either by formal, on the record, hearings or by a notice and comment process.").
134. See Strauss, supra note 133, at 104.
135. See id.
The statute, which requires the record, provides the organization of the rare formal rulemaking process. For informal rulemaking—the analog to Advisory Committee work—the Act only required that the agency provide notice of proposed rulemaking, opportunity for written comment, and, after adoption of a rule, a statement of the basis and purpose of the action. The political theory behind this process was apparently a prediction that interest group participation would, if left alone, produce sound administrative action.

The belief that the APA was itself sufficient to encourage sound decisionmaking began to diminish in the late 1960s and early 1970s. According to Shapiro, "[c]ritics charged that experts served not the public interest but self-interests deeply entangled with narrow private interests. The end result of struggles among groups was no longer inherently good because, to paraphrase Orwell, some groups were far more equal than others."

Some reform efforts focused on the role of the courts that review agency action. At first, judicial reaction attempted to enhance the participation concept at the heart of APA informal rulemaking. Later, courts added procedures to the modest requirements of informal rulemaking, in order to improve the quality of factfinding. This development was cut short by the Supreme Court in Vermont Yankee Nuclear Reactor Corp. v. Natural Resources Defense Council in 1983. The APA excludes from its requirements "a matter relating to agency management or personnel." See 5 U.S.C. § 553(a)(2) (1988). This means essentially that administrative agencies are generally free to make rules governing their internal procedure. These procedures can be distinguished from the rules of procedure produced by the Advisory Committee because the Committee's rules are the principal product of the Committee and are hence comparable to the term "rules," as used in the APA. The internal procedures of the Advisory Committee (e.g., responsibilities of the Chair, frequency of meetings) would be comparable to the matters covered by APA § 553(b)(2).

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138. See id. § 553(b), (c).
139. Id. § 553(c).
140. Martin Shapiro, Administrative Discretion: The Next Stage, 92 YALE L.J. 1487, 1496-97 (1983). According to Shapiro, this theory emerged from the view there was no "correct" solution to a particular policy problem, and thus any solution which emerged from the participation of interested persons was acceptable. Id. at 1497. The apparent rationale was that "group struggle," carried out according to democratic procedures, would produce good policy, virtually because of the character of the process. Id.
141. Id. at 1498.
142. Id. ("If group access was not an adequate democratic control over administration, judicial review might be... The judiciary's first reaction was to use its new-found legitimacy to impose more rules... designed largely to implement [a]... theory of democratic administration—the group theory.").; see Diver, supra note 69, at 410 ("Courts began to require agencies to... provide commenters a mechanism for on-the-record dialogue with agency staff.").
144. 435 U.S. 519, 548-49 (1978) (holding that § 553 of the APA prohibited courts from "impos[ing] upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good").
which the Court held that judicial addition to the statutory requirements was error. Yet, as Alan Morrison pointed out: "Despite this restraint on procedural innovations, the courts have managed to supervise agency factfinding by closely scrutinizing the resulting agency decisions."  

According to Morrison: "When courts have found an agency's factfinding to be inadequate, they have rejected the promulgated rules on the grounds of insufficient factual basis or inadequate explanation of the underlying factual disputes."  

Other reformers turned to the executive branch. In June 1971, President Nixon initiated a "Quality of Life Review" to ensure that proposed agency rules were cost effective. The program required administrative agencies to send proposed rules to reviewing groups such as the Council on Wage and Price Stability, which had four weeks to comment on the proposed rules, and the proposed rules were then sent back to the agency for further action. The program's intended idea was to inject "outside views of regulatory costs and alternatives" into the process and improve policymaking. The program applied to all regulations concerning "environmental quality, consumer protection, and occupational health and safety," but, in reality, it was applied "almost exclusively" to Environmental Protection Agency rules. In 1974, President Ford adopted his "Inflationary Impact Statement" program, which authorized the Office of Management and

146. Id.
147. See H.R. Doc. No. 134, 95th Cong., 1st Sess. 506 (1976) ("This procedure, called 'quality of life review' by officials in affected agencies, requires selected executive departments or agencies to submit a summary to OMB indicating, among other things, [a]lternatives to the proposed actions that have been considered; [and] a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives considered."
148. The Council on Wage and Price Stability was an office of the executive created to review agency rules and draft reports which could be used to improve the rules. See Bruff, supra note 147, at 547, 553.
149. Id. at 547.
150. Id.
152. Bruff, supra note 147, at 546-47.
Budget to “develop criteria”\textsuperscript{154} which agencies should use to determine whether a “major regulation may have a significant impact” on the economy.\textsuperscript{155} The order required any agency proposing such a rule to submit an Inflationary Impact Statement along with the proposed rule,\textsuperscript{156} but no external monitor for this program existed.\textsuperscript{157}

President Carter eliminated President Nixon’s program\textsuperscript{158} but continued to require inflationary impact statements similar to those instituted by President Ford.\textsuperscript{159} President Carter also required agencies to prepare detailed “Regulatory Analyses” of proposed rules,\textsuperscript{160} and he established offices such as the Regulatory Analysis Review Group\textsuperscript{161} to review rules having “major economic consequences.”\textsuperscript{162} Development of the Executive oversight technique was completed in 1981 when President Reagan issued Executive Order No. 12,291,\textsuperscript{163} which established general requirements for agency regulations\textsuperscript{164} and sought to monitor compliance by requiring agencies to prepare a “Regulatory Impact Analysis” on every “major rule”\textsuperscript{165} and to submit those analyses to the Office of

\textsuperscript{154} Id. § 2(a) (“designat[ing] and empower[ing] [the director] . . . to develop criteria”). The considerations for devising criteria were established in id. § 3 (“In developing criteria for identifying legislative proposals, regulations, and rules subject to this order, the Director must consider, among other things, the following general categories of significant impact: a. cost impact on consumers, businesses, markets, or Federal, State, or local government; b. effect on productivity of wage earners, businesses or government at any level; c. effect on competition; d. effect on supplies of important products or services.”).

\textsuperscript{155} Id. § 2(9).

\textsuperscript{156} Id. § 1.

\textsuperscript{157} See Bruff, supra note 147, at 547.

\textsuperscript{158} John Quarles, President Carter’s Acting Administrator for Enforcement and General Counsel for the EPA, terminated the Quality of Life Review by memorandum on January 25, 1977, because he thought it was “discriminatory in that it applied only to EPA and that it had grown into an administrative millstone seriously impeding the Agency’s ability to perform its statutory functions.” Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Work, 96th Cong., 1st Sess. 60, 66 (1979) (statement of John Quarles, Deputy Administrator, EPA).


\textsuperscript{160} Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979).

\textsuperscript{161} The Regulatory Analysis Review Group [was] composed of representatives from the principle economic and regulatory agencies. RARG’s purpose was to review a limited number of regulatory analyses having substantial economic impact. Its four-member executive committee included representatives from OMB and the Council of Economic Advisors (CEA) as permanent members; the other two memberships rotated every six months among the cabinet departments (excluding State and Defense) and EPA.

\textsuperscript{162} See Exec. Order No 12,044, supra note 160, at 154 (regulations which “may have major economic consequences for the general economy, for individual industries, geographical regions or levels of government” are reviewed by the Regulatory Analyses Review Group).


\textsuperscript{164} Id. at 128; see infra note 208 and accompanying text.

\textsuperscript{165} 5 C.F.R. at 128. Section 1(b) defines a “major rule” as “any regulation that is likely to result in (1) An annual effect on the economy of $100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on
Management and Budget. Both the general requirements and the mandatory elements of the impact analyses employ a "cost-benefit" approach to regulation. The fundamental idea of this technique is to add up all the advantages to the public from choosing one policy option, and then subtract the disadvantages. If there are a number of options, comparison of a series of analyses informs the policymaker of the socially preferable option. The core techniques are well established and have been applied to a wide variety of policymaking problems.

Colin Diver has proposed a useful framework for considering the development of administrative law since the 1930s. Diver suggests that since the end of the "delegation doctrine," two fundamentally different models of rulemaking have been employed: During the early years, agencies followed an "incrementalism" model, but beginning in the 1970s, a new model, "comprehensive rationality," or "synoptic" decisionmaking, attracted followers and now prevails. According to Diver, the incrementalism model has three distinctive features:

First, policymaking is piecemeal and tightly restricted in scope. . . . For each alternative, moreover, analysts consider only a limited range of future consequences. They routinely exclude remote or uncertain consequences, even though those consequences might prove momentous. Second, the process is dynamic and remedial. Policymaking becomes a series of small adjustments and avowedly temporary ‘fixes.’ . . . Finally, incrementalism is decentralized. Policy is made by many actors at many levels.
Diver described the comprehensive rationality model this way:

First, the decisionmaker must specify the goal he seeks to attain. Second, he must identify all possible methods of reaching his objective. Third, he must evaluate how effective each method will be in achieving the goal. Finally, he must select the alternative that will make the greatest progress toward the desired outcome.174

Diver commented that, “the most demanding aspect of the synoptic paradigm is the care with which it requires policymakers to consider the consequences of each policy option.”175 Neither model is inherently superior; the choice of model must depend, according to Diver, on a careful analysis of the context of policymaking.176 Overall, Diver’s article suggests that both judicial and executive reform efforts exhibit a steady movement from acceptance of an incrementalism approach toward employment of a synoptic model.177 Judicial reform of this type was moderated (but not eliminated) by the Vermont Yankee decision,178 and executive reform with its emphasis on cost-benefit analysis, shows unabated approval of the synoptic approach.179 Considered together, the judicial and executive reform efforts suggest alternative methods which can be employed to move from incrementalism to a synoptic approach to policymaking.

III. Reforming Civil Rulemaking

These administrative law developments since the New Deal can provide important insights about federal civil rulemaking.180 Conceptually, it is clear that the current model of Advisory Committee rulemaking approximates the incrementalism model which dominated administrative law before the 1970s.181 Like the incrementalism model, Advisory Committee policymaking is “piecemeal and tightly restricted in scope.”182 Committee members also “routinely exclude remote or uncertain consequences,”183 as the Rule 11 and

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173. Id. at 399.
174. Id. at 396.
175. Id. at 416.
177. See generally Diver, supra note 69.
178. See supra notes 143-46 and accompanying text.
179. See supra notes 147-69 and accompanying text.
180. Others have noticed the relationship between administrative law and court rulemaking. See Jack B. Weinstein, Reform of Court Rulemaking Procedures 92 (1977) (“The Administrative agencies, which assume legislative, executive, and judicial roles, furnish a useful analogy [to judicial rulemaking].”); Stephen Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1193 (1982) (“[W]ould-be reformers have followed, often without acknowledging it, the path of administrative law . . . [A]tention to the similarities of, as well as the differences between, the two contexts may well be useful if there is to be further reform.”); Mullenix, supra note 2, at 839 (mentioning the possible “administrative nature of rulemaking”).
181. See Diver, supra note 69, at 401-09.
182. Id. at 399.
183. Id.
Rule 26 episodes illustrate.\textsuperscript{184} Likewise, the Committee's approach is "dynamic and remedial."\textsuperscript{185} As Diver states, "[e]rrors are corrected and problems are solved; lofty visions of some preferred social state play no part."\textsuperscript{186} Whether the current rulemaking process is "decentralized" is less clear.\textsuperscript{187}

Comparison of the Committee process with the alternative comprehensive rationality model\textsuperscript{188} more clearly illustrates the incremental character of civil rulemaking, at least by negative implication. The Committee's work, as the Rule 11 and Rule 26 episodes illustrate, does not employ the synoptic model: Alternatives were not identified, and the prospects of achieving goals were not calculated. Also, the current procedures of the Advisory Committee correspond very closely to the procedures for informal rulemaking established in 1946 by the Administrative Procedure Act, which Diver describes as "an incrementalist mechanism."\textsuperscript{189} Both Committee procedures and APA requirements for informal rulemaking provide for notice of rulemaking activity, opportunity for comment, and an explanation of completed action.\textsuperscript{190}

Identifying the current Advisory Committee process with the incrementalism model suggests the option of changing the Committee's process to a comprehensive rationality model. One attraction of this alternative is clear: Implementation of the model would limit Advisory Committee discretion which, I have argued, would halt the politicalization of the rulemaking process and diminish the likelihood of increased congressional and presidential participation. Simple comparison of the informal rulemaking provisions of the Administrative Procedure Act\textsuperscript{191} with the requirements of Executive Order No. 12,291\textsuperscript{192} clearly demonstrates that, in gross terms, the comprehensive rationality model employed in the order imposes much greater limits on agency action.

Beyond the need to distinguish Advisory Committee work from

\textsuperscript{184} See supra notes 7-32 and accompanying text.
\textsuperscript{185} See Diver, supra note 69, at 399.
\textsuperscript{186} Id.
\textsuperscript{187} See id. Indeed, the policymaking appears to be centralized in the Committee by virtue of its vast discretion, which introduces some ambiguity about whether civil rulemaking reflects all aspects of the incrementalism model.
\textsuperscript{188} See id.
\textsuperscript{189} See id. at 405-06.
\textsuperscript{191} See APA, 5 U.S.C. § 553.
\textsuperscript{192} Exec. Order No. 12,291, supra note 163.
legislation, however, I have proposed that any reform ought to encourage better policymaking. One must ask, then, whether a synoptic model is likely to function well for the Committee, given the context of its policymaking responsibilities. According to Diver, the comprehensive rationality model should be preferred "in relatively stable [rulemaking] environments."193 He reasons that, "[t]echnical uncertainty is likely to be greater and public opinion most polarized at the beginning of a new policy initiative."194 Federal civil rulemaking is far from its beginning and has reached maturity, if not perfection. Indeed, application of this primary indicator for synoptic rulemaking even suggests that early use of the incrementalism model may have been justified, given the long, contentious prelude to the initial rulemaking venture.195

Even if one argues that the current situation is unstable—in light of the current controversy over Rules 11 and 26—Diver’s criteria for synoptic decisionmaking still suggest that the Advisory Committee should employ the comprehensive rationality model. He states that in “unstable environments,”196 comprehensive rationality is preferred where the “intended beneficiaries” of regulatory programs “have little access to political power, legal advice, and self-help” and, hence, “are often unable to participate in any agency proceeding.”197 The synoptic model is superior in this situation, because the decisionmaker “must consider all interests.”198 The beneficiaries of civil rulemaking are the actual and potential parties to future cases—most of whom are unknown at the time of rulemaking—and society as a whole. A few “repeat players”199 may participate in the Advisory Committee enterprise, but this can be only a handful of the thousands, perhaps millions, of persons whose interests are directly affected by major changes.200 Although individual attorneys and representatives of groups of attorneys may participate in committee work, this factor—if not irrelevant to this indicator—surely is not decisive. The federal civil courts are operated for the benefit of the parties and society as a whole, not for the benefit of attorneys. The synoptic model would require attention to the interests of future parties and the public.

193. Diver, supra note 69, at 431.
194. Id.
196. Diver, supra note 69, at 431.
197. Id. at 432.
198. Id.
199. See Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc’y Rev. 95, 97-103 (1974) (describing how repeat players often prevail in litigation). “The discussion here focuses on litigation, but I believe an analogous analysis might be applied to the regulatory and rule-making phases of legal process. O&Ss [one-shotters] and RPs [repeat players] may be found in regulatory and legislative as well as adjudicative settings.” Id. at 97 n.3.
Shifting Advisory Committee rulemaking from an incrementalism model to a comprehensive rationality model thus emerges as an attractive option from the administrative-law tradition. As noted above, this change has been accomplished in administrative law both by changing the focus of judicial review and by adding executive oversight. Over the years in administrative law, judicial review has been the predominant method for controlling discretion, with executive oversight a recently developed alternative. Thus, in choosing a method for altering the Committee's policymaking model, straightforward application of the administrative law analogy would suggest the method of judicial review. Yet, perhaps ironically, judicial review—review of proposed rules by the Supreme Court—has failed to curb Advisory Committee discretion. The failure of judicial review suggests pursuing the general method of formulating rules exemplified in the recent executive-oversight alternative.

Executive Order No. 12,291, which has the advantage of being fully developed and elaborately specified, provides a model for changing the Committee's method of policymaking. Moreover, there is now considerable experience with this model, and the results are encouraging. Then-Governor Bill Clinton, responding to an inquiry by the Section of Administrative Law and Regulatory Practice of the American Bar Association, observed, "Executive Order 12,291 built upon President Carter's regulatory reform executive order, and the concept underlying these orders, including executive oversight and coordination of agency rulemaking and the desirability of conducting regulatory analyses, has received bipartisan support as well as the endorsement of the ABA." Although he criticized the Reagan-Bush implementation of the order, Clinton

201. See supra text accompanying notes 142-69.
202. See supra text accompanying notes 79-87.
203. I do want to underscore that I only wish to pursue the core method of executive oversight (standards and monitoring)—not actual executive participation, which is not, in my view, a promising model for civil rulemaking. See Deborah R. Hensler, Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform, 75 JUDICATURE 244 (1992) (sharply criticizing the evidence used to support the proposals) But see Gregory B. Butler & Brian D. Miller, Fiddling While Rome Burns: A Response to Dr. Hensler, 75 JUDICATURE 251 (1992) (arguing that the proposals are justified). I also want to note that, as with any effort to proceed by analogy, particular attention must be given to the differences in context between the model and the problem at hand. For example, the internal practices of agencies subject to effective judicial review as well as executive oversight today are surely different from the practices of the Committee, which is free from both. Thus, I pursue the core model with caution, yet also with the anticipation that Committee practices not addressed here—staffing, research, project development—would change in response to new external influence.
204. Exec. Order No. 12,291, supra note 163.
indicated that he would continue executive oversight in his administration. Harold Bruff also has concluded that "a presidential oversight program has its place in the administrative state." Yet, I wish to emphasize that I only employ Executive Order 12,291 by analogy, and the worth of my proposal should be judged free of any ultimate evaluation of Executive Order 12,291 and its application. The question is whether the techniques (requirements and monitoring) of Executive Order 12,291 might meet the current needs of federal civil rulemaking, not whether Executive Order 12,291 has succeeded as applied.

Adaptation of the order to civil rulemaking would not be difficult. For example, section 2 of the order establishes the following general requirements for "promulgating new regulations" and "reviewing existing regulations”:

(a) Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
(b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;
(c) Regulatory objectives shall be chosen to maximize the net benefits to society;
(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and
(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy, and other regulatory actions contemplated for the future.

Some commentators have argued that the technique of cost-benefit analysis that is incorporated in these requirements includes a normative determination. Others have contended that the use of cost-benefit analysis is not normative but "is based instead on the pragmatic conclusion that any value system one adopts is more likely to be promoted if one knows something about the consequences of the choices to be made." I agree with the latter view, and therefore believe that adapting the Executive Order 12,291 requirements for civil rulemaking would not determine the values or objectives of the rules. Instead, this course would bring to the rulemaking process instrumental rationality—a systematic concern

206. Id.
208. Exec. Order No. 12,291, supra note 163, at 128.
210. See James V. Delong, Defending Cost-Benefit Analysis, REG., Mar.-Apr. 1981, at 39 (one of several essays collected under the title).
with the relation between means and ends. In turn, this process would require the Advisory Committee to specify in particular contexts the objectives of proposed rule changes. 211 Fulfilling this requirement, without doubt, would be a challenging assignment for the committee, but attention brought to the issue of goals would be an important benefit of employing the cost-benefit technique.

The Executive Order 12,291 requirements could be rewritten for the Advisory Committee as follows:

(a) Civil rulemaking shall be based on adequate information concerning the need for and consequences of proposed rules;
(b) Civil rulemaking shall not be undertaken unless the potential benefits to society from the rule outweigh the potential costs to society;
(c) Civil rulemaking objectives shall be chosen to maximize the net benefits to society;
(d) Among alternative civil rulemaking approaches to any given objective, the alternative involving the least net cost to society shall be chosen; and
(e) The Advisory Committee shall set rulemaking priorities with the aim of maximizing the aggregate net benefits to society.

The specification of requirements, however, would mean little without effective monitoring and enforcement. Section 3 of Executive Order 12,291 provides a mature example of just how to monitor and enforce synoptic policymaking. Section 3 requires agencies to prepare a Regulatory Impact Analysis of "major rules" and transmit them to the Director of the Office of Management and Budget for Review. 212 The location of the OMB Director external to the subject agencies screens the director from potential agency pressure. 213 As a practical matter, director approval of the analysis is required before rulemaking can continue. 214 Section 3 includes a statement of the information which must be contained in a Regulatory Impact Analysis:

211. See Thomas D. Rowe, Jr., Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation, 1989 Duke L.J. 824, 847-50 (discussing "procedural values and goals" and collecting useful references).
212. See Exec. Order No. 12,291, supra note 163, § 3.
213. See Bruff, supra note 147, at 560-62.
214. Ann Rosenfield, Presidential Policy Management of Agency Rules Under Reagan Order 12,498, 34 ADMIN. L. REV. 63, 76 (1986) (describing OMB power as a "pocket veto" power). Executive Order No. 12,291, § 3(e)(1), authorizes the director of OMB to review preliminary and final Regulatory Impact Analyses, notices of proposed rulemaking, and final rules. Section 3(f)(1) prevents an agency from publishing its preliminary Regulatory Impact Analysis or notices of its proposed rulemaking without the completion of the director's review. Although § 3(f)(2) permits an agency to publish final Regulatory Impact Analyses and final rules without the agreement of the director, virtually nothing prohibits the director from continuously withholding completion of his review under § 3(f)(1). In the case of a persistent conflict, the agency can resort to the Council on Competitiveness. New York v. Reilly, 969 F.2d 1147, 1150 n.3 (D.C. Cir. 1992).
A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;

(4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of this potential benefit and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and

(5) Unless covered by the description required under paragraph (4) of this subsection, an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order.215

Here again, these requirements could easily be adapted for the Advisory Committee. The Committee could be required to prepare analyses which include the following items:

(1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;

(2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;

(3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms; and

(4) A description of alternative approaches that could substantially achieve the same rulemaking goal at lower cost, together with an analysis of this potential benefit and a brief explanation of the reasons why such alternatives could not be adopted.

A substitute for the Director of the Office of Management and Budget would be needed to perform the review function, and the Director of the Federal Judicial Center is a good candidate.216 The Director of the Center has approximately the same institutional relationship to the Chief Justice as the Director of OMB has to the President. The Chief Justice is chairman of the Center's Board of Directors and surely plays a major role in choosing the Director of the Center.217 The President, of course, chooses the Director of OMB.218 The Director of the Center is institutionally independent


217. See 28 U.S.C. § 621(a)(1) (making the Chief Justice the Chairman of the Board); id. § 624 (empowering the Board "to appoint and fix the duties of the Director... who shall serve at the pleasure of the Board").

218. 31 U.S.C. § 502(a) establishes the Director as the head of the OMB and provides that: "The Director is appointed by the President, by and with the advice and consent of the Senate." Id.
from the Advisory Committee which is, at least formally, an agency of the Judicial Conference, just as the Director of Management and Budget is independent of all other federal administrative agencies. Although the Center has fewer staff members than OMB, the review task would be considerably smaller than the task assigned to OMB under Executive Order 12,291. The Center already has an experienced staff able to carry out the details of review for the Director.

One persistent concern about OMB oversight deserves brief mention in this context: the "openness" of the review process and the related possibility of direct communication to the monitoring agency. Secrecy about the basis of the monitoring agency's review might shield decisive information from public scrutiny. These same concerns might arise in the case of FJC review, because interested parties might provide information to the Center regarding proposed civil rules. Present OMB practice, however, provides a good starting point for resolving this issue: The FJC should make available copies of proposed rules and correspondence with the Advisory Committee (and other government agencies) as well as logs of communications and copies of written materials received from persons outside of government.

Enforcement requires only brief comment. The Supreme Court could by order establish requirements and monitoring which describe this structure as an integral part and condition of Supreme Court review of proposed rules. Indeed, asserting this position would provide, for the first time, a clear and practical role for the Court itself. Members of the Court could verify that the required analyses had been prepared and approved by the Director of the Center, and the analyses and the Director's responses could provide

219. See supra text accompanying note 95-97.
221. Review of the Annual Reports of the Judicial Center makes this clear. See, e.g., Federal Judicial Center, Annual Report 17-19 (1990) (describing the results of research on various aspects of the legal system); Federal Judicial Center, Annual Report 18-21 (1989) (same); Federal Judicial Center, Annual Report, 25-33 (1988) (same). Of course, the assignment of this additional duty to the Center might well require additional staffing, although the OMB review work is reportedly carried out by a small number of staff persons. Rosenfield, supra note 214, at 93 ("OIRA staff [Office of Information and Regulatory Affairs, the division of the OMB responsible for review], is in reality, quite small.").
222. See generally Bruff, supra note 147, at 578-89 (discussing the controversy surrounding OMB oversight of rulemaking and the appropriate degree of openness).
223. Id.
a focal point for effective Court oversight. The statutory responsibility of the Court for civil rulemaking is clear, and establishing requirements for the Advisory Committee, with monitoring by the Judicial Center, essentially would be a technique for responding to the mandate of Congress. Thus, adoption of the reform would not in any way diminish the congressional instruction.

Establishing requirements, monitoring, and enforcement are the essential elements necessary for reform, but several other matters require brief mention. Just as Executive Order 12,291 applies only to “major rules,”\(^\text{225}\) I would require Judicial Center review only for “major civil rules.” Order 12,291 provisions are not helpful in determining the appropriate scope of civil rule review, but the problem is not difficult. I would exclude changes intended only to clarify meaning or modernize language, but include all other changes. The chair of the Advisory Committee should determine which rules are covered, but, (and here Order 12,291\(^\text{226}\) is helpful) the Director of the Judicial Center should have independent authority to require review. Some might be concerned that changing the Advisory Committee process would tend to “protect” existing rules. A similar concern is treated in Executive Order 12,291 which provides that, “[a]gencies shall initiate reviews of currently effective rules in accordance with the purposes of this Order, and perform Regulatory Impact Analyses of currently effective major rules.”\(^\text{227}\) The same section provides that the Director may, under some circumstances, require review of current rules, “and establish schedules for reviews and analyses under this order.”\(^\text{228}\) This reasonable approach at least makes clear that no long-term protection should be given to current civil rules, though limited resources would certainly mean that review of current rules may proceed slowly.

IV. Changing Philosophy

To this point, I have discussed only the functional aspects of my reform proposal, but I am obliged to point out in closing that adopting my proposal would bring about significant change in a well-established philosophy of federal civil rulemaking, which seems to have prevailed since the early days of the project. This philosophical approach, in its most basic form, is called “rationalistic” and rests “on the belief that people can understand through reason and intuition alone.”\(^\text{229}\) This rationalistic approach stands in contrast with the “empirical” approach, which “begins with the assumption

\(^{225}\) See Exec. Order No. 12,291, supra note 163, at 128.

\(^{226}\) Exec. Order No. 12,291, § 3(b), provides that agency directors are responsible for deciding whether proposed rules are “major,” but the Director of OMB has the authority to “prescribe the criteria for making such determinations, to order a rule to be treated as a major rule, and to require any set of related rules to be considered together as a major rule.” Id. at 128.

\(^{227}\) Id. at 129.

\(^{228}\) Id.

\(^{229}\) JOHN M. NEALE & ROBERT M. LIEBERT, SCIENCE AND BEHAVIOR: AN INTRODUCTION TO METHODS OF RESEARCH 2 (3d ed. 1986).
that direct observation and experience provide the only firm basis for understanding nature." The approaches are not entirely separate, because reason is necessarily involved in the meaningful interpretation of observation, but the two approaches do present significantly different views about the sources of knowledge. On the one hand logic is viewed as necessary and sufficient, and on the other, observation is viewed as only necessary and not sufficient.

Civil rulemaking historically has preferred a rationalistic approach. The original movement to create a national system of federal civil rules was significantly connected to the Classical Jurisprudence of the nineteenth century, which was profoundly rationalistic: Nineteenth-century Classical Jurisprudence was dominated by the view that a correct answer could be achieved in every case by the sheer application of logic and natural principles of law. In deciding cases, judges "found" the law and described it to the public as an incident to deciding cases. These ideas recognized a dichotomy between substance and procedure and assigned to procedure the exclusive task of facilitating substantive goals, an "instrumental" view of procedure.

The three people most responsible for developing the original rules, Roscoe Pound, Thomas Shelton, and Charles Clark, each had

230. Id.
231. Id.
232. Cf. Abraham Kaplan, The Conduct of Inquiry 6 (1964) ("Of course, every scientist is 'logical' or aspires to be so; the issue is whether logic is to be conceived as validating the process of scientific inquiry, or as ultimately validated by that process.").
233. See John Monahan & Laurens Walker, Social Science in Law 1 (2d ed. 1990); see also Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1839-1940, in 3 Research in Law and Sociology 3, 3-9 (1980); (defining Classical Legal Thought as "a rationalistic ordering of the whole legal universe"); G. Edward White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 Va. L. Rev. 999, 1004 (1972) (defining Classical Legal Thought as "conceptions [that] were developed logically at the expense of practical results through an artificial process of legal reasoning").
234. Sir Henry Maine, the great English scholar, wrote in the late nineteenth century: "The primary distinction between the early and rude, and the modern and refined, classification of legal rules, is that the Rules relating to Actions, to pleading and procedure, fall into a subordinate place and become, as Bentham called them, Adjective Law." Henry Maine, Dissertations on Early Law and Custom 389 (1886). This view also was held by influential Americans, including David Dudley Field, author of New York's "Field Code" of Civil Procedure. He wrote in 1878, that the New York Code was established upon "the subordination in all things of form to substance." Letter from David D. Field to Cephas Brainerd, Rowland M. Hall, P. Van Alstine and James A. Ross (Feb. 20, 1878), in The Latest Edition of the New York Code of Civil Procedure, Correspondence Between Cephas Brainerd and Others and David Dudley Field 4 (1878). David M. Trubek described this aspect of Classical jurisprudence as a "transparent procedure," David M. Trubek, The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure, 51 Law & Contemp. Probs. 111, 113 (1988). He wrote that: "The rules of a formalist system are already there. The correct rule is not made; rather, it is discovered through procedure." Id. at 114. In other words, Trubek explained: 'Procedure was to be the handmaiden of justice, as justice was defined in classical thought." Id. at 115.
an instrumental view of procedure. Pound, widely regarded as the founder of the movement which produced the rules,235 certainly held this view.236 Shelton, who from 1912 to 1928 chaired the American Bar Association's Special Committee for Uniform Judicial Procedure,237 also held an instrumental view, though he apparently doubted that the independent effect of procedure could be escaped entirely.238 Charles Clark, principal draftsman of the 1938 rules,239 may have held more complex views of procedure than those of either Pound or Shelton,240 but Clark's often-declared opinions were essentially the same as those of Pound and Shelton. Clark quoted, with certain approval, Richard Collins' view that "the relation of rules of practice to the work of justice is intended to be that of a handmaid."241


236. Roscoe Pound, A Practical Program of Procedural Reform, 22 GREEN BAG 438, 438-39 (1910) ("[a]fter a period of rigidity in practice, in which substance has been sacrificed to form and end has been subordinated to means, we are evidently about to enter upon a period of liberality in which the substance shall prevail and the machinery of justice shall be restrained by and made strictly to serve the end for which it exists. . . . Adjective law is but an instrument.").

237. AMERICAN BAR ASSOCIATION, REPORT OF THE FIFTY-FIRST ANNUAL MEETING 27, 802 (1928); see also Subrin, supra note 235, at 948-49, 953-54 (depicting Shelton's importance to the Enabling Act story as lobbyist and spokesman for Pound's principles of simplified procedure).

238. THOMAS W. SHELTON, SPIRIT OF THE COURTS 32 (1918) ("Judicial procedure is to law what the aqueduct and water pipes are to the great reservoir where water is stored. The quality, quantity, and usefulness of the water, however put its origin, depends absolutely upon the aqueduct in which it is conveyed to the city and distributed.").


240. Bone, supra note 235, at 88 (Clark "denied any natural distinction between substance and procedure. He did believe, however, that it was analytically useful (although not conceptually fundamental) to divide procedure from substance, and he constantly insisted on an instrumental relationship between procedure and substantive law").


Perhaps everyone would now concede that rules of pleading exist simply as a means to an end and not as an end in themselves, or, as an able English judge said, as the 'handmaid rather than the mistress' of justice. Hence they find their justification only in their effectiveness in making easier and surer the application of the principles of substantive law.

Id.; see also Charles E. Clark, The Challenge of a New Federal Civil Procedure, 20 CORNELL L.Q.
The notes to the 1938 rules prepared by the Advisory Committee\textsuperscript{242} indicate a general willingness to proceed by reason and intuition with little attention to observation or experience. The note for Rule 16\textsuperscript{243} establishing pretrial conferences is an exception, citing information about the function of pretrial procedure in other courts. But the notes regarding such central areas as pleading,\textsuperscript{244} discovery,\textsuperscript{245} summary judgment,\textsuperscript{246} and class actions\textsuperscript{247} describe no observation or experience. The Civil Rules were amended according to the Rules Enabling Act process at least eighteen different times between 1939 and 1991,\textsuperscript{248} and my review of that amendment process reveals only one or two instances when the Committee abandoned the rationalistic approach and sought an empirical predicate for decision.\textsuperscript{249} Maurice Rosenberg, a veteran advocate of the empirical approach and a member of the Advisory Committee from 1980 to 1987, concluded in 1988 that the empirical approach to rulemaking has not been influential: “In part this lack of influence is due to the unreceptiveness of the intended users. Many lawyers and judges appear to believe that thinking like a lawyer means relying on law books, logic, speculation, argument, and—when it comes to addressing questions of societal reality—invoking intuition.”\textsuperscript{250} Rosenberg also reported,

\begin{quote}
[experience in reporting findings to procedural revisers and rulemakers teaches a sobering lesson: Persuading them to accept empirical research results will be a formidable task even if the research speaks directly to precisely defined and topical questions. Data have great trouble piercing made-up minds. Some judges and lawyers believe there are only two kinds of research findings: those they intuitively agree with (“That’s obvious!”); and those they intuitively disagree with (“That’s wrong!””).\textsuperscript{251}
\end{quote}

\begin{itemize}
\item 243. \textit{Id.} at 16-17.
\item 244. \textit{Id.} at 9-11.
\item 245. \textit{Id.} at 27-33.
\item 246. \textit{Id.} at 53-54.
\item 247. \textit{Id.} at 22-24.
\item 250. \textit{Id.} at 13.
\item 251. \textit{Id.} at 29. There has, in contrast, been some enthusiasm for determining the impact on the courts of substantive legislative change. \textit{See Report of the Federal Courts Study Committee} 89-92 (1990) (calling for assessment by the judicial branch); \textit{see also} \textit{Hearings on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties and
\end{itemize}
Also in 1988, Paul Carrington succinctly observed, "there are still many slips between the cup of empirical study and the lip of policy."\textsuperscript{252}

Over the years, the experiences of individual committee members have doubtless played a role in policymaking, and some might contend this amounts to employing an empirical approach. Indeed, I have argued above that this experience, particularly judicial experience, is the best starting point for civil rulemaking.\textsuperscript{253} Policymaking based on occasional personal experience, however, does not add up to employing a systematic empirical approach. Deborah Hensler explained,

"Anecdotes, no matter how individually compelling, are an inadequate substitute for systematic analysis of the interrelationship between the legal system and the economy, because critical details that could determine what inferences we derive from an anecdote are often missing. Also, we have no way of telling whether an anecdote represents a common or aberrant occurrence, which we need to know to decide how much weight to assign the anecdote."\textsuperscript{254}

Adoption of the comprehensive reform I have proposed would significantly shift the philosophy of rulemaking from the rationalistic toward the empirical. Synoptic policymaking promotes concern with effects in a real world (e.g., costs and benefits) systematically analyzed, and is virtually certain to encourage, if not require, that the Advisory Committee employ empirical investigations.\textsuperscript{255} Indeed, the potential for collecting the highest quality information about the likely effect of civil rules is very great,\textsuperscript{256} certainly much greater than in areas of federal regulation that involve public health and safety which make experimentation difficult or impossible.

This change would connect the civil rulemaking process to what might be called, in contemporary jurisprudential terms, a Law-and-Social-Science approach. This view assumes that observation and experience are essential to knowledge and incorporates the general goals of predicting when events will occur, controlling whether events occur, and understanding what causes events to occur.\textsuperscript{257} Law and Social Science employs the methods and results of social

\textsuperscript{253} See supra text at notes 34-35.
\textsuperscript{255} See, e.g., Musgrave & Musgrave, \textit{supra} note 169, at 199-225 (providing a series of case studies of cost-benefit analysis). The analysis of an outdoor recreation project is particularly instructive since it suggests both the need to collect data as well as a number of innovative techniques. \textit{Id.} at 208-12.
\textsuperscript{256} See Walker, \textit{supra} note 200 (contending that true experiments could be legally and ethically employed to test proposed civil rules).
\textsuperscript{257} See Monahan & Walker, \textit{supra} note 233, at 34-36; see also Robert Cooter & Thomas Ulen, \textit{Law and Economics} 7 (1988) (discussing the empirical approach in specific relation to the economic analysis of legal problems).
science research to provide insight about the actual and potential content of legal norms and to assess the effect of those rules. This jurisprudence includes and employs the products of economics, psychology, sociology, anthropology, political science, and linguistics.\textsuperscript{258} Wallace Loh explained, "[t]hese disciplines are relevant for law primarily because they provide a methodology for thinking about legal issues, rather than because they have accumulated particular knowledge. These are traditions of inquiry and analysis."\textsuperscript{259} Loh continued, "[t]heir educational purposes are to help the legal community to understand the consequences of existing rules, to ascertain the ways in which these rules are or are not socially effective or economically efficient, and to recommend ways to facilitate the attainment of their objectives."\textsuperscript{260}

**Conclusion**

The controversy about Rule 11 sanctions and the proposal to add a duty of disclosure to Rule 26 has revealed the substantial possibility that judicial expertise, the foundation of civil rulemaking since 1934, may be lost or assigned to a lesser role in the rulemaking process. My comprehensive reform is intended to preserve judicial expertise as the starting point for rulemaking while at the same time improving the quality of the current rulemaking product. I propose that the analogy of modern administrative law be employed to suggest adoption of a synoptic model of rulemaking for use by the Advisory Committee on Civil Rules. The constraints entailed in this model would both make it clear that the Committee is not performing a legislative function and also produce more effective rules. On the one hand, the role of the committee would be clearly distinguished from the functions of the other branches and, on the other, general satisfaction with the work of the Committee would be enhanced. These two results would discourage participation by both the legislative and executive branches in rulemaking and preserve judicial primacy.

\textsuperscript{258} See Richard Posner, The Future of Law and Economics: A Comment on Ellickson, 65 Chi.-Kent L. Rev. 57, 61-62 (1989) ("Whether the hypotheses that legal scholars test by confronting them with data . . . come from psychology, sociology, economics, or some other social science is unimportant. The important thing is to get on with the testing.").


\textsuperscript{260} Id.