

# The Federal Courts' Rulemaking Buffer

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## Repository Citation

Jordan M. Singer, *The Federal Courts' Rulemaking Buffer*, 60 Wm. & Mary L. Rev. 2239 (2019),  
<https://scholarship.law.wm.edu/wmlr/vol60/iss6/5>

## THE FEDERAL COURTS' RULEMAKING BUFFER

JORDAN M. SINGER\*

### ABSTRACT

*Procedural rulemaking is often thought of as a second-order task for the federal court system, relevant to the courts' work but not essential to their function. In reality, rulemaking plays an integral role in the court system's operation by actively insulating the courts from environmental pressure. This Article explains how power over procedural rulemaking protects the federal courts from environmental uncertainty and describes the court system's efforts to maintain the effectiveness of the rulemaking buffer in response to historical and contemporary challenges.*

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## INTRODUCTION

For a coequal branch of the most powerful government on the planet, the United States courts operate under a remarkable amount of environmental uncertainty. Almost every critical resource that the courts need to function must be obtained from somewhere else. The courts look to Congress for funding, judgeships, staffing, and jurisdiction; the executive branch for judicial nominations, budgeting input, courthouse security, and enforcement of decrees; the bar for a steady stream of justiciable cases and controversies; the media for dissemination of important messages; and the public for legitimacy. The federal courts depend on these providers to furnish resources not only in adequate amounts but also at predictable rates: the system cannot operate effectively, for example, if the number of incoming cases far exceeds the capacity of its courtrooms or judges.

The court system has a variety of methods for managing this resource dependency. Some strategies are outwardly focused, designed to extract additional support from external resource providers.<sup>1</sup> Other strategies are inwardly focused, designed to restructure the court system from within to help it manage its existing resources more effectively.<sup>2</sup> This Article focuses on one such internal strategy, known as buffering, and one particularly potent form of buffering—the crafting of procedural rules pursuant to the Rules Enabling Act.<sup>3</sup>

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1. See, e.g., Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 264-66 (2012) (noting the relationship between the federal courts and the Department of Justice, and the incentives it creates to protect the courts); Harvey Rishikof & Barbara A. Perry, "Separateness but Interdependence, Autonomy but Reciprocity": A First Look at Federal Judges' Appearances Before Legislative Committees, 46 MERCER L. REV. 667, 674-82 (1995) (discussing direct requests to Congress for additional funding); Dick A. Semerdjian, *Lawyers and Judges: Excellence in the Pursuit of Justice*, 42 BRIEF 4, 5 (2013) (noting judicial activities with the American Bar Association).

2. See, e.g., Orna Rabinovich-Einy & Yair Sagy, *Courts as Organizations: The Drive for Efficiency and the Regulation of Class Action Settlements*, 4 STAN. J. COMPLEX LITIG. 1, 16-17 (2016) (describing a few of the courts' internal mechanisms).

3. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

A buffer is a structure or process that is placed between an organization's technical core and its external environment to protect the core from disruption.<sup>4</sup> Buffers absorb external shocks (such as changes in the flow of resources or demand for the organization's services) so that the organization's core operations can proceed under relatively stable and predictable conditions.<sup>5</sup> A single organization can use several buffers in combination,<sup>6</sup> and indeed, the process of creating rules of procedure—what I shall call *court-centered rulemaking*—is but one of many internal buffers developed by the federal court system over the past century.

Court-centered rulemaking's contribution to the federal court system's network of buffers stems from its ability to regulate, in part, the flow of cases into and out of the system. The design of procedural rules can encourage or discourage case filing, make it easier or harder to end a case before trial, authorize greater or lesser expenditure of judicial time and resources, and invest district judges with more or less discretion to manage their individual dockets. Procedural rules, in other words, act as safety valves for the court system, allowing it to absorb an unexpected surge in filings or an unexpected drop in staffing or material resources. The power to make procedural rules lowers the stakes of resource dependence, increasing the court system's overall autonomy and leaving it less susceptible to environmental disturbance.

Viewing court-centered rulemaking as a strategic buffer sheds light on two otherwise puzzling facts about the rulemaking process. First, it helps explain why an efficiency-driven, counter-majoritarian, adjudication-centered entity such as the federal court system chooses to engage in a time-consuming, quasi-democratic, and policy-driven activity such as procedural rulemaking. The disconnect between the demands of rulemaking and the traditional expertise of the court system could not be more evident: rulemaking is deliberately slow, forward-looking, and substantively flexible, while traditional adjudication prizes efficiency, adherence to historical

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4. See W. RICHARD SCOTT & GERALD F. DAVIS, ORGANIZATIONS AND ORGANIZING: RATIONAL, NATURAL, AND OPEN SYSTEM PERSPECTIVES 128 (2007).

5. See *id.*

6. See *id.*

facts, and substantive consistency.<sup>7</sup> Yet the rulemaking buffer has proven to be so strategically important to the court system as an organization that it is willing to sublimate some of its core traditions and practices to maintain control over the rulemaking process.<sup>8</sup>

The buffering perspective also helps explain why the court system has allowed (and even encouraged) court-centered rulemaking to become progressively complex and hierarchical over time. Nearly all organizations prefer to operate their buffers privately and under strong internal supervision in order to maximize efficiency and minimize external interference.<sup>9</sup> But organizations with a strong public character, such as the federal court system, must also be sufficiently transparent about their procedures to preserve their legitimacy with the public.<sup>10</sup> To view rulemaking as a buffer is to witness fully the tension between openness and control that pervades the federal court system's internal operations. The evolution of court-centered rulemaking, from the private deliberations of an elite group of lawyers in the 1930s to the far more complex and open process we see today, reflects the federal court system's ongoing effort to find the right balance.<sup>11</sup>

More broadly, the buffering perspective sees the federal court system—not individual rulemakers, judges, or lobbyists—as the chief protagonist in the rulemaking process. To date, this view has been largely neglected. Committee- or judge-level analyses of

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7. See WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* 97 (1990).

8. Contemporary scholarship increasingly recognizes the organizational character of court systems and their behavior. See, e.g., Rabinovich-Einy & Sagy, *supra* note 2, at 12 (“Courts are organizations.... similar to the U.S. Steel Corp., the Red Cross, a corner grocery store, and the New York State Highway Department.”); Yair Sagy, *A New Look at Public Law Adjudication: A Critical Organizational Analysis and an Israeli Test Case*, 24 *J. TRANSNAT'L L. & POL'Y* 65, 66 (2014) (“[O]ne does not have to be well versed in organizational studies to observe that courts possess dominant features of commonplace organizations.”); Ido Shahaar, *A Tale of Two Courts: How Organizational Ethnography Can Shed New Light on Legal Pluralism*, 36 *PoLAR* 118, 118 (2013) (“Courts of law are organizations.”); see also Olga Frishman, *Should Courts Fear Transnational Engagement?*, 49 *VAND. J. TRANSNAT'L L.* 59, 60-61 (2016) (arguing that courts' use of foreign law can be understood by viewing courts as organizations within a transnational organizational field).

9. See HOWARD E. ALDRICH, *ORGANIZATIONS AND ENVIRONMENTS* 22 (1979); cf. SCOTT & DAVIS, *supra* note 4, at 128.

10. See *infra* note 199 and accompanying text.

11. See *infra* Part III.

rulemaking are surely important and add much to our understanding of group dynamics and rule interpretation. But only the organizational view can meaningfully situate the rulemaking process within the federal court system's broader ambitions.

In light of these benefits, this Article examines the extent of court-centered rulemaking's buffering power, and analyzes the tactics that the federal court system has used to develop and strengthen that power, with a particular focus on the civil rulemaking process. Part I describes the organizational nature of the federal court system, identifies the pressures posed by the court system's external environment, and introduces more fully the concept of court-centered rulemaking as an organizational buffer. Part II situates the federal court system's campaign to obtain rulemaking authority in the 1920s and 1930s within a larger strategy to manage its resource dependence and increase its organizational autonomy. Part III explains how environmental pressure since the passage of the Rules Enabling Act caused the court system to gradually convert court-centered rulemaking from a simply configured, internal process in the 1940s to one that is structurally complex, hierarchical, and public today. Part IV looks to current environmental conditions that might pressure the federal court system to alter its formal rulemaking structure yet again, and examines how the court system is likely to respond.

## I. THE STRATEGIC ROLE OF RULEMAKING

Court-centered rulemaking generally, and federal civil rulemaking in particular, can be understood as an organizational coping strategy.<sup>12</sup> The federal court system relies on external actors for key resources, among them funding, staffing, jurisdictional authority, public legitimacy, and disputes requiring resolution. These resources are not guaranteed, and their availability can fluctuate.<sup>13</sup> A

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12. *See infra* notes 45-49 and accompanying text.

13. This is not to say that the federal courts are not well-resourced. On the whole, federal judges enjoy higher salaries, more staffing, grander courthouses, and lighter dockets than their state counterparts. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 148 (2009). But these advantages do not make the court system any less resource-dependent. It still relies on external providers for nearly all of its inputs.

drop in funding, a surge in federal filings, or a spate of unfilled judicial vacancies can strain federal dockets, compromising efficiency and even threatening the basic administration of justice.

The court system cannot directly control much of this resource variability, but it can try to manage its ebbs and flows. Rulemaking is one of these management tools. By controlling the development of procedural rules, the federal court system can implement downstream measures to control its docket—for example, by loosening or tightening requirements for dismissal; by increasing judicial discretion in areas such as joinder, consolidation, or discovery; or through the use of alternative dispute resolution.<sup>14</sup> This Part explores the federal court system's resource dependence in an organizational context, looking first at the characteristics that define the federal courts as an organization, and then at the individuals and entities outside the federal court system that influence its behavior.

#### A. *The Court System's Technical Core*

Howard Aldrich has proposed a general definition of organizations as “goal-directed, boundary-maintaining, activity systems.”<sup>15</sup> Organizations are *goal-directed* in that their members believe they are engaged in a common goal or task, as opposed to merely interacting socially.<sup>16</sup> They are *boundary-maintaining* in that they distinguish between members and nonmembers: some people may participate in the activities of the organization, and some are excluded.<sup>17</sup> And they are *activity systems* in that the roles of organizational members, and the relationships between those roles, are structured by the organization's activities.<sup>18</sup>

The federal court system embodies each of these characteristics. Broadly speaking, its goal is to provide a fair and efficient forum for

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14. See, e.g., Edward Brunet, *The Triumph of Efficiency and Discretion Over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 291, 303 (1991); Rabinovich-Einy & Sagy, *supra* note 2, at 8.

15. ALDRICH, *supra* note 9, at 4 (emphasis omitted); see also Joel A. C. Baum & Tim J. Rowley, *Introduction to THE BLACKWELL COMPANION TO ORGANIZATIONS* 1, 3 (Joel A. C. Baum ed., 2005) (describing the Aldrich definition as an effort “to combine elements” of various approaches).

16. See ALDRICH, *supra* note 9, at 4.

17. See *id.* at 4-5.

18. See *id.* at 5.



the resolution of disputes commensurate with its constitutional and statutory obligations. Its primary activity for achieving this goal—what we might call the court system’s *technology*<sup>19</sup>—is processing cases to resolution.<sup>20</sup> And its boundaries are defined by behaviors that specifically relate to that technology. Attorneys, for example, act within the court system’s boundaries when they present disputes for adjudication according to court rules and customs, and they act outside those boundaries when they seek to resolve conflicts through private arbitration or settlement. Similarly, jurors and witnesses act within the court system’s boundaries by participating in trials and hearings at the court’s direction, but act outside those boundaries once they leave the courthouse. For the federal court system, as for all organizations, “it is behaviors that are organized, not individual people.”<sup>21</sup>

At the heart of the court system’s technology lies an even narrower and more fundamental aspect of its work: the resolution, through adjudication, of substantial disputes invoking federal law or federal interests.<sup>22</sup> It is this technical core which defines the

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19. An organization’s technology is the component of its work that transforms inputs into outputs. See SCOTT & DAVIS, *supra* note 4, at 21-22. In the organizational literature, “technology” is a term of art that includes not just machinery and equipment, “but also the skills and knowledge of workers, and even the characteristics of the objects on which work is performed.” *Id.* at 125; see also JAMES D. THOMPSON, ORGANIZATIONS IN ACTION: SOCIAL SCIENCE BASES OF ADMINISTRATIVE THEORY 15 (1967) (referring to an organization’s technology as “an important variable in understanding the actions of complex organizations”).

20. See BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 143 (2017) (“Courts are organizations that process cases. That is their primary purpose.”); John A. Martin & Nancy C. Maron, *Courts, Delay, and Interorganizational Networks: Managing an Essential Tension*, 15 JUST. SYS. J. 268, 275 (1991) (asserting that the job of the court system generally “is to convert legal disputes, the demands or ‘inputs’ of the environment into disposition, that is to create ‘outputs’”).

21. JEFFREY PFEFFER & GERALD R. SALANCIK, THE EXTERNAL CONTROL OF ORGANIZATIONS: A RESOURCE DEPENDENCE PERSPECTIVE 30 (1978). Behaviors associated with the court system’s goals, and by extension organizational membership, are often indicated by formal documentation or ceremony (such as a jury summons, the granting of an application to practice law in the court, or the swearing in of a witness). Such ceremonial trappings help delineate the behaviors of member-participants from those who are present merely as observers.

22. The federal court system itself has made clear its own belief that its central role is to provide a federal forum for the resolution of federal interests. In its 1995 self-study, the Judicial Conference of the United States asserted that federal jurisdiction should extend to civil matters in only six narrowly defined areas: (1) those arising under the U.S. Constitution; (2) those deserving a federal forum because the issues raised pose a strong need for uniformity or invoke paramount federal interests; (3) those involving foreign relations of the United

federal courts and makes them distinctive.<sup>23</sup> It is also the segment of court work that is the least amenable to disruption and the first to obtain the organization's protection.<sup>24</sup> Put differently, while diversity cases will receive the same careful attention as federal question cases as long as adequate resources are available, under environmental pressure the federal court system is apt to divert its resources and energy to adjudicating federal issues first.<sup>25</sup>

### *B. The Court System's External Environment*

Like all public (and most private) organizations, the federal court system cannot operate exclusively on its own. To survive, it must interact with other entities, organizations, and individuals located beyond its boundaries.<sup>26</sup> This external environment provides the court system with the materials it needs to undertake its technical tasks effectively.<sup>27</sup> From Congress, the court system obtains annual and emergency funding, staffing (through confirmation of judicial nominees), and statutory authorization (for lower courts, judgeships,

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States; (4) those involving the federal government, federal officials, or federal agencies as parties; (5) those involving disputes between or among the states; and (6) those affecting substantial interstate or international disputes. See JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 28-29 (1995), [hereinafter LONG RANGE PLAN], [https://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan\\_0.pdf](https://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf) [<https://perma.cc/9VKB-TFWN>].

23. See Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 657 (1980). The organization's prioritization of federal issues is evidenced in part by "an impressive body of judicially created doctrines that limit or renounce federal jurisdiction in favor of state courts," including the complete diversity rule, the "well-pleaded complaint rule," and various abstention doctrines. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1015, 1018-23 (2002). It is also seen in periodic calls to curb or curtail diversity jurisdiction. See, e.g., LONG RANGE PLAN, *supra* note 22, at 30 (calling diversity cases "a massive diversion of federal judge power away from their principal function—adjudicating criminal cases and civil cases based on federal law").

24. See SCOTT & DAVIS, *supra* note 4, at 109-10.

25. See THOMPSON, *supra* note 19, at 78 ("The more its technology and task environment tend to tear it apart, the more the organization must guard its integrity.").

26. Put differently, the federal courts operate in an *open system*, a complex and dynamic environment populated by a variety of different actors, materials, and norms. The open system view likens organizations to organisms: they are "adaptive and interdependent systems, comprised of various interrelated—possibly conflicting[—]subsystems[,] attempting to meet and influence the dynamic demands of the environment." Baum & Rowley, *supra* note 15, at 6.

27. See *id.* at 8 (discussing technical environments for organizations).

and jurisdiction to hear disputes).<sup>28</sup> From the executive branch, it secures judicial nominations, building administration and security, a steady stream of criminal and regulatory filings, coordination with law enforcement and regulatory agencies, and the enforcement of judicial decrees.<sup>29</sup> From state court systems, it seeks guidance on the application of state law;<sup>30</sup> from the media, it seeks a means of communicating broadly with external audiences.<sup>31</sup> It looks to aggrieved members of the public and their attorneys to provide civil case filings. And periodically, the federal court system demands the time and effort of individuals *not* party to a dispute to respond to subpoenas and requests for jury service.<sup>32</sup>

The federal court system also depends on the external environment for its legitimacy.<sup>33</sup> Though intangible, legitimacy is a critical resource: it “seems to provide organizations with a ‘reservoir of support’ that enhances the likelihood of organizational survival and perpetuates ... individuals’ loyalty to the organization and willingness to accept organizational actions, decisions, and policies.”<sup>34</sup> The Supreme Court itself has acknowledged that its “power lies ... in its

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28. See generally Thomas G. Walker & Deborah J. Barrow, *Funding the Federal Judiciary: The Congressional Connection*, 69 JUDICATURE 43 (1985) (discussing the relationship between the courts and Congress).

29. See JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 7 (2015), [https://www.uscourts.gov/sites/default/files/federaljudiciary\\_2015strategic\\_plan.pdf](https://www.uscourts.gov/sites/default/files/federaljudiciary_2015strategic_plan.pdf) [<https://perma.cc/6FB6-KGGJ>].

30. See *id.* at 5.

31. See Olga Frishman, *Court-Audience Relationships in the 21st Century*, 86 MISS. L.J. 213, 241-42, 248-49 (2017) (identifying direct media interviews and press releases as two ways in which the courts rely on the media to communicate their messages).

32. See, e.g., FED. R. CIV. P. 45 advisory committee’s note to 1991 amendment.

33. Legitimacy is, in the words of one thoughtful scholar, “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995); see also Jean-Philippe Vergne, *Toward a New Measure of Organizational Legitimacy: Method, Validation, and Illustration*, 14 ORGANIZATIONAL RES. METHODS 484, 484-85 (2011) (“Legitimate organizations are those whose existence, values, and behavior appear congruent with socially accepted norms.”). To say that a court system possesses legitimacy is to say that one “belie[ves] in the binding nature of [its] decisions, even when one disagrees with them.” John C. Yoo, *In Defense of the Court’s Legitimacy*, 68 U. CHI. L. REV. 775, 777 (2001).

34. Leigh Plunkett Tost, *An Integrative Model of Legitimacy Judgments*, 36 ACAD. MGMT. REV. 686, 686 (2011) (citations omitted) (quoting John Dowling & Jeffrey Pfeffer, *Organizational Legitimacy: Social Values and Organizational Behavior*, 18 PAC. SOC. REV. 122 (1975)).

legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."<sup>35</sup> Possessing legitimacy also allows the court system to justify its consumption of material resources that could "presumably ... find alternative uses elsewhere."<sup>36</sup> From a general organizational perspective, then, legitimacy is both a strategic resource in its own right<sup>37</sup> and a means of securing and maintaining other resources.<sup>38</sup>

Variations in the flow of any of these resources can hamper the federal court system's basic work and can even threaten its technical core.<sup>39</sup> Most obviously, an increase in case filings relative to the court system's material resources places pressure on the system's ability to process cases efficiently.<sup>40</sup> Changes in resource flow can also affect the *quality* of the court system's services by reducing each judge's time to consider the issues and circumstances presented by each case, straining collegial relationships between judges, or eroding the coherence of legal doctrine.<sup>41</sup> And a drop in legitimacy

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35. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion).

36. See PFEFFER & SALANCIK, *supra* note 21, at 24.

37. See generally Gerardo Patriotta et al., *Maintaining Legitimacy: Controversies, Orders of Worth, and Public Justifications*, 48 J. MGMT. STUD. 1804, 1804 (2011) (discussing strategic approaches to organizational legitimacy).

38. See PFEFFER & SALANCIK, *supra* note 21, at 193-96.

39. See George A. Zsidisin & Lisa M. Ellram, *An Agency Theory Investigation of Supply Risk Management*, 39 J. SUPPLY CHAIN MGMT. 15, 15-16 (2003) (discussing the risk associated with the cutoff of critical organizational resources). Resource variability probably does not threaten the federal court system's actual survival, given that it is a constitutionally mandated entity. Yet the loss of resources could still be devastating to the overall work and effectiveness of the court system, especially since its public character restricts the organizational strategies that are realistically available to it. Cf. SCOTT & DAVIS, *supra* note 4, at 21 (discussing limited strategies of public schools).

40. See LONG RANGE PLAN, *supra* note 22, at 93-100. Beyond the sheer volume of cases, the complexity of cases (as measured by case weight) can also influence case processing; Wolf Heydebrand & Carroll Seron, *The Crisis of Crisis Management in the Courts*, 4 ORG. & ENV'T 77, 82-83 (1990); Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 632 (1997) (noting an 86 percent rise in civil rights filings in federal courts in the half-decade after the enactment of the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991). See *U.S. District Courts-Judicial Business 2017*, U.S. CTS., [www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017](http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017) [<https://perma.cc/LDS7-ETZW>] ("Case types that on average are more time consuming for district judges to resolve receive weight values greater than 1.00, whereas case types that are less time consuming receive lower weights.").

41. See Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1114-15 (2011) (identifying a correlation between burgeoning caseloads and "lightened scrutiny" of appellate

can create a spiral effect, depriving the court system not only of public support, but of support from material resource providers as well.<sup>42</sup>

Were the external environment wholly predictable and stable, the court system could adopt standard behaviors to assure itself of adequate resources year after year.<sup>43</sup> But the external environment is not stable; it is dynamic and uncertain.<sup>44</sup> Congress and Presidential administrations turn over, laws change, competitors in the market for dispute resolution emerge, and public confidence grows and wanes. Under these conditions, the court system must employ strategies to assure both that adequate resources will be available to it and that those resources will be available at the right time and in the right proportion.

There is no single organizational strategy for coping with the threat of resource disruption. Rather, organizations may adopt a range of strategies, from “passivity to increasing active resistance,” depending on the nature of the pressure being exerted.<sup>45</sup> At the most

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cases in the Second and Ninth Circuits); John B. Oakley, *The Myth of Cost-Free Jurisdictional Reallocation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 60-62 (1996).

42. See Tost, *supra* note 34, at 686.

43. See PFEFFER & SALANCIK, *supra* note 21, at 47.

44. See SCOTT & DAVIS, *supra* note 4, at 128.

45. Christine Oliver, *Strategic Response to Institutional Processes*, 16. ACAD. MGMT. REV. 145, 151-52 & tbl.2 (1991). This spectrum, first articulated by Professor Oliver, was drawn from the “convergent insights” of two dominant organizational theories of the late twentieth century: resource dependence theory (RDT) and neoinstitutionalism. *See id.* at 145-46. RDT sees resource dependence in terms of relative power: the entity providing resources has power over the entity receiving them, and accordingly, an organization’s autonomy is inversely proportional to its dependence on the external environment. *See PFEFFER & SALANCIK, supra* note 21, at 52-53; Johannes M. Drees & Pursey P. M. A. R. Heugens, *Synthesizing and Extending Resource Dependence Theory: A Meta-Analysis*, 39 J. MGMT. 1666, 1670 (2013); *see also* Gerald F. Davis & J. Adam Cobb, *Resource Dependence Theory: Past and Future*, in 28 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS: STANFORD’S ORGANIZATION THEORY RENAISSANCE, 1970-2000, at 21, 24 (Claudia Bird Schoonhoven & Frank Dobbin eds., 2010) (noting that power and resource dependence “are simply the obverse of each other”). Accordingly, RDT suggests that an organization facing environmental uncertainty will take aggressive steps “to manipulate external dependencies or exert influence over the allocation or source of critical resources.” Oliver, *supra* note 45, at 148. Proponents of neo-institutionalism, by contrast, posit that a resource-dependent organization will conform its behavior to the norms of the environment in order not to draw attention to itself. *See generally* Royston Greenwood et al., *Introduction* to THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 1, 3-5 (Royston Greenwood et al. eds., 2008). Oliver concluded that both theories were correct in their observations of organizational behavior but errant in their predictions that organizational responses were monolithic. *See Oliver, supra* at 173-75.

passive end of the spectrum is a strategy of acquiescence, in which the organization tries to assure the continued flow of resources by blindly adhering to prevailing social norms, mimicking existing institutional models, and obeying rules.<sup>46</sup> At the other end of the spectrum are aggressive strategies such as defiance (in which the organization dismisses or challenges prevailing rules and norms) and outright manipulation (in which the organization attempts to co-opt, influence, or control resource providers and their processes).<sup>47</sup> And at the midpoint of the spectrum is buffering: the strategy of shielding the organization's technical core from the environment's disruptive pressures.<sup>48</sup> Buffering provides an extra layer of protection for the organization by inserting a process or structure between its technical core and the external environment to make the flow of resources into the technical core steadier and more predictable.<sup>49</sup>

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Rather, Oliver observed, an organization's responses vary according to the environmental pressures it faces. *See id.* at 175.

While RDT and neoinstitutionalism alone do not fully capture the dynamic range of organizational behavior, Oliver's typology provides a useful framework for understanding the federal court system's strategic responses to its environment. And indeed, over the past quarter century it has become commonplace to use RDT and neoinstitutionalism to explain a wide range of organizational behaviors. *See, e.g.,* María de la luz Fernández-Alles & Ramón Valle-Cabrera, *Reconciling Institutional Theory with Organizational Theories: How Neoinstitutionalism Resolves Five Paradoxes*, 19 J. ORGANIZATIONAL CHANGE MGMT. 503, 503-04 (2006); Amy J. Hillman et al., *Resource Dependence Theory: A Review*, 35 J. MGMT. 1404, 1416-18 (2009); Tina Nabatchi, *The Institutionalization of Alternative Dispute Resolution in the Federal Government*, 67 PUB. ADMIN. REV. 646, 648 (2007); Peter D. Sherer & Kyungmook Lee, *Institutional Change in Large Law Firms: A Resource Dependency and Institutional Perspective*, 45 ACAD. MGMT. J. 102, 102 (2002); Pamela S. Tolbert, *Institutional Environments and Resource Dependence: Sources of Administrative Structure in Institutions of Higher Education*, 30 ADMIN. SCI. Q. 1, 1 (1985).

46. *See* Oliver, *supra* note 45, at 152.

47. *See id.*

48. *See id.* at 151-52, 154-55; *see also* Monty L. Lynn, *Organizational Buffering: Managing Boundaries and Cores*, 26 ORG. STUD. 37, 38 (2005).

49. *See* Lynn, *supra* note 48, at 38-39 (calling this process "[i]nput and output smoothing"). Buffering can take a variety of forms, depending on the needs and capacities of the organization. *See id.* In one form, the organization creates new structural elements to absorb environmental turbulence before it reaches the organization's core technology. *See* Kenneth J. Meier & Laurence J. O'Toole, Jr., *Management Theory and Occam's Razor: How Public Organizations Buffer the Environment*, 39 ADMIN. & SOC'Y 931, 936 (2008). For example, a school district may create a specialized intake unit for children of migrant farm workers. *See id.* In another form of buffering, the organization reprograms its existing elements to handle environmental shock; for example, priming an accounting office to handle external audits. *Id.* While this Article focuses on public sector buffering, there are just as many examples of buffering activities among private firms. *See, e.g.,* PFEFFER & SALANCIK, *supra* note 21, at 108

Because the organization neither capitulates to the external environment nor demands anything of it, buffering is ultimately an avoidance strategy.<sup>50</sup> Buffering (as used in this Article) is also an *internal* strategy, carried out exclusively or predominantly within the organization's boundaries.<sup>51</sup>

The federal court system has successfully implemented several organizational buffers, among them the Administrative Office of the U.S. Courts and the Judicial Conference of the United States, to stabilize the flow of resources into its technical core.<sup>52</sup> Court-centered rulemaking, however, is a particularly robust and compelling example of buffering in operation. For more than eighty years, rulemaking has been an effective mechanism for controlling case-flow in an uncertain resource environment. Moreover, it has revealed itself to have more protective dimensions than its progenitors could have imagined.

### *C. Rulemaking's Buffering Qualities*

The power to develop procedural rules protects the federal court system's technical core in several key ways. First, and perhaps most importantly, rulemaking *regulates* (albeit indirectly) the flow of cases and legal claims into the system. As John Rabiej, the former Chief of the Judicial Conference's Rules Committee Support Office, has explained with respect to class actions under Federal Rule of Civil Procedure 23:

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(discussing organizational efforts to control the rules governing demand and supply exchanges); THOMPSON, *supra* note 19, at 20-21 (discussing stockpiling of raw materials and strategies to smooth out customer demand).

50. See Oliver, *supra* note 45, at 151-52, 154-55.

51. The internal view of buffering adopted here is consistent with the bulk of the organizational literature, and excludes techniques such as interorganizational linkages or widespread interactions with the external environment, which are more typically classified as "bridging" techniques. See SCOTT & DAVIS, *supra* note 4, at 128-29, 235-43. *But see* Meier & O'Toole, Jr., *supra* note 49, at 933 ("[E]ven the development of interorganizational linkages can be a means of buffering core organizational activities.").

52. See, e.g., Lori A. Johnson, *Creating Rules of Procedure for Federal Courts: Administrative Prerogatives or Legislative Policymaking?*, 24 JUST. SYS. J. 23, 24-25, 36 (2003); Longan, *supra* note 40, at 635.

Making Rule 23 too efficient raises a counter-intuitive limitation. As a general matter, the courts could never handle all claims that could possibly be litigated. They are able to cope with their caseloads only because the vast majority of litigable claims are never pursued in court. History teaches that when Rule 23 is amended to make it more efficient, more persons will participate in class actions. Professor Francis McGovern, who has provided helpful counsel to the advisory committee on numerous occasions, characterizes the ironic consequence of enhancing a litigation procedure as the “freeway effect.” If you build a better highway, more drivers will be drawn to it, creating more congestion.<sup>53</sup>

Carrying forward Professor McGovern’s analogy, rulemaking power allows the court system to erect situational “speed bumps” to dissuade users from flooding the system with more cases than it can handle. Conversely, should the court system decide to invite new filings or stem a decline in the existing rate of filings,<sup>54</sup> court-centered rulemaking provides an important avenue to pursue that policy by lowering barriers to entry.

Rulemaking also permits the federal courts to regulate the flow of claims *out* of the system. Under the current iteration of the Federal Rules of Civil Procedure, a district court whose caseload is disproportionate to its resources—because it is flooded with cases, for example, or because it is experiencing a high level of judicial vacancies—has at its disposal a wide range of rule-based techniques to bring its docket into line.<sup>55</sup> Among other things, the Rules

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53. John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 327-28 (2005) (footnotes omitted).

54. Like a surge in filings, a decline in filings will often stem from circumstances outside the court system’s immediate control. *See, e.g.*, Joe Palazzolo, *Courtroom Surprise: Fewer Tort Lawsuits*, WALL ST. J., July 25, 2017, at A1 (identifying factors such as state restrictions on litigation, improved safety, and changes in public opinion as contributing to the national decline in tort filings).

55. *See, e.g.*, Hillel Y. Levin, Iqbal, Twombly, and the Lessons of the Celotex Trilogy, 14 LEWIS & CLARK L. REV. 143, 148-49 (2010) (discussing the docket control effects of Rules 12(b) and 56); *see also* Edson R. Sunderland, *Observations on the Illinois Civil Practice Act*, 28 ILL. L. REV. 861, 871 (1934) (noting that the high percentage of “summary judgments” in the United Kingdom “is the real explanation why less than twenty judges can dispose of all the litigation in England brought in the higher courts of general jurisdiction”); William H. Wicker, *Trials and New Trials Under the New Federal Rules*, 15 TENN. L. REV. 570, 578 (1939) (same).



explicitly authorize a district court to promote settlement,<sup>56</sup> suggest alternative dispute resolution,<sup>57</sup> dismiss a case for a variety of jurisdictional or substantive infirmities,<sup>58</sup> or grant summary judgment in whole or in part.<sup>59</sup> This regulatory function specifically protects the federal court system's technical core by helping it block out or dispose of matters that divert energy from the adjudication of meritorious federal issues.

Of course, the mere fact that the Rules permit more flexible judicial disposition of cases before trial does not mean that such disposition will occur. Commentators have noted the federal judiciary's complicated relationship with Rule 56 in particular, with some judges enthusiastically embracing summary judgment as a tool of efficiency while others view it with great caution.<sup>60</sup> The point is simply that court-centered rulemaking allows the court system to invest its district judges with powerful tools for docket control. Just as rules can be shaped to restrict or encourage the flow of cases into the system, they can also be shaped to restrict or encourage the flow of cases out of the system.<sup>61</sup>

A second quality of court-centered rulemaking is that it *consolidates* support among the organization's members by forging a closer partnership between the bench and the bar. The organized bar has traditionally been a champion of the federal judiciary and an important link to the entities in the court system's external environment.<sup>62</sup> The Federal Rules of Civil Procedure strengthen that relationship by embracing a teamwork-centered model of federal

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56. See FED. R. CIV. P. 16(c)(2)(I).

57. See *id.*

58. See, e.g., FED. R. CIV. P. 41.

59. See FED. R. CIV. P. 56.

60. See, e.g., William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 466 (1983).

61. To be sure, the formal rulemaking process is not the federal court system's only means to achieve this goal. It can, for example, lobby for or against legislation that would expand its jurisdiction. See Rabiej, *supra* note 53, at 388 (discussing the Judicial Conference's support of the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001 and opposition to an early draft of the Class Action Fairness Act). The Supreme Court can also narrow or broaden the scope of procedural rules in the course of deciding individual cases. See, e.g., Richard A. Nagareda, *1938 All over Again? Pretrial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 660-68 (2011).

62. See *infra* note 130 and accompanying text.

adjudication.<sup>63</sup> This closer relationship, in turn, protects the court's technical core by giving the bar a more personal stake in the workings of the litigation process. The relationship is further bolstered by the fact that the modern rulemaking process relies on the contribution of practitioners in both formal and informal ways.<sup>64</sup>

Third, court-centered rulemaking *insulates* judicial decision-making from environmental pressure.<sup>65</sup> The federal court system naturally strives to make district court decisionmaking as rational as possible, in the sense that decisions are consistent, predictable, and timely.<sup>66</sup> But even life-tenured judges are not immune to pressures from the external environment.<sup>67</sup> The ongoing judicial vacancy crisis, for example, has left some district courts far below their statutorily authorized level of judges.<sup>68</sup> The pressure on remaining judges to process cases without delay creates at least unconscious incentives to spend less time on each case than they otherwise might.<sup>69</sup> Other changes in externally sourced resources, such as a drop in congressional funding or an influx of cases from new federal legislation, create similar pressures. Indeed, some have suggested that even the threat of a significant change in material resources can affect the federal courts' organizational behavior, including decisionmaking in individual cases.<sup>70</sup>

Court-centered rulemaking relieves some of this environmental pressure by establishing standard operating procedures for district court adjudication and providing district judges with particular guidance about how, and under what circumstances, cases should be resolved.<sup>71</sup> The current Federal Rules of Civil Procedure, for

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63. See HEYDEBRAND & SERON, *supra* note 7, at 85-88.

64. See *infra* Part III.

65. See generally Ferejohn & Kramer, *supra* note 23.

66. See HEYDEBRAND & SERON, *supra* note 7, at 96.

67. See Ferejohn & Kramer, *supra* note 23, at 976-77.

68. As of February 14, 2019, approximately 18 percent of authorized federal district court judgeships nationwide (124 of 677) remained unfilled. See *Judicial Vacancies*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-vacancies> [<https://perma.cc/8G7NZ-BRRF>].

69. See Oakley, *supra* note 41, at 61.

70. See Ferejohn & Kramer, *supra* note 23, at 977 (stating that congressional power over the courts' jurisdiction and material resources "seems to have turned the [federal] judiciary into an effective self-regulator," devising strategies that "minimize[] [its] chances of stepping heedlessly into political thickets").

71. See SCOTT & DAVIS, *supra* note 4, at 55; see also Owen M. Fiss, *The Bureaucratization*

example, set guidelines for the timing and content of pleadings and motions,<sup>72</sup> the standards for granting dispositive motions,<sup>73</sup> and so on. By directing district judges to an established set of procedures and by enforcing internal norms that frown on deviation from those procedures, court-centered rulemaking aims to increase the rationality and consistency of federal adjudication.<sup>74</sup>

To be fair, rulemaking is hardly perfect in this regard. Even when the judicial hierarchy provides uniform guidance on the rules to lower-court judges, the consistent application of rules is vulnerable to internal disobedience and interjudiciary fractures.<sup>75</sup> Not every district judge will apply rules in the same way or with the same vigor—a challenge of internal behavior common to all large organizations.<sup>76</sup> Still, most of the time, judges act within a zone of discretion envisioned by the rules, suggesting that rulemaking reduces external pressure in judicial decisionmaking and creates conditions within the organization's technical core that more closely permit the exercise of rationality.

Rulemaking further insulates the technical core by relieving some of the workload pressure that might otherwise compromise rational judicial decisionmaking.<sup>77</sup> For one thing, it allows the court system to delegate certain litigation tasks to other organizational members, thereby freeing up time and resources for judges to focus on core substantive issues.<sup>78</sup> The current Federal Rules of Civil Procedure, for example, place much of the discovery process in the hands of parties and counsel.<sup>79</sup> Similarly, the Federal Rules expect (and local

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*of the Judiciary*, 92 YALE L.J. 1442, 1451-52 (1983) (describing the Federal Rules of Civil Procedure as an effort to control the decisions of lower-court judges).

72. See FED. R. CIV. P. 7-15.

73. See *id.* 12, 50, 52, 56.

74. See THOMPSON, *supra* note 19, at 18-19 (“Under norms of rationality, organizations seek to seal off their core technologies from environmental influences.”)

75. For a discussion of lower federal courts “materially modify[ing]” or flat-out refusing to follow Supreme Court directives, see Walter F. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1018, 1023-25 (1959), see also Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power”*, 80 B.U. L. REV. 967, 971-73 (2000), *infra* Part III.B (identifying examples of judicial disobedience in the 1950s before judges gained a prominent role in the court-centered rulemaking apparatus).

76. I am grateful to Yair Sagy for encouraging me to make this point more explicit.

77. Cf. SCOTT & DAVIS, *supra* note 4, at 55.

78. See *infra* notes 79-83 and accompanying text; cf. SCOTT & DAVIS, *supra* note 4, at 55.

79. See generally Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA

rules often require)<sup>80</sup> the parties to propose a pretrial schedule,<sup>81</sup> alert the court as to potential procedural infirmities,<sup>82</sup> and identify salient facts for the court's consideration on summary judgment.<sup>83</sup> This delegation of authority to the organization's downstream workers allows the court system to better absorb external resource shocks while simultaneously promoting system-wide consistency in the adjudicative process.<sup>84</sup> Organizational control over rulemaking further allows the court system to adjust these requirements periodically so as to maximize judicial time and resources.<sup>85</sup>

Fourth, court-centered rulemaking *educates* the court system about its work, and allows it to standardize best practices. Because procedural rules establish protocols for judges and court staff, the effect of the rules can be monitored and empirically assessed by the larger organization. Indeed, the federal court system routinely commissions studies on the operation of various rules and case management procedures through its research arm, the Federal Judicial Center (FJC).<sup>86</sup> By tracking how rules are used and interpreted, the court system as a whole is better positioned to understand how its rules work in practice, adjust the rules as necessary, and (if needed) enforce procedural conformity, an important step to maintaining efficiency in a condition of ongoing resource dependence.<sup>87</sup> Internal control over rulemaking also allows the court system to synchronize the efficient practices and interpretations that originate in specific

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CLARA L. REV. 145 (2012) (discussing ramifications of party-controlled discovery).

80. See, e.g., D. COLO. CIV. R. 5.1, 16.3, 56.1, 81.1.

81. See FED. R. CIV. P. 16(b), 26(f).

82. See, e.g., *id.* 12(b) (motions to dismiss), 37 (sanctionable discovery conduct).

83. See *id.* 56(a) (requiring a moving party to show that there is no genuine dispute of material fact), 56(c) (requiring the movant to cite to the record to show the absence of a material dispute).

84. Cf. SCOTT & DAVIS, *supra* note 4, at 55.

85. For example, party responsibilities for (and freedom over) pretrial discovery were increased in 1970, shortly after the court system became saturated with new federal litigation. See Robert G. Bone, *Judging as Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. DISP. RESOL. 129, 134-35 (noting an influx of federal cases in the 1960s). When too much party control led to an influx of motions on disputed discovery, however, rulemakers progressively cut back party control in the 1980s and 1990s. See Singer, *supra* note 79, at 179-80, 188-89.

86. See *Research About the Courts*, FED. JUD. CTR., <https://www.fjc.gov/research> [<https://perma.cc/ZWU8-U4K7>].

87. See generally Oliver, *supra* note 45 (discussing procedural conformity in the contexts and comparisons of RDT and neoinstitutionalism).

districts at a national level.<sup>88</sup> All of this protects the court system's technical core by positioning rulemakers to give better guidance to district judges, allowing court administrators to tailor external resource requests to the specific needs of the court system, and providing empirical evidence for administrators to support those requests.

Finally, rulemaking *allocates* professional capital to the court system's organizational goals. Rulemaking bodies cannot investigate and act on every proposed rule change.<sup>89</sup> Those ideas that are pursued reflect the larger goals of the organization, be they the goals of efficiency, docket control, cost-effectiveness, or accuracy.<sup>90</sup> Accordingly, rulemaking has the ability to signal the court system's priorities to the external environment. And because the modern rulemaking process is deliberately protracted, if a signaled priority raises concerns from an external resource provider, the court system can formulate an appropriate response before too much time has been invested.<sup>91</sup>

Moreover, the development of a rulemaking buffer with the precise qualities described above is no historical accident. As the next Part explains, court-centered rulemaking originated as a key component of the federal court system's larger buffering strategy between 1910 and 1940. Initially, the court system seized upon rulemaking's regulatory benefits: if the courts could make the rules themselves, they could improve the efficiency of adjudication and better manage their dockets. As the century progressed, the court system would discover and embrace rulemaking's other buffering qualities as well. As a result, by the early-2000s, court-centered rulemaking had matured into a highly sophisticated buffer that advanced the federal court system's autonomy on multiple fronts.

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88. For example, substantial elements of the 2006 amendments to Rule 26(b)(2)(B), covering the discovery of electronically stored information, paralleled case law developed in the Southern District of New York. *See, e.g.,* David K. Isom, *The Burden of Discovering Inaccessible Electronically Stored Information: Rules 26(b)(2)(B) & 45(d)(1)(D)*, 3 *FED. CTS. L. REV.* 39, 56-58 (2009). This well-developed doctrine would not have been binding on any other district court absent codification in the Federal Rules. It is also unlikely that Congress would have paid immediate attention to the issue had it held direct rulemaking authority. For a related point, see Levin, *supra* note 55, at 149-53 (arguing that the Supreme Court's interpretations of Rules 12(b)(6) and 56 originated with docket-conscious lower federal courts).

89. *See* Edward H. Cooper, *Revising Civil Rule 56: Judge Mark R. Kravitz and the Rules Enabling Act*, 18 *LEWIS & CLARK L. REV.* 591, 592-93 (2014).

90. *See generally* Rabinovich-Einy & Sagy, *supra* note 2.

91. *Cf.* Cooper, *supra* note 89, at 593.

## II. DEVELOPING THE BUFFER

In the early twentieth century, the federal court system initiated a two-part strategy to increase its autonomy and insulate its technical core from environmental uncertainty. First, the court system made a series of requests to Congress to grant it more resources and greater autonomy in the use of those resources.<sup>92</sup> Through the extraordinary political acumen of Chief Justice William Howard Taft, the federal courts eventually secured more judges, a lighter mandatory docket, and the ability to engage in some degree of self-administration through the Conference of Senior Circuit Judges.<sup>93</sup> Second, the federal court system sought to develop advanced internal mechanisms to allow it to better manage its ongoing resource dependence. Court-centered rulemaking was a core element of this internal buffering plan.

### *A. Taft's Push for Organizational Autonomy*

A century ago, the federal courts were backlogged, decentralized, and under attack. The administration of the court system (such as it was) was essentially unchanged from 1789: “[E]ach court managed its work for itself without regulation of its methods by any higher authority.”<sup>94</sup> That approach had worked in a time of lighter caseloads, but the growth of federal law during Reconstruction and the Progressive Era had strained the courts to the breaking point. The federal courts’ criminal docket rose by 800 percent in less than a decade from the mid-1910s to the mid-1920s,<sup>95</sup> spurred by

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92. See Henry P. Chandler, *Some Major Advances in the Federal Judicial System 1922-1947*, 31 F.R.D. 307, 321-26 (1962).

93. See *id.* at 318-26.

94. *Id.* at 313; see also Justin Crowe, *The Forging of Judicial Autonomy: Political Entrepreneurship and the Reforms of William Howard Taft*, 69 J. POL. 73, 77 (2007) (“Despite recognition as the ‘third branch,’ the pre-1920 [federal] judiciary was neither capable of planning and administering its own programs nor responsible for the regulation of its internal affairs.”)

95. See JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 199 (2012); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 21 (2000).

Prohibition,<sup>96</sup> the Espionage Act,<sup>97</sup> and a variety of statutes federalizing economic crimes.<sup>98</sup> The civil docket was also booming, owing to a massive expansion of federal statutes regulating business,<sup>99</sup> as well as disputes stemming from the cancellation of wartime contracts after 1918.<sup>100</sup> Although earlier legislation—most notably the Evarts Act of 1891<sup>101</sup>—had alleviated pressure on the Supreme Court docket,<sup>102</sup> no particular mechanism, legislative or otherwise, was available to provide immediate relief to the lower courts. As a result, the federal district courts could not keep up with the flood of new cases.

Compounding the court system's administrative challenges was a tumultuous political environment.<sup>103</sup> The unpopularity of the Supreme Court's *Lochner* Era decisions, coupled with the bully pulpit tactics of Teddy Roosevelt, Robert LaFollette, William Jennings Bryan, and other Progressive politicians, nourished an ultra-reform movement that threatened the court system's ongoing vitality.<sup>104</sup> As Professor Barry Friedman has documented, during the 1910s and 1920s, Progressive proposals included electing federal judges, allowing Congress and voters to override judicial decisions, and prohibiting lower federal judges from overturning laws.<sup>105</sup> At one point, Progressives opposed to the newly created Commerce Court sought not only to abolish that Court, but also to remove its five life-tenured federal judges from the bench altogether.<sup>106</sup>

From the perspective of the federal court system, these conditions can be framed as a series of resource deficiencies. The first

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96. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 230 (1928).

97. Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified at 18 U.S.C. § 792); see ALPHEUS THOMAS MASON, *WILLIAM HOWARD TAFT: CHIEF JUSTICE* 89 (1964).

98. See MASON, *supra* note 97, at 89.

99. See PETER GRAHAM FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 19-20* (1973).

100. FRANKFURTER & LANDIS, *supra* note 96, at 230; MASON, *supra* note 97, at 89.

101. Judiciary Act of 1891, 26 Stat. 826.

102. See CROWE, *supra* note 95, at 175.

103. See Peter G. Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 125-29.

104. See JEFFREY ROSEN, *WILLIAM HOWARD TAFT* 80 (2018); Barry Friedman, "Things Forgotten" in the Debate over Judicial Independence, 14 GA. ST. U. L. REV. 737, 747-48 (1998).

105. See Friedman, *supra* note 104, at 748-49.

106. See Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 482 (2018).

deficiency was a shortage of material resources needed to overcome the existing backlog of cases. By 1920, the federal district courts were seriously undermanned, with widespread congestion and delay.<sup>107</sup> At the same time, mandatory federal jurisdiction flooded the courts with cases that might have been better handled elsewhere, or not at all.<sup>108</sup> The problem extended to the Supreme Court itself; notwithstanding the partial relief provided by the Evarts Act, the Court still heard well over 225 cases each year as part of its obligatory jurisdiction in the decade from 1916 to 1925.<sup>109</sup> The majority of these cases were low-stakes and legally unimportant, yet the influx of filings meant that the average interval between the filing of a transcript with the Court and a hearing was more than fourteen months.<sup>110</sup>

The second resource deficiency was less tangible but more significant: even if the federal courts received more resources to help process cases, they lacked the legal authorization to organize or utilize those resources in ways that might improve judicial efficiency. The court system's finances and administration were under the control of the Department of Justice, but after years of frustration with trying to wrangle a decentralized federal bench, the Department had essentially withdrawn from bureaucratic oversight.<sup>111</sup> District judges could not be freely assigned to handle cases outside of their districts,<sup>112</sup> and there was no meaningful effort to keep caseload statistics or identify areas of strength or weakness in the way cases were handled in each district.<sup>113</sup> Even if an enterprising would-be administrator within the court system wanted to introduce modern bureaucratic methods, he did not have the authority to do so.

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107. See Chandler, *supra* note 92, at 318-20.

108. See *id.* at 321.

109. See FRANKFURTER & LANDIS, *supra* note 96, at 295 tbl.I.

110. MASON, *supra* note 97, at 108.

111. See CROWE, *supra* note 95, at 226; FISH, *supra* note 99, at 98-99; Walker & Barrow, *supra* note 28, at 44.

112. Even after liberalizing legislation in 1913, an intercircuit judicial assignment was considered appropriate only when necessitated by "a judge's physical or mental deficiencies, not delays arising from a heavy volume of business." FISH, *supra* note 99, at 15-16.

113. The Justice Department kept rudimentary statistics on federal cases starting in the 1870s, but they were crude by modern standards, tracking only pending cases rather than new filings. See Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 844 (2012).



The third deficiency concerned legitimacy. A quarter-century of populist attacks on the judiciary, and in particular the Supreme Court, had taken their toll.<sup>114</sup> This was evident in a swath of legislation—both proposed and enacted—that chipped away at the federal courts' power and authority.<sup>115</sup> The legislative fusillades were particularly salient because “the elected branches were perceived to be the sole representation of public opinion” and their attacks “the major informative signal of the Court’s waning public support.”<sup>116</sup> Without direct elections or public opinion polls, the Supreme Court (and indeed, the entire federal court system) could not point to any significant, independent source of public support for its work.<sup>117</sup>

Collectively, these resource deficiencies significantly restricted the federal court system’s organizational autonomy. The courts had no way to control the flow of cases into the system, no way to manage cases in a centralized manner, and insufficient public support to secure immediate help. To make matters worse, the causes of—and solutions to—each deficiency lay largely in the hands of a single entity: Congress. Only Congress had the power to create new judgeships, limit federal jurisdiction, and allocate funds to the judiciary.<sup>118</sup> Congress alone could authorize the courts to develop bureaucratic processes and more centralized management.<sup>119</sup> And Congress primarily set the tone as to whether the judiciary’s decisions should be respected or impugned.<sup>120</sup>

The courts’ dependence on the legislature for so many key resources posed an obvious problem. Even if the courts could extract *some* resources from Congress, obtaining resources adequate to cure all three deficiencies seemed well-near impossible. How could the courts obtain more judges when some legislators were trying to

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114. See Friedman, *supra* note 104, at 747-48 (describing prolonged populist attacks on the Supreme Court during the *Lochner* Era).

115. See PURCELL, JR., *supra* note 95, at 22-26 (discussing legislation denying the federal courts jurisdiction to enjoin state ratemaking as “typical” of the times).

116. Or Bassok, *The Supreme Court’s New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 161-62 (2013).

117. See *id.* at 162. Meaningful tracking of public support for the Supreme Court and its decisions did not begin in earnest until the 1960s. See *id.* at 157.

118. See, e.g., FISH, *supra* note 99, at 21; Walker & Barrow, *supra* note 28, at 44.

119. See generally FISH, *supra* note 99 (discussing Congress’s oversight over and Chief Justice Taft’s push for reform).

120. See Friedman, *supra* note 104, at 747-48.

remove federal judgeships altogether?<sup>121</sup> How could the courts secure independent administrative authority when their ability to perform their most basic function of case processing was openly questioned? And how could the courts convince Congress of the need to publicly grant them greater legitimacy when the justice system was seen as unacceptably slow and expensive? Threading the needle would require a dynamic, respected, and visionary figure. The federal courts found that figure in William Howard Taft.

Taft became Chief Justice in 1921, having laid the groundwork for court reform in a series of passionate speeches over the course of the previous decade.<sup>122</sup> His approach to Congress was to unite three very different resource requests under a single theme: the need for “executive principle” in the federal court system.<sup>123</sup> If decentralization, docket congestion, and unaccountability were mutually reinforcing vices in the federal judiciary, then strong, centralized, internal management could simultaneously improve all three.<sup>124</sup> As Taft explained to the Senate Judiciary Committee in October 1921, the federal courts required “some head to apply the judicial force at the strategic points where the arrears have so increased that it needs a mass of judges to get rid of them.”<sup>125</sup> Taft further suggested that with respect to managing caseloads, each judge “should be subject to a judicial council that makes him a cog in the machine.”<sup>126</sup> And that “machine” required executive management and supervision from within.<sup>127</sup>

Taft masterfully married the message of executive principle with tried-and-true political action, leveraging his political connections

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121. See Grove, *supra* note 106, at 482.

122. See Crowe, *supra* note 95, at 201.

123. MASON, *supra* note 97, at 97-99 (detailing the “[t]hree needed steps for progress,” guided under “the executive principle”).

124. See *id.* at 96-100; Kevin J. Burns, *Chief Justice as Chief Executive: Taft's Judicial Statesmanship*, 43 J. SUP. CT. HIST. 47, 49-50, 55-56 (2018); Robert Post, *Judicial Management: The Achievements of Chief Justice William Howard Taft*, OAH MAG. HIST., Fall 1998, at 24, 25-26. This perspective echoed Taft's faith in centralized executive management during his presidency. See FISH, *supra* note 99, at 20.

125. MASON, *supra* note 97, at 99.

126. Robert Post, *Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft*, 1998, at 50, 55.

127. *Id.*; see also HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 995 (1939) (discussing the needed “machinery”).

to build alliances for his reform project.<sup>128</sup> Taft befriended Warren Harding's Attorney General, Harry Daugherty, who would help him negotiate a hostile Congress.<sup>129</sup> Taft also used his close ties to the American Bar Association (ABA) to secure that organization's vocal support for his proposals,<sup>130</sup> and cultivated media relationships to secure support for his proposals and critiques of his opponents.<sup>131</sup> Separately, he sought to show Congress that the federal judiciary *itself* desired reform. At Taft's urging, the Associate Justices of the Supreme Court testified before the House and Senate Judiciary Committees on several occasions, assuring Congress that the proposed reforms were "a response to real problems rather than judicial aggrandizement."<sup>132</sup> To underscore the judiciary's acceptance of its institutional responsibilities, the Justices were organized into committees to handle internal court business.<sup>133</sup>

These efforts eventually bore fruit in two major pieces of legislation.<sup>134</sup> The Judicial Conference Act of 1922 added twenty-four new judgeships to the federal courts, authorized the court system to collect performance statistics, and allowed the Chief Justice to transfer judges across districts as staffing needs arose.<sup>135</sup> It also created the Conference of Senior Circuit Judges,<sup>136</sup> composed of the Chief Justice and the Chief Judge of each of the nine circuit courts of appeal, which would meet annually to review statistics, discuss internal management, and fashion proposals to Congress as needed.<sup>137</sup> The second piece of legislation, the Judiciary Act of 1925,<sup>138</sup> converted much of the Supreme Court's mandatory jurisdiction into

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128. See FISH, *supra* note 99, at 25-26.

129. See *id.* at 25-34.

130. See Crowe, *supra* note 94, at 79-80. This would eventually manifest itself in the ABA volunteering to be a "surrogate for the judiciary" in persuading Congress to provide the courts with resources. See Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1228 n.312 (1996) (quoting Robert A. Katzmann, *The Underlying Concerns*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 165 (Robert A. Katzmann ed., 1988)).

131. See Crowe, *supra* note 94, at 79.

132. *Id.* at 80.

133. See *id.* at 78.

134. See CROWE, *supra* note 95, at 200.

135. Ch. 306, 42 Stat. 837 (1922) (codified as amended at 28 U.S.C. § 331 (2012)).

136. CROWE, *supra* note 95, at 200.

137. *Id.*; see also Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 275-77 (2003).

138. Ch. 229, 43 Stat. 936 (1925).

discretionary jurisdiction, “unburden[ing] the Court from hearing a multitude of insignificant appeals.”<sup>139</sup> With the passage of these acts, the federal court system acquired both immediate relief from burgeoning dockets and the ability to manage its long-term caseload in a more centralized way.<sup>140</sup> The court system also increased its organizational autonomy relative to its position even a few years earlier.<sup>141</sup>

But the legislation was ultimately a partial solution. Even with the oversight power available to the new Conference of Senior Circuit Judges, the court system remained highly susceptible to variations in the flow of external resources.<sup>142</sup> To address that problem more fully, it would need to develop additional buffers to insulate its technical core.<sup>143</sup> One such buffer came in the form of in-house budgeting, monitoring, and administration, which was eventually secured by the Administrative Office Act of 1939.<sup>144</sup> Another buffer would be needed to address the flow of cases into and out of the system, which would take the form of an internal rulemaking apparatus.<sup>145</sup>

### *B. A Special Role for Court-Centered Rulemaking*

The capacity to develop procedural rules for civil cases was, in many ways, an ideal buffer for the federal court system. For one thing, it had the potential to alleviate all three resource dependencies afflicting the federal courts in the 1920s.<sup>146</sup> By creating simplified rules that eliminated procedural technicalities, courts would be better positioned to steer cases through the system or out of the system entirely, allowing them to respond more nimbly to surges in

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139. CROWE, *supra* note 95, at 200. For an extensive history of the Judiciary Act of 1925, see FRANKFURTER & LANDIS, *supra* note 96, at 255-99.

140. See CROWE, *supra* note 95, at 200; MASON, *supra* note 97, at 107.

141. See CROWE, *supra* note 95, at 200.

142. See *id.* at 226.

143. See Lynn, *supra* note 48, at 38.

144. Pub. L. No. 76-299, 53 Stat. 1223 (1939) (codified as amended at 28 U.S.C. § 444 (2012)). The Act vested the federal judiciary with its own bureaucracy (including budget authority) and created circuit judicial councils. See CROWE, *supra* note 95, at 227. Previously, the federal court system's budget and personnel management were controlled by the Department of Justice. See Geyh, *supra* note 130, at 1174.

145. See CROWE, *supra* note 95, at 213.

146. See *supra* notes 107-17 and accompanying text.

case filings or judicial vacancies.<sup>147</sup> By placing rulemaking in the hands of the judiciary, the court system could alter rules more deftly and with greater precision than could Congress. And by accepting responsibility for rulemaking and connecting that effort to the themes of expertise and access to justice, the court system could bolster public confidence in its overall work.<sup>148</sup> In light of this clear fit with the court system's larger autonomy goals, it is not surprising that Taft repeatedly advocated for court-centered rulemaking in his public speeches about court reform.<sup>149</sup>

But court-centered rulemaking was a much bolder project than either of the earlier reform initiatives. The 1922 and 1925 Acts each restructured a portion of the federal court system's existing operations.<sup>150</sup> Court-centered rulemaking, by contrast, called for the court system to take on a wholly different type of task—one that lay outside its adjudicative expertise,<sup>151</sup> and which had only been attempted on a limited scale before.<sup>152</sup> A rulemaking apparatus of the type Taft imagined would require the federal courts to identify and assemble a group of competent rulemakers, oversee their work, monitor the effectiveness of the resulting rules, and adjust rules on an ongoing basis.<sup>153</sup> Court-centered rulemaking also faced a formidable *legal* hurdle: the Conformity Act of 1872 required each federal district court in actions at law to follow the “modes of proceeding” of the state in which it was situated.<sup>154</sup> Put another way, Congress had already spoken on the matter of uniform court-developed rules, and had prescribed the opposite path.

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147. See CROWE, *supra* note 95, at 213-14.

148. See Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 12 (1988).

149. See William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 607 (1922) [hereinafter Taft, *Possible and Needed Reforms*]; William Howard Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3, 13 (1916) [hereinafter Taft, *Attacks on the Courts*]; William Howard Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34, 35 (1922).

150. See CROWE, *supra* note 95, at 200. Such internal restructuring is a common approach used by public sector organizations to manage resource dependency. See Heydebrand & Seron, *supra* note 40, at 80.

151. Charles W. Grau, *Who Rules the Courts? The Issue of Access to the Rulemaking Process*, 62 JUDICATURE 428, 428 (1979) (“Making rules is not the primary function of courts. According to liberal constitutional theory, their fundamental purpose is adjudication.”).

152. See CROWE, *supra* note 95, at 215.

153. See *id.* at 201.

154. PURCELL, JR., *supra* note 95, at 28.

A different approach would therefore be needed: one that could persuade Congress to change its longstanding position on the applicable procedure for cases at law, and simultaneously set up the court system to succeed in an endeavor outside its core competency. Once again, Taft was up to the task. Under his guidance, the court system adopted a three-part strategy. First, members of the judiciary and their allies publicly challenged the long-term sustainability of the Conformity Act.<sup>155</sup> Under the Act, some federal district courts applied modern state procedural codes, others followed old common law forms of action, and still others disregarded state procedures altogether.<sup>156</sup> The result, critics charged, was uncertainty, expense, and delay.<sup>157</sup> Taft seized upon this sentiment to call for a new, simplified procedural system for all actions at law,<sup>158</sup> emphasizing that simplified rules were necessary to reduce cost and delay in judicial administration.<sup>159</sup> Left unspoken was that simplified procedure would also carry distinct benefits for the court system, including more centralized control over district court proceedings and less vulnerability to the whims of individual state legislatures.

The second part of the strategy was to emphasize the specific benefits of forging the new system of rules through the *courts* rather than the legislature.<sup>160</sup> In one sense, this proposal could be couched as a mere incremental step,<sup>161</sup> since the Supreme Court already had the authority to promulgate procedural rules for equity, admiralty,

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155. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 692-93 (1998).

156. See *id.* at 693.

157. See *id.* at 692-93; see also Comment, *Ineffectiveness of the Conformity Act*, 36 YALE L.J. 853, 858 (1927).

158. See Taft, *Possible and Needed Reforms*, *supra* note 149, at 604.

159. See FISH, *supra* note 99, at 19. While Taft plainly favored a system that merged law and equity, and publicly advocated for merger, he also recognized that rulemaking authority and the resultant uniform rules were conceptually separable. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1070-71 (1982). As Professor Burbank has described, Taft himself drafted the statutory language that would become Section 2 of the Rules Enabling Act of 1934, granting the Supreme Court authority to promulgate unified rules only after such rules had been reported to Congress and Congress had been given a chance to act. See *id.* at 1074-75 & n.265. Taft did not appear to believe that a merged system of rules would be developed until the Court had first devised a set purely for cases at law. See *id.* at 1074 n.265.

160. See Taft, *Possible and Needed Reforms*, *supra* note 149, at 607.

161. See *id.* at 604.

and bankruptcy cases.<sup>162</sup> But it still required considerable delicacy. Any transfer of rulemaking authority from Congress to the courts could be seen as a significant transfer of power, one that Congress would be loath to undertake. Taft's response was not to deny the potential increase in judicial power, but rather to frame it as being necessary to serve the interests of efficiency and justice.<sup>163</sup> In his commencement address to the University of Cincinnati Law School in 1914, he charged that "Congress is content to dump all this business upon the courts and then give no attention to providing the machinery for its prompt disposition."<sup>164</sup> By contrast, Taft argued, in England, "[t]he success of the [judicial] system rests on the executive control vested in a council of judges to direct business and economize judicial force [and] to mould their own rules of procedure."<sup>165</sup> Taft would later cite statistics to support this claim, noting that of approximately 43,000 civil cases filed in the King's Bench division in 1919, more than 28,000 were resolved without any proceeding after the initial summons.<sup>166</sup>

The final step of Taft's strategy was to utilize members on the court system's organizational periphery to convey its message to Congress. Such organizational members, denoted in the literature as *boundary-spanning agents*, were able to transition freely between the world of courts and that of the external environment, and in so doing could finesse the relationship between the court system and its resource providers.<sup>167</sup> The most logical boundary-spanners for the court system were lawyers, but not all lawyers would qualify.

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162. MASON, *supra* note 97, at 116.

163. See Taft, *Possible and Needed Reforms*, *supra* note 149, at 607. To be sure, court-centered rulemaking would be a boon to court autonomy. In Taft's view, the transfer of rulemaking power to the court system would not only ease internal administration, but would enhance public respect for the judiciary, which had been undermined by decades of political attacks on judges. See Weinstein, *supra* note 148, at 12. Gains in public legitimacy, in turn, would ease the federal courts' ability to further manage their resources and control their internal affairs. Taft's ultimate goal, then, "was not just more judges or a lighter workload but an improved and empowered judiciary; his focus was not on gaining power in the short term but on consolidating it for the long-term." Crowe, *supra* note 94, at 80.

164. Taft, *Attacks on the Courts*, *supra* note 149, at 16.

165. *Id.* at 13.

166. Taft, *Possible and Needed Reforms*, *supra* note 149, at 606.

167. See Mick Marchington et al., *The Role of Boundary-Spanning Agents in Inter-Organizational Contracting*, in FRAGMENTING WORK: BLURRING ORGANIZATIONAL BOUNDARIES AND DISORDERING HIERARCHIES 135, 135-37 (Mick Marchington et al. eds., 2005).

Those attorneys whose practices did not give them direct and regular contact with the federal court system could not fully appreciate or advocate for the system's interests.<sup>168</sup> At the same time, boundary-spanning lawyers did not necessarily have to be federal litigators. Legal academics, government lawyers, and even legislators might well qualify, depending on the nature and extent of their interaction with the court system.

With respect to rulemaking, the federal court system found an early boundary-spanning ally in the ABA. In 1911, attorney Thomas Shelton introduced a resolution at the ABA's annual meeting to create a Committee on Uniform Judicial Procedure, which would seek legislation to empower the Supreme Court to promulgate uniform procedural rules for cases at common law.<sup>169</sup> One year later, Shelton was rewarded with the chairmanship of the Committee.<sup>170</sup> He undertook his new role with zeal, speaking and writing almost immediately on the need for court-centered procedural reform.<sup>171</sup> Shelton was also an excellent face for the movement.<sup>172</sup> He was intimately familiar with the federal court system but was not defined by this connection.<sup>173</sup> The ability to separate himself from the courts—to be seen as *for* the court system without being *of* it—would be a considerable asset when it came to negotiating with Congress.

Shelton was the most prominent boundary-spanning agent during the campaign for court-centered rulemaking, but he was hardly

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168. *See id.* at 137 (“It is recognized that the work of boundary-spanning agents is complex and potentially contradictory because they operate at the edge of organizations, often trying to persuade other people over whom they have not any real authority. On the one hand, this means that they need to be continually aware of their own organization's needs, able to move between a reliance on strict ... requirements, and a willingness to take advantage of deals that are likely to benefit their own organization. On the other hand, they must be able to empathize with the needs and priorities of those working for collaborating organizations and appreciate the effect their actions may have on longer-term and wider inter-organizational relations.”).

169. 35 REPORT OF THE ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 434-35 (1912).

170. *See* CROWE, *supra* note 95, at 214.

171. *See* Thomas W. Shelton, *The Reform of Judicial Procedure*, 1 VA. L. REV. 89, 90-91 (1913); *see also* Thomas W. Shelton, *Campaign for Modernizing Procedure*, 7 A.B.A. J. 165, 165-66 (1921).

172. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 948-49 (1987).

173. *See id.*



alone. Other nonjudicial members of the federal court system, among them prominent scholars such as Roscoe Pound and national bar leaders such as Frank Kellogg and Elihu Root, also took on boundary-spanning roles.<sup>174</sup> They sounded the same theme as Taft and Shelton: court-centered rulemaking was absolutely necessary if the federal courts were to do their best work.<sup>175</sup> These agents also echoed Taft's pledge that the work that would go into court-centered rulemaking would be paid off many times over in public respect for the courts, procedural flexibility, and outcomes that were faster, cheaper, and more just.<sup>176</sup>

Ultimately, the federal court system would also need a boundary-spanning agent who could wield the influence of the executive branch. Homer Cummings, appointed as Attorney General in 1933, was ideally suited to take on this role.<sup>177</sup> Although firmly planted in the executive, he had spent the preceding decade in private practice and had a natural affinity for the judiciary.<sup>178</sup> Highly experienced in both criminal and civil cases, and widely seen as a moderate statesman, he was

a lawyer's lawyer. He knew the dynamics of both the courtroom and the office, could relate to both the judge and the client, and understood both public service and private practice. Of course, at the same time that he was thoroughly immersed in the conventions of law, he was intimately familiar with the customs of politics. A former mayor of Stamford, president of the Mayors Association of Connecticut, and candidate for a variety of state

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174. See Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 354 (1987).

175. Pound argued, for example, that one of the "four cardinal items" for improving the administration of justice was the "simplification of procedure and relegation of procedural machinery to its legitimate place in the administration of justice"—that is, the courts. Roscoe Pound, *Introduction* to THOMAS W. SHELTON, *SPIRIT OF THE COURTS* at xi, xiv-xvi (1918). Pound further argued that rulemaking had always been the province of the courts, citing examples dating back to the Middle Ages. See Roscoe Pound, *The Rule-Making Power of the Courts*, 10 J. AM. JUDICATURE SOC'Y 113, 116 (1926); see also Grau, *supra* note 151, at 428-29 (citing Pound as one of the "proponents [who] long have argued that rulemaking always was a judicial power").

176. See, e.g., Weinstein, *supra* note 148, at 12.

177. Cummings was appointed Attorney General only after Franklin Roosevelt's initial choice, court rulemaking foe Thomas Walsh, died en route to the capital to accept his appointment. See CROWE, *supra* note 95, at 217.

178. *Id.* at 217-18.

and federal offices (including both the House and the Senate), Cummings had carefully cultivated “wide personal acquaintance in every state” as well as meaningful affiliations with a host of social clubs, civic organizations, and interest groups along the Eastern seaboard.<sup>179</sup>

Cummings exploited his personal networks to great effect. He met continuously with legislators, with a friendly relentlessness that eventually broke their resistance.<sup>180</sup> He regularly championed the bill before legal groups, “simultaneously emphasizing that reform was supported by nearly everyone and that reform would benefit nearly everyone.”<sup>181</sup> He also saw an opportunity to recast the rulemaking movement’s longstanding themes in different political garb. Notwithstanding the determined efforts of previous boundary-spanners, the rulemaking bill had been stymied by the political divide between progressives and conservatives<sup>182</sup> and had not received any serious consideration since 1926.<sup>183</sup> In 1930 the ABA, reeling from the recent deaths of both Shelton and Taft, chose to scale back its efforts until the prospects of passage were more favorable.<sup>184</sup> This step back ultimately created “political space” for Cummings to maneuver.<sup>185</sup> He reframed the bill as embracing New Deal principles, and worked assiduously to secure the support of President Roosevelt, as well as reluctant Democrats in Congress.<sup>186</sup> Sounding the same themes as Shelton, Pound, and Taft, but with a progressive veneer, Cummings promised that court-centered

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179. *Id.* (quoting William A. Kelly, *Honorable Homer Cummings, Attorney General of the United States—A Biographical Sketch*, 14 BULL. NEW HAVEN COUNTY B. ASS'N 13, 15 (1934)).

180. *Id.* at 221.

181. *Id.* Crowe further notes that “[t]o illustrate his broad base of political support, Cummings repeatedly reminded his audiences that reform had been endorsed, at one point or another, by a distinguished list of prominent individuals, including four presidents (Taft, Wilson, Coolidge, and Roosevelt); five attorneys general (James McReynolds, Thomas Gregory, A. Mitchell Palmer, Harlan Fiske Stone, and John Sargent); ‘outstanding jurists’ (and previous judicial reformers) Taft and Pound; the deans of ‘many important law schools including Harvard, Yale, Cornell, and Virginia’; and, in a 1921 poll, more than 80 percent of circuit judges and 75 percent of district judges.” *Id.* at 221-22 (internal citations and footnotes omitted).

182. See PURCELL, JR., *supra* note 95, at 31-32.

183. See Burbank, *supra* note 159, at 1089.

184. See *id.* at 1094.

185. CROWE, *supra* note 95, at 223.

186. See *id.* at 220.

rulemaking would simplify and improve “an outworn system’ that served ‘to delay justice or entrap the wary.’”<sup>187</sup> Conservative Republicans, who had long desired the reform, joined the coalition.<sup>188</sup> From there, events unfolded with startling immediacy. Cummings announced the Administration’s support for the bill in March 1934;<sup>189</sup> within two months the Senate Judiciary Committee favorably reported the bill, and a month later the Rules Enabling Act was signed into law.<sup>190</sup>

The Rules Enabling Act’s passage left the federal court system fundamentally transformed. A judiciary that in 1915 was decentralized, disorganized, and partially delegitimized had become, by 1935, far more autonomous, centralized, and capable of coping intelligently with its resource dependency. Court-centered rulemaking, along with the Conference of Senior Circuit Judges and the soon-to-be created Administrative Office, helped to cushion the court system’s technical core from environmental disruption. But implementing the rulemaking buffer proved to be only a first-order solution. Court-centered rulemaking *itself* was now exposed to the court system’s external environment and would require periodic maintenance to preserve its efficacy as an organizational shield.

### III. MAINTAINING THE BUFFER

The passage of the Rules Enabling Act substantially enhanced the federal court system’s organizational autonomy. Not only was the court system authorized to develop a set of rules that could help it regulate the flow of system-wide inputs and outputs, but those rules could be adjusted as needed and without external interference.<sup>191</sup> The original Rules Enabling Act imposed no particular requirements on the internal structure of the rulemaking process, and the Supreme Court took advantage, assigning the entire task

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187. See *id.* at 222 (citation omitted).

188. See *id.* at 222-23.

189. See Burbank, *supra* note 159, at 1096.

190. See *id.* at 1096-97.

191. See Mark R. Kravitz et al., *They Were Meant for Each Other: Professor Edward Cooper and the Rules Enabling Act*, 46 U. MICH. J.L. REFORM 495, 507 (2013).

to a single Advisory Committee of experts working directly under the Court's aegis.<sup>192</sup>

Between 1935 and 1937, the Advisory Committee worked in private to develop a simplified and unified set of rules for federal civil cases.<sup>193</sup> In drafting the rules, the Advisory Committee neither included nor sought significant input from those outside the court system, effectively maximizing the court system's internal control.<sup>194</sup> At the same time, the rulemaking process enjoyed a substantial degree of external legitimacy, owing to a general confidence in expertise that prevailed during the New Deal Era.<sup>195</sup> Simply put, outsiders expressed little desire to second-guess the Advisory Committee's initial work; the Committee's credentials, along with legislative authorization and the public's general support of the courts, provided all the legitimacy that was needed.

Longtime proponents of court-centered rulemaking had hoped for exactly this result, with tight internal control over rulemaking proceeding in lockstep with public confidence and respect.<sup>196</sup> To the extent there was grumbling about the process (mostly from lawyers unenthusiastic about learning a new set of rules), the court system's response was to double down on the technocratic benefits of internal control. Court-centered rulemaking, it was argued, was legitimate precisely because recognized experts were in charge. This messaging largely succeeded, and within a generation, the new rules regime helped consolidate the court system's relationship with the bar.

But the conflation of internal control and external legitimacy was unsustainable.<sup>197</sup> In publicly oriented organizations such as the federal court system, control and legitimacy are typically in opposition. On the one hand, opacity and strong internal control serve the court

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192. *See id.* at 495.

193. *See id.* at 503-04.

194. *See* Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 460 (2013).

195. *See infra* Part III.A.

196. *See, e.g.,* Weinstein, *supra* note 148, at 13 (noting Chief Justice Charles Evans Hughes's assertion that uniform, court-developed rules of procedure would build and enhance respect for the judiciary "at the grassroots level").

197. RDT, for example, would predict that the original form of court-centered rulemaking could not absorb and benefit from the legitimacy of supportive outside groups because the cloistered expert model of the original Advisory Committee did not allow for many visible connections to the external environment. *See* Drees & Heugens, *supra* note 45, at 1688.

system's organizational interests of "maintaining autonomy, minimizing external intervention, and maximizing efficiency."<sup>198</sup> On the other hand, as a government entity, the court system must be more open and transparent about its internal activities than organizations whose work does not rely on public approval.<sup>199</sup> It was only a matter of time before the federal court system would be forced to confront the tradeoff between control and legitimacy directly.

The challenges began in earnest in the mid-1950s, when an increase in judicial dissatisfaction with certain rules threatened the overall stability of the rulemaking process. They arose in a different form in the 1970s, amid a growing sense that "legitimate" rulemaking required transparency and broader public participation. And they appeared yet again in the 1990s, when increasing public involvement in rulemaking threatened to ossify the process altogether.

The court system reacted to the challenges of each era by initiating a series of strategic responses designed to maintain the legitimacy of rulemaking among its critical audiences. It addressed internal dissatisfaction in the 1950s by increasing the role of federal judges in the rulemaking process. It dealt with calls for transparency in the 1970s and 1980s by opening its rulemaking procedures to the public and bringing its practices in line with the prevailing expectations for administrative rulemaking. And, since the 1990s, it has further opened the rulemaking process to public view and comment, while quietly decoupling the substance of rulemaking from its (increasingly complex) formal procedures.

In comparison to the tightly controlled rulemaking of the 1930s, these developments represented a steady forfeiture of internal control over court-centered rulemaking, as well as a partial erosion of rulemaking's effectiveness as a buffer.<sup>200</sup> But the strategic responses

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198. See Oliver, *supra* note 45, at 155.

199. See *id.* (noting that when an organization requires public approval, "the misguided effort to decouple organizational activities from public inspection and evaluation may throw the organization's activities open to suspicion and reduce its ability to obtain resources, legitimacy, or social support"); see also Drees & Heugens, *supra* note 45, at 1688 ("In-sourcing arrangements allow organizations to manage resource dependencies through buffering-type mechanisms, but they lack the legitimacy bestowing effect of the other arrangement types.").

200. See Johnson, *supra* note 52, at 33 ("[Advocates of RDT] hope to insulate the work of the courts from the vicissitudes of democratic politics and promote less costly and more uniform disposition of cases."); Russell R. Wheeler, *Broadening Participation in the Courts*

of each era also mitigated that erosive effect by advancing court-centered rulemaking's other buffering qualities. Persuading a generation of attorneys to accept the rulemaking process and its results in the 1940s enabled the court system to consolidate its relationship with the bar. Expanding the Advisory Committee and incorporating the Judicial Conference into the rulemaking process in the 1950s allowed the court system to better insulate itself from environmental pressures. Including public input and empirical research in the 1970s and 1980s fit with rulemaking's ability to educate the court system about its work. And the need to decouple actual rule revisions from the growing number of public suggestions in the 1990s and 2000s gave the court system more of an opportunity to set the agenda for procedural policy by selecting the specific issues that would demand its attention.

The challenges, responses, and revelations of each era are set out in Table 1 below. It illustrates how the federal court system's management of legitimacy threats over time transformed a relatively simple, tightly controlled rulemaking process with primarily regulatory benefits into something far more open, complex, and robust.

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*Through Rule-Making and Administration*, 62 JUDICATURE 280, 282 (1979) ("Judicial control of judicial administration rests largely on the power to make system-wide rules of procedure and the existence of administrative offices capable of undertaking court management tasks.").

Table 1. Responses to Legitimacy Deficiencies in the Rulemaking Process, 1934-2015

Era	Threat to legitimacy	Court system response	Elevated quality of rulemaking
1934-1956	Novelty	Persuasion: emphasize rulemaker expertise	Consolidation
1957-1974	Unworkability	Cooptation: bring judges into the rulemaking fold  Influence tactics: solicit bar and legislative support for restructuring rulemaking process in a manner that centralizes judicial control	Insulation
1975-1994	Insularity	Isomorphism: align elements of court-centered rulemaking with agency rulemaking, ceding some authority to protect legitimacy	Education
1995-2015	Ossification	Decoupling: cede autonomy at the margins, and move the core of rulemaking away from full, formal process	Allocation

### A. *Emphasizing Expertise, 1934-1956*

Court-centered rulemaking came into the world with a high degree of legitimacy, but that legitimacy was not quite universal. In particular, the Rules Enabling Act had been opposed by lawyers who were skeptical of the need for and propriety of a new system of procedure.<sup>201</sup> The bill eventually passed over their opposition, but

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201. Predictably, many older attorneys who had flourished under the old rules were loath to learn a new system late in their careers. See Richard W. Galiher, *The Lawyers Look at the Rules After Seventeen Years of Use*, 1955 A.B.A. SEC. INS. NEGL. & COMPENSATION L. PROC.

going forward the court system still needed the practicing bar to lend professional legitimacy to the rulemaking enterprise. Indeed, the legal profession had the power to extend three different forms of legitimacy to the rulemaking process, all of which would be essential for the new rules to be effective.<sup>202</sup> Attorneys could provide *instrumental* legitimacy to the extent they believed that court-centered rulemaking operated well enough to advance their professional interests.<sup>203</sup> They could offer *relational* legitimacy to the extent they believed that rulemaking affirmed their self-worth and social identity and treated them with professional dignity and respect.<sup>204</sup> And they could lend *moral* legitimacy to the extent they believed the rulemakers' practices and behaviors were consistent with the legal profession's own moral and ethical values.<sup>205</sup>

All three forms of legitimacy might have come from directly involving the bar in the rulemaking process. But despite some initial promises to the contrary,<sup>206</sup> the original Advisory Committee did

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259, 260 (1955) (recalling "how horrified the older lawyers in the District of Columbia were when the Federal Rules were adopted"). A related objection was raised by lawyers whose practice was limited to a particular state and who could depend on the same procedures applying in state or federal court. Even though the Conformity Act never assured true conformity between state and federal procedures within a state, the result was still more predictable than an entirely new set of rules would be. As Edson Sunderland noted shortly after the passage of the Rules Enabling Act, those "lawyers ... whose practice chiefly consists of state and federal litigations in their own states ... will be more substantially benefitted by conformity between state and federal practice within the state than by federal uniformity throughout the nation." Edson R. Sunderland, *Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise*, 21 A.B.A. J. 404, 409 (1935); see also Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2007-08 (1989) ("[M]any who resisted [reform] maintained that the Conformity Act worked properly and aided local lawyers."); *Address of Chief Justice Hughes*, 21 A.B.A. J. 340, 340 (1935) ("[Many lawyers] do not wish to be put to the necessity of learning a new system of procedure in actions at law.").

202. See Tost, *supra* note 34, at 690-94 (identifying three components as the basis for the content of legitimacy judgments).

203. See *id.* at 692.

204. See *id.* at 690.

205. See *id.* at 694.

206. See *Address of Chief Justice Hughes*, *supra* note 201, at 341 ("[F]ull opportunity should be given for the cooperation of the Bench and Bar in the different Circuits through the adequate and helpful expression of their views."); see also Charles E. Clark, *A Striking Feature of the Proposed New Rules*, 22 A.B.A. J. 787, 787 (1936) ("[W]e are now prepared for a quite unique development ... namely, the invitation to the bar as a whole to participate in the work of drafting both by suggestions in advance and criticism after an initial first draft has been prepared."); Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20



not seek broad attorney participation.<sup>207</sup> The Committee circulated its proposed rules only to selected judges and lawyers before forwarding them to the Supreme Court,<sup>208</sup> and made little effort to obtain feedback on the proposed rules or justify its work more publicly.<sup>209</sup> Instead, the Committee chose to win over the bar by emphasizing its own isolation and expertise.

This was a sensible approach, given the times. The Rules Enabling Act came into being just as the “expertise” theory of government was gaining purchase among the New Deal political elite.<sup>210</sup> As one proponent explained, “[a]dministration by non-political technical experts is the contemporary answer to the challenge to bridge the gap between popular government and scientific government.”<sup>211</sup> Judges generally subscribed to this technocratic view,<sup>212</sup> as did the general public<sup>213</sup> and many in Congress.<sup>214</sup> Indeed, the Rules Enabling Act itself was passed with the presumption “that those with the most experience with the federal courts—lawyers, law professors, and judges—were the ones who should have the responsibility for writing and reviewing the rules of procedure.”<sup>215</sup>

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CORNELL L.Q. 443, 458 (1935) (citing Chief Justice Hughes’s 1935 speech for the proposition that “the Court will welcome the aid of the Bench and Bar, of the Department of Justice, and of all those interested in the improvement of procedure”).

207. At minimum, it seems clear that Charles Clark, whose stamp upon the initial Advisory Committee is beyond question, held the opinions of practicing lawyers on matters of procedure in far less regard than those of experts like himself. See Subrin, *supra* note 172, at 968-69.

208. See Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 275 (2009).

209. See Freer, *supra* note 194, at 460; see also Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 910 (2002) (displaying skepticism regarding the amount of outside consultation the rulemakers engaged in during their reform efforts).

210. See William J. Butler, *The Rising Tide of Expertise*, 15 FORDHAM L. REV. 19, 23-24 (1946) (describing the “expertise” theory); see also Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 417-18 (2007) (“[The] theme of expertise permeated the thought of intellectuals within the administration.”); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272-74 (1997) (“The New Dealers were committed to expertise.”).

211. John Dickinson, *Judicial Control of Official Discretion*, 22 AM. POL. SCI. REV. 275, 277 (1928).

212. See Butler, *supra* note 210, at 25-27 (citing examples).

213. See Bassok, *supra* note 116, at 168-70.

214. See Walker, *supra* note 210, at 1272-73.

215. Johnson, *supra* note 52, at 35.

The credentials of the first Advisory Committee on Civil Rules were perfectly suited to lend this sort of expert legitimacy to the new rulemaking enterprise. Although the Supreme Court was slow to create the Committee, by June 1935 it had assembled a group of fourteen highly respected lawyers and academics, led by former Attorney General William Mitchell.<sup>216</sup> The group included Professor Armistead Dobie of the University of Virginia, *A.B.A. Journal* editor and Special Assistant to the Attorney General of the United States Edgar Tollman, and Florida state senator and ABA President Scott Laughton, in addition to two particularly influential academics, Charles Clark of Yale (who would serve as Reporter to the Committee) and Edson Sunderland of the University of Michigan.<sup>217</sup> Clark himself argued that the appointment of these original members “was a practical way of giving concrete expression to informed professional and scientific opinion as to the course the reform should take.”<sup>218</sup>

This emphasis on a professional and scientific approach was well-suited to a legal community that was completing its own professional transformation. By this time, American law schools had embraced the “German scientific method” of legal study, which valued “empirical investigation, verification, and inductive logic.”<sup>219</sup> Moreover, the rapid professionalization of both federal judges and lawyers in the early twentieth century made it possible for attorneys to think of themselves as officers of the court for the first time.<sup>220</sup> As their own professional identities became imbued with a sense of scientific rigor, lawyers were bound to find unobjectionable the professed application of similar rigor in court-centered rulemaking.<sup>221</sup> The bar’s faith in expertise also bought the court system time

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216. Goodman, *supra* note 174, at 356 & n.30. Mitchell’s February 1935 letter to Chief Justice Hughes pushing for full implementation of the rulemaking program may well have contributed to him being named the Chair of the Committee. See Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 439 (1958).

217. See Goodman, *supra* note 174, at 356 & n.30; John J. Parker, *Improving the Administration of Justice*, 27 A.B.A. J. 71, 71 (1941).

218. Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 447 (1936).

219. Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENG. L. REV. 251, 253, 279 (2005).

220. See Resnik, *supra* note 113, at 861.

221. See *id.* at 863-64.

to promote the virtues of the new rules more widely.<sup>222</sup> By the early 1950s, a full generation of lawyers had been raised exclusively on the new Federal Rules and was comfortable with the expanded pretrial role for attorneys that the rules envisioned.<sup>223</sup>

While outreach to the bar in this era was more explanatory than participatory, it did underscore rulemaking's ability to consolidate the support of the court system's key organizational members.<sup>224</sup> By appealing to the same values (merit, professionalism, and scientific expertise) that the bar was using to define itself, the court system bought goodwill for the first decade of its rulemaking experiment. And by drafting rules that treated lawyers as full partners in pretrial litigation, the federal court system was able to obtain support from the bar that would extend beyond the rulemaking process.

### *B. Looking Inward, 1957-1974*

Uncritical faith in the Advisory Committee's expert credentials would not last.<sup>225</sup> As the twentieth century reached its midpoint, there was a growing sense within the judiciary itself that "expert" committees and institutions were entitled to less deference than previously thought.<sup>226</sup> Justice Frankfurter, for example, had been an enthusiastic advocate for "the deliberateness and truthfulness of really scientific expertness" leading up to and during the New Deal Era,<sup>227</sup> and had expressed "confidence in the informed judgment of the Advisory Committee on Rules of Civil Procedure" as late as

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222. See, e.g., Parker, *supra* note 217, at 71-72; John J. Parker, *The Judicial Office in the United States*, 20 TENN. L. REV. 703, 708-09 (1949).

223. See Galihier, *supra* note 201, at 260-61.

224. See *supra* notes 62-64 and accompanying text.

225. Although it does not appear to have been directed to court-centered rulemaking specifically, during the 1950s there was a more full-throated and broad-based public backlash against expert domination of policymaking and public institutions. See RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 221, 223-27 (1963) (describing the backlash in the context of the 1952 Presidential campaign).

226. See Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 132-33, 135-36 (2005).

227. Walker, *supra* note 210, at 1272 (quoting Letter from Felix Frankfurter, Attorney, Bureau of Insular Affairs, U.S. War Dep't, to Learned Hand, U.S. Dist. Judge, S. Dist. of N.Y. (Sept. 23, 1912), reprinted in JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 45 (1978)).

1946.<sup>228</sup> But by the early 1950s, Justice Frankfurter found himself losing faith in expert discretion.<sup>229</sup> External checks on expert decisionmaking would be—in the words of Frankfurter's protégé Louis Jaffe—a “necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”<sup>230</sup>

The weakened judicial enthusiasm for expert rulemaking was not just philosophical. In practice, the federal judiciary struggled to implement the new Federal Rules of Civil Procedure in the manner the Advisory Committee had hoped.<sup>231</sup> District courts around the country proliferated inconsistent or redundant local rules, undermining the promised uniformity of the new Federal Rules regime.<sup>232</sup> Judges also criticized or ignored individual rules that they found too cumbersome—such as Rule 52(a)'s requirement that they specifically state their findings of fact and conclusions of law in a bench trial<sup>233</sup>—or too lenient—such as Rule 8(a)'s guidance that a pleading need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>234</sup> no matter how complex the case.<sup>235</sup> In 1952, the Ninth Circuit Judicial Conference bluntly adopted a resolution calling for Rule 8 to be amended to require a pleading to “contain the facts constituting a cause of action.”<sup>236</sup>

The absence of a judicial voice on the Advisory Committee must have hampered its ability to be fully responsive to these concerns. And in any event, the Advisory Committee as then constituted

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228. Order, 329 U.S. 843 (1946).

229. See Fenster, *supra* note 226, at 132-33.

230. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965).

231. See Subrin, *supra* note 201, at 2016-17.

232. See *id.*

233. See, e.g., Note, *The Law of Fact: Findings of Fact Under the Federal Rules*, 61 HARV. L. REV. 1434, 1435 (1948). Rule 52(a) engendered “voluble” pushback from the judiciary by the late 1940s. See *id.*; see also Clarence M. Hanson, *Findings of Fact and Conclusions of Law: An Outmoded Relic of the Stage Coach Days*, 32 A.B.A. J. 52, 54 (1946) (detailing the impracticalities of Rule 52(a)).

234. FED. R. CIV. P. 8(a)(2).

235. See Rebecca Love Kourlis et al., *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 250-51 (2010).

236. Judicial Conference of the Judges of the Ninth Circuit, *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952).

seemed unwilling or unable to address the complaints in a rigorous manner. Consequently, by the mid-1950s, the committee dwindled into irrelevance.<sup>237</sup> In October 1955, the Advisory Committee offered a package of rules amendments to the Supreme Court, but the Court took no action.<sup>238</sup> Instead, it abruptly entered an order on October 1, 1956, terminating the Advisory Committee as a continuing body and thanking its members for their service.<sup>239</sup>

Dissolving a committee that had lost the confidence of a substantial part of the judiciary was a responsible act, if not a particularly courageous one. No organization can maintain rulemaking authority if its own members lack confidence in the rulemaking process. But dissolving the committee was only the first step. Without a formal rules committee in continuous operation, the Supreme Court faced the choice of letting the existing rules stay in force without regular review and revision, or taking up the rulemaking task itself.<sup>240</sup> Neither seemed acceptable.<sup>241</sup>

The most straightforward solution would have been for the Supreme Court to reconstitute the Advisory Committee with new membership—membership that this time would include a number of federal judges. Including judges in rulemaking made sense as a matter of maintaining rule quality (by offering an important perspective on how the rules worked in practice) as well as sound

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237. See Albert B. Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A. J. 772, 773 (1961).

238. See *id.*

239. See Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

240. The only other rules committee in existence at the time, the Advisory Committee on Criminal Rules, had never been empowered as a continuing body. See Maris, *supra* note 237, at 773-74.

241. The judiciary's ability to continually review and revise procedural rules was asserted to be a primary benefit of court-centered rulemaking as far back as the 1910s. See, e.g., Edmund M. Morgan, *Judicial Regulation of Court Procedure*, 2 MINN. L. REV. 81, 83-85 (1918). Yet commentators had warned that rulemaking lay beyond the Supreme Court's direct competency, see Edson R. Sunderland, *Implementing the Rule-Making Power*, 25 N.Y.U. L. REV. 27, 29-32 (1950), and Chief Justice Warren himself concluded in 1957 that "[t]he existing personnel and facilities of the Supreme Court are in no sense adequate to the great responsibility for rulemaking." *The Rule-Making Function and the Judicial Conference of the United States: A Discussion of Rule-Making Under a Plan Soon to Be Considered by the Congress of the United States*, 21 F.R.D. 117, 118 (1957); see also Steven S. Gensler, *Ed Cooper, Rule 56, and Charles E. Clark's Fountain of Youth*, 46 U. MICH. J.L. REFORM 593, 601 (2013) ("[T]he Court could have had no intention of doing the necessary research and drafting work itself."); Maris, *supra* note 237, at 774 ("[T]he Supreme Court itself has neither the time nor the staff to undertake the extensive study and research involved.").

organizational management (by providing the organization's most important members a voice on matters that directly affected them).<sup>242</sup> Moreover, there was no statutory barrier to reshuffling the Advisory Committee's membership in this way: the text of the Rules Enabling Act remained remarkably deferential to the Supreme Court's judgment as to how best to effectuate the rule-making process.<sup>243</sup> Had the Court simply announced that it was appointing a new committee that would now include several well-respected judges, it likely would have been greeted with little more than a supportive shrug.

The court system's leadership, however, saw the Advisory Committee crisis not only as an opportunity to shore up its internal legitimacy with federal judges, but also to further insulate the court system from environmental disruption. In 1957, Chief Justice Earl Warren, Justice Tom Clark, and Fourth Circuit Judge John Parker developed a new plan as they crossed the Atlantic aboard the *Queen Mary* on their way to the American Bar Association's meeting in London.<sup>244</sup> The plan called for the Judicial Conference of the United States to create and supervise a series of committees, each responsible for the review and development of procedural rules in a given field.<sup>245</sup> The Chief Justice, as Chairman of the Judicial Conference, would appoint the members of each committee.<sup>246</sup> The Judicial Conference would approve all proposed rules before submitting them to the Supreme Court for review and promulgation.<sup>247</sup>

The so-called Queen Mary Compromise was an audacious proposal, a disproportionately large solution for a lesser problem. Involving the Judicial Conference and creating a vast hierarchy of committees might have improved internal support for court-centered rulemaking, but the same support likely could have been achieved simply by adding judges to the Advisory Committee. The Supreme Court did not want direct rulemaking responsibility, but that hardly called for such a complex and involved rulemaking

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242. See Parker, *supra* note 217, at 72.

243. See Burbank, *supra* note 159, at 1097-98, 1101-02.

244. See Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 328 (1991) (discussing the "Queen Mary Compromise"); John P. Frank, *Justice Tom Clark and Judicial Administration*, 46 TEX. L. REV. 5, 34 (1967).

245. See Frank, *supra* note 244, at 34.

246. See Baker, *supra* note 244, at 328.

247. See Frank, *supra* note 244, at 34.

structure. In any event, there had been no groundswell outside the courts to change the existing rulemaking system.<sup>248</sup> Moreover, the proposed changes would need congressional approval, and Congress had already considered once before—and rejected—any formal role for the Judicial Conference in the rulemaking process.<sup>249</sup> As an answer to the otherwise manageable problem of replacing an aging and unpopular Advisory Committee, the Queen Mary Compromise made no sense.

As a mechanism for insulating the court system and increasing its autonomy, however, the Compromise was a brilliant tactical maneuver. Under the guise of solving a rulemaking problem, the court system would be able to increase the power and influence of the Judicial Conference, its primary administrative body.<sup>250</sup> The proposal also brought together the three buffering structures that the court system had secured during the 1920s and 1930s.<sup>251</sup> Court-centered rulemaking and the Judicial Conference would be inex-

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248. *See supra* note 243 and accompanying text.

249. Chief Justice Hughes, with the assistance of then-Professor Felix Frankfurter, lobbied the Senate Judiciary Committee for a Judicial Conference role in rulemaking back in the early 1930s. *See FISH, supra* note 99, at 62-64. But when the Rules Enabling Act was passed in 1934, it made no provision for the Conference's involvement. *See id.*

250. It should come as no surprise that the three men behind the Queen Mary Compromise would seek to inject the Judicial Conference directly into the rulemaking process. All three were dedicated proponents of Roscoe Pound's philosophy of court administration, which emphasized centralized authority over the judicial system, flexibility for the courts to make their own procedural rules, and altering both institutional structure and personnel as needed to achieve efficient outcomes. *See James A. Gazell, Chief Justice Warren's Neglected Accomplishments in Federal Judicial Administration*, 5 PEPP. L. REV. 437, 446-48 (1978); James A. Gazell, *Justice Tom C. Clark as Judicial Reformer*, 15 HOUS. L. REV. 307, 311-12, 316 (1978). The Judicial Conference was a natural tool for achieving and legitimating these outcomes. All three were also tireless advocates for robust use of the tools of federal judicial administration. Judge Parker in particular espoused a philosophy of "judge dominance of the administration of justice," developed in response to the widespread political attacks on judges that he observed early in his career. Peter G. Fish, *Guarding the Judicial Ramparts: John J. Parker and the Administration of Federal Justice*, 3 JUST. SYS. J. 105, 106 (1977). As Fish has described it, Parker

labored to insulate the judicial function. Subordination of lawyers and of popular control evidenced in jury, diversity jurisdiction, and rule-making struggles worked to further judicial autonomy and to safeguard that function. Establishment of a distinct federal court administrative system and judge-controlled procedural rule-making power maximized the role of judges in the administration of federal justice.

*Id.*

251. *See supra* Part II (highlighting the three buffering structures).

trically tied, and the Administrative Office's role in rulemaking would necessarily increase. Quietly, the power of the Chief Justice would also grow dramatically: he would have a role in every level of the rulemaking hierarchy, as the appointer of Advisory Committee and Standing Committee members, the head of the Judicial Conference, and the leader of the Supreme Court.<sup>252</sup>

The expansion of judicial control over rulemaking would require external support, particularly from the bar and from Congress. To secure this support, the federal court leadership turned to *influence tactics* to manipulate those groups' existing beliefs about the appropriate structure of court-centered rulemaking.<sup>253</sup> They began with the ABA, where both Parker and Clark were well connected.<sup>254</sup> In November 1957, the ABA's Section of Judicial Administration held a panel discussion on the Queen Mary Compromise proposal (now a draft bill), during which prominent attorneys, judges and academics all advocated for Judicial Conference involvement in rulemaking.<sup>255</sup> The panelists repeatedly emphasized two points: (1) the Judicial Conference was well equipped to organize and manage rulemaking, and (2) the rules committees would be so constituted that both judges and the bar would have an important voice in rule proposals.<sup>256</sup> Third Circuit Chief Judge John Biggs, for example, explained that "it was our thought ... that most of these persons [on the Advisory Committee] would be the people in the field who deal with the rules every day."<sup>257</sup>

The messaging was tremendously successful. Once the ABA and the judiciary leant their support to the proposal, Justice Clark

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252. For an empirical study of this power, see generally Dawn M. Chutkow, *The Chief Justice as Executive: Judicial Conference Committee Appointments*, 2 J.L. & CTS. 301 (2014).

253. Influence tactics are directed toward changing values and beliefs or definitions and criteria of acceptable practices or performance. See Oliver, *supra* note 45, at 158. Such tactics are an aggressive organizational response to environmental conditions, typically manifested in lobbying efforts and coalition building. See *id.*

254. Clark had become Chair of the ABA's Section of Judicial Administration in July 1957, and Parker had been active in the ABA leadership since the 1930s. See Morris A. Soper, *A Tribute to Judge John J. Parker—"The Gladsome Light of Jurisprudence,"* 37 N.C. L. REV. 1, 10 (1958) (statement of Fred B. Helms); *The Rule-Making Function and the Judicial Conference of the United States*, 44 A.B.A. J. 42, 44 (1958).

255. See generally *The Rule-Making Function and the Judicial Conference of the United States*, *supra* note 254.

256. See generally *id.*

257. *Id.* at 44 (statement of Chief Judge Biggs).



began mobilizing state committees of the ABA to lobby Congress.<sup>258</sup> Other bar organizations quickly followed suit; in all, at least seventeen different bar and professional organizations formally supported the bill.<sup>259</sup> The influence tactics and logrolling efforts had their intended effect. The proposed bill passed the Senate Judiciary Committee without amendment and received a glowing report in June 1958,<sup>260</sup> and Congress passed the bill shortly thereafter.<sup>261</sup> The upshot of the final legislation was that the judicial role in court-centered rulemaking had been dramatically increased, with the awareness and full support of perhaps the two most significant constituencies in the federal courts' external environment.

The Judicial Conference wasted little time establishing greater control over rulemaking. In 1959, it formally created the Standing Committee on the Rules of Practice and Procedure, as well as five Advisory Committees.<sup>262</sup> Each Advisory Committee would develop proposed rules as needed, and submit them directly to the Standing Committee for review.<sup>263</sup> If approved there, the rule proposals would go to the Judicial Conference, then to the Supreme Court.<sup>264</sup> The new structure also introduced federal judges at the Advisory Committee level. While the original Advisory Committee on Civil Rules did not include a single judge among its members,<sup>265</sup> the newly constituted Advisory Committee post-1958 included three federal judges among its fifteen members,<sup>266</sup> and the new Standing Committee included four more judges among its membership.<sup>267</sup> Moreover, within about a decade, the number of judges would far eclipse nonjudges on the Advisory Committee.<sup>268</sup> With additional

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258. See Frank, *supra* note 244, at 34.

259. S. REP. NO. 85-1744, at 3025-26 (1958).

260. See *id.* at 3023, 3026.

261. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356.

262. See Maris, *supra* note 237, at 774.

263. Baker, *supra* note 244, at 329.

264. See *id.* at 330-31.

265. See Coleman, *supra* note 208, at 290 (noting that the original Advisory Committee consisted of five academics, and the rest government and private lawyers).

266. See Maris, *supra* note 237, at 774 n.29.

267. See *id.*

268. Minutes of the Meeting of the Advisory Committee on Civil Rules, Sept. 21, 1971, [https://www.uscourts.gov/sites/default/files/fr\\_import/CV09-1971-min.pdf](https://www.uscourts.gov/sites/default/files/fr_import/CV09-1971-min.pdf) [<https://perma.cc/4YZD-EVYW>] (showing eleven judges and only five nonjudges on the Advisory Committee). One recent study notes that after judges became the ascendant majority on the Advisory

judges on the Standing Committee and a Judicial Conference composed exclusively of federal judges, any rule proposal would pass before dozens of federal judges before it could become effective.

### *C. Inviting Public Input, 1975-1994*

The federal court system shored up internal support for court-centered rulemaking in the 1950s by introducing federal judges at every level of the rulemaking process.<sup>269</sup> The strategy had worked in part because rulemaking's *external* legitimacy was largely unaffected by the substitution of judges for academics. Whatever its precise composition, the Advisory Committee still operated under the direct authority of the Supreme Court, and the Committee benefitted from the Court's own legitimacy. By the 1970s, however, the credentials of both the Committee and the Court were called into question. Critics argued that only a few Advisory Committee members were truly experts in rulemaking, and in any event, they would be rotated off the Committee after three years.<sup>270</sup> Other commentators challenged the belief that the Justices of the Supreme Court had sufficient expertise to even sign off competently on rules for the trial courts.<sup>271</sup> Put differently, the challenge to rulemaking in this era was not whether experts should be involved in court-centered rulemaking, but rather whether the chosen experts were indeed "experts" at all.

The federal court system had to adjust to this changing perception of expertise by finding an alternative source of rulemaking legitimacy. Faced with the same problem in an adjudicative capacity, the Supreme Court had sought legitimacy through "public confidence," as measured by public opinion polls.<sup>272</sup> But the legitimacy of court-centered rulemaking could not be captured by polling, in part because the results of rulemaking were barely salient to

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Committee in 1971, "[a]cademics disappeared from the committee entirely for a decade and then rebounded to something on the order of a 10 percent share of seats." Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 *NEV. L.J.* 1559, 1568 (2015).

269. See *supra* notes 265-67 and accompanying text.

270. See Cheryl L. Haas, *Judicial Rulemaking: Criticisms and Cures for a System in Crisis*, 70 *N.Y.U. L. REV.* 135, 145 n.68 (1995).

271. See *id.* at 146 & nn.71-72 (citing criticisms).

272. See Bassok, *supra* note 116, at 194.

the general public, and in part because the public had no opportunity to evaluate the rulemaking process. A different basis for legitimacy was needed, and the court system found it in a familiar place: executive branch agencies.

Administrative rulemaking by executive branch agencies had developed in parallel with court-centered rulemaking,<sup>273</sup> and similarly benefitted in its early decades from the perception that rulemaking was best left in the hands of thoughtful experts.<sup>274</sup> But by the early 1970s this perception had changed. There was instead “a general social trend that came to view agencies less as apolitical ‘experts’ administering a strictly rational process, and more as political bodies making choices among alternatives in response to social needs and political inputs.”<sup>275</sup> As a result, the prior consensus on expertise—“that agency action was ‘expert,’ intended to operate at some remove from politics”<sup>276</sup>—was called into question.

The perceived *value* of expertise was also changing. While an agency in the New Deal Era “could over time acquire sufficient expertise in a particular subject matter to second-guess private decisionmakers on limited questions,”<sup>277</sup> by the 1970s the scope of agency authority had grown such that “[n]o individual ... ha[d] genuine expertise in all of the required areas.”<sup>278</sup> Accordingly, agencies were instructed to take more seriously both the nature and scope of public comment and the explanation each agency provided for its final actions.<sup>279</sup> If an initial round of comments produced significant changes to the proposal, a second round of public comments would also be needed.<sup>280</sup> Moreover, each agency was advised to clearly state “the factual basis for and reasonableness of its judgments,

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273. See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-59 (2012)).

274. See Schiller, *supra* note 210, at 418.

275. Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 755-56 (1996); see also James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 369-74 (1976) (identifying sources of public skepticism toward expertise).

276. See Strauss, *supra* note 275, at 753.

277. Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 60 (1991).

278. *Id.* at 61.

279. See Strauss, *supra* note 275, at 756-57.

280. See *id.* at 757.

and that it had taken a 'hard look' at any matters that had proved controversial" in order to withstand legal challenges.<sup>281</sup>

Congress played a significant part in creating these new norms of openness and accountability.<sup>282</sup> It demanded greater transparency in the administrative process through the Freedom of Information Act,<sup>283</sup> the Government in the Sunshine Act,<sup>284</sup> and related legislation.<sup>285</sup> It also passed the Federal Advisory Committee Act (FACA), which required federal committees dispensing "advice or recommendations"<sup>286</sup> to the President or executive branch agencies to make their deliberations "objective and accessible to the public"<sup>287</sup>—a mandate that was extended in short order to require fully open meetings.<sup>288</sup> But the federal courts played a healthy role in opening administrative rulemaking as well, by reading the notice and comment provisions of the Administrative Procedure Act (APA) more vigorously than before, and by instituting "hard look" review on their own initiative.<sup>289</sup> As Peter Strauss observed, "[o]ne finds in the cases of this time ... an appreciation of the virtues of rulemaking from this [open] perspective, since in rulemaking *anyone* was free to participate."<sup>290</sup>

Whether the federal courts recognized it at the time, their insistence on transparency and public participation in administrative rulemaking would eventually create pressure to conform court-centered rulemaking to the same values. To be sure, the two forms

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281. *Id.*

282. *Id.* at 758.

283. Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552 (2012)).

284. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (2012)).

285. See Freedman, *supra* note 275, at 368.

286. 5 U.S.C. app. 2, § 3(2) (2012).

287. *Federal Advisory Committee Act (FACA) Management Overview*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-act-faca-management-overview> [<https://perma.cc/FD9K-2JLL>].

288. See Henry H. Perritt, Jr., *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471, 491 (1986). For an empirical study of the mixed effect of open meetings on federal advisory committees, see generally Kevin D. Karty, *Membership Balance, Open Meetings, and Effectiveness in Federal Advisory Committees*, 35 AM. REV. PUB. ADMIN. 414 (2005).

289. See Strauss, *supra* note 275, at 757. "Notice and comment" practice requires the agency to publish a notice of proposed rulemaking, offer an opportunity for the public to give written comments on the proposed rule, and provide a concise general explanation for its reason for adopting the rule. See *id.* at 752.

290. *Id.* at 756.

of rulemaking differed in important ways,<sup>291</sup> and not everyone immediately saw parallels between court-centered rulemaking and its administrative cousin.<sup>292</sup> But beneath historical and cosmetic differences lay increasing areas of intersection and overlap.<sup>293</sup> Both forms of rulemaking derived their authority from Congress and were subject to the legislature's watchful eye.<sup>294</sup> A subset of attorneys was becoming well-versed in both the agency rulemaking process and the Federal Rules of Civil Procedure, poised to carry administrative ideas into the adjudicative realm. And federal courts themselves were routinely determining the propriety of agency rules and procedures.

This increased interaction between the courts and agencies led to a cross-pollination of ideas and values—so much so that by the 1970s, both court rulemaking and agency rulemaking bodies could be said to occupy the same organizational field.<sup>295</sup> That is, the two forms of rulemaking were sufficiently connected that their participants would interact regularly and come to possess a common meaning system.<sup>296</sup> Administrative rulemaking and court-centered rulemaking remained distinct endeavors on paper, but in practice they shared many networks, practices, and norms,<sup>297</sup> and were characterized by common beliefs, cultural frames, and archetypes.<sup>298</sup>

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291. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 907-08 (1999).

292. See, e.g., Wheeler, *supra* note 200, at 281-82 (describing public involvement in court-centered rulemaking as “[i]ronic[ ]”).

293. See Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1205 (2012).

294. See *id.* at 1191.

295. In its most basic definition, an organizational field consists of “those organizations that, in the aggregate, constitute a recognized area of institutional life.” Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 148 (1983).

296. See Melissa Wooten & Andrew J. Hoffman, *Organizational Fields: Past, Present, and Future*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 55, 56 (Royston Greenwood et al. eds., 2d ed. 2017).

297. See, e.g., Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 863-64 (2006) (noting the increase in voluntary engagement among multiple players in the regulatory field in the second half of the twentieth century); Mulligan & Staszewski, *supra* note 293, at 1205 (identifying analogous features between administrative agencies and the federal courts with respect to rulemaking).

298. Organizations within a field need not be directly connected to each other or constructed the same way, as long as they share some sense of identity and “perceive each other as peers or ‘like units’ in some important sense.” Olga Frishman, *Transnational Judicial*

Organizational fields are a source of ideas, guidance, and support for their constituent organizations. But they also exert pressure on those organizations to conform to the field's shared values and practices.<sup>299</sup> The reward for conformity is legitimacy: by looking and acting similar to other organizations in the same field—looking the way an organization in that field is “supposed to look”—an organization can boost its level of social approval.<sup>300</sup> By contrast, failure to conform to the accepted norms of the organizational field can diminish an organization's legitimacy, with consequences ranging from social disapproval to full-on ostracism.<sup>301</sup>

The emergent values of public participation and transparency in the broader organizational field threatened the legitimacy of court-centered rulemaking's still internal, and mostly private, process.<sup>302</sup> The court system consequently felt pressure to conform its rule-making procedures to the new norms of openness.<sup>303</sup> This pressure came in three forms. First, the court system felt *coercive pressures* in the form of direct legislative challenges to court-centered rulemaking's procedures and outcomes.<sup>304</sup> In 1973, Congress suspended implementation of the proposed Federal Rules of Evidence—the first time it had ever exercised its supervisory authority under the Rules

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*Dialogue as an Organisational Field*, 19 EUR. L.J. 739, 744 (2013) (quoting Klaus Dingwerth & Philipp Pattberg, *World Politics and Organizational Fields: The Case of Transnational Sustainability Governance*, 15 EUR. J. INT'L RELATIONSHIPS 707, 720 (2009)).

299. See Rachel Ashworth et al., *Escape from the Iron Cage? Organizational Change and Isomorphic Pressures in the Public Sector*, 19 J. PUB. ADMIN. RES. & THEORY 165, 170 (2007) (“Institutional theory suggests that organizations conform to the coercive, normative, and mimetic pressures that surround them. Such pressures are pervasive in modern and mature organizational fields.”); Pursey P.M.A.R. Heugens & Michel W. Lander, *Structure! Agency! (And Other Quarrels): A Meta-Analysis of Institutional Theories of Organization*, 52 ACAD. MGMT. J. 61, 62 (2009) (“Organizations sharing an organizational field and occupying a similar structural position in it can reasonably be expected to be exposed to similar structural forces.”).

300. See, e.g., David L. Deephouse, *Does Isomorphism Legitimate?*, 39 ACAD. MGMT. J. 1024, 1033 (1996) (finding empirical support for this proposition in a study of Minnesota banks).

301. See *id.* at 1026.

302. See Mulligan & Staszewski, *supra* note 293, at 1202-04.

303. See Bone, *supra* note 291, at 903; Coleman, *supra* note 208, at 279.

304. Coercive pressures are based in politics and power: they are “formal and informal pressures exerted on organizations by other organizations upon which they are dependent and by cultural expectations in the society within which organizations function.” DiMaggio & Powell, *supra* note 295, at 150; see also Eva Boxenbaum & Stefan Jonsson, *Isomorphism, Diffusion, and Decoupling*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM, *supra* note 45, at 78, 80 (“[C]oercive pressures result from power relationships and politics.”).

Enabling Act.<sup>305</sup> Four years later, the House of Representatives initiated a series of hearings to explore the need for greater public participation and transparency in court-centered rulemaking.<sup>306</sup> The House hearings, which would be held in fits and starts over the next decade, took a more urgent tone after the Supreme Court approved controversial amendments to Federal Rule of Civil Procedure 11 in 1983 and Federal Rule of Civil Procedure 68 in 1985.<sup>307</sup> In all, Congress enacted two dozen laws modifying or suspending court-proposed procedural rules between 1973 and 1984.<sup>308</sup> Even though Congress did not mandate transparency for court-centered rulemaking in this period (as it had for administrative rulemaking), its heightened attention to court rulemaking likely placed pressure on the federal court system to adopt its own transparency norms.<sup>309</sup>

The court system also felt *mimetic pressures* to open its rulemaking process, a direct consequence of its own insistence that administrative rulemaking take on a more public dimension.<sup>310</sup> As noted above, during this era, the federal courts ratcheted up the notice-and-comment process for agency rulemaking, imposing additional participation and transparency requirements that did not

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305. See Pub. L. No. 93-12, 87 Stat. 9 (1973); Bone, *supra* note 291, at 902. The proposed evidence rules were the culmination of a seven-year effort within the court-centered rulemaking process and had the blessing of the entire judicial rulemaking hierarchy. See Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 125 (1973). Nevertheless, Congress suspended implementation until it could study the rules further—the first time it had ever exercised its power to do so under the Rules Enabling Act. *Id.* at 126 & n.6. Congress would later propose its own amendments to the draft rules. *Id.* at 126.

306. See Carl Tobias, *Improving the 1988 and 1990 Judicial Improvement Acts*, 46 STAN. L. REV. 1589, 1598 (1994).

307. See Burbank & Farhang, *supra* note 268, at 1585-86.

308. See Geyh, *supra* note 130, at 1188.

309. The degree of congressional attention may influence not only the structure and transparency of court-centered rulemaking, but also the scope and nature of proposed amendments. Stephen Burbank and Sean Farhang have suggested, for example, that Congress's focus on class actions in the 1990s and early 2000s "highlighted the institutional stakes" for the Advisory Committee, "dampening the zeal for ambitious retrenchment even of [Committee] members otherwise favoring it." Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 56 (2018). By contrast, the federal discovery rules, which elicited far less congressional interest (and which raised fewer flags under the Rules Enabling Act), received a much more comprehensive overhaul in 2015. See *id.* at 54-56.

310. Mimetic pressures are felt *inside* the organization and reflect its members' desire to look like other "legitimate" organizations in the same field. See Ashworth et al., *supra* note 299, at 167.

appear in the text of the APA.<sup>311</sup> Even though these decisions were limited to agency rulemaking, they suggested a growing judicial consensus favoring public participation and transparency. Indeed, even one of the most forceful critics of enhanced judicial review of administrative rulemaking, Judge J. Skelly Wright of the D.C. Circuit, acknowledged that basic fairness required a certain level of public involvement.<sup>312</sup> That Judge Wright and Chief Justice Warren Burger—both highly experienced in administrative adjudication and both supporters of public input into administrative rulemaking—sat as members of the Judicial Conference from 1978 to 1980 must have heavily influenced the Judicial Conference's thinking on this issue.<sup>313</sup>

Finally, the court system felt *normative pressures* from others in the legal profession to open court-centered rulemaking to participation and public view.<sup>314</sup> In the aftermath of the Evidence Rules fiasco, some academics argued that the Supreme Court had become a rubber stamp for the Advisory Committee, signing off on rules changes that were developed under secretive and opaque conditions which had not been properly scrutinized.<sup>315</sup> Professor Howard Lesnick summarized the charges:

[W]e face the unique situation of rules drafted by a committee of private citizens and judges acting in an advisory capacity, which operates for the most part in private; approved by a body of

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311. See Strauss, *supra* note 275, at 756. Notably, a series of court decisions in the early 1970s afforded the public both a qualified right of cross-examination and a right to access details of an agency's methodology. Stephen F. Williams, "Hybrid Rulemaking" *Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 402 (1975). Neither of these rights appeared in the "notice-and-comment" provisions of the APA, suggesting to commentators that the federal courts themselves created a new procedural category of "hybrid" or "notice-and-comment-plus" rulemaking. *Id.*

312. See J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375, 397 (1974).

313. *Judicial Conference of the United States: Members*, FED. JUD. CTR., <https://www.fjc.gov/history/administration/judicial-conference-united-states-members> [<https://perma.cc/J9UY-A3PN>].

314. Normative pressures are tied to notions of professionalism and "pertain to what is widely considered a proper course of action, or even a moral duty, such as when there are signals from the organizational environment that the adoption of a particular practice or structure is a correct moral choice." Boxenbaum & Jonsson, *supra* note 304, at 80 (internal citation omitted).

315. Baker, *supra* note 244, at 327; Coleman, *supra* note 208, at 276.



judges, meeting entirely in private; promulgated by the Supreme Court without any real expectation, or the procedure to warrant that expectation, of focused consideration of constitutional or statutory questions; and “approved” by the legislature through simple inaction for a period of ninety days. In short, neither as a legislative nor an adjudicatory process does the present structure for rule making meet the expectations of our constitutional traditions.<sup>316</sup>

Lesnick was not alone: the unmistakable tenor from most academic commentaries of the time was that the existing rulemaking process provided insufficient guarantees of legitimate outcomes.<sup>317</sup> Proposed solutions to the problem varied,<sup>318</sup> but the bulk of them reflected scholars’ increasingly positive view of notice-and-comment rulemaking, which was seen as more democratic and more accountable than the work of cloistered experts.<sup>319</sup> If the structure of administrative rulemaking carried such significant benefits for a democratic society, surely, they argued, a similar structure should improve the court-centered rulemaking product.<sup>320</sup>

A separate source of normative pressures on the federal court system came from the practicing bar. As attorneys became increasingly familiar with the notice-and-comment process on the agency

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316. Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-Examination*, 61 A.B.A. J. 579, 582 (1975).

317. *But see* Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1294 (1978) (book review) (“[A] quite undemocratic legislative [rulemaking] process has proven capable of producing a very satisfactory product.”).

318. Among the suggestions were calls to increase public input into the rulemaking process, see Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 931-33 (1976); requiring that rules be promulgated directly by the Judicial Conference rather than the Supreme Court, see MICHAL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953-1969*, at 262 (2005); and returning to direct Supreme Court oversight of the Advisory Committees, see Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 677 (1975). Professor Lesnick himself advocated for a “more representative” composition of the advisory committees and tentatively suggested replacing the Judicial Conference in the rulemaking hierarchy with a legislative commission. *See* Lesnick, *supra* note 316, at 581-83.

319. *See* Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 406-07 (2006); Strauss, *supra* note 275, at 755.

320. *See* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1349 (2011) (discussing normative pressures toward accountability in an institutional field).

side, it was only a matter of time before they would bring some of the same expectations to court-centered rulemaking. Government lawyers working within regulatory agencies, for example, “typically preside[] at any informal public hearings that the agency conducts in connection with rulemaking initiatives.”<sup>321</sup> As attorneys moved in and out of agency employment, or even socialized with other attorneys about the nature of their jobs, the expectation of public involvement in court-centered rulemaking was bound to spread across the profession.<sup>322</sup>

Court-centered rulemaking might have been less susceptible to these environmental pressures if there were a tangible means of demonstrating its utility to the public. Rulemaking, however, lacks interpretable output measures.<sup>323</sup> There is no consensus, for example, on the optimal number of rules amendments that the Advisory Committee should propose or the number of constituencies it should consult each year. Consequently, the court system had to take more visible measures to bolster confidence in rulemaking among Congress, the bar, and the public.<sup>324</sup> And adopting the emerging norms of its organizational field—the norms of transparency and public participation—were its best bet to maintain legitimacy with those constituencies.<sup>325</sup> That meant opening court-centered rulemaking to the public, and ceding internal control, more than ever before.

As in previous eras, however, the federal court system softened the blow of diminished internal control by adding a new buffering dimension to the rulemaking process. In this instance, the new dimension was education, and the tool of choice was the FJC. That body's research on rulemaking would provide the court system with

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321. Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 LAW & CONTEMP. PROBS. 19, 24 (1998).

322. While they expressed different values, the mimetic and normative pressures on the court system overlapped in practice. Those advocates of greater transparency inside the court system may well have felt that opening the rulemaking process was both the right thing to do (a normative pressure) and the safe thing to do (a mimetic pressure). See *supra* notes 310, 314.

323. See Peter Frumkin & Joseph Galaskiewicz, *Institutional Isomorphism and Public Sector Organizations*, 14 J. PUB. ADMIN. RES. & THEORY 283, 289 (2004).

324. *Cf. id.* at 289-90.

325. See Oliver, *supra* note 45, at 160 tbl.4 (noting that the more an organization expects to gain legitimacy by adopting the norms of its organizational field, the more likely it is to adopt those norms).

a trusted source of information, a neutral point of comparison against public comment and the increasing number of independent studies of the civil justice system.<sup>326</sup> By the late 1970s, the FJC had begun in earnest to study and publish reports on the operation of individual court rules.<sup>327</sup> If the public was to have its say on rules, the court system would contribute its own research as well.

The FJC also provided a useful mechanism for channeling public concerns about court-centered rulemaking away from the rulemakers themselves. In his 1979 *Annual Report on the State of the Judiciary*, Chief Justice Burger requested that the FJC and the Judicial Conference take a fresh look at the court-centered rulemaking process.<sup>328</sup> In response, the FJC organized a conference on federal rulemaking in December of that year, at which critiques and proposals were discussed and debated.<sup>329</sup> The discussion—later documented in a 1981 FJC report by Winifred Brown—captured many of the critiques of court-centered rulemaking that had been circulating for a decade.<sup>330</sup> In doing so, it made tangible the pressures felt by the court system to conform to agency rulemaking norms and enabled the court system to be seen as adopting those norms on its own initiative.

Not that the court system was waiting for the FJC in order to change its practices. As early as 1978, the Advisory Committee began holding formal public hearings on its proposed amendments to the discovery rules.<sup>331</sup> By 1983, the Standing Committee had announced an “evolved practice” which included public hearings and the publication of transcripts.<sup>332</sup> When Congress finally did amend the Rules Enabling Act in 1988 by passing the Judicial

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326. See Gazell, *supra* note 250, at 457-58.

327. See generally, e.g., PAUL R. CONNOLLY ET AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978); PAUL R. J. CONNOLLY & PATRICIA A. LOMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (1980); JOSEPH L. EBERSOLE & BARLOW BURKE, DISCOVERY PROBLEMS IN CIVIL CASES (1980); NANCY WEEKS, DISTRICT COURT IMPLEMENTATION OF AMENDED CIVIL RULE 16: A REPORT ON NEW LOCAL RULES (1984).

328. Warren E. Burger, *The State of the Federal Judiciary—1979*, 65 A.B.A. J. 358, 360 (1979).

329. WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES, at vi-ix (1981).

330. See generally *id.* at 41-86.

331. See Marcus, *supra* note 209, at 917.

332. Freer, *supra* note 194, at 460.

Improvements and Access to Justice Act (JIA),<sup>333</sup> most of the legislation's key elements—including opening meetings to the public (with good cause exceptions), adding appellate judges to the Advisory Committee, and publishing a statement of the Committee's procedures—had already been implemented by the court system years earlier.<sup>334</sup>

The JIA has been criticized as an instance of congressional capture by special interests: groups that had previously been shut out of rulemaking successfully lobbied Congress to open up the process, thereby enabling them to similarly lobby the Advisory Committee (or any other group in the rulemaking hierarchy) for advantageous rules.<sup>335</sup> But to ascribe the opening of the rulemaking process only to the work of special interests is to miss the federal courts' *own* interest in opening the process. And the way in which openness in rulemaking was eventually manifested—by largely mimicking the notice-and-comment process for executive agency rulemaking<sup>336</sup>—was no accident. It was a predictable result of forces that emerged inside and outside the federal court system during the previous two decades.<sup>337</sup> Over time, the federal court system “consciously and strategically cho[se] to comply with institutional pressures in anticipation of specific self-serving benefits.”<sup>338</sup>

#### *D. Efficiency Through Decoupling, 1995-2015*

The opening of court-centered rulemaking to public involvement in the 1970s and 1980s was necessary to maintain the federal court

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333. Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 2073 (2012)).

334. See Kravitz et al., *supra* note 191, at 507-08.

335. See, e.g., Geyh, *supra* note 130, at 1188-89, 1189 n.122; Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 736 (1995); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 835 n.206, 836-37 (1991).

336. See Freer, *supra* note 194, at 460 (noting that the 1988 amendments to the Rules Enabling Act look “a good deal like agency rulemaking under the Administrative Procedure Act. [The JIA] changed the rulemaking process fundamentally from one in the hands of a cadre of experts to a participatory model.” (footnotes omitted)).

337. See *supra* notes 304-22 and accompanying text (discussing the three forms of pressure that the federal court system faced).

338. See Oliver, *supra* note 45, at 153 (describing the “[c]ompliance” tactic within the larger organizational response of acquiescence).

system's legitimacy in the rulemaking arena.<sup>339</sup> But maintaining legitimacy came with costs. During the 1990s, court rulemakers were increasingly challenged by the volume and intensity of competing proposals, leading to high-profile delays.<sup>340</sup> Even ordinary rule changes typically took three years or more, virtually assuring widespread turnover in the membership of the Advisory Committee from the time a rule proposal was initiated to the time the final rule was promulgated.<sup>341</sup> Sending a proposal up the hierarchy to the Standing Committee, Judicial Conference, and Supreme Court further extended the process.<sup>342</sup> As one commentator blithely noted in 1998, current practice "requires more steps to amend a Federal Rule of Civil Procedure than it does to amend the U.S. Constitution."<sup>343</sup>

Commentators took notice, drawing parallels between the trends affecting court-centered rulemaking and those affecting its institutional cousin.<sup>344</sup> Agency rulemaking suffered a crisis of ossification in the 1980s, as federal agencies reacted to demands for a more substantial paper trail.<sup>345</sup> In some instances, efforts to comply with anticipated "hard look" review<sup>346</sup> dragged out a single agency

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339. See *supra* note 33.

340. See, e.g., Cooper, *supra* note 89, at 595-96 (noting that the 2010 amendments to Rule 56 had their genesis in a 1992 proposal, and that the core proposal "published for comment in the summer of 2008 was shaped by three years of continuous work"); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 954-55 (discussing the ten-year saga over proposed amendments to Federal Rule 23).

341. See Cooper, *supra* note 89, at 593.

342. See Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 235 (1998).

343. *Id.* (footnote omitted)

344. See, e.g., Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 244-45 (1997); Mulligan & Staszewski, *supra* note 293, at 1203-04.

345. See Strauss, *supra* note 275, at 760. Commentators have recognized that all three branches of the federal government contributed to the problem through additional demands on the rulemaking process, but the broad consensus placed "most of the blame for ossification on judicially created administrative law doctrines." Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 485 (1997).

346. The hard look doctrine

helps to ensure that agency decisions are determined neither by accommodation of purely private interests nor by surreptitious commandeering of the decisionmaking apparatus to serve an agency's idiosyncratic view of the public interest.... Essentially, under the hard look test, the reviewing court scrutinizes the agency's reasoning to make certain that the agency carefully deliberated

rulemaking for a decade or more.<sup>347</sup> In other instances, agencies simply gave up on rulemaking, concluding that the time and money spent to devise a rule under judicially augmented APA procedures did not justify the risk that a court would later set the rule aside.<sup>348</sup> Even when an agency did successfully promulgate a rule, the cost and complexity of rulemaking gave it “every incentive” not to re-examine it, even in the face of new data.<sup>349</sup>

Court-centered rulemaking never experienced this degree of stasis, but the risks were ever-present. Among other things, the advent of “e-rulemaking”—the use of Internet-based technology to expand public access to the rulemaking process<sup>350</sup>—at the turn of the century expanded the possibility that rulemakers would be swamped with outside comments.<sup>351</sup> Easier access to the rulemaking process can amplify the number of comments from the public in high-visibility rulemakings, sometimes by orders of magnitude.<sup>352</sup> An early draft of the 2013 proposed amendments to the Federal Rules of Civil Procedure, for example, drew more than 2300 comments.<sup>353</sup>

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about the issues raised by its decision.

Seidenfeld, *supra* note 345, at 491 (footnotes omitted).

347. See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 61 (1995) (discussing a single EPA rulemaking costing millions of dollars and taking ten years, which was eventually set aside as being procedurally inadequate).

348. See *id.* (describing The Occupational Safety and Health Administration's failure to issue rules related to toxic substances).

349. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1390 (1992).

350. See Mendelson, *supra* note 320, at 1344.

351. In the early 2000s, the federal government began designing a single web portal and common electronic docket for its rulemaking entities. See generally *The eRulemaking Initiative*, REGULATIONS.GOV, <https://regulations.gov/aboutProgram> [<https://perma.cc/5EZU-AEN6>]. That portal, launched in 2003, covers more than 300 federal entities, including the federal court system. *About Us: Partner Agencies*, REGULATIONS.GOV, <https://www.regulations.gov/aboutPartners> [<https://perma.cc/HEQ3-8LWR>]. The Obama Administration urged rulemaking agencies to embrace the next generation of technology by bringing social media into the rulemaking process. See Mendelson, *supra* note 320, at 1345; Elizabeth Porter & Kathryn Watts, *Visual Regulation—and Visual Deregulation*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 29, 2018), <http://yalejreg.com/nc/visual-regulation-and-visual-deregulation-by-elizabeth-porter-kathryn-watts/> [<https://perma.cc/7NMM-89ZU>].

352. See Mendelson, *supra* note 320, at 1345.

353. See Proposed Amendments to the Federal Rules of Civil Procedure, Docket ID USC-RULES-CV-2013-0002, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=USC-RULES-CV-2013-0002> [<https://perma.cc/XE7K-ZULZ>].

A large number of comments, however, does not necessarily reflect a broad or accurate range of interests. Federal agencies have recently endured spates of regulatory comments “submitted” by individuals who are dead, never existed, or are unaware that their names have been used.<sup>354</sup> Even when the comments themselves are genuine, they are often identically worded and their submission carefully orchestrated.<sup>355</sup> Professors Burbank and Farhang, for example, concluded that the thousands of comments on the proposed amendments in 2013 primarily reflected “powerful interest group mobilization.”<sup>356</sup> At bottom, focusing merely on the volume or intensity of public comment “runs the risk of equating topics that evoke substantial reaction with substantive.”<sup>357</sup>

Increased public comment—whether from e-rulemaking or otherwise—imposes additional externalities on rulemaking’s deliberative process. One is the sheer volume of work for rulemakers: while not all proposed rules amendments will draw the kind of explosive public response seen in 2013,<sup>358</sup> the Advisory Committee faces both a legal and a sociological obligation to comb through the comments and give each an appropriate level of consideration.<sup>359</sup> Another is timing: the ease and speed of communicating through the Internet places additional pressure on rulemakers to show early responsiveness to public concerns.<sup>360</sup> Finally, as public input grows through e-rulemaking, rulemakers have to sort through more

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354. See James V. Grimaldi & Paul Overberg, *Fake Comments Hit Rule Making*, WALL ST. J., Dec. 13, 2017, at A1; James V. Grimaldi & Paul Overberg, *Fiduciary Rule Draws A Lot of Fake Critics*, WALL ST. J., Dec. 28, 2017, at B1.

355. See Mendelson, *supra* note 320, at 1359, 1361 (noting that many agencies receive comments from individuals with identical or near-identical text, which were drafted and supplied by an interest group).

356. Burbank & Farhang, *supra* note 268, at 1595.

357. Freer, *supra* note 194, at 461 (emphasis omitted).

358. See Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 616 (2014) (“For the last 20 years or so, even controversial rule-amendment packages have attracted no more than about 300 comments during the statutorily directed public comment period.”); see also, e.g., Burbank & Farhang, *supra* note 309, at 57-58 (noting that proposed amendments to Rule 23 in 2017 “elicited fewer than ninety written comments”).

359. See *Proposed Amendments Published for Public Comment*, U.S. CTS., <https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment> [<https://perma.cc/KG2J-TYLV>] (“Written comments are welcome on each rule proposal. The advisory committees will review all timely comments, which are made part of the official record and are available to the public.”).

360. See Mendelson, *supra* note 320, at 1345-46.

comments and take stock not only of technical points but also of increasing numbers of value-laden comments.<sup>361</sup>

The federal court system was hardly the first organization to confront the inefficiencies associated with implementing legitimacy-boosting structures. As noted, administrative agencies faced a similar problem,<sup>362</sup> as did industries as wide-ranging as hospitals, universities, and public transit.<sup>363</sup> Affected organizations, however, typically do not resign themselves to inefficiency as the inevitable price of maintaining legitimacy. Rather, they *decouple* their real-world practices from their formal or espoused structure, retaining the ceremonial trappings of formal practices but only superficially abiding by them.<sup>364</sup> The decoupling process “enables organizations to maintain standardized, legitimating, formal structures while their activities vary in response to practical considerations.”<sup>365</sup> Professor Oliver describes decoupling as a concealment tactic, which involves “disguising nonconformity behind a facade of acquiescence.”<sup>366</sup>

The federal court system adopted an unmistakable decoupling strategy in the 1990s and early 2000s to streamline the rulemaking process. One important tactic was to reach out informally to select parties before announcing any proposed rule change, thereby affording those parties an opportunity to shape the rule before it went public. In the mid-1980s, Paul Carrington, as Reporter to the Advisory Committee, broke with longstanding tradition and began circulating amendment proposals to scholars, practitioners, and “interested bar groups to get their reactions and ideas on pending issues.”<sup>367</sup> This process was continued by Carrington’s successors,<sup>368</sup> and became more routinized as the Advisory Committee leadership grew to favor the practice.<sup>369</sup> By the late 1990s, this outreach had

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361. *See id.* at 1346.

362. *See supra* notes 344-49 and accompanying text.

363. *See* John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340, 355 (1977).

364. *See* Boxenbaum & Jonsson, *supra* note 304, at 80-81; Greenwood et al., *supra* note 45, at 3-4; Meyer & Rowan, *supra* note 363, at 356-57.

365. Meyer & Rowan, *supra* note 363, at 357.

366. Oliver, *supra* note 45, at 154.

367. Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991).

368. Marcus, *supra* note 209, at 917 n.100.

369. Much of the credit for institutionalized committee outreach has been assigned to



coalesced into a series of invitation-only meetings known as mini-conferences, at which members of the Advisory Committee would meet with representatives of various bar, academic, and industry groups to flesh out ideas and proposals for civil rules amendments.<sup>370</sup> Sometimes, this outreach occurred before the Advisory Committee even prepared a rule revision.<sup>371</sup> In other instances, “groups were assembled to address specific issues already identified by the Committee as seeming to warrant close attention,”<sup>372</sup> and the participants “focused on [existing] mock-ups of possible rule changes.”<sup>373</sup>

A newer, but related, innovation has been to invite selected industry groups and bar associations to attend semiannual Advisory Committee meetings, where they may present comments directly to the committee.<sup>374</sup> Newer still is to assemble a large conference to discuss issues that more broadly affect federal civil litigation. To date, the Advisory Committee has held two such conferences: one at Boston College Law School in 1998 (focusing on discovery practice), and one at Duke Law School in 2010 (examining all aspects of civil litigation from pleadings to trial).<sup>375</sup> While not open to the public, these “maxi-conferences” brought together scores of participants from the judiciary, academia, government, private practice, business, and the nonprofit world.<sup>376</sup> Studies and proposals made at these conferences directly influenced civil rule changes in 2006 and 2015.<sup>377</sup>

In hindsight, the court system’s use of a “select participation” decoupling strategy is not particularly surprising. Early outreach to interested and knowledgeable parties increases the Advisory Committee’s access to a range of perspectives and information<sup>378</sup> and

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Judge Patrick Higginbotham, who Chaired the Advisory Committee from 1993 to 1996. See Kravitz et al., *supra* note 191, at 519-20; Rabiej, *supra* note 53, at 327 n.18, 349.

370. See Cooper, *supra* note 89, at 595 n.11; Marcus, *supra* note 209, at 918 & n.102, 919 & nn.103-04.

371. See Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 217 (2010).

372. Marcus, *supra* note 358, at 623.

373. *Id.*

374. See Kravitz et al., *supra* note 191, at 509-10.

375. See *id.* at 511.

376. See *id.*

377. See Marcus, *supra* note 358, at 624.

378. See, e.g., Marcus, *supra* note 209, at 918-19 (using the example of e-discovery).

heightens the possibility of achieving a broad consensus for a rule change—an issue of particular importance to the Committee.<sup>379</sup> Moreover, this very sort of outreach was partially—and ironically—blessed by Congress when it passed the Negotiated Rule-making Act of 1990.<sup>380</sup> What is surprising is how successfully the court system has framed decoupling practice as going above and beyond congressional expectations for rulemaking transparency.<sup>381</sup> The torrent of praise for early outreach is certainly justified in terms of the quality of, and professional investment in, the resulting rules. But it also masks the reality that meeting with select groups to fashion a consensus for a draft rule *before* public release necessarily narrows the range of possible outcomes.<sup>382</sup>

Another decoupling strategy is captured by the typically less intensive review of rule proposals at the top levels of the court hierarchy. The Rules Enabling Act requires that once a proposed rule has made it through the public participation stage with any appropriate revisions, it must be approved by the Standing Committee, Judicial Conference, and Supreme Court before it is promulgated.<sup>383</sup> To be sure, each level of the hierarchy formally complies with the requirement each time. But in the thirty years since the JIA established the modern rulemaking scheme, it has been an extremely rare event for the Judicial Conference or the Supreme Court to reject a proposed Federal Rule of Civil Procedure.<sup>384</sup> The point here is not that the Judicial Conference and Supreme Court are deliberately shirking their responsibilities, but rather that the

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379. See Rabiej, *supra* note 53, at 367.

380. 5 U.S.C. §§ 561-570 (2012). That Act encouraged federal agencies “to form balanced private-public negotiating groups, representative of all interests likely to be involved, that could, with a facilitator’s aid, develop consensual proposals for rulemaking.” Strauss, *supra* note 275, at 764. That is, a select group of representative interests would be tasked with developing an agreed-upon rule before public notice of the rulemaking. See *id.*

381. Marcus, *supra* note 358, at 623.

382. See *id.*

383. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103-04 (2002).

384. For a rare example of a rule proposal that was rejected by the Judicial Conference, see Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1156-57 (2002) (discussing a proposed change to Federal Rule of Civil Procedure 26(c)); see also STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 92 (2017) (identifying two additional proposals that did not survive Judicial Conference or Standing Committee scrutiny).

rulemaking hierarchy is—by design—far more rigorous on paper than it is in practice.<sup>385</sup> The Supreme Court and Judicial Conference’s formal compliance with their respective roles promotes rule-making legitimacy, just as their relatively cursory review of proposed rules promotes efficiency.<sup>386</sup> Sensible decoupling keeps the process in balance.<sup>387</sup>

As in previous eras, the court system’s responses in this period have highlighted another buffering benefit of court-centered rulemaking. The practice of decoupling effectively allows the court system to allocate its energies toward the most promising rule changes, while delaying or ignoring others.<sup>388</sup> Every proposal and comment is still read and considered, of course, but the increase in public comments makes it impossible to consider each comment or proposal extensively.<sup>389</sup> Public comment, in other words, has grown so voluminous as to give the rulemakers a certain degree of cover from pursuing every suggestion. The result is a modern rulemaking process whose energies are focused far more narrowly in practice than a formal description would suggest.<sup>390</sup>

#### IV. THE FUTURE OF THE BUFFER

For nearly eighty-five years, the federal court system has periodically adjusted its rulemaking buffer to maintain the buffer’s

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385. See Haas, *supra* note 270, at 146 (discussing the Court’s “[c]ursory [r]eview” of rule proposals); Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 98 (2010) (“[T]he intermediate players, while important, are not central .... Committee rulemaking is in some ways a two-player game between the advisory committees and Congress.”); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 463 (1993) (“[C]ivil rulemaking ... in practice gives near absolute discretion to the Advisory Committee.”).

386. See Haas, *supra* note 270, at 146-47.

387. Similar decoupling strategies have been employed by administrative agencies. See, e.g., Joel E. Hoffman, *Public Participation and Binding Effect in the Promulgation of Nonlegislative Rules: Current Developments at FDA*, ADMIN. & REG. L. NEWS, Spring 1997, at 1; McGarity, *supra* note 349, at 1386.

388. See *supra* notes 89-91.

389. See Haas, *supra* note 270, at 146-48.

390. Cf. McGarity, *supra* note 349, at 1462 (“To the extent that society needs the services that the agencies are attempting to provide, the agencies should be free to provide those services through an efficient and effective informal rulemaking process unburdened by undue fears of judicial or political reversal.”).

legitimacy with its critical constituencies.<sup>391</sup> These periodic adjustments have required some sacrifice of internal control over the rulemaking process, but the court system has been careful never to put the buffer itself at risk. In the coming years, a new challenge to the legitimacy of court-centered rulemaking—the belief that rule-makers *themselves* are inescapably biased—will test the buffer once again. This Part briefly describes the dimensions of this new challenge, and considers how the federal court system will respond.

### A. *Skepticism over Rulemaker Neutrality*

Previous challenges to the legitimacy of court-centered rulemaking have focused primarily on the amount and quality of information available to rulemaking bodies.<sup>392</sup> To be sure, there has always been a strain of philosophical objections to the general idea of “administrative expertise,”<sup>393</sup> but most observers have never seriously questioned the credentials and motivations of Advisory Committee members. However, that is beginning to change. Over the past decade, both the general public and the professional elite have increasingly expressed doubts about the ability of rulemakers to undertake their craft neutrally and without bias.

This skepticism has a broad social underpinning in the general public's current characterization of experts as elitist and aloof.<sup>394</sup> A particular disdain is shown for those experts working in the government.<sup>395</sup> For example, in a 2015 survey by the Public Religion Research Institute, 66 percent of respondents agreed that “everyday Americans understand what the government should do better than the so-called ‘experts.’”<sup>396</sup> In the same study, about one-third of respondents expressed high levels of distrust in major institutions such as the federal government, news organizations, and

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391. *See supra* tbl.1.

392. *See supra* notes 197-99 and accompanying text.

393. *See* Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425, 457 & n.184 (2011).

394. *See* TOM NICHOLS, *THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS* 218-19 (2017).

395. *See* ROBERT P. JONES ET AL., *ANXIETY, NOSTALGIA, AND MISTRUST: FINDINGS FROM THE 2015 AMERICAN VALUES SURVEY* 4, 33 (2015).

396. *Id.*

large corporations.<sup>397</sup> To distrust experts is to see them as out of touch with ordinary citizens; as Tom Nichols has observed, “citizens do not understand, or do not choose to understand, the difference between experts and elected policymakers. For many Americans, all elites are now just an undifferentiated mass of educated, rich, and powerful people.”<sup>398</sup> It is probably too much to say that expertise is an affirmative liability for policymakers, but it certainly does not warrant the deference or respect that it did a generation or two ago.<sup>399</sup>

More pointedly, in recent years, expert bodies have been accused of subsuming their expertise to partisan ends or even opening themselves to self-dealing.<sup>400</sup> The recent public battle over the composition of the five-member Federal Communications Commission is one well-known example.<sup>401</sup> Although no similar charges have yet been leveled at court-centered rulemaking bodies,<sup>402</sup> the belief that other expert bodies in the rulemaking field are merely vehicles for partisan gain is likely to have an eventual detrimental effect on the courts as well.

The most direct attacks on the neutrality of court-centered rulemaking have been clothed in the language of cognitive bias. Professor Elizabeth Thornburg, for example, has recently argued that “[n]o matter how knowledgeable and experienced Committee members may be, individually and collectively they lack the ability to arrive at first principles that do not favor one type of litigant over another.”<sup>403</sup> Thornburg accordingly rejects the characterization of

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397. See *id.* at 34; see also Russell J. Dalton, *The Social Transformation of Trust in Government*, 15 INT’L REV. SOC. 133, 134-35 (2005) (noting a steady and steep drop in trust in government institutions by the American public from the 1950s through the early 2000s).

398. NICHOLS, *supra* note 394, at 218-19.

399. See *supra* notes 210-15 and accompanying text (discussing the support for expertise in the New Deal Era).

400. See Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 918 n.9 (2010) (book review).

401. See, e.g., Jim Puzzanghera, *Trump Nominates Brendan Carr to Fill Final FCC Seat and Provide Crucial Vote on Net Neutrality Rules*, L.A. TIMES (June 29, 2017), <https://www.latimes.com/business/la-fi-fcc-brendan-carr-20170628-story.html> [<https://perma.cc/F9SY-KFS6>].

402. *But see* Burbank & Farhang, *supra* note 309, at 48 (describing a study showing that under Chief Justice Burger and his successors, “the Advisory Committee came to be dominated by federal judges appointed by Republican presidents and, among its practitioner members, by corporate lawyers”).

403. Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation*

the Advisory Committee as a “Band of Experts,” concluding that “the concept does not fit the role. Although members are intelligent and experienced, the committees fall prey to predictable cognitive traps.”<sup>404</sup> Other commentators have accused the Advisory Committee of confirmation bias, arguing that recent rules amendments reflect the personal beliefs of committee members rather than objective analyses of empirical data.<sup>405</sup> These critiques have been extended to the recent Duke-style “maxi-conferences,” which— notwithstanding their broad-based approach—have been characterized as too elite<sup>406</sup> or too dismissive of information actually presented.<sup>407</sup>

Neutrality skeptics’ proposed remedies tend to focus on altering the membership of the offending expert body.<sup>408</sup> One prescription is to change a committee’s composition (either by adding new members or replacing existing ones) to explicitly include additional perspectives, ideologies, or group identities.<sup>409</sup> Under this view, diversifying the racial, gender, ideological, or experiential makeup of a rules committee would help reduce the risk of unconscious bias or groupthink among the committee at large. A more radical reform suggestion calls for an entirely new system of appointing committee members, by diluting or removing altogether the Chief Justice’s exclusive appointment authority.<sup>410</sup> While neither proposal has yet coalesced into a serious threat to the current rulemaking framework, it is not a stretch to imagine one or both demands gaining steam in the near future.

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*Narrative*, 65 DEPAUL L. REV. 755, 756 (2016).

404. *Id.* at 792.

405. See Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1052-55 (2016); Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1119-20 (2012).

406. See, e.g., Coleman, *supra* note 405, at 1023.

407. See *id.* at 1054; Reda, *supra* note 405, at 1107-08.

408. Prescriptions tend to focus on the rulemaking body as a whole, rather than on any individual member. See Geyh, *supra* note 130, at 1211-14 (citing examples).

409. See *id.* at 1211 n.241.

410. Such a position would not be entirely new. Variants were proposed by Judge Weinstein, Professor Lesnick, and Dean Cramton nearly forty years ago. See BROWN, *supra* note 329, at 68-69, 78-79; see also Stancil, *supra* note 385, at 125-27 (exploring the dynamics of Congress appointing members of the Advisory Committee).

*B. Predicting the Federal Court System's Response*

Assuming they continue, the trends described above will force the federal court system to further reassess the balance between court-centered rulemaking's internal control and external legitimacy in the coming years. To a significant degree, the court system will be able to meet these challenges with acquiescence strategies.<sup>411</sup> Calls to diversify the membership of the Advisory Committee, for example, can be met without upsetting the larger rulemaking structure. There is no shortage of highly qualified people in every meaningful demographic who can serve with distinction on the committee.

By contrast, proposals to revoke the court system's internal authority over committee appointment would be met with considerable resistance. Perhaps the court system would concede to a transfer of power away from the Chief Justice to another internal body (say, the Judicial Conference), but it is unlikely to permit any more significant change. The reason is straightforward: allowing those outside the court system to have a hand in selecting committee members would deeply undermine the court's internal control over rulemaking, and with it, rulemaking's efficacy as a buffer.<sup>412</sup> In the face of such a proposal, one would expect the court system to respond with aggressive tactics: using boundary spanning allies to influence beliefs about the court system's structural independence, directly attacking the details of any populist proposal, or even pitting external groups against each other.<sup>413</sup> Such tactics may be costly to the court system but will be seen as justified in light of the threat to internal control.

Might the courts adopt a different approach? Alternative responses have been suggested in the literature, but none fully accounts for the federal court system's need to balance internal control and external legitimacy within the rulemaking enterprise. Lori Johnson's suggestion that committee members drop the pretense of expertise and attempt to become more savvy political advocates,<sup>414</sup> for example, directly threatens the perception of neutrality that is

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411. *See supra* note 46 and accompanying text.

412. *See supra* note 200 and accompanying text.

413. *See supra* note 47 and accompanying text.

414. *See Johnson, supra* note 52, at 36.

the foundation of the court system's organizational legitimacy.<sup>415</sup> Similarly, Charles Geyh's proposal for an Interbranch Commission on Law Reform and the Judiciary smartly recognizes the need to maintain the court system's organizational legitimacy, but the proposal overcompensates by sacrificing too much internal control over the rulemaking process.<sup>416</sup> In the end, the court system will likely adjust the structure of rulemaking only as much as needed to retain its legitimacy; if proposed changes come at too great an expense of internal control, the entire rulemaking buffer will be put at risk.

### CONCLUSION

The organizational perspective inverts the traditional view of the federal court system and its work. Administrative and rulemaking activity, tucked safely behind adjudication in the traditional view as a second-order function of the courts, emerge in the organizational view as much more forceful mechanisms for assuring the court system's well-being. Adjudication still lies at the technical core of the courts' operations, but its competence, efficiency, and independence depend on the success of the organization's non-adjudicative tasks.

This perspective offers much-needed context to contemporary studies of court-centered rulemaking. It clarifies the importance of rulemaking to the federal court system's identity and broader agenda. It also provides a foundation for future explorations into rulemaking's cognitive dynamics. Questions regarding group decisionmaking, cognitive bias, use of empirical data, public participation, judicial review, and other aspects of rulemaking are improved by explicitly accounting for the rich organizational context in which rulemakers operate. Finally, the organizational view reminds us that the federal court system, like any public organization, responds to identifiable external pressures in predictable ways. Recognizing those pressures can promote a more complete assessment of court-centered rulemaking's past and a more realistic discussion of its future.

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415. See *supra* notes 33-35 and accompanying text.

416. See Geyh, *supra* note 130, at 1234.