

UNIFORMITY IN PROCEDURAL RULES AND THE ATTRIBUTES OF A SOUND PROCEDURAL SYSTEM: THE CASE FOR PRESUMPTIVE LIMITS

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When I received a tentative schedule for this conference, I saw that I was to speak on "Uniformity in Procedural Rules." I mused on how the naval architect must have felt when in 1913 he was asked to speak on "The Structural Safety of the Titanic." But as a long-standing Boston Celtics fan, who saw Bill Russell outrebound Wilt Chamberlain the first time they met in the Garden, I have now had a full decade to develop the humility and wisdom that accompany fallen glory.

This is not an easy time to talk about uniformity in procedural rules. The three types of uniformity that grew to be part of the Enabling Act Movement¹ have taken severe beatings in recent years:² inter-federal district court uniformity, intrastate

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1. On inter-federal district court uniformity: Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1042-54 (1982) [hereinafter Burbank, *Enabling Act*]; Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002-05 (1989) [hereinafter Subrin, *Uniformity, Divergence*]. On intrastate uniformity: *id.* at 2005-06. On trans-substantive uniformity: *id.* at 2006; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 956-61 (1987) [hereinafter Subrin, *How Equity Conquered*]. The proponents did not emphasize a fourth potential type of uniformity: uniformity of result. On uniformity of result: *id.* at 1000; Subrin, *Uniformity, Divergence*, *supra* at 2003-04, 2006.

2. See Charles Alan Wright, *Forward: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 1-11 (1994) [hereinafter Wright, *Malaise*]; see also Subrin, *Uniformity, Divergence*, *supra*, note 1, at 2018-31, 2048-51; DAVID RAUMA & DONNA STIENSTRA, *THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK* (FEDERAL JUDICIAL CENTER, 1995) [hereinafter RAUMA & STIENSTRA, *SOURCEBOOK*]; Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 781-93 (1995); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1447-48 (1994); Ste-

uniformity, and trans-substantive uniformity. By inter-federal district court uniformity, I mean national procedural uniformity across all federal district courts. I use intrastate uniformity to describe a state's having the same civil procedural rules in both its state courts and in the federal district courts that are housed within the state. Trans-substantive uniformity means that the same procedural rules are used for different types of cases, regardless of the substantive law being applied.

Recall that the twentieth century ABA movement for uniform federal procedural rules started with the proposition that the Conformity Act of 1872³ had failed, and that lawyers had difficulty knowing what procedure would apply in any given federal district court.⁴ The procedure should be the same in every federal district court, the argument went (inter-federal district court uniformity). The Supreme Court of the United States would make such modern, correlated, and enlightened rules, the proponents continued, that the states would see the light and follow suit (intrastate uniformity). Procedural technicality was the villain. The judges had been handicapped by political legislatures that had adopted unscientific procedure and forced it on an unwilling judiciary, the argument continued.⁵ Charles Clark insisted that merger of law and equity was the only way to truly eliminate the complexities.⁶ It turned out that if there was to be one simple, flexible procedure to apply to all cases (trans-substantive uniformity), that procedure would draw

phen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1155-65 (1993) [hereinafter Subrin, *Teaching*].

3. Conformity Act, ch. 255, §§ 5-6, 17 Stat. 196, 197 (1872), repealed by Rules Enabling Act, ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072).

4. See 37 REP. A.B.A. 434, 434 (1912) (discussing failure of Conformity Act); *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 513-14, 525-27 (1920) (same); Thomas W. Shelton, *Uniform Judicial Procedure-Let Congress Set the Supreme Court Free*, 73 CENT. 319, 321-22 (1911) (same).

5. See Burbank, *Enabling Act*, supra note 1, at 1048-50 (describing the arguments and rhetoric that accompanied the Enabling Act movement); Subrin, *How Equity Conquered*, supra note 1, at 956-61 (same); Subrin, *Uniformity, Divergence*, supra note 1, at 2002-06 (same). Many of Thomas Shelton's articles and speeches about procedure can be found, in somewhat edited form, in THOMAS W. SHELTON, *SPIRIT OF THE COURTS* (1918).

6. Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in JUDGE CHARLES EDWARD CLARK 115, 118-122 (Peninah Petruck ed., 1991) [hereinafter Subrin, *Clark*].

largely from equitable principles.⁷ Ease in pleading, broad joinder, expanded discovery, and judicial discretion rode the bandwagon under the dual flags of Uniformity and Simplicity.⁸ The litigation unit was seen as the transaction or occurrence or "series thereof,"⁹ rather than the more limited writ or single cause of action.¹⁰

Professor Charles Alan Wright has lamented that "[p]rocedural anarchy is now the order of the day."¹¹ This is difficult to dispute. As a consultant to the Reporter for the Federal Rules Project of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, I worked several years with, then Dean, Daniel Coquillette and Mary Squiers analyzing the then 5000 plus local rules and recommending the elimination of rules that contradicted, needlessly repeated, or altered the uniform Federal Rules.¹² We also sought uniform numbering of those local rules that remained.¹³ The effort to constrain the proliferation of local rules and to eliminate rules that were unnecessary and inconsistent with the Federal Rules was bolstered by the 1985 amendments to the Federal Rules and the Judicial Reform Act of 1988.¹⁴ The Civil Justice Reform Act of 1990¹⁵ moved civil procedure away from inter-federal district court uniformity. Rather than mandating

7. *Id.* at 142-44; Subrin, *How Equity Conquered*, *supra* note 1, at 956-61.

8. FED. R. CIV. P. 8, 13, 18-24, 26-37. See Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1464-70, 1474-76 (1987) (describing judicial discretion inherent in the FED. R. CIV. P.) [hereinafter Burbank, *Complexity*]; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 655 (1971) (same).

9. FED. R. CIV. P. 13, 14, 15, 20.

10. For a description of common law pleading, including writs, and David Dudley Field's use of cause of action, see Subrin, *How Equity Conquered*, *supra* note 1, at 914-18, 931-39.

11. Wright, *Malaise*, *supra* note 2, at 11.

12. For descriptions of the Local Rules Project, see Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J., Jan. 1989, at 62; Subrin, *Uniformity, Divergence*, *supra* note 1, at 2020-26.

13. For descriptions of the Local Rules Project, see Daniel R. Coquillette et al., *The Role of Local Rules*, 75 A.B.A. J., Jan. 1989, at 62; Subrin, *Uniformity, Divergence*, *supra* note 1, at 2020-26.

14. For a description of the changes made in FED. R. CIV. P. 85 and 28 U.S.C. §§ 2071, 2077(b) (1994), see CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 432 (5th ed. 1994) [hereinafter WRIGHT, *FEDERAL COURTS*].

15. 28 U.S.C. §§ 471-482 (1994).

uniformity, it obligated experimentation and virtually insured diversity. The opt-out provisions of amended Rule 26¹⁶ added to the breakdown of federal procedural uniformity.¹⁷

But some context is in order. It has never been easy to force federal judges to follow procedure they did not like.¹⁸ Under the Conformity Act of 1872, federal trial judges used the as "near as may be" escape hatch as a means to avoid applying state procedures that they considered unwise.¹⁹ In 1940, two years after the effective date of the Federal Rules, which were meant to provide procedural uniformity, the Knox Committee complained about excessive local rule proliferation.²⁰ As Professor Steve Burbank and others have pointed out, the uniformity of the Federal Rules was itself problematic in that the broad judicial discretion under the rules severely diminished procedural uniformity in application.²¹

Intrastate uniformity did not develop to the extent anticipated, or at least touted, by the Enabling Act advocates of the 1920s. For example, nine of the ten most populated states did not adopt the Federal Rules of Civil Procedure,²² although pro-

16. FED. R. CIV. P. 26(a)(1).

17. RAUMA & STIENSTRA, SOURCEBOOK, *supra* note 2, at 105-30.

18. See *Simplification of Judicial Procedure in Federal Courts: Hearing on S. 1011, 1012, 1546, 2610, and 2870 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 2d Sess. 11 (1922):

Mr. Shelton: I think Mr. Taft will bear me out in that respect, that Federal practice is not anything like State practice at all; and I think I am using his language when I say, Is there any way in the world in which you can make the courts conform to the State practice?

Mr. [Henry] Taft: What I said was, I did not think there was any way short of impeachment.

Mr. Shelton: That is a little stronger than I thought it was.

19. See Subrin, *Uniformity, Divergence*, *supra* note 1, at 2002 n.17; WRIGHT, *FEDERAL COURTS*, *supra* note 14, at 425-26. But Senator Thomas Walsh, the major opponent to the Enabling Act, never conceded that the lack of conformity was as acute as the proponents of the Enabling Act claimed. See Subrin, *Uniformity, Divergence*, *supra* note 1, at 2007 nn.45-46.

20. *Report to the Judicial Conference of the Comm. on Local Dist. Court Rules III* (1940), discussed in Subrin, *Uniformity, Divergence*, *supra* note 1, at 2016-18.

21. See Burbank, *Complexity*, *supra* note 8, at 1474. The fact that federal district court judges have so much discretion under the FED. R. CIV. P., particularly in their individualized management of cases, means that even within the same federal district court there may be a good deal of procedural disuniformity among the judges and magistrates of that district.

22. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A*

cedure throughout the country certainly borrowed from the reform.²³ Moreover, as Charles Clark, the Reporter for the initial Advisory Committee on federal procedural rules, noted over half a century ago, the federal courts have a caseload considerably different from that of the states.²⁴ This phenomenon has accelerated since his death. As of 1987, over 70% of the federal court civil case load was composed of federal question cases or cases in which the United States is a party.²⁵ The federal court system has considerably more court personnel than in most, if not all, state trial courts. These differences between the two systems mean at least two things for uniformity: a) it may not make sense for state courts to use federal procedure as a model;²⁶ and b) the federal judges themselves may be dealing with issues on a daily basis that require policy judgments and a balancing of interests that are different from traditional adjudication and are not easily susceptible, or susceptible at all, to traditional procedural rules or to the uniform treatment of cases. As to creating a more detailed picture of the type of questions state and federal court trial judges must handle on a daily basis, it would help if we knew a good deal more empirically.

There have also been severe inroads on the procedural uniformity that comes with treating all cases alike. The Supreme Court's and other federal courts' treatment of Title VII²⁷ cases and the Congressional procedural incursions with respect to Securities Act litigation,²⁸ plus special rules for pro se cases,

Survey of State Court Systems of Civil Procedure, 61 WASH. L. REV. 1367, 1429 (1986).

23. WRIGHT, *FEDERAL COURTS*, *supra* note 14, at 430.

24. CHARLES CLARK, REPORT ON CIVIL CASES OF THE BUSINESS OF THE FEDERAL COURTS 3-4 (1934), later published as AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, PART II, CIVIL CASES (1934) (on the growing number of government civil cases in federal court of fiscal year ending June 30, 1930).

25. WOLF HEYDEBRAND & CAROLL SERON, RATIONALIZING JUSTICE, THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS 171, tbl. 7.3 (1990).

26. Thomas D. Rowe, Jr., *A Comment on the Federalism of the Federal Rules*, 1979 DUKE L.J. 843, 843.

27. See Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 219-20 (1992) [hereinafter Baumann, *Title VII*].

28. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C.A. § 77z-1 (West 1997)).

prisoners' cases, social security cases, and others,²⁹ have undermined trans-substantive uniformity.

The procedural breakdown has not only been one of disuniformity. There is not agreement on major procedural issues: Rule 23, Rule 68, pleading in civil rights cases, and Rule 11, to name a few. These are by no means merely academic arguments. The politics are intense, and the stakes are often enormous for competing interest groups.³⁰ It will not be easy to reach agreement on procedural matters that will repair the fractures. I believe it was Professor Hazard who pointed out to me many years ago that the legal profession has become so decentralized and diverse that it is unlikely in the extreme that a relatively small group of lawyers, many of whom knew each other in advance, could sit in a room and create an entirely new procedure for the entire country as was the case in the 1930s.³¹

Given the breakdown in uniformity and disagreement on major procedural issues, it is important to determine whether we can find a conceptual framework for analyzing what has occurred, and whether we can glean from what appears to be a mess glimmers of coherence in order to chart a future course. It is also important to ask whether the Rand Report's³² findings give hints of any ways out of the morass. I will argue in this Article that a major lesson of procedural history, including almost six decades of experience under the Federal Rules, is that a sound procedural system requires constraint and focus, concepts upon which I will soon expand. I also urge that it is critical in our democracy that judges in fact judge, and that an important aspect of that judging is presiding over jury trials in open court. Ad hoc case management, I argue, often needlessly distances judges from their essential functions. I will explain how presumptive procedural limits of numbers and time offer a

29. See, e.g., Subrin, *Uniformity, Divergence*, *supra* note 1, at 2026 n.135.

30. Consider, for instance, the intensity of the lobbying with respect to recently proposed amendments to Rule 23, and the heat engendered by the debate over Rule 11 and its amendments.

31. I suspect that the conversation was during the Symposium in Boston and Cambridge on *The 50th Anniversary of the Federal Rules of Civil Procedure* during Oct. 7 and 8, 1988. The Symposium is reported in 137 U. PA. L. REV. 1873 (1989).

32. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) [hereinafter RAND REPORT].

means to combine the positive features of both the Federal Rules and previous procedural systems. The Rand Report, in my view, supports this conclusion.

Let us look a little closer at where we have come from and where we are now. The buzz words of the Federal Rules movement—uniformity, simplicity, and flexibility—at one level describe drafting attributes. They describe means, rather than ends, for a procedural system. One could have a uniform and simple procedural system that is ridiculous, such as flipping coins or picking lots to decide cases. One could have a uniform, simple, and flexible procedural system that is also unsatisfactory. Two rules: lawyers can do whatever they want, and trial judges should decide all procedural issues fairly and equitably on an ad hoc basis—although, perhaps this is not far from the procedural jurisprudence underlying the Enabling Act and Federal Rules movement.

If one looks to the ends one wants a sensible procedure to achieve, rather than the means, there are, I believe, some infirmities in the 1938 Federal Rules system. By looking at the past, I am not advocating a return to the common law procedural system or the Field Code, but their major characteristics do highlight other desirable ends for a procedural system than were behind the twentieth-century reform.³³ Both the writ system and single issue pleading of the common law attempted to define, control, and contain litigation. By the terms “contain” and “containment,” I mean to emphasize the limiting effects of previous civil procedures, in the sense that requiring precision in pleadings; limiting the joinder of parties, claims, and remedies; restricting discovery; and confining the facts to be explored by relevancy all tended to put limits on the size of the litigation.

The limited joinder of the 1848 Field Code³⁴ and the “facts constituting a cause of action”³⁵ also had a containing effect.

33. See Subrin, *How Equity Conquered*, *supra* note 1, at 914-18 (describing the common law pleading system); *id.* at 931-39 (describing the Field Code); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 327-28, 344-45 (1988) [hereinafter Subrin, *Field*].

34. Subrin, *Field*, *supra* note 33, at 332.

35. N.Y. LAW, ch. 379, § 120(2) (1848) amended by N.Y. LAW, ch. 479, § 1 (1951).

Moreover, both common law procedure and the Field Code attempted to bring the facts and the law together in a focused way. Again, I am not arguing for these systems, that themselves had the byproducts of fictions, rigidity, stultification, delay, and expense.³⁶ But they do remind us that historically procedure had built-in containment and focusing characteristics. The earlier systems also attempted to make procedure and results more predictable. Maitland, almost a century ago, spoke of the attempt at predictability of common law procedure compared to the modern procedure of his day: "Now-a-days all is regulated by general rules with a wide discretion left in the Court. In the Middle Ages discretion is entirely excluded; all is to be fixed by iron rules."³⁷ David Dudley Field emphasized the importance of fixed, defining, and predictable rules, both substantive and procedural; throughout his entire life, he loathed judicial discretion.³⁸ As one of a dozen of examples I could have chosen to make the same point, here is what Field said in his address at the opening of the Law School of the University of Chicago in 1859: "If the decision of litigated questions were to depend on the will of the Judge or upon his notions of what was just, our property and our lives would be at the mercy of a fluctuating judgment, or of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican governments above all others. The law is our only sovereign. We have enthroned it."³⁹

In addition to containment, focus, and predictability goals, the former procedures took "participation" goals quite seriously. The common law traverse attempted to make a tidy package for lay jurors, and the Kings called upon the jury system as a means of centralizing justice and gaining loyalty to the crown. David Dudley Field argued that judges should be restrained by

36. See Subrin, *How Equity Conquered*, *supra* note 1, at 917 (describing problems with common law pleading); *id.* at 939-40 (describing problems with code pleading); Subrin, *Field*, *supra* note 33, at 338-40 (same).

37. FREDERIC W. MAITLAND, *EQUITY ALSO THE FORMS OF ACTION AT COMMON LAW*, TWO COURSES OF LECTURES 298 (Alfred Chaytor & William J. Whittaker eds., 1926).

38. Subrin, *Field*, *supra* note 33, at 323, 327-28.

39. David Dudley Field, *Magnitude and Importance of Legal Science*, in 1 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 517, 530 (A.P. Sprague ed., 1884).

procedure, and that the jury should be extended to equity.⁴⁰ The contemporary attack on the jury as inefficient would have appalled John Adams and Thomas Jefferson, for they believed that the jury added democracy to the Third Branch and taught citizens about law and its importance.⁴¹ The judges were to participate in the system by applying law at motions sessions, supervising trials before juries, instructing jurors, or applying law to fact themselves in equity and jury-waived law suits. Until relatively recently, "manager" was not what lawyers, legal scholars, political scientists, or even judges meant by the exalted term "judge."

One inevitable problem with procedural reform is that when it focuses on one type of problem, other potential problems tend to be overlooked.⁴² What were the goals of the Uniform Federal Rule reformers? From Roscoe Pound⁴³ on, and certainly in the words of Charles Clark,⁴⁴ one finds a desire to permit law to grow so that it could meet the needs of the modern community. Put negatively, they did not want the artificial constraining mechanisms of the common law or Field Code to keep judges from doing complete justice in any given case. Recall the words of David Dudley Field in 1859 about the evils of judicial caprice and compare them to these of Roscoe Pound in 1908: "It might well be maintained, indeed, that as between arbitrary action of the law in nearly all cases because of the complexity of procedure, and arbitrary action of the judge in some cases, the latter

40. See *id.*; Subrin, *Field*, *supra* note 33, at 333.

41. See Subrin, *How Equity Conquered*, *supra* note 1, at 914-21 (describing the goals and effects of the common law system); *id.* at 937-39 (describing Field and his Code); Subrin, *Field*, *supra* note 33, at 333 (same); Subrin, *How Equity Conquered*, *supra* note 1, at 928-29 nn.103-106 (discussing the American jury).

42. See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 27-29 (1994) [hereinafter Subrin, *Fudge Points*] (discussing the phenomenon of procedural reform to overlook other potential problems).

43. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395, 403-04 (1906) [hereinafter Pound, *Dissatisfaction*].

44. See, e.g., Charles E. Clark, *Fact Research in Law Administration*, 1 MISS. L.J. 324, 324 (1928) ("One of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants.").

would be preferable.⁴⁵

The Federal Rule reformers wanted the complete story to come out in litigation,⁴⁶ and thus their broad discovery, joinder provisions, and transactional approach made sense. I think it is accurate to say that their twin goals for a procedural system were to permit: 1) the comprehensive resolution of disputes by fully informed and largely unrestrained judges, unhampered by procedural technicality, and aided by experts;⁴⁷ and 2) the creative growth of substantive law to meet modern needs.⁴⁸ I should add that by 1934, when the Enabling Act was passed, procedural reformers at both ends of the political spectrum had similar goals.⁴⁹ One could look at such indicators as the growth of products liability and civil rights law, the role of judges in cases that restructure public institutions, and the evolution of the regulated and rationalized market economy, with administrative agencies operating under the broad supervision of courts, and conclude that many of the reformers of different stripes got much of what they wanted.

But the uniform federal rule regime was not designed to meet the ends or goals of the previous procedural systems. Ease of pleading, broad joinder, and expansive discovery techniques move in the opposite direction from focus and containment. The expanded latitude for lawyers and enlarged discretion for judges under the Federal Rules do not enhance procedural predictability.

45. Subrin, *How Equity Conquered*, *supra* note 1, at 945 (quoting Roscoe Pound, *The Etiquette of Justice*, 3 PROC. NEB. ST. B.A. 231, 249 (1908). Pound adds: "[B]ut better checks may be found to restrain judges than ultraformalism of procedure." *Id.* at n.214. He does not explain, however, what those checks should be).

46. See Roscoe Pound, *Appendix E. Principles of Practice Reform*, 35 REP. A.B.A. 635, 642 (1910) ("The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full extent and applied to every type of proceeding.") (writing for an ABA Subcommittee of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation); see also CHARLES E. CLARK, *HANDBOOK ON THE LAW OF CODE PLEADING* 214, 255-56, 270-73, 179-96, 306-07 (1928) (commenting on the goals and effects of the joinder rules, pleading in the alternative, and pleading the elements of claims for frauds and breach of contract).

47. See, e.g., Pound, *Dissatisfaction*, *supra* note 43, at 401 (comparing law and lawyers to engineering formulas and engineers).

48. For a fuller rendition of the procedural philosophy behind the Enabling Act and Federal Rules of Civil Procedure movement, see Subrin, *How Equity Conquered*, *supra* note 1, at 944-73; see also Subrin, *Clark*, *supra* note 6, at 138-52.

49. Subrin, *How Equity Conquered*, *supra* note 1, at 969-73.

ty. The disuniformity and experimentation we are now witnessing are in some important measure a response to the failure of the Federal Rules to provide the limits and constraints of the earlier procedural models. Case-management, pre-trial orders, firm trial dates, and limits on discovery are attempts to return to the goals of containment, focus, and predictability—ends which were not primary for our federal rule ancestors.⁵⁰ I will speak about the participation goal at the end of this paper.

In some ways, we in the legal community have reached a position similar to the medical community. The search for perfect and complete justice, like the search for perfect health, left unrestrained, leads to excesses of time and expense that society cannot or will not afford. In both the practice of medicine and the practice of law, when the goal to do everything possible to have the best result is combined with the profit motive of the professionals, costs are likely to continue to rise, absent other controls.

The procedural goals of constraint, focus, and predictability are once more being called upon. The clients, particularly corporate clients,⁵¹ are demanding this as a matter of costs, and Congress, concerned with the public outcry of excess (although the facts do not support the extreme excess claims that are often made)⁵² and reacting to the intensive lobbying efforts of segments of the business community,⁵³ has already acted: the Se-

50. There are, of course, many societal influences on the interplay of the types of cases that are litigated, substantive and procedural law, and the roles of lawyers and judges. Cause and effect are difficult to disentangle here as elsewhere. Some of the factors that help account for the current pressures on procedural rules and jurisprudence are: the citizen awareness of rights, size and scope of government, individual and societal expectations for the good and protected life, the growth of legislation and regulation and of transactions and their complexity, wealth disparities between the rich and middle class and poor, photocopying and data processing, the increase in non-tangible property, the size and financial obligations of law firms, and civility of lawyers. See, e.g., Subrin, *How Equity Conquered*, *supra* note 1, at 925.

51. Subrin, *Fudge Points*, *supra* note 42, at 47-48 n.135.

52. See, e.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432-42 (1994); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1094-96 (1996); Stephen N. Subrin, *The Empirical Challenge to Procedure Based in Equity: How Can Equity Procedure Be Made More Equitable*, in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS 761, 788-92 (Stephen Goldstein ed., 1992) [hereinafter Subrin, *Empirical Challenge*]; Subrin, *Fudge Points*, *supra* note 42, at 40 n.94.

53. Professor Resnik commented on this lobbying phenomenon even before it

curities Act amendments and the CJRA are examples. If I am right that the previous goals of constraint, focus, and predictability will somehow be brought back into the system—and that these are goals that belong in a sound procedural system⁵⁴—then the questions become: what are the best ways of achieving these goals, and what effect will such achievement have on other laudable procedural goals: participation; comprehensive, informed dispute resolution leading to just results; creative substantive law growth, aided by the judiciary and other experts?

I see three major approaches to achieving procedural constraint and focus in a traditional litigation setting. I am not discussing the ADR alternatives at this time. The approaches have different effects on predictability and the other procedural goals I have listed. The approaches are: a) the use of procedural definitions and categories, b) intensive ad hoc judicial case management, and c) pre-set limits of time and number.

As to the procedural definitions approach, trying to shove real life into artificial definitional boxes at an early stage of litigation (writs, single issue pleading, facts constituting a cause of action, theory of the case) apparently did not work efficiently or well under the previous systems.⁵⁵ Such methods are at odds with modern thought, which emphasizes the illusiveness of facts and fact-finding, the protean nature of linguistic categories, and the need to see situations in context in order to truly understand them.⁵⁶ The federal rule focus on "transaction and occurrence," although it, too, represents artificial boundaries, accords with the modern understanding of life and disputes.⁵⁷

I have argued elsewhere for the centrality of "elements" and "causes of action" to rational and predictable procedure,⁵⁸ but I do not think we can find a serviceable way of requiring specificity of allegation at an early stage of the litigation process or a

became as pronounced as during recent years. See Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219-20 (1989).

54. I return to these goals at the end of my paper. See *infra* pp. 22-24.

55. See *supra* note 36.

56. Subrin, *Field*, *supra* note 33, at 335-36.

57. Subrin, *Clark*, *supra* note 6, at 142-43.

58. Subrin, *Field*, *supra* note 33, at 340-43; Subrin, *Teaching*, *supra* note 2, at 1177.

workable procedure for early mandatory exchanges of information as long as all cases are treated alike.⁵⁹ In some cases, such as those involving products liability, toxic torts, and discrimination, plaintiffs frequently require discovery before they can specify, in a precise and comprehensive manner, facts underlying elements. When the courts or Congress have required more specificity at the commencement of suit or shortly thereafter, as in the instances of civil rights cases, employment discrimination cases, and the Private Securities Litigation Reform Act of 1995,⁶⁰ they have, in my view, selectively targeted plaintiffs, and often plaintiffs who lack power in the political process. This is not the type of honing procedure and substance that I would applaud, and, I confess, is exactly the political result Professor Hazard warned me about almost ten years ago.⁶¹

So long as we lack a more deliberative and even-handed manner of considering the uses and misuses of procedural definition for particular types of cases, I think we have come about as far as we can with respect to pleading or discovery rules that attempt to contain and focus litigation through procedures that define in a meaningful way. The 1993 amendments to Rule 11 may be a sensible compromise between justified pleading flexibility and restraint on the bringing of uninvestigated or under-investigated lawsuits.⁶² The mandatory disclosure provisions of amended Rule 26 use the definitional approach in an attempt to achieve some containment and early focus in the litigation pro-

59. Others and I have argued previously for the evolution to some substance-specific (or non-transubstantive) procedure. See Subrin, *Fudge Points*, *supra* note 42, at 45-56, 28 n.4, 46 nn.128, 130.

60. *E.g.*, Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 449-50 (1986); Baumann, *Title VII*, *supra* note 27, at 243-52; Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C.A. § 772-1 (West 1997)).

61. See Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246-47 (1989) [hereinafter Hazard, *Discovery Vices*].

62. The effects of the Supreme Court summary judgment "trilogy" (*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)), by clarifying that summary judgment is in fact a prediction of directed verdict and putting more of an obligation on a non-moving party who has the burden of production at trial, may have also added to an earlier focusing of litigation and the weeding out of cases that could not be won.

cess. The terms "disputed facts alleged with particularity" and "relevant to" in Rule 26(a)(1)(A) conjure up notions of David Dudley Field's "facts constituting a cause of action."⁶³ The Rand study found that "[n]either mandatory nor voluntary early disclosure significantly affects time or costs" and that "[l]awyers are significantly less satisfied when a district has a policy of mandatory disclosure."⁶⁴ I think, although I cannot be certain,⁶⁵ that this supports my view that the attempt to contain and focus litigation with the early application of definitions and categories, without providing lawyers with more guidance about

63. Subrin, *Field*, *supra* note 33, at 328-30.

64. RAND REPORT, *supra* note 32, at 17. The Report adds: "However, they [the lawyers] tend to be significantly more satisfied when they actually participate in early disclosure on their case." *Id.* A further analysis of the data by many of the authors of the RAND REPORT, *supra* note 32, although still in preliminary, unreviewed, and unedited form, reaffirms the earlier conclusion that mandatory disclosure does not appear significantly to reduce the costs of litigation or the time to disposition. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA xviii, 45-47, 58, 64-65 (1997) [hereinafter RAND 1997 PRELIMINARY REPORT] (an ABA Survey had similar results) (After this paper was submitted for publication, RAND published this report in its final form. The final report, and other excellent works by RAND can be accessed via the internet at <http://www.rand.org/centers/icj/>). An August 1997 Federal Judicial Conference Report, based on a national survey of counsel in closed federal civil cases, concludes that "[i]nitial disclosure is being widely used and is apparently working as intended, increasing fairness and reducing costs and delays far more often than decreasing fairness or increasing costs and delays." THOMAS E. WILLGING ET AL., DISCLOSURE PRACTICE PROBLEMS AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 2 (FEDERAL JUDICIAL CENTER, 1997) [hereinafter DISCLOSURE SURVEY]. This conclusion was based on the survey answers of responding attorneys, including their perceptions. "[M]ore than a third of the attorneys (37%) who participated in initial disclosure identified one or more problems with the process (and generally with other aspects of discovery in their cases)" and "[p]roblems in initial disclosure arose more frequently in cases involving large stakes and expenses or that were characterized as complex or contentious." *Id.* at 5-6. Later in the FJC document, it says: "For any single effect [of initial disclosure], at least a plurality, and usually a majority of respondents did not see initial disclosure as having that effect. Altogether, however, more than 80% of the respondents said disclosure had at least one of the desired results." *Id.* at 24; see also *id.* at tbl. 17.

65. For instance, I am uncertain what to make about the finding, described in footnote 64, that lawyers are significantly more satisfied when they participate in early disclosure in their own cases. The shift to the word "early" from the word "mandatory" leads me to believe it may cover voluntary disclosures, which would support my view that the binding definitional aspects had not worked or did not lead to satisfaction, although the lawyers on their own may benefit from and like early negotiated reciprocal disclosures.

the conduct demanded of them in the particular type of case they are litigating, provides no gains with respect to time, costs, or satisfaction.⁶⁶

Intensive ad hoc case management can also provide constraint and focus. A judge or magistrate can, after talking with the parties, set discovery dates, limit discovery, ask for documents and summaries that focus the dispute, attempt to facilitate settlement, and set firm trial dates.⁶⁷ The Rand Report indicates that case management can reduce delay.⁶⁸ But the Rand Report also notes that it adds significantly to costs.⁶⁹ There are sound reasons to question whether it makes sense for judges to force the parties and their attorneys, in the typical case, to expend much time on conferences or paper work in preparation for them. So far as I can determine from empirical studies, the vast majority of cases—probably over 95%—will terminate or settle prior to trial with or without case management.⁷⁰ Most cases in both state and federal court do not face long delays,⁷¹ nor do most cases have large amounts of discovery.⁷² I am by no

66. For my opposition, and the opposition of others, to the mandatory disclosure amendments, see Subrin, *Fudge Points*, *supra* note 42, at 36-44.

67. RAND REPORT, *supra* note 32, at 1-2.

68. *Id.* at 14.

69. *Id.*

70. See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 STAN. L. REV. 1339, 1364-71 (1994).

71. See generally Subrin, *Empirical Challenge*, *supra* note 52, at 767-68; TERENCE DUNGWORTH & NICHOLAS M. PACE, RAND INSTITUTE FOR CIVIL JUSTICE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 16-25 (1990) (discussing the stability of processing times for private civil cases in federal district courts despite the increase of filings). For FY 1996, the median time from filing to disposition of federal civil cases was seven months; the slowest 10% exceeded 24 months. For those cases that were tried, the median was 18 months, but the slowest 10% was more than 41 months. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (June 30, 1996).

72. Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences of Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1432-42 (1994); Subrin, *Fudge Points*, *supra* note 42, at 40; Subrin, *Empirical Challenge*, *supra* note 52, at 768. The fact that over 95% of the civil cases terminate or settle prior to trial by no means implies that neither the judiciary nor the litigation process were relevant to the termination. Many cases are terminated as a result of dispositive motions, and, of course, many, if not most, cases settle only because the litigation process has fleshed out the facts or is imposing a "next stop," such as discovery, summary judgment, or an impending trial. The recent Federal Judicial Center study on disclosure practice did not find expensive discovery in most cases, and this was in a study that sought out cases "in which discovery might be expect-

means saying that there are not abuses in some cases that cause needless delay and unnecessary costs, particularly in the discovery phase of litigation. There are clearly such abuses, especially in cases in which the monetary stakes are high.⁷³ I am saying that since the vast majority of cases do not have these problems in significant measure, it does not make sense in the average case to add intensive judicial intervention. This intervention takes the time of judges, adds layers of procedure, and costs the parties money.

Intensive ad hoc judicial management also has severe impediments to the goals of predictability and participation, particularly community participation. Prior to the filing of the complaint, the parties do not know who the judge-manager or magistrate-manager will be. Once a judge is assigned, a hallmark of case management is its alleged ability to meet the needs of individual cases, which is antithetical to realistic predictability. To the extent case management is truly ad hoc, the community, acting through advisory committees or Congress, has not participated in setting boundaries for the case. To the extent that settlement is not only facilitated in a friendly way, but "urged" in a more compelling fashion, party participation and community participation, through the jury, are diminished. To the extent that judges are case-managing, they are not deciding cases on the merits in open court, nor are they presiding over jury trials. I realize that there is an argument that helping achieve a settlement informed by what the facts are likely to be and the judge's view of the law is a meshing of law and fact closer to the historic role of judges than is generally acknowledged. In addition, I

ed." DISCLOSURE SURVEY, *supra* note 64, at 1. The median cost of litigation reported by attorneys in their sample was about \$13,000 per client, and about half of this cost was due to discovery. *Id.* at 4. The recent Rand Preliminary Report notes that "[e]mpirical research has not produced evidence of widespread abuse of discovery." RAND 1997 PRELIMINARY REPORT, *supra* note 64, at xi, 7-8. Moreover, the Report states: "Discovery is not a pervasive litigation cost problem for the majority of cases." *Id.* at 21.

73. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 789, 827-28; Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 229-30, 233-34; Leonard S. Janofsky, *The "Big Case": A "Big Burden" on Our Courts*, 66 A.B.A. J. 848, 848-50 (1980); Subrin, *Fudge Points*, *supra* note 42, at 45.

recognize that in the trial of cases, parties may have a good deal less control than we pretend.⁷⁴ Nonetheless, a manager is different from the historic role of judge, and chamber-discussion is not a public trial.⁷⁵ I think that the something that has been lost is valuable, which I will return to at the end of this talk.

Pre-determined fixed numeric lines—exactly the solution that state and federal courts have turned to more and more—come the closest to meeting the combined goals of both the federal rule reformers and the former common law and Field Code systems. By not altering the ease of pleading requirements, except as constrained by current Rule 11, and leaving joinder provisions as is, we are keeping the “transaction or occurrence,” comprehensive narrative story, largely without the interference of artificial procedural categories, aspects of the Federal rules. By providing numeric limits on discovery, outer time limits for discovery, and a fixed, relatively early trial date, we are providing constraint and predictability.

I think rulemakers should continue considering limits on the length of time for depositions and for the length of trials.⁷⁶ There is empirical evidence showing that limiting interrogatories is a means of reducing lawyer work hours and consequently reducing litigation costs.⁷⁷ Although numeric limits do not provide the focus in the same manner as the common law (writs and single issue pleading) or the Field Code (“facts constituting a cause of action,” verified pleading, and limited joinder), they do force lawyers, because of the time and discovery limits, to focus their attention on the facts supporting the elements of the strongest causes of action and elements of the most promising defenses. Numeric limits and limits of time also provide constraint on the process without ordinarily requiring the delay, expense, and court time required to resolve disputes over such concepts as “what is a fact” (as opposed to evidence or conclusions) and whether “facts” have been sufficiently pleaded.

It is not surprising that the Rand Report shows that an

74. See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92.

75. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 407 (1982).

76. See, e.g., Robert E. Keeton, *Time Limits as Incentives in an Adversary System*, 137 U. PA. L. REV. 2053, 2055-56 (1989).

77. RAND 1997 PRELIMINARY REPORT, *supra* note 64, at xix, 52.

earlier discovery cut-off date and earlier fixed trial dates reduce delay, save money, and do not diminish attorney satisfaction or perceived fairness.⁷⁸ Although many of us have stressed the importance of early fixed trial dates and discovery cut-offs for some time,⁷⁹ the clarity of the Rand Report conclusions is worth emphasizing.

First:

In terms of predicting reduced time to disposition, setting a schedule for trial early was the most important component of early management. Including early setting of trial date as part of the early management package yields an additional reduction of 1.5 to 2 months in estimated time to disposition but no further significant change in lawyer work hours. No other aspect of early judicial management had a consistently significant effect on time to disposition, costs, or attorneys' satisfaction or views of fairness.⁸⁰

Second:

Shorter time from setting a discovery schedule to discovery cutoff is associated with both significantly reduced time to disposition and significantly reduced lawyer work hours These benefits are achieved without any significant change in attorney satisfaction or views of fairness. The data on costs to litigants in dollar terms and in litigant hours spent appear consistent with the data on lawyer work hours. Litigant data also show little difference in satisfaction between shorter and longer time to discovery cutoff.⁸¹

78. See RAND REPORT, *supra* note 32, at 14, 16; see also, RAND 1997 PRELIMINARY REPORT, *supra* note 64, at xix, 55-56 (discussing efficacy of discovery cut-off dates); *id.* at xvii (discussing efficacy of scheduling early trial date, especially in most costly cases). This 1997 PRELIMINARY REPORT also emphasizes the importance of discovery case-management plans as a means of reducing costs and delay. The discovery case-management plan is especially beneficial in reducing time to disposition if a trial schedule is not set early. *Id.* at 62-64.

79. See, e.g., Subrin, *Empirical Challenge*, *supra* note 52, at 785-92; Subrin, *Fudge Points*, *supra* note 44, at 45-46. The later RAND study, however, also emphasizes the importance of discovery case-management plans for reducing time to disposition and limiting costs. RAND 1997 PRELIMINARY REPORT, *supra* note 64, at 62-64. But since case management can itself add significantly to cost (see text accompanying note 69) it remains important, I believe, for courts not to add materially to the time required for conferences and paper work (see text accompanying notes 69-73).

80. RAND REPORT, *supra* note 32, at 14.

81. *Id.* at 16. "Neither mandatory nor voluntary early disclosure significantly affects time or costs." *Id.* at 17.

The early setting of earlier fixed trial dates and of earlier times for the completion of discovery, so long as the parties and their lawyers have a sufficient period of time to prepare their cases, has many benefits. Unlike more intensive hands-on case management, the lawyers do not have additional mandatory layers of work, and are more left to their own skill and creativity to build the case as they see fit. This method keeps open the modern goals of comprehensiveness and substantive law growth, although boundaries are provided to achieve more of the ancient goals of constraint, focus, and predictability. The Rand Report indicates that a small percentage of cases are now treated as complex.⁸² These cases probably require more continuing and intensive case management. When discovery motions indicate abuse in a particular case, whether complex or not, additional case management may be indicated. The smaller cases may need little or no case management of any kind. For the bulk of other cases, what the Rand Report calls "general civil litigation cases,"⁸³ for the reasons I have given, and because the Rand Report reaffirms the notion that limits of time reduce delay and expense, without adding to lawyer dissatisfaction, I would vote for a procedural regime that explicitly calls for presumptive limits based on time and number, with exceptions for good cause. Such a regime would have presumptive times and numbers with respect to trial date, discovery cut-off date, amounts of discovery, and perhaps even length of trial, although I realize that the latter does not yet have empirical support and may lack the support of the trial bar. If, as the Rand Report indicates, categorization of cases cannot be made at an early date,⁸⁴ then I would have procedural rules which set the limits large enough to accommodate most cases. This has been done in the current Federal Rules with respect to interrogatories and depositions,⁸⁵ although the presumptive limit on the number of depositions is probably too large for the average case.⁸⁶

82. *Id.* at 12.

83. *See id.* at 7 n.3. This category excludes the cases put in a complex track and what the Report calls "those types of cases that usually receive minimal or no management." *Id.*

84. *Id.* at 12.

85. *See* FED. R. CIV. P. 33(a) and 30(a)(2)(A).

86. *See* FED. R. CIV. P. 30(a)(2)(A). Most civil litigation in the United States has

I do not claim any expertise or special wisdom on the correct presumptive time for the average case from commencement to trial, except that it should put some relatively early pressure on the parties to either realistically prepare for trial or settle. The time should not be set so early and the trial date should not be so early that lawyers are forced to do extra work in a case in which they already have sufficient information to reach an informed settlement.⁸⁷ Again, it is also important that the lawyers have a reasonable period of time to responsibly and thoroughly prepare the case for trial. To the extent that an early management conference is needed to set the exact dates for trial or completion of discovery, to set interim dates (as for amendments or dispositive motions), or to see if alterations of the norms are needed, I would urge that required paper work, additional attorney preparation time, and time in court on management matters be kept at a minimum in order to reduce costs. I would also urge that the presumptive periods of time and the amounts of discovery be normally enforced by the judges and magistrates, so that lawyers can tell clients in advance what to expect. This would be real predictability.

If what I recommend makes sense, notice what will have happened to American procedure. We will have gone from a nineteenth-century system based on both common law and equity principles, to a largely unbounded equity system of the Federal Rules, to an equity system now bounded by numbers in an attempt to restore some of the constraint, focus, and predictability of previous systems. We may have begun to stumble, through trial and error, onto a sensible balance of comprehensiveness and restraint. This balance may permit us to return to some degree of uniformity, with predictability, at least at the federal trial court level.

I am uncertain, however, whether it is important or even desirable that the presumptive cut-off time for discovery and the presumptive time for commencement or answer to trial date be uniform among the ninety-four federal district courts. Such

nowhere near ten depositions for plaintiffs, defendants, and third-party defendants. Perhaps, though, this means that the larger permitted number makes sense, for lawyers in the average case do not over-depose anyway.

87. RAND REPORT, *supra* note 32, at 14 (pointing out that cases that were about to settle may end up more costly as a result of early case management).

variables as the pressure of the criminal case load and the failure to have a sufficient number of judges in a given district may make variations necessary, at least in the case of trial dates.⁸⁸ If this is true, the uniform national rules could provide presumptive outer limits of time, and the districts could set their presumptive times within those limits. But if lawyers and their clients know what to expect in advance in the normal case in their district with respect to the timing of discovery and trial dates, and if those dates are sufficiently early to force lawyers to focus and limit their work in a manner that saves resources of time and money, then much will have been achieved in terms of constraint, focus, and predictability within the district. I realize that if the lengths of time are dramatically different from district to district, then this can lead to the potential for undesirable variations of substantive result and increased forum shopping. This is one reason to set outer limits of time at the national level.

I want to return to the participation goal of a sound civil procedure, participation as it relates to both judges and juries. In a 1995 article, Professor Judith Resnik issued a challenge that has haunted me since the time I read it. In "*Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*,"⁸⁹ Professor Resnik explained ways in which the judiciary has surprisingly embraced ADR and its underlying assumptions. This is the paragraph that sticks with me:

[T]hose who think adjudication has something to offer had better start explaining why one would aspire to a preserve for adjudication, and why relatively highly paid government officials (to wit federal and state judges) should be empowered to do some of it. If there is an important and affirmative—if not a cheerful—story to be told for the preservation of adjudicatory forms, with judges in distinctive roles, and why a culture would value, cherish, fund, encourage, and sometimes insist on adjudication, then those who

88. Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing A Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165, 185, 208 (1992); Mary Brigid McManamon, *Is The Recent Frenzy of Civil Justice Reform A Cure-all or a Placebo? An Examination of the Plans of Two Pilot Districts*, 11 REV. LITIG. 329, 339-44 (1992).

89. Judith Resnik, *Many Doors? Closing Doors? Alternate Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995).

believe so had better speak up soon, for it is becoming increasingly hard to hear those claims.⁹⁰

I am speaking up. Justice Harlan has eloquently explained why civilizations have legal systems:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call "the state of nature."⁹¹

In trying to have a political system in which citizens can rely on the rule of law, a third branch is needed to help the law get applied, interpret the law, help the law evolve to meet new needs, protect the constitutional rights of all citizens, and permit citizens to have their claims to law heard in public by other citizens, both judges and juries. It is not outdated to think that the constitutions, legislation, and common law give defined rights, and that the citizen should be able to count on those rights being vindicated, without compromise or settlement, when the citizen feels strongly enough about the sanctity of the right and the severity of the infringement.

The uniform Federal Rules had many positive features. The comprehensiveness, ability to discover hidden facts, and flexibility permit wrongs to be righted and the substantive law to grow in positive ways that more restrictive procedure would impede.⁹² But we have learned a lesson: constraint, focus, predictability, and participation are also worthy goals. A totally unconstrained adjudication system requires judges to become what they became: managers. This is not what it meant to be a wise

90. *Id.* at 263.

91. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

92. See, e.g., Hazard, *Discovery Vices*, *supra* note 61, at 2246-47 (1989); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906-07 (1989); Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2179-82, 2195 (1989).

judge for the past three millennium. The role of Solomon—and hundreds of truly wise and courageous trial judges this country has spawned since our founding—should not be reduced to being efficiency experts trying to curtail run-away cases and provoke settlements, largely on an ad hoc basis.

It is no wonder that the judiciary often has difficulty garnering public support, particularly when it comes to funding. When so much of the judicial rhetoric and energy is on efficiency concerns and provoking settlement,⁹³ this tends to diminish the values associated with the rule of law and the importance of the average citizen participating in the democratic process. Those who insisted on a Bill of Rights that included a Seventh Amendment were not foolish in believing that it was critical that lay jurors learn democracy and about law by participating in deciding the fate of other citizens in accordance with law. Nor were they foolish in believing that the jury should add a democratic element to the judicial branch, just as accountability to an electorate should place restraints on the executive and the legislature.⁹⁴ A major reason I have embraced numeric lines as the best means of providing constraint, focus, and predictability to the unruly aspects of the federal rule is to attempt to free trial judges to spend more of their time participating in adjudication in more traditional ways: presiding over trials in open court; educating jurors, parties, witnesses, and lawyers about law; framing instructions and writing opinions that clarify the law; deciding motions in a manner that helps the law evolve in more understandable, rational, and just ways.

It may well be true that because of the inability of Congress to provide defining lines and categories in legislation; the enormous and often conflicting body of law that has evolved in our country; the huge breadth of parties and claims that are often included in one litigation; and the perplexing and complex nature of the type of problems that are often brought to federal court in a society trying to deal with an information explosion, a service economy, huge inter-state and international transactions,

93. Ironically, setting a firm trial date and court readiness to try cases, rather than aggressive settlement activity by trial judges, may be the most effective means to induce settlements. See Subrin, *Empirical Challenge*, *supra* note 52, at 787-88 nn.111, 117-19.

94. *Supra* note 41 and accompanying text.

environmental abuses, and large disparities of wealth, it is frequently impossible for a federal or state judge to deal with the application of law to fact in traditional ways. Judges may be attracted to participate actively in the process of settlement, even though empirical data does not support such interventions on efficiency grounds, because the combination of the number of parties and theories, the factual complexity of the relevant transactions, and the lack of clarity of the law does not make normal adjudication feasible or sensible. To be blunt, maybe "the rule of law" is an empty shell in some circumstances. As I said earlier, we need to know more about the nature of the problems which federal and state trial judges are called upon to solve on a daily basis. Perhaps such empiricism would force us to reconceptualize more dramatically adjudication, procedural jurisprudence, procedural rules, and the role of judges. If, however, we are willing to give up on the notion that laws can be framed and applied in ways that necessitate finding out what happened and applying rules to what happened in order to achieve some degree of predictable results, then I submit that worrying about procedural anarchy is truly fiddling while the nation burns.

One can understand the impossibility of absolute predictability and appreciate the need for some judicial discretion in adjudication and still cherish firm lines. Uniformity of the sort that aids predictability is still a worthy goal for both substantive and procedural law. In criticizing Jerome Frank's *Law and the Modern Mind*,⁹⁵ Felix S. Cohen, the brilliant and subtle legal realist warned in 1931:

Uncertainty, as [Frank] insists, is adventure, but adventure is hunger and thirst and heart-ache and death. Civilization rests upon a vast, intricate complex of expectations and prophecies, and only the predictable behavior of those bodies to which society has entrusted its collectivized physical force can put iron into the scaffolding of hopes and reliances. Even from the standpoint of "justice in the particular case," uniformity of decision is the only practical guarantee against the tyrannical exercise of prejudice⁹⁶

95. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

96. Felix S. Cohen, Book Review, 17 A.B.A. J. 111, 112 (1931).