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Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Suite 7-240
Washington, D.C. 20544

Re: Proposed Amendments to Federal Rules of Civil Procedure

To the Committee:

I am pleased to submit comments on the Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure that was published in August. In my considered opinion, the proposals to contract the scope of discovery, both in general (Rule 26) and as to presumptive limits on interrogatories (Rule 33) and depositions (Rules 30 and 31), cannot be justified by reason or competently documented experience and, if they became effective, would represent bad public policy.

By way of background, after service as General Counsel of the University of Pennsylvania, I have been teaching and writing about civil procedure, the Federal Rules and the rulemaking process for thirty-five years. My work on court rulemaking includes the definitive history of the Rules Enabling Act of 1934.[1] It has consistently highlighted the power of procedure to affect substantive rights, the costs of trans-substantive rules, and the benefits of rulemaking that is informed by systematic empirical data. In recent years, collaborating with political scientists, I have considered the role that procedure can play in facilitating or frustrating statutory regimes that were created by Congress to stimulate private enforcement of federal law, notably civil rights legislation. Interdisciplinary work has also led me to study non-legal influences on judicial behavior.

My current research, in collaboration with Professor Sean Farhang, considers interactions and competition among American institutions, including courts, for power to influence private enforcement of federal law. As part of a forthcoming article on efforts in the three branches of government to reduce private litigation opportunities and incentives in the period 1970-2013, we consider ways in which the federal judiciary has

[1] *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

affected private enforcement through control of procedure.[2] Our next article will focus more closely on court rulemaking within that larger institutional framework.

I have also been active in providing advice and assistance to Congress and to the federal judiciary. Thus, for example, I advised Representative Kastenmeier and testified before both the House Subcommittee he chaired and a Senate Subcommittee on legislation, which was ultimately enacted in 1988, that made important changes to the process by which Federal Rules and amendments are considered. I have twice served as a Reporter for the Third Circuit, including as Reporter of a task force that gathered the first methodologically sound empirical data on the operation of the 1983 amendments to Rule 11.[3] Having regularly commented on proposed amendments to the Federal Rules of Civil Procedure, in 2005 I conceived, and with Gregory Joseph recruited some twenty other academics and lawyers to implement, a project to review the proposed Restyled Federal Rules of Civil Procedure. This effort led to scores of recommended changes, many of which were accepted by the Advisory Committee and are part of the 2007 Restyled Federal Rules. Finally by way of example, I have served as an informal consultant to committees of the federal judiciary, organized numerous conferences/symposia at the request of the federal judges who chaired those committees, and both testified before, and moderated discussions with, them on many occasions.[4]

In these comments I focus on some of the larger issues implicated in the proposed amendments, specifically those that would change the discovery rules. I do not, except in passing, engage the details of the proposals. Given the volume of written comments, prepared statements and oral testimony submitted by others, any detailed commentary that I might offer would likely be redundant. To be sure, the comments and testimony already submitted suggest that some interested observers regard repetition as an important means of influencing the rulemaking process. Yet if court rulemaking under the Enabling Act is to be distinguishable from the legislative process, it must be in substantial part because reason and reliable data are more important than interest group talking points, self-serving assertions or cosmic anecdotes, however often or vigorously espoused.[5]

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[2] *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Perspective*, 162 U. PA. L. REV. ___ (forthcoming 2014), available at SSRN: http://ssrn.com/abstract=2360272

[3] *See* RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (Stephen B. Burbank, rep. 1989).

[4] *See, e.g.*, Stephen B. Burbank, *Foreword: Causes and Limits of Pessimism*, 148 U. PA. L. REV. 1851 (2000) (symposium organized at the request of Judges Scirica and Niemeyer in connection with the Working Group on Mass Torts).

[5] *Cf.* Cary Coglianese, et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 926 (2009) ("To ensure legitimacy in the rulemaking process, agency officials should arrive at their decisions in a fair and transparent manner, specifically by approaching a regulatory problem with an open mind, taking into account all relevant interests, and arriving at well-reasoned decisions."); *id.* at 928-29 ("It is more important

I raise these larger issues with confidence that, whatever the tenor of prior consultations, necessarily less inclusive and transparent,[6] Advisory and Standing Committee members entered the public phase of this rulemaking with minds open to evidence and argument, even evidence and argument that are not consistent with their personal experience or congenial to their personal preferences. The ability to have such confidence is important to serious engagement with the proposed amendments by the bench, bar and the academy, particularly if one believes, as I do, that some of the premises and reasoning underlying a number of the proposals are either unsupported or incomplete, and that those proposals should be withdrawn.

In *Litigation Reform: An Institutional Approach*, Professor Farhang and I identify four institutional differences that may help to understand why, as our data demonstrate, since 1970 the Supreme Court – increasingly conservative and influenced by ideology -- has been more effective than Congress in reducing opportunities and incentives for private enforcement. Among them is the fact that, "although significant legislative reform proposals often present stark alternatives that trigger powerful interest group mobilization, the case-by-case, less visible, more evolutionary process of legal change via court decision is far less likely to trigger group mobilization than a major legislative intervention. It is therefore less likely to be obstructed. A large transformation in private enforcement resulted from a succession of individual Court opinions, none of which may have appeared monumental in isolation."[7] A consideration of the history of discovery reform over the last few decades suggests that, if the current proposed amendments were to become effective, the same might be said about some of them.

Yet, the comments on the proposed amendments that have been submitted show that, notwithstanding repeated characterization of the proposals as "modest" or "measured" by some rulemakers and interest groups, they have in fact "trigger[ed] powerful interest group mobilization" on both sides. Perhaps, as suggested above, that is

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that the agency hear from all distinct viewpoints than that it hear from large numbers of individuals or groups expressing the same arguments or conveying the same information.").

[6]

> The first concern is that the input agencies receive is not meaningful because by the time the notice of proposed rulemaking ("NPRM") is published and the comment period begins the agency is highly unlikely to alter its policy significantly. Many internal deliberations and policy discussions occur before an agency issues its NPRM, during a part of the process that is least open and transparent.

Id. at 931. *See also id.* at 951 ("Today, as a general matter, the rulemaking process does not provide all interest groups – particularly those without significant funding or legal representation – with sufficient access during the crucial early stages of rule development.").

[7] Burbank & Farhang, *supra* note 2 , at ___.

because opponents fear, and proponents expect, "a large transformation in [discovery] result[ing] from a succession of individual [Federal Rules amendments]." Alternatively or in addition, it may be because some individuals on both sides regard the characterizations as naïve or disingenuous: sheep's clothing for a wolf. It is difficult not to entertain the latter possibility knowing that the Advisory Committee's Associate Reporter has identified the concept behind some of the proposals to change the scope of discovery – proportionality -- as one of two "breakthrough ideas" in rulemaking concerning discovery over the last four decades.[8]

In the remainder of these comments, I first provide historical perspective on the proposals of interest and then elaborate four related reasons why they should be abandoned.

Elements of the organized bar, supported by the business community, have sought to restrict the scope of discovery for decades. Following the 1976 Pound Conference, which Chief Justice Burger organized and which some regard "as the most important event in the counteroffensive against notice pleading and broad discovery,"[9] the ABA, working through a Special Committee for the Study of Discovery Abuse of its Section of Litigation, succeeded in setting the agenda for discovery reform in the late 1970s. Thus, the Preliminary Draft of Proposed Amendments that the Advisory Committee circulated for comment in March 1978 "was in major part the response of the Advisory Committee to a study of the discovery rules that had been undertaken by the [ABA Special Committee]."[10] Following two rounds of notice and comment and two days of public hearings, the Advisory Committee forwarded its Final Draft of Proposed Amendments to the Standing Committee. Explaining why, contrary to the ABA Special Committee's recommendation and its own initial inclination, the Advisory Committee had decided not to propose changing the scope of discovery, its Chair observed that "we are not satisfied on the present record, including such empirical studies as have been made, that changes suggested so far would be of any substantial benefit."[11]

In addition to rejecting the ABA Special Committee's proposed scope change (which would have eliminated subject matter discovery), the Advisory Committee also rejected its proposal "to amend Rule 33(a) by limiting the number of questions that could be asked by written interrogatories to a party to thirty (30) unless the court permitted a larger number."[12] Explaining the reasons for that decision, the Advisory Committee Chair observed:

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[8] Richard Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. ____ (forthcoming 2014).

[9] Mike Tonsing, *An Introduction to Symposium on Proposed Changes to Federal Rules of Civil Procedure*, 51 FED. LAW. 22, 25 (2004).

[10] Memorandum from Judge Walter R. Mansfield, Chair of the Advisory Committee on Civil Rules, to Judge Roszel C. Thomsen, Chair of the Stranding Committee 2 (June 14, 1979) (available from author).

[11] *Id.* at 8.

[12] *Id.* at 9-10.

> The constantly-echoed criticism was that a limitation on the number of questions was arbitrary, unreasonable and unnecessary. Many commentators stated that interrogatories are the only form of discovery available to ordinary litigants and to the poor. It was frequently stated that limitation of the number of questions would lead to routine requests for court orders enlarging the number.[13]

In 1980 Justice Powell, joined by two colleagues, dissented from the promulgation of the proposed discovery amendments that emerged from this process, deriding them as "tinkering changes" that would "delay for years the adoption of genuinely effective reforms."[14] In this, Justice Powell, who had been President of the ABA, was echoing the reasoning of the ABA Special Committee, which had urged the Advisory Committee not to transmit its proposals, "[m]indful that the rules which are ultimately adopted will likely govern discovery proceedings for the next decade."[15]

Whether or not the 1983 amendments to the Federal Rules were "genuinely effective reforms," they certainly were not long delayed. Moreover, primarily because of their emphasis on sanctions, particularly in the amendments to Rule 11, they were intensely controversial and only barely escaped legislative override. Again rejecting the ABA's recommendation to eliminate subject matter discovery,[16] the Advisory Committee proposed replacing language in Rule 26(a) that seemed to invite unlimited discovery (in the absence of a protective order) with (1) language in Rule 26(b) imposing a duty on the court to limit discovery if it determined that any of three conditions was satisfied, including if the discovery sought was "unduly burdensome or expensive," and (2) a new provision, Rule 26(g), imposing a duty on attorneys and unrepresented parties to certify that, among other things, requests for and responses to discovery were not "unreasonable or unduly burdensome or expensive," backed up by sanctions. Thus was the concept of proportionality in discovery born.

Following an interval during years when the Advisory Committee was preoccupied by controversies arising from proposals to amend Rule 68, which fueled

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[13] *Id.* at 10.

[14] 446 U.S. 997, 1000 (1980) (dissenting statement of Powell, J., joined by Stewart and Rehnquist, J.J.).

[15] *Id.* at 8 (quoting ABA Special Committee's Comments on Revised Proposed Amendments to the Federal Rules of Civil Procedure).

[16] *See* Advisory Committee on Civil Rules, Analysis of Comments to Rules 26 (a) and (b) 1 (Dec. 21, 1981) (available from author) ("The ABA believes the proposal does not go far enough in restricting discovery and urges that we submit our 1979 version, which would eliminate the 'subject matter' relevancy standard of 26(b) in favor of 'claims or defenses.'"). This memorandum carries the initials of the Chair and Reporter of the Advisory Committee.

legislation to amend the Enabling Act,[17] and from the 1983 amendments to Rule 11, which seemed to produce all of the negative effects that critics had identified when they were first proposed, discovery reform returned to center stage in the 1993 amendments. Again, however, the Advisory Committee eschewed change to the scope of discovery in favor of other measures, chiefly required disclosures and presumptive limits on depositions and interrogatories. Unfortunately, having confirmed the value of systematic empirical data in crafting proposed amendments to get Rule 11 right,[18] the Advisory Committee reverted to bad habits in its proposed amendments to Rule 26 on required disclosures.

> Again, there was little relevant empirical evidence and, indeed, the Committee repeatedly rejected pleas to stay its hand pending the evaluation of experience under local rules. Having once abandoned ship, the Committee was apparently persuaded to reboard by the view that it "had a duty to provide leadership in light of its study and hearings," by expressed doubt that ongoing experimentation would yield any useful empirical data and by the argument that a national rule would be necessary to effect "the cultural change the Committee sought."[19]

The Advisory Committee linked the proposed presumptive limits on interrogatories (but not those on depositions) to the disclosures required by proposed Rule 26(a)(1)-(3): "Because Rule 26(a)(1)-(3) requires disclosures of much of the information previously obtained by this form of discovery, there should be less occasion to use it."[20] The Committee did not revisit the subject when it reduced the scope of required disclosures in 2000.[21]

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[17] *See* Burbank & Farhang, *supra* note 2, at ___; Stephen B. Burbank, *Proposals to Amend Rule 68 – Time to Abandon Ship?*, 19 U. MICH. J.L. REFORM 425 (1986).

[18] Before the Advisory Committee had access to reliable empirical data on the operation of the 1983 amendments to Rule 11, it had regarded "the criticism [a]s impressionistic." Advisory Committee on Civil Rules, Committee Minutes 53-54 (April 27-29, 1989) (available from author). Even so, it recognized that "the anger level in the bar is high." Moreover, a member "urged that the Committee should strive to be sufficiently receptive to the concerns of others that people will not generally think it necessary or desirable to go to Congress for help." *Id.*

[19] Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOKLYN L. REV. 841, 845 (1993). Some may view the 2014 proposed amendments favorably on the view that the rulemakers are resuming reform leadership following implicit rebukes in *Twombly* and *Iqbal*. If so, they should consider what a perceived "duty to provide leadership" wrought in (and after) 1993.

[20] FED. R. CIV. P. 33 advisory committee note (1993).

[21] *See* Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 239 (1999).

The discovery/disclosure proposals (and the Rule 11 proposals) encountered resistance at the Supreme Court, with the Chief Justice indicating that Court promulgation did not mean that "the Court itself would have proposed these amendments,"[22] and with "four other Justices indicat[ing] their agnosticism about, lack of competence to evaluate or disagreement with, one or more of the amendments."[23] As in 1983, the proposed amendments barely escaped legislative override.

Much of the Advisory Committee's work during the 1990s was devoted to class action reform and to attempts to reach out to and reflect the concerns of the practicing bar. The former bore fruit in a 1998 amendment adding Rule 23(f), which has proved more consequential than many imagined at the time by facilitating the development of appellate class action jurisprudence. The latter were largely unsuccessful, as proposed amendments on jury size and voir dire were squelched by the Judicial Conference and Standing Committee respectively, and the Chair of the Advisory Committee was not reappointed to a second term. It is interesting that in the last year of his three-year term, shortly before the Advisory Committee returned to discovery, Judge Higginbotham observed:

> Congress has elected to use the private suit, private attorneys-general as an enforcement mechanism for the anti-trust laws, the securities laws, environmental law, civil rights, and more. In the main, the plaintiff in these suits must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.[24]

Nonetheless, in the proposed amendments that became effective in 2000, the Advisory Committee finally yielded to calls from the organized bar and business community to "calibrate" discovery by restricting its scope, eliminating the right to subject matter discovery and making it available only upon a showing of good cause. In support of that action, after noting some of the prior history with scope proposals and its efforts to "address concerns about overbroad discovery" by other means, the Advisory Committee observed:

> Concerns about costs and delay of discovery have persisted nonetheless, and other bar groups have repeatedly renewed similar proposals for amendment to this subdivision to delete the "subject matter" language. Nearly one third [*sic*] of the lawyers surveyed in 1997 by the Federal Judicial Center endorsed narrowing the scope of discovery as a means of

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[22] H.R. DOC. NO. 74, 103d Cong., 1st Sess. 1 (1993), *reprinted in* 113 S. Ct. (Preface) 477 (1993).

[23] Burbank, *supra* note 19, at 842

[24] Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997). *See also* Patrick E. Higginbotham, *Iron Man of the Rules*, 46 U. MICH. J.L. REFORM 627, 627-30 (2013).

> reducing litigation expense without interfering with fair case resolutions … The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the "subject matter" involved in the action.[25]

One might draw the inferences from the last sentence that (1) judges were not adequately enforcing existing limitations, and (2) lack of adequate judicial oversight under existing law was a suitable reason to impose additional limitations. Those inferences are supported by other 2000 discovery amendments, in particular the avowedly redundant reminder that "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(i),(ii), and (iii)," and the equally redundant reminder that, in order to be within the prescribed scope, information that is not admissible at trial but "appears reasonably calculated to lead to the discovery of admissible evidence" must be relevant.

Other inferences that might be drawn from the Advisory Committee's 2000 note on the scope change are that (1) some interest groups count more than others, and (2) those interest groups also count more than empirical evidence, at least if they are persistent.[26] Those inferences also find support, this time in the breathless memorandum that Robert Campbell, the Chair of the American College of Trial Lawyers' Committee on Federal Civil Procedure sent to his fellow members in September 1999 to report the "extremely good news" that the Judicial Conference had "approved by a close vote the College proposal (substantially adopted by the Advisory Committee) to amend Rule 26 (b) (1) changing the primary scope of discovery from 'subject matter' to 'claims and defenses'." [27]

Noting that he had "just finished speaking to Fourth Circuit Judge Paul V. Niemeyer, Chair of Advisory Committee (who presented the proposed amendments to the discovery rules to the Judicial Conference) as well as to those in the Administrative Office of the U.S. Courts," and having summarized the Conference's actions on the discovery proposals, Mr. Campbell stated that during "the last few days before the Judicial Conference meeting" he "used up not an inconsiderable amount of telephone wires in talking with individual members of our committee, particular federal judges, and our Regent[s] and Officers" in deciding whether to send a "lobbying letter" to the

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[25] FED. R. CIV. P. 26 (b)(1) advisory committee note (2000).

[26] *See* Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520 (1998) (observing that "it is the persistence of complaints and questions about the merit of broad discovery and its expense that, at bottom, has caused the Committee to take another look").

[27] Memorandum from Robert W. Campbell, Jr. to Members, Federal Civil Procedure Committee, American College of Trial Lawyers 1 (Sept. 16, 1999) (available from author).

members of the Judicial Conference, as had groups opposed to the proposed scope amendment.[28]

Toward the end of his memorandum, Mr. Campbell, apparently oblivious to the history of discovery retrenchment efforts by the ABA, observed:

> I think this Committee and certainly the Regents of the College should allow themselves a brief moment of congratulations. There is absolutely no question that the proposed amendment on scope of discovery originated with our Committee in the Fall of 1995. Thousands of hours have been given by our Committee since that time to this effort. The Regents spent considerable time and gave the amendment its substantial support in early 1998. So many on our Committee have given unselfishly of their time at the Advisory Committee discovery conferences, symposiums and meetings. Fran Fox [a member of the ACTL Committee] played a major role as a member of the Advisory Committee, itself, in advocating the proposed amendment to Rule 26 (b) (1).[29]

Methodologically sound empirical data concerning discovery have been remarkably consistent in debunking claims of ubiquitous abuse or excess made by bar organizations and the business community over the last forty years.[30] From the perspective of putative abuse, in other words, the discovery landscape did not appear meaningfully different in the run-up to the 2000 amendments than it had in 1980. Nor, alas, did the claims of those seeking to curtail discovery. An abiding lack of reliable empirical evidence did not cause them to change their tune, a strategy of blinkered persistence that finally paid off (with a different group of rulemakers).

With the advent and rapid spread of e-discovery, however, even a hard-hearted empiricist aware of the studies in question had reason to wonder whether the landscape had changed or would soon change. The Advisory Committee's work in this area,

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[28] *Id.* at 2.

[29] *Id.* at 3. Recall the concern that administrative agency rulemaking "does not provide all interest groups – particularly those without significant funding or legal representation – with sufficient access during the crucial early stages of rule development." *See supra* note 6.

[30] *See, e.g.*, EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf; Danya Shocair Reda, *The Cost and Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1103-11 (2012) (discussing 2009 FJC study); *id.* at. 1111 ("Nearly every effort to quantify litigation costs and to understand discovery practice over the last four decades has reached results similar to the 2009 FJC study.").

culminating in the 2006 amendments, is a model of careful and inclusive rulemaking designed to identify incipient problems and nip them in the bud. The FJC's 2009 study, which was stimulated in large part because of concerns that e-discovery was a game-changer, does not give reason for serious general concern, except to those who refuse to believe that their own experience is not the norm.[31]

Having surveyed the history of discovery retrenchment, I turn to four related reasons why the Advisory Committee should withdraw the proposed amendments to Rules 26, 30 and 33.

First, these proposals represent the seventh set of (non-stylistic) proposed reforms since 1980. The major change in the landscape during that period – electronic discovery – was the focus of relatively recent reforms, the effects of which have yet to be thoroughly evaluated, while a 2009 study of e-discovery does not support the retrenchment narrative. For those reasons, and because the current proposals come on the heels of Supreme Court decisions that sought to address the same putative discovery problems through judicial amendment of the pleading rules, they are at best premature and at worst overkill.

Consideration of discovery reform in historical perspective reveals repeated amendments to the discovery rules starting in 1980, with the brass ring – scope reduction -- repeatedly sought by the organized bar and the business community, which tended to dismiss other reforms as, in the words of Justice Powell, "tinkering changes." Having for twenty years resisted scope reduction on the ground that there was insufficient evidence to warrant it, but with no qualitatively different evidence before it, in 2000 the Advisory Committee essentially acknowledged that it was yielding to the insistent claims of elements of the organized bar – as if long-term repetition could fill the empirical vacuum -- while also admitting that less than one third of lawyers surveyed by the FJC supported the change.

Because the only major change in the discovery landscape since 2000 is the growth of e-discovery, because the Advisory Committee addressed the special problems of e-discovery in the 2006 amendments, and because there is no reliable evidence that

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[31] *See id.* at 1103-11. Professor Reda here discusses both the FJC 2009 study and a 2010 FJC study reporting the results of multivariate analysis of the factors associated with litigation costs. *See* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS (2010).

The most recent set of discovery amendments, which became effective in 2010, again targeted specific perceived problems, in that case in connection with expert discovery. I will not discuss them, except to note that many of the problems cited by the Advisory Committee in the note accompanying the 2010 proposals arose from expert reports, which were first required in the 1993 amendments. Incredibly, in 1993 the Advisory Committee reasoned that, as a result of the required reports, "the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition." FED. R. CIV. P. 26 (a)(2)(B) advisory committee note (1993).

those amendments have been ineffective,[32] further discovery amendments at this time (other than those that address special problems, as in 2006 and 2010) are at best premature.

At worst they are overkill. In presenting a preliminary draft of proposed amendments to Rule 56 for public comment in 2008, the Advisory Committee referred to "summary judgment as the third leg of the notice-pleading, discovery, summary-judgment stool." Both the Supreme Court's 2007 *Twombly* decision and its 2009 *Iqbal* decision, which judicially amended the pleading rules, were predicated on supposed (albeit quite different) costs of discovery and on the inability of federal district court judges to manage discovery in such a way as to keep those costs under control. After what has happened to summary judgment and notice-pleading, one can only wonder whether, if these proposed discovery amendments became effective, the furniture would still be serviceable for the purposes for which it was intended.

The elimination of subject matter discovery (upon a demonstration of good cause) can only seem "modest" or "moderate" if one neglects the history recounted above and uses as the basis of comparison the post-2000 language of Rule 26. To be sure, we do not know whether its wholesale elimination would have substantial effects. The interest groups treating subject matter discovery like a piñata since the 1970s obviously hope so. In that regard, to eliminate other language in Rule 26, which had previously survived in the face of *Twombly*-like claims of managerial deficits, could only further encourage courts to see in these amendments a major change of course.

A more likely cause of such a change of course, however, is the proposal to transmogrify proportionality from a limitation on the discovery of relevant evidence to be raised by a party objecting to discovery or by the court itself – its status since 1983 – into an integral part of the scope definition.

I do not infer from Professor Arthur Miller's comments on these proposed amendments that the Advisory Committee he served as Reporter in 1983 intended to bury a bomb that could be detonated decades later after having been unearthed and sold as a firecracker. But the fact that the limitation has existed since 1983 and has been given greater prominence because of concern that judges were not properly managing discovery[33] again lends surface plausibility to the "modest" or "measured" label. That is

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[32] *See* Frank H. Easterbrook & Thomas E. Baker, *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 699 (1995) ("[T]he Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.").

[33] The kinship of this reasoning with the Court's reasoning in *Twombly* and *Iqbal* suggests that it is a common trope of litigation reform. Whatever the institutional mode of retrenchment, one should not accept the concerns at face value. Thus, the Advisory Committee's Associate Reporter has chronicled increasing attention to proportionality under the existing rule. *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2008.1, at 159 (2010) ("Judges relatively frequently limit or forbid

also apparently the intent of those who argue that the proposed change would not, as claimed by critics, shift the burden in discovery disputes, pointing to Rule 26(g). The argument is fallacious.

It is true that parties seeking discovery under current law must make the certification prescribed by Rule 26(g). It is not true, however, that they have the burden of persuasion when another party makes a motion for sanctions:

> To guard against misuse of the rule, including the use of hindsight, the courts presume the validity under Rule 26(g) of discovery requests, responses and objections and of Rule 26(a)(1) and (3) disclosures. As under Rule 11 … this is not a formal evidentiary presumption. Rather, it is a reflection of the fact that *the burden is on the opposing party to demonstrate the inadequacy of any challenged paper.* It represents an approach under which all doubts are resolved in favor of the signer, and sanctions are imposed only if it is patently clear that they are appropriate.[34]

The most worrisome potential effect of the proposed scope change is not the prospect of substantially increased transaction costs if proportionality replaced burdensomeness as the preferred objection of those who have something to hide or for whom discovery is an opportunity to inflict financial pain on opponents (which, as discussed below, is worrisome enough). It is rather that, either in prospect or in fact, such transaction costs would prevent a party from securing discovery that was central to its claims or defenses, imposing costs of a very different order.

The same is true of the proposals to reduce the number of presumptively permissible interrogatories and depositions. Here, however, the complex, high-stakes cases that, as empirical evidence consistently demonstrates, are most likely to occasion disproportionate discovery, will usually not be affected, because the parties will stipulate out of the limits. No, here the effects will be felt most often in cases with parties that have asymmetric discovery demands and asymmetric resources. In other words, the costs will predictably be incurred most often by individual plaintiffs suing corporate defendants.

Second, the proposed amendments in question proceed from an impoverished view of litigation and discovery that minimizes or ignores the benefits of both. Put otherwise, the proposed amendments do not reflect serious or sustained consideration of the fact that limiting discovery may entail substantial costs for the enforcement of the

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discovery when the cost and burden seem to outweigh the likely benefit in producing evidence.").

[34] GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 642 (5th ed. 2013) (emphasis added).

substantive law, including law that Congress, legislating against the background of the Federal Rules, intended to be enforced through private litigation.

The primary architect of the Federal Rules on discovery, Edson Sunderland, was both a Legal Realist and, more important for these purposes, a Progressive.[35] The Progressives gained prominence in the early 20th Century, reacting to the excesses of the Industrial Revolution through a campaign for what they called "legibility" – we would say transparency. They contended that effective regulation was impossible without access to the facts concerning the regulated enterprise.[36] Sunderland wrote in 1925:

> The spirit of the times calls for disclosure, not concealment, in every field – in business dealings, in governmental activities, in international relations, and the experience of England makes it clear that the courts need no longer permit litigating parties to raid one another from ambush.[37]

Shortly following the 1980 discovery amendments, in an article that was sharply critical of the retrenchment effort (particularly as evidenced by Justice Powell's dissent), Professor Friedenthal pointed out that discovery enables parties in civil litigation to secure not only evidence that is necessary to establish their claims and defenses, but also, on occasion, evidence that reveals the inadequacy of existing substantive law.[38] Moreover, the reminder by a recent Chair of the Advisory Committee that "[c]alibration of discovery is calibration of the level of enforcement of the social policy set by Congress," was echoed at the same symposium by a recent Reporter:

> We should keep clearly in mind that discovery is the American alternative to the administrative state … every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accomplished by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish disincentives for lawless behavior across a wide spectrum of forbidden conduct.[39]

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[35] *See* Burbank & Farhang, *supra* note 2, at ___.

[36] *See* Ken I. Kersch, *The Reconstruction of Constitutional Privacy Rights and the New American State*, 16 STUD. AM. POL. DEVELOP. 61 (2002).

[37] Edson R. Sunderland, *An Appraisal of English Procedure*, 24 MICH. L. REV. 109, 116 (1925). *See id*. at 129 ("The legal profession alone halts and hesitates. If it is to retain the esteem and confidence of a progressive age, it must itself become progressive.").

[38] *See* Jack Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806 (1981).

[39] Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

More recently, research by political scientists has demonstrated that the increase in federal litigation in the late 1960s and 1970s is closely correlated with purposeful decisions by Congress to provide incentives for private enforcement of federal statutes, and that in doing so instead of relying exclusively on administrative (or other public) enforcement, Congress was seeking to insulate the majority's preferences from subversion by agencies under the control of an ideologically distant executive.[40] This and other work makes clear that Americans rely on decentralized litigation – for a variety of cultural, institutional, financial, and political reasons -- to do what in many other advanced democracies is done by a central bureaucracy.[41] It also makes clear that private enforcement regimes are complex, polycentric designs and that they rely on – may stand or fall because of -- the procedural infrastructure.[42]

Knowing these things, it is disconcerting to see how little attention the Advisory Committee has given to the benefits of litigation and discovery. Access to court, which receives an occasional passing nod in the materials (e.g., minutes) from this process that I have read, is important in its own right.[43] But we live in a society where the same influences that prompt reliance on private enforcement of public law render it difficult to make up for capacity that is lost in that realm, an insight that may have contributed to the Reagan Administration's decision to pursue deregulation through litigation reform.[44] In the case of the long campaign for discovery retrenchment, success may lead to *no enforcement*, an insight that suggests why some in the business community and those who do their bidding are willing to invest in what I described above as "a strategy of blinkered persistence."

Inattention to the benefits of litigation and discovery (or the costs of discovery retrenchment) is especially disconcerting when one recalls that any power the rules committees exercise (as agents of the Supreme Court) under the Enabling Act is delegated legislative power. It is not an accident that, through institutional dialogue in the shadow of proposed legislation and ultimately the 1988 amendments to the Enabling Act,

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[40] *See, e.g.,* SEAN FARHANG, THE LITIGATION STATE (2010).

[41] See *id.*; ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001). Thus, if "it behooves us to look to places like the U.K. and Germany to see how you can have an effective court system which does not function the way ours does," Transcript of Proceedings 125 (Nov, 7, 2013) (Dan Troy), it also behooves us to consider the broader regulatory environment – which might dampen the zeal of those who make such partial comparisons.

[42] *See, e.g.,* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

[43] Proponents of these discovery proposals sometimes seek to sell them in terms of access, leading the Chair of the Advisory Committee to suggest at the first public hearing that "concern about access to justice is pushing on both sides of this." Transcript of Proceedings 62 (Nov. 7, 2013). Those who are concerned about access to justice for the parties in high-stakes, complex cases should find a solution to discovery problems in such cases that does not come at the price of access for the poor and middle class.

[44] *See* Burbank & Farhang, *supra* note 2.

the rulemaking process has come to look very much like the administrative process.[45] One need not believe that formal cost-benefit analysis is appropriate for federal court rulemaking[46] to conclude that the rulemakers should stop burying their heads about what is at stake. Instead of ignoring such soft variables, the Advisory Committee should take them into account. One way to do so would be by self-consciously determining the strength of the evidence that is needed to justify discovery retrenchment, recognizing the risk it poses of destabilizing the infrastructure upon which Congress can be assumed to have relied in the 1960s and (particularly) 1970s, when it passed scores of statutes with private enforcement regimes.

Doing so at this time should render it more difficult to ignore or dismiss the fragility of the empirical basis underlying the proposed amendments in question. It should also make clear that, were the Advisory Committee to proceed with those proposals for what some interest groups, lacking sound empirical support, have been calling "normative reasons," it would signal intent, in Judge Higginbotham's words, to "calibrat[e] … the level of enforcement of the social policy set by Congress."

Third, even if the proposed amendments of interest are responsive to discovery problems that occur in a relatively small slice of federal litigation, they would predictably generate additional transaction costs in the great majority of cases that lack such problems, disadvantaging litigants with fewer resources, including plaintiffs seeking remedies under federal statutes that include private enforcement regimes.

Professor Friedenthal's objections to the 1980 discovery amendments included the criticism that they responded to problems arising chiefly or exclusively in complex cases.[47] As I pointed out a few years later,

> But if there has been distortion, complex litigation may not be the culprit. Rather, the problem may be that today's reformers remain transfixed by the vision of uniform, trans-substantive procedure that animated the [1938] Federal Rules of Civil Procedure. Whatever the cause, *the fact that complex litigation has brought to light serious problems may make us less critical than we ought to be about the effects of proposed reforms in other types of cases*.[48]

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[45] *See id.*

[46] *Cf.* Administrative Conference of the United States, Benefit-Cost Analysis at Independent Regulatory Agencies (Recommendation 2013-2) (June 13, 2013), available at http://www.acus.gov/sites/default/files/documents/Recommendation%202013-2%20%28Benefit-Cost%20Analysis%29_0.pdf

[47] *See* Friedenthal, *supra* note 38, at 813.

[48] Stephen B. Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1465 (1987) (emphasis added).

In the intervening decades, we have witnessed dramatic evidence of the dilemma that this vision can pose for procedural reform, with the Court's pleading decisions a recent but particularly vivid example.[49] Of course, it is a welcome dilemma for those who seek to leverage isolated problems into wholesale retrenchment.

We have also witnessed less obvious effects of turning the Federal Rules of Civil Procedure into the Federal Rules of Complex Litigation. Since I started teaching Civil Procedure around the time of the 1980 amendments, it appears that all federal civil litigation has become more complex and expensive. Part of the responsibility must lie with the rulemakers and with federal judges who faithfully seek to implement their reforms. The sheer number of discovery changes since 1980 -- prominently including a new layer of disclosures, expert reports and multiple requirements to confer -- gives pause in that regard, as does the creeping substitution of motion practice for trial practice. Also consequential, I suspect, has been the relentless push toward judicial management, which is a necessity in some types of cases under a system of "General Rules" that must go easy on determinative content and provide substantial room for judicial discretion. That which is a necessity in high-stakes, complex cases, however, can be a curse in simpler cases of modest stakes.[50]

As previously noted, in 1993 the Advisory Committee suggested that, as a result of the required expert reports it proposed, "the length of the deposition of such experts should be reduced, and in many cases the report may eliminate the need for a deposition."[51] My incredulity about that comment reflects its inattention to the incentives that drive litigation behavior and the effect that those incentives have on transaction costs. Some of the current proposals appear to reflect similar inattention.

Thus, for instance, once one recognizes that making proportionality part of the scope definition rather than a defense to a request for relevant evidence would in fact shift the burden to the party seeking discovery, one cannot avoid the possibility – some would say the likelihood -- that, as I observed above, "proportionality [would replace] burdensomeness as the preferred objection of those who have something to hide or for whom discovery is regarded as an opportunity to inflict financial pain on opponents."

Nor would these costs – expense and delay -- be confined to the parties. Others have commented about the difficulty of assessing proportionality under the proposed amendments and the risk that the multi-factor analysis it prescribes would lead to subjective and inconsistent judgments that are effectively unreviewable. As Judge Easterbrook has observed, "[m]ulti-factor standards cut down on loopholes – the bane of

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[49] *See* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009).

[50] *See* Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, 91 JUDICATURE 163 (2008).

[51] S*upra* note 31.

rules—but at great cost."[52] Whatever one thinks of the Supreme Court's reliance on Judge Easterbrook's 1989 article, *Discovery as Abuse*, in its *Twombly* decision – the Court did not so much as mention the numerous post-1989 discovery amendments – his description of the dilemma that a judge faces when seeking to identify abuse in a regime of proportionality still seems apt in the altered landscape of plausibility pleading:

> Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves. The timing is all wrong. … The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find … Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests … The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label a request as abusive … [Judicial officers] have no way to evaluate the costs and benefits of discovery ex ante… .[53]

Finally in this connection, even the empirical assumption prefacing this comment -- that "the proposed amendments of interest are responsive to discovery problems that occur in a relatively small slice of federal litigation" -- is generous as applied to the proposal to reduce the number of depositions presumptively permitted.[54] Moreover, the

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[52] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 641 (1989). The quest for proportionality is not the problem. The means chosen are. For a different vision of proportionality, one that relies on relatively hard-and-fast limits on discovery, but only in a separate track for simple cases (defined to exclude cases brought under statutes containing private enforcement regimes), see Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 409-12 (2011).

[53] *Id.* at 638-39. "The portions of the Rules of Civil Procedure" cited by Judge Easterbrook were Rules 26(g) and 26 (c). *See id.* at 638 n. 14. Note that the informational problems he describes are less serious if questions of proportionality are raised late in the discovery process, which seems more likely under the current regime than that proposed.

[54] In its May 2013 report to the Standing Committee, the Advisory Committee discussed FJC research suggesting that, in a data base that excluded categories of cases unlikely to have any discovery, and counting only cases in which there was at least one deposition, there were more than 5 depositions by the plaintiff or defendant in between 14% and 23% of cases. That research also yielded estimates that 78% or 79% of those cases (i.e., 78% of 14%) had 10 or fewer depositions. *See* Memorandum from Hon. David G. Campbell to Hon. Jeffrey S. Sutton 13 (May 8, 2013), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2013.pdf

justification for reducing the number of interrogatories is an ipse dixit resting on reasoning that bites itself in the back.[55] To date the Advisory Committee's most frequent response to comments about the lack of empirical justification for these proposals appears to be the mantra that "it is easier to manage up than to manage down." That may be true, but the empirical data suggest that this is a case of management looking for a problem to manage. The need to manage down under the current Rules has not been demonstrated in enough cases to cause concern; District Court judges should not be given still more dubious management tasks that keep them out of the courtroom, and attempts to manage from (any) presumptive limits may yield to their allure as anchors, particularly in the challenging informational environment that Judge Easterbrook describes.[56]

So viewed, if the proposals were adopted, they would represent (depending upon one's perspective) either another in a long line of self-inflicted wounds or another means of pricing the poor and middle class out of court. For, given that the parties in high-stakes, complex cases would usually stipulate out of the limits, the potentially substantial transaction costs that they portend -- in a distinctly unfavorable negotiation landscape for those seeking discovery -- would disproportionately fall on individual plaintiffs suing or being sued by corporate defendants, a prospect suggested by the Advisory Committee when it rejected the ABA Special Committee's proposal to limit interrogatories in 1980.[57] Moreover, and again, the greatest concern here, which attention to the allure of an anchor can only deepen, is the possibility "that in prospect or in fact, such transaction costs would prevent a party from securing discovery that was central to its claims or defenses, imposing costs of a very different order," including costs to articulated congressional policy. It is no surprise that these proposals have aroused substantial opposition, which

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> The proposal to reduce the presumptive number of Rule 33 interrogatories has not attracted much concern. There has been some concern that 15 interrogatories are not enough even for some relatively small-stakes cases. As with Rules 30 and 31, the Subcommittee has concluded that 15 will meet the needs of most cases, and that it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater amount.

Id. at 14.

56 *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 119-28 (2011). "[An anchoring effect] occurs when people consider a particular value for an unknown quantity before estimating that quantity … the estimates stay close to the number that people considered – hence the image of an anchor." *Id*. at 119. *See id*. at 125-26 (discussing research in which experienced German judges who had been given facts concerning a crime set sentences that showed an anchoring effect of 50% depending upon whether the (rigged) dice they rolled – to set a baseline from which to determine the sentence -- came up 3 or 9).

57 *See supra* text accompanying note 13.

probably reflects in part the same behavioral dynamic that makes it easier to manage up than to manage down.[58]

Fourth, in light of the long history of discovery retrenchment sought by powerful and persistent interest groups and the abiding paucity of sound empirical data supporting their claims, if these proposals became effective, rulemaking would be destined for controversies, professional and political, akin to those which led to the 1988 amendments to the Enabling Act and attended the 1993 amendments – controversies that this Committee's predecessors worked hard to put behind them.

In our study of litigation reform, Professor Farhang and I provide an institutional account of federal court rulemaking that traces its travails in the 1980s and early 1990s, in large part, to the perceived insularity and lack of openness of the rulemakers and the rulemaking process, and inattention to both empirical data and the limits on rulemaking imposed by the Enabling Act. We attribute the relative lack of controversy attending amendments to the Civil Rules in recent years to "the deeper epistemic foundation that results from an open process and from greater commitment to empirical study" and to "the rulemakers' commitment to take the Enabling Act's limitations seriously."[59] We also suggest that changing institutional dynamics may have played a part:

> [O]pening the process to additional sources of information, anecdotal and empirical, may have triggered institutional dynamics that were less likely to operate when rulemaking committees were dominated by non-judges and when rulemaking was the product of "a relatively cloistered culture." … Smart people operating as part of a group may be perfectly willing to make decisions on the basis of their pooled reflections. Particularly if they can claim expertise or are confident about their power, they may also be willing to recommend bold action that they deem normatively desirable without worrying about empirical support, and without any rigorous attempt to assess costs and benefits.
>
> When those people are judges, however; when reason must be exercised on an evidentiary record more complete than "judicial experience and common sense;" when the decision-makers' monopoly of expertise is in question, in part because the effect of potential policy choices on substantive rights is plain for all to see, they may be reluctant to become involved in controversies in which their decisions can be tarred with a political label. The rulemakers are not courts, and rulemaking under the Enabling Act is not an exercise of judicial power under Article III. It is in

[58] *See* Burbank & Farhang, *supra* note 2, at ___ ("The phenomenon of 'negativity bias,' or an 'endowment effect,' leads people to be substantially more likely to mobilize to avoid the imposition of losses of existing rights and interests, as compared to securing new ones.").

[59] Burbank& Farhang, *supra* note 2, at ____.

> essence a legislative, not a judicial activity, and federal judges are understandably reluctant to be seen as active participants in a political process.[60]

These proposed amendments put our faith in the rulemakers and the rulemaking process to a test. Will the same qualities that in recent years have led the Advisory Committee to reject a number of improvident proposals and prompted four distinguished former members to celebrate the Enabling Act Process[61] prevail again? Or will the Advisory Committee and Standing Committee take their lead from the Supreme Court, whose decisions "interpreting" the Federal Rules of Civil Procedure in recent decades have privileged ideological preferences and institutional power over precedent and respect for regulatory policy, all in the service of retrenchment.[62]

The record to this point in the process is not promising. The further contraction of the general scope of discovery that the Advisory Committee proposes, were it to become effective, could only be explained by the same dynamics that prevailed in 2000.[63] Certainly, there is no better empirical foundation for additional retrenchment. The quality of the justifications given is at times strikingly inadequate, as for instance when the Advisory Committee simply announces that "[p]roportional discovery relevant to any party's claim or defense suffices."[64] That sounds like a legislator (or some members of the Supreme Court), not a committee dominated by judges who are experienced in assessing evidence and explaining their decisions. Given the reaction of the American College of Trial Lawyers to their limited victory in 1999/2000, imagine the celebrations that would greet the success of these proposed amendments.

There, is, of course, ample time for the Advisory Committee or the Standing Committee to withdraw the proposals in question (and any others that, upon mature

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[60] *Id.* (footnotes omitted).

[61] *See* Mark R. Kravitz, David F. Levi, Lee H. Rosenthal & Anthony J. Scirica, *They Were Meant for Each Other: Professor Edward Cooper and The Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495, 515-24 (2013). *Cf.* Richard L. Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J.L. REFORM 637, 637 (2013) ("what the Advisory Committee on Civil Rules does not do is, in some ways, as important as what it does"). The phenomenon is not confined to court rulemaking. *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui tam Litigation*, 112 COLUM. L. REV. 1244, 1318-19 (2012) ("One reason litigation politics have become so dysfunctional in recent decades is a lack of empirical data that can inform public debate.").

[62] *See* Burbank & Farhang, *supra* note 2, at ____.

[63] *See supra* text accompanying notes 25-29. The evidentiary support adduced for the proposals to reduce the number of interrogatories and depositions presumptively permitted is perhaps even weaker, and the likely effects (by reason of predictable transaction costs) appear even clearer.

[64] *See also supra* text accompanying note 55 ("an ipse dixit resting on reasoning that bites itself in the back").

reflection, appear to be improvident).[65] If they were not withdrawn, the 2010 Duke Conference might come to be viewed like the Pound Conference as an "important event in the counteroffensive against …. broad discovery."[66] Moreover, the "powerful interest group mobilization" that has been triggered by the prospect of death by a thousand cuts -- or in the explosion of a bomb that was sold as a firecracker -- would surely continue to the next levels of the Enabling Act Process. In that regard, the likelihood that a determined effort to force these changes through to effectiveness could not be defeated in the current Congress is quite irrelevant. The integrity of the rulemaking process, to which I have devoted a substantial portion of my professional career, would be seriously undermined, prompting renewed interest (among those with the patience to wait for a future Congress) in amendments to the Enabling Act. That would be unfortunate.

Sincerely,

s/Stephen B. Burbank

Stephen B. Burbank
David Berger Professor
for the Administration of Justice

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[65] The Advisory Committee's cost-shifting proposal has a history very similar to that of the proposals that are the subject of these comments. Committee minutes and the comments of others suggest hope in some quarters that it too will have greater explosive potential in the future. *See, e.g.*, Comments of Don Bivens, et al. ["members of the Leadership of the American Bar Association Section of Litigation"] 2 (Feb. 3, 2014) ("Cost sharing is an extremely important issue, and we commend the Committee's plan to focus in the future on potential cost sharing in lieu of the current presumption that the responding party should bear the costs imposed by discovery responses.").

[66] *Supra* text accompanying note 9. The equation would be questionable on many grounds, including the fact that the proposed scope amendments find little support in the Duke proceedings:

> The extent of the actual change effected by [the 2000 scope] amendment continues to be debated. *But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform.* There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. *Again, however, there was no suggestion that this rule language should be changed.*

Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation 8 (emphasis added), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf