The End of the New Deal and the 
Federal Rules of Civil Procedure

Laurens Walker*

I. INTRODUCTION

A salient fact of contemporary American politics is that the New Deal—for better or for worse—is over. Apparently more than sixty years is ample time to dampen enthusiasm even for a political regime as dramatic and sometimes brilliant as the New Deal. President Clinton gave notable recognition to this change during both his 1995 and 1996 State of the Union Addresses to Congress. In his 1995 Address, President Clinton stated that the New Deal “helped to restore our nation to prosperity and defined the relationship between our people and their Government for half a century.” He then observed, “That approach worked in its time. But we today, we face a very different time and very different conditions.” In his 1996 Address, President Clinton twice said simply that “[t]he era of big government is over.” Later in 1996, Congress enacted major welfare reform legislation, said to “sweep away six decades of federal welfare policy,” which powerfully substantiated Clinton’s observations. The new law returned to the states important social policy-making authority that the federal government had assumed early in the New Deal.5

* T. Munford Boyd Professor of Law and Hunton & Williams Professor of Law, University of Virginia; A.B., 1959, Davidson Coll.; J.D., 1963, Duke; S.J.D., 1970, Harvard. I wish to acknowledge with appreciation the comments and suggestions of Mary Anne Case, Barry Cushman, Michael Klarman, John McCoid, Richard Merrill, Glen Robinson, George Rutherglen, and the participants at the 1996 summer workshop series, sponsored by the University of Virginia School of Law. I also want to thank Charles Haake, Vijay Shanker, and Michael Webber for able research assistance.

2. Id.
6. See infra note 85 and accompanying text (describing early New Deal welfare legislation). Many observers share President Clinton’s views. For example, writing a few years earlier, Steve Fraser and Gary Gerstle said, “When Ronald Reagan assumed office in January of 1981, an epoch in the nation’s political history came to an end. The New Deal, as a dominant order of ideas, public policies, and political alliances, died, however much its ghost still hovers over a troubled polity.” Steve Fraser & Gary Gerstle, Introduction to The Rise and Fall of the New Deal Order, 1930-1980, at ix (Steve Fraser & Gary Gerstle eds., 1989). At the

1269
This sea change in our national politics might affect the Federal Rules of Civil Procedure (Rules) in surprising ways. Beginning with Professor Stephen Subrin, legal commentators have pointed out the influence of the New Deal on the original Rules, but no one has explored how the end of the New Deal might relate to present federal civil procedure. Now is an excellent time for such an inquiry because in recent years federal civil procedure has undergone a series of puzzling changes. This series began late in the 1970s when federal district courts began widespread proliferation of local rules. Early in the 1980s, after four decades of deference to other rulemakers, Congress began to enact directly general civil rules. In 1990 Congress required local civil justice reform. In 1992 the first optional federal civil rules took effect, and in 1995 the same time, Jonathan Rieder wrote: "The New Deal collapsed in the 1960s. Badly put, in need of qualification, this is the key truth, the essential condition, of our recent political life. The popular coalition that sustained the New Deal through postwar prosperity and McCarthyism burst into its constituent shards." Jonathan Rieder, The Rise of the "Silent Majority," in The Rise and Fall of the New Deal Order, supra, at 249. More recently, Alan Brinkley referred to the period of 1937-1945 and said, "The New Deal did, in fact, largely come to an end in those years as an active force for reform; its growing political weaknesses left it unable to match, or even approach, the great liberal achievements of its first term." Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War 8 (1995). Although these observers differ as to the time the era closed, they all agree that the New Deal is now over.

7. See Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 944-48 (1987) [hereinafter Subrin, How Equity Conquered Common Law] (documenting the Federal Rules' heavy reliance on equity procedures, which mirrored New Deal principles by permitting, for example, greater discretion by expert judges and easier access to the legal system); Stephen N. Subrin, The New Era in American Civil Procedure, 67 A.B.A. J. 1648, 1649-51 (1981) [hereinafter Subrin, New Era] (arguing that the creation of uniform federal rules with liberal pleading requirements and discovery provisions reflected New Deal values by expanding the role of the federal government and facilitating public litigation); see also Terry S. Kogan, A Neo-Federalist Tale of Personal Jurisdiction, 69 S. Cal. L. Rev. 247, 348 (1990) (arguing that the Federal Rules were related to New Deal concepts of government and the legal system); Judith Resnick, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 502-05 (1986) (arguing that the prominent role of lawyers in drafting the Federal Rules was part of a broad New Deal faith in lawyers as altruistic professionals, well suited to the task of reforming government in general); Paul T. Wangerin, The Political and Economic Roots of the "Adversary System" of Justice and "Alternative Dispute Resolution," 9 Ohio St. J. on Disp. Resol. 203, 227 (1994) (explaining that New Deal legal reformers played an important role in drafting the Federal Rules); Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1441, 1462 n.96 (1990) (arguing that the Federal Rules were one of many New Deal programs to be validated by a "paradigm shift" in constitutional law in the late 1930s); Charles M. Yablon, Justifying the Judge's Hunch: An Essay on Discretion, 41 Hastings L.J. 231, 245-46 (1990) (stating that the Federal Rules, by expanding the discretion of judges, were related to the New Deal practice of expanding "the power and number of administrative decision makers").

8. See infra text accompanying notes 97-146 (discussing puzzling changes to federal civil procedure in recent years).

9. See infra text accompanying notes 97-105 (discussing proliferation of local rules).
10. See infra text accompanying notes 106-25 (analyzing congressional rulemaking).
11. See infra text accompanying notes 126-31 (discussing mandatory local reform).
Congress established a class action procedure solely for cases brought under federal securities laws.\(^\text{13}\)

Taken together, these changes surely present the most serious challenge to the procedural status quo since the adoption of the original Federal Rules in 1938. According to Professor Charles Alan Wright, "When I survey the federal rule-making scene, the words of Sir Edward Grey, looking out his Foreign Office window on August 3, 1914, come inevitably to mind: 'The lamps are going out all over Europe; we shall not see them lit again in our lifetime.'\(^\text{14}\)" Professor Stephen Burbank has called for a moratorium on federal procedural reform followed by a broadly representative study of current problems,\(^\text{15}\) and Professor Carl Tobias has called for the creation of a national commission on civil procedure.\(^\text{16}\) A committee of the Judicial Conference of the United States has engaged in a general review of judicial rule-making, largely prompted by complaints about recent changes in federal civil rules.\(^\text{17}\) In a more prosaic response, the Administrative Office of the United States Courts recently published *Guidelines for Drafting and Editing Court Rules*,\(^\text{18}\) which is described as containing a "'black-letter' statement of principles followed by illustrations."\(^\text{19}\) The variety of responses to the challenge is itself evidence of the uncertain nature of the problem. The path of effective reform is correspondingly unclear.

In Part II, I turn to the New Deal, first describing the core aspects of New Deal political principles and their influence on the original Rules, then describing how these principles came to be discarded or modified. Important topics in Part II include the New Deal's use of experts, policies of centralized federal decision-making, and the establishment of the federal government as an agent of social reform. In Part III, I briefly review the recent puzzling changes in federal civil procedure and then propose a general explanation which can be used to plan reform. In Part IV, I proceed to describe both the scope and method of effective contemporary reform.

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13. See infra text accompanying notes 116-25 (describing class action procedures).
15. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 Brook. L. Rev. 814, 854-55 (1993) ("It is time for a breather, for a group that includes rulemakers, members of Congress and members of the bar carefully to review where we have been, where we are going and where we should be going.") (footnote omitted).
16. See Carl Tobias, *More Modern Civil Process*, 55 U. Pitt. L. Rev. 801, 839 (1995) ("[C]urrent civil procedure could well be so fragmented . . . that it is advisable to move outside the ordinary channels which modify procedure . . . . It appears better . . . to create an entity, such as a national commission on civil procedure . . . .") (footnotes omitted).
19. *Id.* at ix.
II. THE END OF THE NEW DEAL

The establishment of the New Deal by President Franklin Roosevelt and his followers was one of the most significant American political events of the Twentieth Century. The avalanche of new federal agencies and programs created during a short period of time provided a clear mark of fundamental change in American government. The political foundation for these events was manifested in commitment to a short list of principles—expertise, centralization, and social reform—all of which both guided creation of the New Deal program and influenced the original Federal Rules.

A. Expertise

The New Dealers were committed to expertise—the proposition that a few very well-educated and experienced professionals could make the best decisions about national policies. "The New Deal believed in experts. Those who rationalized its regulatory initiatives regarded expertise and specialization as the particular strengths of the administrative process." James Landis wrote that with "the rise of regulation, the need for expertness became dominant."

Felix Frankfurter, another important New Deal intellectual, shared this opinion. According to Frankfurter, "[W]e are singularly in need in this country of the deliberateness and truthfulness of really scientific expertness." Enthusiasm for the model was so great that an excuse was made for ignoring congressional directives: any deviation by the expert agency from the original plan of Congress resulted from the agency's superior information and technical knowledge. This apology was founded on the belief that "if only everyone had the same information and expertise possessed by the agency, everyone would agree that such...

20. See William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 326 (1963) ("In eight years, Roosevelt and the New Dealers... almost revolutionized the agenda of American politics."); see also Bruce A. Ackerman, Reconstructing American Law 6 (1984) ("A half-century ago, our legal system was reeling under one of the greatest shocks in its history. Although America had experienced many depressions before, it had never confided political power to a leadership so evidently willing to respond by questioning the legitimacy of laissez faire itself.").
21. See Leuchtenburg, supra note 20, at 326-48 (providing a retrospective view of "The Roosevelt Reconstruction").
24. Letter from Felix Frankfurter, Attorney, Bureau of Insular Affairs, United States War Department, to Learned Hand, United States District Judge, Southern District of New York (Sept. 23, 1912), reprinted in Freedman, supra note 22, at 45.
alterations execute the 'will of the people.' This strong version of the model provided agencies near total freedom to solve problems plainly left to them by Congress. The development of the original Federal Rules of Civil Procedure shows a commitment to expertise. Congress began the rule-making process by delegating responsibility to the Supreme Court. The only limit was the proviso that "[s]aid rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." The authority was illustrated in grand terms: "All laws in conflict therewith shall be of no further force or effect [after such rules have taken effect]." The Court accepted the task and by order created the Advisory Committee on Civil Rules and charged the Committee with preparing a proposed set of civil rules for the United States district courts. The Committee was composed of experts, both practitioners and academics. Thus Congress, with some help from the Supreme Court, carried out a classic New Deal delegation to an expert agency. The Committee responded by furnishing a preliminary draft in a short period of time, and the Supreme Court eventually approved the final version with some changes. The Court forwarded the Rules to Congress, as required by statute, but Congress made no changes, thus deferring in all aspects to the experts' plan.

27. See Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 Tex. L. Rev. 83, 91 (1994) ("In other words, although agencies may set regulatory policy, they do not make controversial, value laden choices, but rather use their expertise to solve technical problems left to them by Congress.").
30. Id.
32. See Subrin, How Equity Conquered Common Law, supra note 7, at 971-72.
34. Id. at 505 (summarizing 48 U.S. Stat. 1064). The summary notes that: Section 2 of the statute required, as previously stated, that united rules for law and equity should not take effect until after the close of a session at which they had been reported to that body. Affirmative approval was not necessary. But clearly a right of the Congress to disapprove or change such rules was implied.
35. See id. at 511-12. The Advisory Committee on Civil Rules apparently viewed itself as charged with more than providing a starting point for official action. The work product of the Committee contained not only proposed rules, but also comment in the form of notes which accompanied each rule. See, e.g., Report of the Advisory Comm. on Rules for Civil Procedure, Proposed Rules of Civil Procedure for the District Courts of the United States (1937); see also Laurens Walker, Writings on the Margin of American Law: Committee Notes, Comments, and Commentary, 29 Ga. L. Rev. 993, 997-1007 (discussing the subsequent influence of the notes).
This deference to expert decision was not without its problems and limitations. As early as 1930 Harold Laski expressed doubts about expertise in an influential article. According to Laski, “[e]xpertise, it may be argued, sacrifices the insight of common sense to intensity of experience. It breeds an inability to accept new views from the very depth of its preoccupation with its own conclusions.” In 1954 Louis Jaffe noted that “there are signs that we are readying ourselves for a Great Disillusion.” Jaffe criticized the “planning thesis” because it did not account for “the special attitudes developed in the regulator by the fact of regulation itself.” Thus, Professor Jaffe, in one brief statement, foretold concerns that regulators might be subject to both industry pressure and other forms of self-interest.

Skepticism about expertise first clearly affected policy-making during the Johnson Administration. Instead of leaving the development of programs for poverty relief solely to experts in the federal government, as the New Deal view would suggest, the novel idea was that “government policies should be framed and administered with the ‘maximum feasible participation’ of those they are intended to serve.” Professor Bruce Ackerman and William Hassler pointed to the environmental legislation of the early 1970s as examples of new-found congressional doubts about experts. Ackerman and Hassler cite the Clean Air Amendments of 1970 as examples of new-found congressional doubts about experts. Ackerman and Hassler cite the Clean Air Amendments of 1970 as examples of new-found congressional doubts about experts.
1970\(^4\) as legislation which significantly limits freedom of agency action.\(^5\) They pointed out that the Act both required the agency to set quantitative targets for clean air and established 1977 as the year to achieve these goals.\(^6\)

Congressional skepticism about agency expertise remains. The Telecommunications Act of 1996\(^7\) contains many detailed directives to the Federal Communication Commission (FCC) which limit Commission action. For example, the Act requires the FCC to prescribe regulations which require local telephone exchange carriers to share infrastructure with other qualified carriers.\(^8\) The Act then provides "terms and conditions of regulations"\(^9\) which establish seven mandatory principles limiting Commission action.\(^10\) The 1996 Act is a particularly powerful example of skepticism because it amended the 1934 Communications Act,\(^11\) a prominent example of New Deal Commitment to expertise, which broadly delegated authority to the FCC by requiring only that agency action be required by "public convenience, interest, or necessity."\(^12\)

B. Centralization

The New Dealers believed that centralization of government decision-making was absolutely necessary to survive the crisis of the depression. According to Professor Cass Sunstein, "Interdependencies in the economy, a central revelation of the Depression, made it increasingly difficult for reformers to believe that states could solve social and economic problems on their own."\(^13\) This commitment to centralization also followed naturally from the commitment to expertise because decision-making by a small number of experts requires centralization. The first and most ambitious of these initiatives was the National Recovery Administration, which sought to bring over five hundred industries into a planned system of production.\(^14\)


\(^{45}\) See Ackerman & Hassler, supra note 43, at 9.

\(^{46}\) See id.


\(^{48}\) See id. § 101(a), 110 Stat. 77 (codified at 47 U.S.C. § 259(a) (1996)).

\(^{49}\) Id. § 101(a), 110 Stat. 78 (codified at 47 U.S.C. § 259(b) (1996)).

\(^{50}\) See, e.g., id. § 101(a), 110 Stat. 78 (codified at 47 U.S.C. § 259(b)(2) (1996)) (requiring that regulations prescribed by the FCC shall "permit, but shall not require, the joint ownership or operation of public switched network infrastructure and services by or among such local exchange carrier and a qualifying carrier").


\(^{54}\) See Otis L. Graham, Jr., Toward a Planned Society: From Roosevelt to Nixon 28
Representatives of business and government met and negotiated agreements about most aspects of national industrial enterprise. Although this program was struck down by the Supreme Court, it is nevertheless a clear example of New Deal centralization. Another strong example is the Agriculture Adjustment Act of 1933. The core concept of the Act was centralized control of production in order to increase prices. The program required national prediction of demand and related production quotas. These are just two examples that illustrate the New Deal vision of a nationwide support system for the economic problems of particular areas.

The New Deal was an era in which power previously dispersed among the three branches of government often was centralized in regulatory agencies. The newly created agencies often combined the traditionally separated functions of the legislature, the executive, and the judiciary because they issued rules, enforced public policies, and engaged in adjudication. According to Professor David Yassky, the times demanded "that administrative agencies be free to regulate without having to wait for agreement among the three branches—without, that is, the restraints of separated powers." Similarly, Professor Sunstein observed, "[T]he Madisonian system of deliberative democracy included the system of checks and balances as a necessary safeguard of private property and liberty against factionalism and self-interested representation. In contrast, the New Deal conception of autonomous administration rejected checks and balances, considering them an obstacle to social change." The New Deal's increased reliance on the expertise of centralized agencies necessitated a more centralized power source in national policy-making.

The original Rules are a strong example of centralization at the federal level. Before the Rules were adopted, an act of Congress directed federal courts to follow state procedures in common-law actions,
although equity cases were governed by national rules. A major effect of the original Rules was to change this practice and centralize all federal civil procedure at the national level. The procedure chosen for producing the original Rules, though not a strong example, nevertheless has some similarity to the New Deal technique of consolidating multibranch functions in a single agency. Congressional delegation and the Supreme Court's order did produce a new agency, the Civil Rules Committee. The combined effect of the delegation and order resulted in the Rules Committee engaged in work directed by two of the three branches.

As with other aspects of the New Deal, the commitment to centralizing authority in the federal government has been modified. Professor Daniel Farber cited the Reagan presidency as a "watershed" in American politics. According to Professor Farber, "For the first time since Hoover, a president was actively hostile to the modern administrative state, elected on a platform of 'less government.'" President Reagan declared in his first Inaugural Address: "It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people." Subsequently, Reagan issued Executive Order No. 12,372 which required federal agencies to provide opportunities for consultation and coordination with state and local officials. Similarly, President Bush issued Executive Order No. 12,612 which was entitled "Federalism" and was designed to "restore the division of governmental responsibilities between the national government and the States."


66. See Subrin, How Equity Conquered Common Law, supra note 7, at 952-56 (discussing the character and origin of the Federal Equity Rules).

67. See Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature . . . ."); see also 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1011 (3d ed. 1987) ("Rule 1 describes the scope of application of the Federal Rules of Civil Procedure—for all practical purposes, and with few exceptions, these rules control the procedure in all civil actions in the United States district courts.").

68. See Rules Enabling Act, 28 U.S.C. § 2072 (1994); see also Wright & Miller, supra note 67, § 1011 ("The Rules Enabling Act of 1934 gives the Supreme Court of the United States the power to prescribe rules of civil procedure 'for the district courts of the United States and for the courts of the District of Columbia.'").


70. Id.


The trend established in the Reagan and Bush Administrations continued in the Clinton Administration. President Clinton focused on the issue of "unfunded mandates"—duties imposed by federal action on state, local, and tribal governments which require those governments to raise and spend funds to comply with federal law. In 1993 President Clinton issued Executive Order No. 12,875 which severely limited the authority of federal agencies to establish unfunded mandates. Early in 1995 Congress passed the Unfunded Mandates Reform Act of 1995. This legislation established a series of procedural constraints on Congress in order to limit further congressional imposition of mandates, and codified the general provisions of President Clinton's prior executive order curbing further agency mandates. At the signing ceremony, President Clinton discussed the relationships between federal, state, and local governments. He said:

We are recognizing that the pendulum has swung too far, and that we have to rely on the initiative, the creativity, the determination and the decision making of people at the State and local level to carry much of the load for America as we move into the 21st century.

Like the decrease in reliance on agency expertise, post-New Deal administrators have decentralized the national policy-making process.

C. Federal Social Reform

Finally, the New Dealers were committed to focusing a restructured federal government on solving domestic social problems. New Deal programs reflected a belief that the federal government should be an agent for social reform. Less than a month after taking office, President Roosevelt issued an executive order to establish the Civilian Conservation Corps, which was intended to put large numbers of unemployed persons back to work on public projects. The Conservation Corps was soon followed by the Federal Emergency Relief Administration, through

74. Exec. Order No. 12,875, 3 C.F.R. 669 (1994), reprinted in 5 U.S.C. § 601 (1994) (recognizing that state, local, and tribal governments "should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation").


77. Id. §§ 201-209, 109 Stat. 64-67 (codified at 2 U.S.C.S. §§ 1511-15138 (1996)).


79. Id. at 455.


82. See Bremner, supra note 80, at 70-71.

which the federal government made outright grants to the states for the administration of various local social programs. The most significant New Deal social welfare legislation was the Social Security Act, which provided a federally administered old age pension system, a federal-state system of unemployment insurance, a grant-in-aid system for aid to dependent children, and expanded health programs.

The courts also adopted a heightened role in providing social welfare legislation. Professor Stephen Subrin concluded that Charles Clark, the reporter for the original Advisory Committee on Civil Rules, began his work as Reporter with this goal. “Advocates, like Clark, wanted procedure to be less technical and more flexible in order to meet newly recognized social needs and to permit the expanded role of the federal government.” Given this pointed view, it is not surprising that Clark and his colleagues produced a set of rules which permitted courts an active role in federal social reform. Federal District Court Judge Jack Weinstein wrote that the Federal Rules of Civil Procedure “nationalized federal practice and prepared the federal courts to conduct litigation required by an increasing number of federal statutes.” Innovations such as the class action rule, liberal pleading, liberal joinder, and liberal discovery served to make the courts an engine for social change. Professor Geoffrey Hazard argued that contemporary complex litigation would not be possible without these innovations: “The total effect of this development has redounded to the benefit of ‘have nots’ relative to ‘haves’ . . . .

As with the other aspects of the New Deal, the federal role in promoting social reform has changed. The main vehicle of the Reagan Administration (and later the Bush Administration) for achieving this

721-728 (1934)) (terminated under section 3(a) of the Act after two years).

84. See Bremner, supra note 80, at 71. However, agencies could withhold grants, and in this way, the federal government began to acquire influence over the character of relief offered by the states. See id.; see also James Patterson, The New Deal and the States: Federalism in Transition 50-101 (1969) (giving an account of the intricate and often strained relationship between the federal government and the states in the administration of FERA money).


86. See Bremner, supra note 80, at 78; see also Leuchtenburg, supra note 20, at 332 (“The devotion Roosevelt aroused owed much to the fact that the New Deal assumed the responsibility for guaranteeing every American a minimum standard of subsistence.”).

87. Subrin, New Era, supra note 7, at 1651.


90. Id. at 2242.

91. See David S. Clark, Judge Posner’s Theology and the Temples of the Law—The Federal Courts: Crisis and Reform, 1985 Wis. L. Rev. 1183, 1183 (book review) (discussing the 1980 election of President Ronald Regan and pointing out that “President Regan and his advisors . . . have consistently argued that promoting social change and economic redistribution are not appropriate roles for the federal government”).
change was the replacement of categorical federal grants-in-aid programs with block grants.\textsuperscript{22} Categorical grants provide well-defined goals for certain programs and involve national officials in local administrative operations. Block grants, on the other hand, go to the state or local governments according to a statutory formula for use in a variety of activities and programs within a broad functional area and with comparatively little federal oversight.\textsuperscript{23} The Clinton Administration also diminished the role of the federal government in social reform, chiefly by granting numerous welfare-related waivers to states\textsuperscript{24} which freed them from established federal policies. These waivers were issued pursuant to section 1315(a) of the Social Security Act Amendments of 1994,\textsuperscript{25} which permits the Secretary of the Department of Health and Human Services to selectively release states from federal restrictions on payment of money pursuant to the Aid to Families with Dependent Children program.\textsuperscript{26} Although the trend which began in the early 1980s certainly has not returned the entire responsibility of social reform to the states, the New Deal commitment to federal management diminished as a result of Reagan, Bush, and Clinton Administration practices.

III. RECENT CHANGES IN FEDERAL CIVIL PROCEDURE

There have been many changes in federal civil procedure during the past fifteen years, but several events stand out as puzzling reversals of prior practice. For example, the proliferation of local rules, direct congressional rule-making, mandatory local reform, and optional rules raise important questions about the current foundations of the Rules project. Is there an explanation which can account for all of these disparate developments and, most importantly, guide reform of the Rules?

A. Proliferation of Local Rules

Local district court rules follow from Federal Rule of Civil Procedure 83, which provides that "each district court . . . may . . . make and amend rules governing its practice."\textsuperscript{27} For decades, the federal judiciary helped

\textsuperscript{23} See id. at 26. In his first year, President Reagan consolidated more than 70 categorical programs into block grants. See id. at 42; see also, Dale Tate, Reconciliation Spending Cut Bill Sent to Reagan, 1981 Cong. Q. 1371, 1377 (reporting creation of block grants for federal health programs).
\textsuperscript{26} See id.
\textsuperscript{27} Fed. R. Civ. P. 83.
maintain the national uniformity of the Rules by adopting comparatively few local rules, and very few local rules in conflict with the national Rules.98 This situation changed beginning in the early 1970s as the district courts rapidly began to add rules.99 In the 1980s, the Judicial Conference of the United States responded by carrying out a study of local rules,100 which showed a remarkable number of rules, many inconsistent with the general Federal Rules.101 The project report concluded: “The ninety-four federal district courts have an aggregate of approximately 5000 local rules, not including many ‘sub-rules,’ standing orders, and standard operating procedures.”102 Congress significantly altered the process of making local rules in 1988 when it passed a statute requiring district courts to appoint advisory committees to assist judges in writing local rules.103 Professor Carl Tobias, discussing what he called the “balkanization” of federal procedure, wrote:

The local committees essentially could replace the expert, and ostensibly neutral, Civil Rules Committee, whose charge is to study the Federal Rules from the perspective of what is best for all ninety-four districts that comprise the civil justice system and to develop proposals for change in those provisions that will be most efficacious.104 Tobias concluded, “In 1988, Congress essentially substituted for the Civil Rules Committee ninety-four relatively amateur entities, composed of local federal court practitioners appointed by the judges of those courts.”105 This conclusion is striking because it suggests the original Rules project has been undermined. Yet, this significant development lacks, to date, a useful explanation—in the sense of an explanation that can guide reform.

B. Congressional Rule-making

The current era of civil rule-making began in 1934 with passage of the Rules Enabling Act which provided that “[t]he Supreme Court . . . shall have the power to prescribe by general rules . . . practice and procedural”106 for the district courts. Congress left rule-making entirely to the

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99. See id. at 1997-99 (citing the experimentation of courts in formulating local rules).
104. Tobias, supra note 98, at 1400.
105. Id.
Supreme Court until 1958 when it added a role for the Judicial Conference of the United States, but Congress itself took no other role. However, in 1980 Congress changed this practice and began to amend the Rules directly. Professor Wright traced the advent of congressional rule-making back to "the sad saga of the Evidence Rules." In 1972, the Supreme Court sent proposed evidence rules to Congress for review, and Congress made wholesale changes. Significantly, this was about the same time that Congress began demonstrating a loss of faith in expertise. Not surprisingly, "Congress refused to defer to the Supreme Court and its expert advisors on the Evidence Rules, and it has felt little need to defer since." In 1980 Congress changed Rule 37 to permit the award of expenses and fees against the United States for violation of the discovery rules. In 1983 Congress amended Rule 4, which governs service of process, apparently in large part to relieve the United States Marshals of routine service work. In 1988 Congress amended Rule 35 to allow psychologists who were not also physicians to carry out mental examinations.

The most significant action occurred in 1995 when Congress passed the Private Securities Litigation Reform Act, which included notable changes to the class action practice in cases involving claims under the Securities Act of 1933 and the Securities Exchange Act of 1934. The provisions apply to all actions brought under the 1933 and 1934 Acts "as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." Despite this reference to the Federal Rules, the Act of

108. Wright, supra note 14, at 11.
110. See Ackerman and Hassler, supra note 43, at 25 (discussing the effect of environmental legislation in curtailing agency authority).
111. Wright, supra note 14, at 11; see also Griffin Terry, Comment, A Critical Analysis of the Formulation and Content of the 1993 Amendments to the Federal Rules of Civil Procedure, 63 U. Cin. L. Rev. 869, 879 (1995) ("[T]he traditional deference afforded to judicial rulemaking expertise is being diminished.").
1995 included significant departures from established practice. First, each plaintiff seeking to serve as a representative party must file with the complaint a sworn, personally signed certificate describing in detail the party's relation to the lawsuit. Second, the Act provides for the appointment of a lead plaintiff and establishes rebuttable presumptions to guide this choice. Third, the Act limits discovery which may be conducted in connection with selection of a lead plaintiff. Fourth, the Act provides that the lead plaintiff, subject to court approval, shall choose counsel to represent the class. Finally, the Act provides that a lead plaintiff can serve as such in no more than "5 securities class actions brought as plaintiff class actions pursuant to the Federal Rules of Civil Procedure during any 3-year period." Although it could be argued that prior direct rule-making by Congress produced only minor changes in the civil rules, the 1995 action dramatically limited the scope of the general class action rule and implemented for securities litigation a novel and complex structure quite different from Rule 23. Congressional intervention on this scale suggests a major change in legislative perception of the Rules project—a change virtually certain to effect future reform.

C. Mandatory Local Reform

In 1990 Congress passed the Civil Justice Reform Act, which invited wholesale local modifications of the Rules. A key aspect of this Act was the requirement that each United States district court create an advisory committee composed of both attorneys and litigants to work together in producing a plan to make civil litigation more efficient. The statute also provided that judges shall consult this advisory group annually regarding potential improvement of the plan. The truly remarkable
structural implications were pointed out by Professor Linda Mullenix who wrote that, "Congress has taken procedural rulemaking power away from the judges and their expert advisors and delegated it to local lawyers."\(^{129}\) The resulting plans differ from one another\(^{130}\) and sometimes contravene the requirements of the Federal Rules of Civil Procedure. For example, the Eastern District of Texas adopted a plan which provided, "To the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."\(^{131}\) In this case, Congress has again taken an active role in rule-making, but instead of legislating rules, it has delegated responsibility to local agencies. Again, fundamental legislative rule-making seems to be changing in a dramatic way.

\section*{D. Optional Rules}

The 1993 amendments to the Federal Rules of Civil Procedure included, apparently for the first time, the right of a district court to "opt-out" of civil rule requirements.\(^{132}\) Federal Rule of Civil Procedure 26(a)(1) requires parties to disclose certain information to the parties "[e]xcept to the extent . . . directed by order or local rule,"\(^{133}\) and Rule 26(f) mandates a meeting of parties "[e]xcept in actions exempted by local rule or when otherwise ordered."\(^{134}\) Half of the ninety-four federal district courts have "opted-out" of the national disclosure requirements, although many have substituted other disclosure rules.\(^{135}\) Professor Lauren Robel called these innovations especially "surprising with respect to Rule 26(a)(1) because it suggests a lack of commitment by the Advisory Committee to a controversial rule and because it represents starkly the lack of consensus

\(^{1284}\) (1994).


130. See David Rauma & Donna Stienstra, Federal Judicial Ctr., The Civil Justice Reform Act Expense and Delay Reduction Plans: A Sourcebook 6 (1995) ("The expense and delay reduction plans differ markedly in their content, as would be expected of plans formulated on the basis of local issues and needs.").


135. See Donna Stienstra, Federal Judicial Ctr., \textit{Implementation of Disclosure in United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rules of Civil Procedure} 26, 165 F.R.D. LXXXVIII, LXXXVIII (1996) ("Of the forty-seven districts that have not implemented the rule, three require initial disclosure through local rules, orders, or the CJRA plan, one requires disclosure in a specified set of case types, and seventeen . . . specifically give judges authority to require initial disclosure.").
about even the most fundamental aims of our procedural system.\textsuperscript{136} This notable rejection of centralization and expertise requires a rationale.

\textbf{E. The End of the New Deal}

The end of the New Deal provides a general explanation for the recent puzzling changes in federal civil rule structure. For example, the rejection of expertise provides an explanation for a number of changes. Direct congressional rule-making is an obvious indication that delegation to experts in this area is now disfavored. As in so many other areas, Congress has expressed new-found confidence in its own law-making ability and has partially rejected claims for expert decision-making. The 1995 enactment of the novel class action provisions for suits under the 1933 and 1934 Securities Acts\textsuperscript{137} is strong evidence that Congress is confident that it can fashion complex civil rules dealing with important substantive topics. Congress' rejection of expertise also furnishes a strong explanation for both 1988 and 1990 legislation requiring citizen participation in aspects of rule-making.\textsuperscript{138} These requirements show that Congress not only gained confidence in its own ability, but also concluded that a representative group of citizens assembled on a district-by-district basis can be trusted. Recall that the addition of citizen participation requirements to Great Society programs is cited as early evidence in actual policy-making that belief in expertise has declined.\textsuperscript{139}

Also, doubts about the benefits of centralization offer insights into recent changes. Most notable is the proliferation of local rules which has roughly paralleled increasing doubts about centralization.\textsuperscript{140} The program of mandatory local reform enacted in 1990\textsuperscript{141} also has provided recent impetus to this movement. The adoption of widely divergent reform programs adds strikingly to the decentralization trend begun by the proliferation of local rules. The reform plans have the practical effect of adding many new local rules, as a result of which the procedural law among districts becomes ever more diverse. This trend was continued in 1993 by the novel "optional" rules\textsuperscript{142}—further clear evidence of doubt about the benefits of centralization. Taken together, these developments suggest that federal civil practice is now much more than before a matter of local determination, a situation consistent with the analysis of contemporary politics.

\begin{itemize}
\item \textsuperscript{136} Robel, supra note 132, at 51.
\item \textsuperscript{137} See supra notes 116-25 and accompanying text (discussing changes to class action provisions).
\item \textsuperscript{138} See supra notes 109-05 and accompanying text (discussing 1988 legislation).
\item \textsuperscript{139} See supra notes 41-52 and accompanying text (discussing evidence of how belief in expertise has declined).
\item \textsuperscript{140} See supra notes 97-105 and accompanying text (describing proliferation of local rules).
\item \textsuperscript{141} See supra notes 126-51 and accompanying text (discussing mandatory local reform).
\item \textsuperscript{142} See supra notes 132-36 and accompanying text (discussing optional rules).
\end{itemize}
Finally, questions about the appropriate federal role in social reform provide insight into recent changes. The Committee on Practice and Procedure of the Judicial Council of the United States recently approved for publication and comment the first change to the federal class action rule since the rule was entirely rewritten in 1966. The proposal’s key provision is the addition of a new type of class action intended solely to facilitate the settlement of cases involving large numbers of parties. If adopted, this change, at least in terms of public impact, will be the most important civil rule modification since this rule was rewritten. This proposed change signals new support by the rule-makers for settlement as a vehicle for social reform and diminishes the role of adjudication, thus diminishing the federal role. This signal is present because the proposed rule expressly provides that the economies of the class action device will be available to facilitate the settlement of some cases that could not be certified for trial. Although district judges would still be required to approve the terms of settlement in the new type of class, the opportunity for active policy-making would diminish. As Owen Fiss observed, “A settlement will... deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement.”

IV. EFFECTIVE REFORM

If review of recent political developments can, as it seems, help explain recent changes in federal civil procedure, then it is likely this same insight can predict the scope and method of effective reform. The only practical option for proceduralists is to accept the fact of inevitable political change and to take that change into account when planning the work of reform. There will be differences of opinion as to just how to take political change into account, but I propose a response in terms of both the scope and method of reform efforts.

A. Scope

Major change in political structure and practice requires bold action. Several commentators have called for a study group or a national commission to review the status of federal civil procedure and to propose changes. Professor Burbank wrote: “It is time for a breather, for a group that includes rulemakers, members of Congress and members of the bar carefully to review where we have been, where we are going and where we should be going.” Recently, Professor Tobias proposed “a national

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144. See id.
145. See id.
commission on civil procedure.\textsuperscript{148} The scope of the Burbank-Tobias suggestions seems appropriate. Although I have earlier suggested other, less drastic, ways to improve the current system,\textsuperscript{149} the case for fundamental review is now powerful. Also, the changed political circumstances suggest the need for a general review by some group different from the bodies currently employed. As Tobias observed, "[I]t is advisable to move outside the ordinary channels which modify procedure."\textsuperscript{149} The proposed scope of review is about the same as that which occurred in the early 1930s when the current Rules were produced. The review was fundamental and the Advisory Committee then was a new institution in judicial rule-making.\textsuperscript{151}

In contrast, the report of a general review of rule-making recently made to the Committee on Practice and Procedure\textsuperscript{152} seems unlikely to produce much effective reform. The report's suggestions are narrow in scope and apparently do not take into account changed political circumstances. Most of the proposals relate only to the management of the current process and do not address fundamental problems suggested by the recent developments discussed above.\textsuperscript{153} For example, the report first recommends to the Chief Justice that "[a]ppointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar."\textsuperscript{154} The report next recommends to the Advisory Committees that "[c]hairs and [r]eporters of the Advisory Committees should schedule orientation meetings with new members."\textsuperscript{155} The third recommendation is to the Chief Justice and proposes that "[t]he term for Chair of the Advisory Committees should be five years."\textsuperscript{156} The fourth recommendation is to the Advisory Committees and suggests that Reporters be encouraged to circulate pertinent articles and organize in-


\textsuperscript{150} Tobias, supra note 16, at 839.

\textsuperscript{151} See supra notes 106-25 and accompanying text (discussing fundamental nature of review).

\textsuperscript{152} See Self-Study of Federal Judicial Rulemaking, supra note 17, at 679.

\textsuperscript{153} See supra notes 97-136 and accompanying text (discussing recent developments).

\textsuperscript{154} Self-Study of Federal Judicial Rulemaking, supra note 17, at 696.

\textsuperscript{155} Id. at 697.

\textsuperscript{156} Id.
house seminars. Similarly, the Guidelines for Drafting and Editing Court Rules, a "blackletter statement of principles" for modern rule-drafting, is not responsive to the major needs. Although not controversial, these suggestions focus mostly on style and certainly not on the issues posed by recent changes.

B. Method

The goal of a study group or national commission should be the production of innovative solutions to current problems. One promising strategy would be to analyze post-New Deal restructuring which has already occurred in other subject matter areas such as welfare, the environment, and transportation. The objective would be to find contemporary models for restructuring the rules. Adoption of this "freerider" strategy for civil rule reform would allow a study group or commission to move directly to policy options which have promise. For example, consider the possibilities of borrowing from the recent welfare reform experience in a search for innovative solutions for civil rule reform. Although federal civil rules and welfare may seem largely unrelated, in the context of New Deal politics there are important similarities: recall that both civil rules and welfare were centralized in the national government during the early 1930s, both in a manner designed by a small group of experts and both with a result which enhanced the federal role in social reform. This similarity in

157. See id.
159. Id. at ix.
160. For example, the Guidelines begin as follows:

1. Basic Principles

1.1 Be clear.
A. Identify instances of vagueness and ambiguity and sharpen the wording.
B. If you need substantive directions, consider alternative wordings and set them out as possibilities for the decision-maker.

1.2 Make the draft readable.
A. Prefer short sentences. The average sentence length in good drafting is no more than 30 words.
B. Use the simplest possible words to express the idea clearly. Avoid legal jargon.
C. Use a word or phrase consistently to express a single idea. Do not vary your terminology for the sake of "elegant variation."

1.3 Be as brief as clarity and readability permit.

1.4 Organize the rule to serve clarity, readability, and brevity.
A. Organize the draft logically, with headings and subheadings, so that the reader has bearings.
B. Use structure to enhance readability and reinforce meaning.

Id. at 1 (emphasis omitted).

161. See supra notes 97-136 and accompanying text (discussing recent changes and issues they pose).

162. See generally Joseph P. Lash, Dealers and Dreamers (1988) ("A book about the 350 odd men and women, the New Dealers, who helped Roosevelt put through the social transformation of the thirties.").

163. See supra notes 53-79 and accompanying text (discussing the centralization of federal
political origin suggests that techniques used to adjust welfare programs to new political realities might be used to make similar changes to the Federal Rules of Civil Procedure. At least four strong candidates emerge from federal welfare reform: the use of waivers, enhanced local control, mandatory research, and use of incentives, each of which is discussed below.

The Clinton Administration’s widespread use of waivers in federal reform was carried on in partial response to a highly-conflicted legislative debate which characterized federal welfare reform. Legislative initiatives included President Clinton’s proposal to modify the current system and a Republican plan for drastic change. The Clinton plan was not reported out of committee, and the Republican plan was twice passed and twice vetoed. For a while, these events left the waiver program as the exclusive vehicle of actual change. With neither the President’s nor the Republicans’ plan capable of enactment, the only change available was through the ad hoc executive process of exception from general federal welfare mandates.

Late in 1996 the Republican plan was adopted a third time by Congress and signed by President Clinton, who called the legislation “significantly better than the bills I vetoed.” Although the new law is long and complex, several features should be noted as possibly significant for federal procedural reform. First, Congress gave the waiver practice strong support. The Act provides that existing waivers will remain in effect for their full stated durations. States may abandon existing waiver conditions, but the Act encourages states operating a waiver to continue. The significance of these features is the legislative enthusiasm for ad hoc change, even as part of permanent reform. This widespread

civil procedure); supra notes 80-96 and accompanying text (discussing the expansion of the federal role in social welfare).

164. See supra notes 80-96 and accompanying text (discussing federal social reform).
167. See Legislative Summary: Welfare Overhaul, 1994 Cong. Q. 3182.
173. See id.
174. See id.
175. See id.
and enthusiastic use of the waiver suggests, in larger terms, that in times of important political readjustment, change may happen easily in small ways that do not force confrontation of disputed political values.

The second pertinent feature of the Act of 1996 is the technique adopted for long-term change. The key change provides for federal payment to the states of a specified and limited sum of money for welfare, leaving the terms of distribution to be determined by a state plan, subject to a few federal constraints such as work requirements and time limits. Thus, although the legislation establishes a new relationship between federal and state governments, strong monitoring techniques are retained at the federal level, providing assurance of similar, though not identical state programs. Here again, in a time of political transition, is a technique which can produce politically necessary change without a dramatic focus on conflicting values.

A third pertinent aspect of the 1996 Act is the attention paid to research. At several places in the legislation requirements for research are described, and there are even suggestions about research methods. The focus on research is attractive because it adds a pragmatic quality to the change, diminishing the focus on changing political values. Finally, the Act uses incentives to encourage efforts to meet policy objectives. Once again, the clash of political values seems diminished by the inclusion of this obviously pragmatic mechanism.

The techniques of waiver, monitored change, required research, and the use of incentives might help to provide fresh approaches to procedural reform. For example, a study group or commission might consider enacting a statute similar to the waiver provisions of the Social Security Act, which would permit individual districts to waive national rules, subject to approval by the Administrative Office of United States Courts. As in the case of welfare, such a system would both enhance local control and provide for a degree of national supervision. Commission members might also consider the "block grant" technique of long-term welfare reform. This development suggests that a series of waivers can lead, over a period of years to enhanced delegation, subject to a few limiting principles. A study group or commission might consider the prospect that local district courts may eventually be permitted to adopt their own rules of civil procedure subject to a few generally stated constraints such as a requirement of "liberal discovery" or "notice pleading." In this way, broad federal policies could be enforced, but greater flexibility is allowed for adjustments to local conditions, as well as for testing local innovations.

176. See id.
178. See id.
180. Another possible limit would require conformity to local state procedure, producing, at least within the district, the benefit of a single civil procedure.
The focus of the 1996 Act on research also deserves consideration. The contents of the Act suggest that enhanced local control, whether by waiver or other technique, may incorporate a research requirement and might even include suggestions about the proper method. No previous change in the Federal Rules of Civil Procedure has ever included a research requirement, but the possibility of such action is now suggested by the welfare experience. District courts might be permitted to modify particular parts of the Federal Rules of Civil Procedure on the condition that data be collected according to specified methods. Finally, the Act's use of incentives to encourage state enterprise in managing welfare suggests consideration of similar techniques for managing civil litigation. Federal procedural requirements might be lifted if successful management were demonstrated.

V. CONCLUSION

The end of the New Deal has inevitably caused major change in a system of procedure established largely on New Deal principles, and this change is almost certain to continue. Indeed, I view the prospect as a good thing because any official and important social structure in a democratic society ought to reflect contemporary political values. The present imperative for proceduralists is to grasp the significance of these developments and embark on a program of reform that is consistent with contemporary views. Change which is responsive to these new political realities can, I believe, be guided in constructive ways. As to scope, I have argued, as have others, that a fresh start is necessary, and I have proposed a method of beginning with an analysis of post-New Deal programs in search of structural techniques which might find some useful application in federal civil procedure. While these suggestions may seem surprising to contemporary readers, in essence these steps are approximately the same taken in the 1930s civil rules project. I argue that we must follow that example in order to achieve effective contemporary reform.
