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Winter 1986

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## PROPOSALS TO AMEND RULE 68— TIME TO ABANDON SHIP†

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Stephen B. Burbank\*

It is no surprise that, having included “facilitating the settlement of the case” as one of the objectives of pretrial conferences in the 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure,<sup>1</sup> the Advisory Committee has turned its attention to Rule 68. The Rule was intended to provide an incentive to settle by requiring that a prevailing claimant who has declined a more favorable offer of judgment pay post-offer “costs.”<sup>2</sup> But, in the Advisory Committee’s view, Rule 68 has proved ineffective.<sup>3</sup> The concern, apparently, is not that too few civil cases filed in fed-

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1. FED. R. CIV. P. 16(a)(5). See also FED. R. CIV. P. 16(c)(7); *infra* note 12.
2. FED. R. CIV. P. 68 (“Offer of Judgment”) provides in pertinent part:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. . . .

3. The Committee states:

The principal reasons for the rule’s past failure have been (1) that “costs,” except in rare instances in which they are defined to include attorney’s fees . . . are too small a factor to motivate parties to use the rule; and (2) that the rule is a “one-way street,” available only to those defending against claims and not to claimants. Moreover, some parties defending against claims for money are inclined to delay making otherwise acceptable offers until trial so that in the interim they may have the use at favorable interest rates of funds that otherwise would have been available to the offeree under an offer accepted at an earlier time.

Proposed FED. R. CIV. P. 68 advisory committee note, 98 F.R.D. 363-64 (1983); proposed FED. R. CIV. P. 68 advisory committee note, 102 F.R.D. 433-34 (1984). For an economic analysis of present Rule 68, developing theoretical explanations for the Rule’s marginal effectiveness, see Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93 (1986).

eral court are settled—less than seven percent of filed cases go to trial—but, rather, that they are not settled promptly, entailing expense and delay for both the federal courts and the parties.<sup>4</sup> Accordingly, the Advisory Committee has proposed to “put teeth into”<sup>5</sup> Rule 68, withdrawing its initial 1983 proposal in the face of criticism and substituting a 1984 proposal designed to blunt the force of that criticism.<sup>6</sup> No surprise, perhaps, but some of the rulemakers’ basic premises in proposing amendments to Rule 68 are questionable. The burden of this comment, however, lies elsewhere. Both formal legal analysis and the politics of court rulemaking counsel that the Committee, having changed course, should now abandon ship.

As to the rulemakers’ premises, the Chairman and Reporter of the Advisory Committee have asserted:

Surveys over the last seven years reveal that our nation’s traditional dispute-resolution system is ill, principally due to excessive delays and spiralling costs, often out of all proportion to the amounts at stake or the issues being litigated. Public complaints are too loud to be ignored. No longer is middle-income America the sole complainant. Bar associations and corporate business enterprises have joined the demand for better and less expensive ways of resolving their disputes. If lawyers and courts are to avoid public distrust of the system, changes are essential. . . . The proposed amendments of Rule 68 are part of an effort to meet public demand.<sup>7</sup>

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4. The Chairman and Reporter of the Advisory Committee explained:

The Advisory Committee recognizes that, although 93% of all civil cases in federal courts never go to trial, the great majority of those settled are not disposed of until shortly before trial, after long delays and excessive expense. The objective of the rule should be to induce parties to talk settlement seriously at an early stage and dispose of cases then. Early settlement would also give a claimant timely use of the funds received . . . .

W. Mansfield & A. Miller, Proposed Amendment of Rule 68: Background Memorandum 3 (Apr. 15, 1984) [hereinafter cited as Background Memorandum] (copy on file with U. MICH. J.L. REF.).

Although one may accept the Advisory Committee’s claim that the goal of the proposals to amend Rule 68 is not to induce more settlements, that might well be their effect if implemented. See *infra* text accompanying note 59.

5. Background Memorandum, *supra* note 4, at 5.

6. See letter from Hon. Walter R. Mansfield [then Chairman of the Advisory Committee] to the Committee on Rules of Practice and Procedure (Aug. 1984), 102 F.R.D. 423, 424 (1984) [hereinafter cited as Mansfield letter]; Background Memorandum, *supra* note 4, at 1. The 1984 proposal is reproduced *infra* note 20.

7. Background Memorandum, *supra* note 4, at 1-2 (footnote omitted).

Rejecting the alternative that nothing be done to amend Rule 68, the Chairman and Reporter have reasoned: "This course . . . ignores the public's demand for some means of reducing excessive expense and delay in the use of federal courts as the traditional dispute-resolution mechanism. It would force people to resort to some other, less reliable methods such as arbitration."<sup>8</sup>

There is much of interest here. An historian of American procedure would note the persistence of reform rhetoric, including the emphasis on bar associations and corporate business enterprises.<sup>9</sup> An historian would also be interested in the persistence of hostility to arbitration.<sup>10</sup> But no interest in history is needed to ask whether the rulemakers have accurately perceived or described the problem of expense and delay in the federal courts,<sup>11</sup> or why settlement is among the "better and less expensive ways of resolving . . . disputes" while arbitration is not.<sup>12</sup> Moreover, one need not fully embrace Professor Fiss' eloquent plea against settlement to wonder with him whether, "although dockets are trimmed, justice may not be done."<sup>13</sup>

In the 1983 proposed amendments to Rule 68, the Advisory Committee sought a more effective incentive for parties to settle cases promptly by making the proposed Rule available to all parties, adding expenses and reasonable attorney's fees to the

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8. *Id.* at 8.

9. See, e.g., Shelton, *Uniform Judicial Procedure Will Follow Simplification of Federal Procedure*, 76 *CENT. L.J.* 207 (1913); Taft, *The Attacks on the Courts and Legal Procedure*, 5 *KY. L.J.* (No. 2) 3, 10-24 (1916). See generally Graham, *The Persistence of Progressive Proceduralism* (Book Review), 61 *TEX. L. REV.* 929 (1983). For a discussion of contemporary reform rhetoric, see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 6-11, 61-69 (1983).

10. As to disputants being "forced" to resort to arbitration, see, e.g., Taft, *The Delays of the Law*, 18 *YALE L.J.* 28, 31 (1908); Shelton, *Uniformity of Judicial Procedure and Decision*, 22 *THE LAW STUDENT'S HELPER* (No. 10) 5, 8 (1914); Shelton, *The New Era of Judicial Relations*, 23 *CASE & COM.* 388, 389-90 (1916).

11. Not everyone accepts at face value the rulemakers' assertion that "enormous delay and expense . . . marks [sic] dispute resolution in most federal courts." Mansfield letter, *supra* note 6, 102 *F.R.D.* at 423. See, e.g., Silverstein & Rosenblatt, *A Square Peg in a Round Hole: The Application of Rule 68 to Awards of Attorney's Fees in Civil Rights Litigation*, 16 *CONN. L. REV.* 949, 965 (1984); see also Levin & Colliers, *Containing the Cost of Litigation*, 37 *RUTGERS L. REV.* 219 (1985); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 *UCLA L. REV.* 72 (1983).

12. In addition to including "facilitating the settlement of the case" as one of the objectives of pretrial conferences, Rule 16, as amended in 1983, includes "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute" among the subjects to be discussed at pretrial conferences. *FED. R. CIV. P.* 16(c)(7). Those in whose path the writers of the memorandum were following, although distrusting arbitration, thought that it had promise as a means of reducing burdens on the courts in certain classes of cases. See, e.g., Taft, *supra* note 10, at 36-38.

13. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1075 (1984).

costs that are shifted, and providing for an award of interest.<sup>14</sup> Opponents of that proposal claimed that it would violate the Rules Enabling Act,<sup>15</sup> that it was inconsistent with a variety of federal statutes that permit an award of attorney's fees to a prevailing party, and that it would deter impecunious and contingent-fee plaintiffs from seeking relief.<sup>16</sup>

The Chairman of the Standing Committee on Rules cited the widespread interest in the 1983 proposal as evidence of the adequacy of published rulemaking procedures.<sup>17</sup> The question remained for the rulemakers, however: what to do? The rulemakers knew that, if they persisted, they could expect continuing and determined opposition.<sup>18</sup> That opposition could result in congressional action to block the proposed amendments if they were prescribed by the Supreme Court. Moreover, continuing controversy over Rule 68 could only strengthen the hand of those seeking to amend the enabling acts.<sup>19</sup> In a rational world, the decision to scrap the effort or to proceed would have depended on the rulemakers' ability to make a persuasive response to their critics and on an informed sense of the political climate. The rulemakers did proceed, and we have a basis for evaluating that decision from both perspectives.

Whereas the 1983 proposal retained the mandatory cost-shifting aspect of the existing Rule, adding expenses and reasonable attorney's fees to "costs," with discretion in the judge to grant a reprieve, the 1984 proposal invokes the language of "sanctions."<sup>20</sup> What is in a word? A lot in this case, because that word

14. See proposed FED. R. CIV. P. 68 & advisory committee note, 98 F.R.D. 361-67 (1983); Background Memorandum, *supra* note 4, at 3-4.

15. 28 U.S.C. § 2072 (1982).

16. See Mansfield letter, *supra* note 6, 102 F.R.D. at 424; Background Memorandum, *supra* note 4, at 5-7; see also Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719 (1984).

17. See *Hearings on Rules Enabling Act (Oversight and H.R. 4144) Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. 117-18 (1983-84) [hereinafter cited as *Rules Enabling Act Hearings*]. For the rulemaking procedures, see *id.* at 112-15; 98 F.R.D. 389-93 (1983). They were a long time in coming, see Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1021 n.17 (1982), and credit may be due to previously expressed legislative interest. See 129 CONG. REC. H8031 (daily ed. Oct. 18, 1983).

18. After the Chairman and Reporter of the Advisory Committee came up with the alternative that, as revised in minor particulars, was eventually published as the 1984 proposal, a meeting was held with some of those who had opposed the 1983 proposal. Opposition persisted. Telephone conversation with Burt Neuborne, Legal Director, American Civil Liberties Union (Sept. 20, 1985).

19. See, e.g., *Rules Enabling Act Hearings*, *supra* note 17, at 133-48 (statement of Burt Neuborne); 130 CONG. REC. H4104 (daily ed. Oct. 1, 1984).

20. RULE 68. OFFER OF SETTLEMENT; SANCTIONS

At any time more than 60 days after the service of the summons and complaint

carries with it baggage the rulemakers hope will insulate them from their critics. Various Federal Rules of Civil Procedure authorize the award of attorney's fees as a sanction for abuse of the litigation process.<sup>21</sup> The 1984 proposal represents an attempt to embrace that model, with the assurance of rulemaking validity that it inspires,<sup>22</sup> rather than the model of fee-shifting, with

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on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a[n] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

In determining the amount of any sanction to be imposed under this rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

Proposed FED. R. CIV. P. 68, 102 F.R.D. 432-33 (1984).

21. See, e.g., FED. R. CIV. P. 11, 16(f), 26(g), 37(b).

22. The Chairman of the Advisory Committee has noted:

Our Committee, without taking any position regarding the validity of these objections [to the 1983 proposal], believes that they are met by the present proposal, which is clearly procedural and does not provide for attorney's fee shifting but authorizes imposition of a sanction based on the creation of unnecessary delay and needless increase in the cost of litigation.

Mansfield letter, *supra* note 6, 102 F.R.D. at 424. See also proposed FED. R. CIV. P. 68 advisory committee note, 102 F.R.D. 436 (1984); W. Mansfield, Memorandum Re: Whether the Proposed "Attorneys' Fee" Amendment of Rule 68 Complies with the Rules Enabling Act, 28 U.S.C. § 2072, at 4-6 (June 14, 1983) [hereinafter cited as Enabling Act Memorandum] (copy on file with U. MICH. J.L. REF.).

its troubling jurisprudence and the problems created by existing fee-shifting statutes.<sup>23</sup>

In addition, the rulemakers have moved from the mandatory scheme of the existing rule, largely retained in the 1983 proposal, to a proposal conferring discretion on the trial judge (1) whether to impose a sanction and (2) how much of a sanction to impose. The 1984 proposal circumscribes that discretion by enumerating considerations appropriate to each aspect of the decision.<sup>24</sup> Formally mandatory sanctions were a cornerstone of the 1983 amendments to Rules 11 and 26.<sup>25</sup> In formulating the 1984 proposal to amend Rule 68, the rulemakers recognized that compromise on that score was a useful, if not a necessary, response to critics of the 1983 proposal. It remains to be seen whether the response is sufficient.

Relatively few Supreme Court cases provide guidance on the validity of a Federal Rule of Civil Procedure. *Hanna v. Plumer*<sup>26</sup> tells us that a Rule is *constitutional* if it is "rationally capable of classification"<sup>27</sup> as procedural or, in Justice Harlan's caricature of the Court's test, if it is "arguably procedural."<sup>28</sup> In other words, if a purpose—or perhaps only effect—of a Rule is to order the process of litigation in federal courts, it is within the constitutional power of Congress, delegated for these purposes to the Court. This constitutional test, together with the Court's language in *Hanna* erecting a presumption of validity for Federal Rules,<sup>29</sup> has for almost twenty years been the first resort of

23. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Analytically, *Alyeska* is only marginally relevant, if it is relevant at all, because it concerned the allocation of lawmaking power between the federal courts adjudicating cases and controversies and Congress. But many have argued that *Alyeska* also speaks to the allocation of prospective lawmaking power concerning attorney's fees as between the Supreme Court and Congress. See, e.g., *Marek v. Chesny*, 105 S. Ct. 3012, 3032 (1985) (Brennan, J., dissenting). For problems created by existing fee-shifting statutes, see *infra* text accompanying notes 53-61, 73-75.

24. See *supra* note 20. The 1983 proposal did grant some discretion to the trial judge.

25. See FED. R. CIV. P. 11, 26(g); see also Burbank, *Sanctions in The Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1009-10 (1983).

26. 380 U.S. 460 (1965) (holding that FED. R. CIV. P. 4(d)(1) is pertinent and valid in a diversity action).

27. *Id.* at 472.

28. *Id.* at 476 (Harlan, J., concurring).

29. The Court in *Hanna* reasoned:

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

the rulemakers in responding to arguments that a Rule or proposed Rule is invalid. Unfortunately, it has usually also been their last resort, and the resulting errors in analysis support the view that the rulemakers simply do not care about legal limitations on the rulemaking enterprise.<sup>30</sup> Thus, in their memorandum responding to critics of the 1983 proposal to amend Rule 68, the Chairman and Reporter of the Advisory Committee stated:

Whether the August 1983 proposals exceed the Committee's powers under the Rules Enabling Act . . . is an issue that can be debated ad nauseam without reaching a clear-cut resolution. The Supreme Court has noted the absence of any bright line between "procedure" and "substantive right" as those terms are used in § 2072. . . . In *Hanna* the Court took the view that a federal rule should be treated as presumptively procedural and upheld as such if it is "rationally capable of classification" as procedural or is "arguably procedural."<sup>31</sup>

This analysis is wrong and wrong-headed. It is wrong because the Court in *Hanna* did not intend its constitutional test to do double duty, so that if it is satisfied, one need not even inquire about validity under the Rules Enabling Act.<sup>32</sup> It is wrong-headed because central to the Court's presumption of validity was the premise that the rulemakers take questions of power seriously.<sup>33</sup> Whatever one may think of that presumption in the context of adjudication, it has no proper place in the context of rule *formulation*.<sup>34</sup> Both the Supreme Court and Congress have a right to expect more of those to whom primary responsibility for rulemaking has been entrusted.<sup>35</sup>

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*Id.* at 471 (footnote omitted).

30. See Burbank, *supra* note 17, at 1132-37, 1194-95.

31. Background Memorandum, *supra* note 4, at 7 (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1972); 380 U.S. at 476 (Harlan, J., concurring)).

32. See 380 U.S. at 464-65, 469-74; Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 720 (1974); Burbank, *supra* note 17, at 1034.

33. See *supra* note 29. But see *United States v. Abel*, 105 S. Ct. 465, 468 (1984) ("[W]e are in truth merely a conduit when we deal with an undertaking as substantial as the preparation of the Fed. Rules of Evid.").

34. See Burbank, *supra* note 17, at 1132-37, 1155, 1178-79, 1195-96.

35. If the question of the 1983 proposal's validity was as close as subsequently represented, see *supra* text accompanying note 31, it is doubtful that those who shaped the Enabling Act would have countenanced its publication.

Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision [the Rules Enabling Act] in such a way that it will not have the effect of an attempt to delegate to the

In fairness, the Court in *Hanna* provided very little guidance on the Enabling Act's limitations, indicating continuing willingness to adhere to the "test" set forth in *Sibbach v. Wilson & Co.*<sup>36</sup> "The test [of validity under the Enabling Act] must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."<sup>37</sup> But, if only because *Sibbach's* language contains so little determinative content and has hardly been elaborated since 1941, it holds the potential for a narrowing construction by a court so inclined.<sup>38</sup> For example, if one shared Professor Fiss' view of settlement generally and noted that the 1984 proposal is intended to discourage court involvement in the process of settlement,<sup>39</sup> one might question whether the proposed Rule "really regulates . . . the judicial process for enforcing rights and duties" or is not, rather, designed precisely to abort that process.<sup>40</sup>

Rulemakers and commentators have long taken comfort in the notion asserted by the Chairman of the Advisory Committee in 1983 that "[t]here is precious little legislative history bearing on the Enabling Act, and the legislative history with respect to the 'substantive rights' proviso is virtually nonexistent."<sup>41</sup> On the contrary, there is an uncommonly rich legislative history, including hearings and detailed reports on a bill that, in all material respects, was identical to the bill enacted in 1934. That history reveals a purpose in the procedure/substance dichotomy to allo-

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courts what is in reality a legislative function.

S. REP. NO. 1174, 69th Cong., 1st Sess. 11 (1926) [hereinafter cited as 1926 SENATE REPORT]. See Burbank, *supra* note 17, at 1120.

36. 312 U.S. 1 (1941) (rejecting a challenge to the validity of FED. R. CIV. P. 35); see *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965) (quoting *Sibbach*).

37. *Sibbach*, 312 U.S. at 14.

38. See Burbank, *supra* note 17, at 1029 n.59, 1033 n.71, 1195.

39. See *supra* note 20.

40. See Fiss, *supra* note 13, *passim*. I do not believe this argument is only a play on words, although *Sibbach's* mumbo-jumbo certainly encourages word play. Other Federal Rules that "regulate" the process described by the Court in *Sibbach* by cutting it short contemplate sanctions for failure to abide by Rules and orders in aid of adjudication, see, e.g., FED. R. CIV. P. 41(b), or formal determinations that a party has no legal right to proceed. See, e.g., FED. R. CIV. P. 12(b), 12(c), 56. But cf. FED. R. CIV. P. 16(a)(5) and 16(c)(7), which are not, however, by their terms coercive. Rules providing for mandatory arbitration provide a good counter. But they are not Federal Rules, and local rules so providing have been vigorously challenged. See Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 544-45 (1985).

41. Enabling Act Memorandum, *supra* note 22, at 3 (citations omitted); see also Burbank, *supra* note 17, at 1023-25.

cate federal lawmaking power between the Supreme Court as rulemaker and Congress, and provides a basis for limitations on rulemaking that is consistent with congressional purpose.<sup>42</sup>

Under standards derived from the history of the Enabling Act, it is not clear that the 1984 proposal is invalid. The key here is discretion. Because it confers substantial discretion on the trial judge, the proposed Rule might not be thought to have a predictable and direct effect on rights claimed under the substantive law, such as the right to be free from discrimination in employment.<sup>43</sup> But there is evidence that those in Congress who drafted and gave serious attention to the bill that became the Enabling Act did not regard substantive law in this sense as the only area to be avoided in or protected from supervisory court rulemaking. The 1926 Senate Judiciary Committee noted that “[s]ome of our most valued civil liberties have been obtained through the creation by legislative edict of mere remedial measures.”<sup>44</sup> In its view, the grant of rulemaking power did not extend to “matters involving substantive legal and remedial rights affected by the considerations of public policy.”<sup>45</sup> The Committee included in the category of remedial choices thus reserved for Congress those that “define[] or limit[] . . . civil rights . . . using that term in its broad sense.”<sup>46</sup> Viewed in the light of this history, the 1984 proposal confronts serious difficulty. Animating some statutory attorney’s fees provisions, notably in the civil rights area, is Congress’ conviction that the vindication of substantive rights is inextricably linked to arrangements for fees.<sup>47</sup> Even if the 1984 proposal were not thought to make

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42. See Burbank, *supra* note 17, at 1035-1131. The Solicitor General’s *amicus curiae* brief in *Marek v. Chesny*, 105 S. Ct. 3012 (1985), alerted the Court to the existence of this research. Brief for the United States as Amicus Curiae Supporting Petitioners at 25-26 n.19. But the Court sidestepped the Enabling Act question; see *infra* text accompanying note 67. Had the Court confronted the Enabling Act issue in *Marek*, it would have been hard pressed to adhere to its previous interpretations. *Sibbach* and *Hanna* formulated the Act’s procedure/substance dichotomy on the assumption that Congress was concerned about the protection of state law. *Marek* involved only questions of the allocation of federal lawmaking power.

43. See Burbank, *supra* note 17, at 1121-31; Burbank, *supra* note 25, at 1007-10.

44. 1926 SENATE REPORT, *supra* note 35, at 12.

45. *Id.* at 9. See Burbank, *supra* note 17, at 1121, 1125-31.

46. 1926 SENATE REPORT, *supra* note 35, at 10 (quoting 3 REPORT OF THE BOARD OF STATUTORY CONSOLIDATION ON THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF NEW YORK 477 (1915)). See Burbank, *supra* note 17, at 1121-22, 1125-31.

47. The Senate Judiciary Committee Report on the bill that became 42 U.S.C. § 1988 (1982) observed:

All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these

choices, because it is discretionary, it would nonetheless lead to alteration of Congress' arrangements in a predictable class of cases.<sup>48</sup>

This is 1986, not 1934, and whatever view one takes of the relevance or implications of the Enabling Act's history, we need an interpretation of the statute that is adequate for present needs and conditions. It is important but not sufficient to protect existing "substantive legal and remedial rights."<sup>49</sup> In addition, attention should be paid to Congress' basic purpose to allocate federal lawmaking power. When federal lawmaking is proposed that necessarily and obviously requires a choice between policies that relate to the process of litigation and policies that are extrinsic thereto, the choice should reside with Congress. The concern is that

if the rulemakers are left to make choices in such areas, and whatever the purpose of the [procedure/substance] dichotomy, they will choose to advance those policies that are their special province and to subordinate those that are not. To say Congress is likely to evince a similar bias in the other direction is not an answer, whether the concern is allocation of powers or federalism.<sup>50</sup>

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laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S. REP. No. 1011, 94th Cong., 2d Sess. 2 (1976) [hereinafter cited as S. REP. No. 1011].

Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. . . . Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. . . . This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce . . . Federal rights . . . .

*Id.* at 5 (citations omitted).

48. See *infra* text accompanying notes 53-61, 71-72; see also Testimony of the Alliance for Justice on the 1984 Proposal to Amend Rule 68, at 23-29 (Jan. 28, 1985), reprinted in *Rules Enabling Act of 1985: Hearing on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 99th Cong., 1st Sess. 132-42 (1985) [hereinafter cited as *1985 Rules Enabling Act Hearing*] (suggesting that statutory attorney's fees provisions confer a substantive right within the meaning of the Enabling Act).

49. See *supra* text accompanying note 45.

50. Burbank, *supra* note 17, at 1191-92 (footnotes omitted).

Lest it be thought that this is merely an academic concern, consider the rest of the response by the Chairman and Reporter of the Advisory Committee to objections made to the 1983 proposal to amend Rule 68:

In response to the contention that the proposed amendments conflict with Congress' intention to encourage private enforcement of certain laws by providing an award of attorney's fees to the "prevailing party," it should be noted that the Supreme Court has construed such laws as permitting an award of attorney's fees in favor of a defendant against a plaintiff who prosecutes an action that is "frivolous, unreasonable, or without foundation" . . . . *Although rejection of an offer of settlement cannot be so characterized, Congress might well view promotion of settlement by award of fees as something to be encouraged, particularly when the rejection is unreasonable under the circumstances.*

The contention that the proposed amendments would deter impecunious and contingent-fee plaintiffs from seeking relief from the court is *somewhat exaggerated*. On the opposite side of the ledger is the enormous unnecessary legal expense that must be incurred by defendants as a result of rejection of reasonable offers, following which the plaintiff either settles for the identical amount on the eve of trial or recovers less or nothing after trial. Some consideration must be given to the party who is hurt financially by such conduct.<sup>51</sup>

Whether one considers this response in the context of reinterpreting the Enabling Act or, passing questions of power, in the context of rulemaking prudence, it is obvious that at least one range of policies implicated in this lawmaking calculus is far removed from the domain of procedural expertise.<sup>52</sup>

From either the power or prudence perspective, the 1984 proposal presents a closer question than its predecessor. That proposal, however, has not wholly eschewed choice, either of policy or of the means to implement it. Rather, the rulemakers have determined that, in some circumstances, the means chosen by Congress to advance its policy choices in various attorney's fees statutes should be displaced in order to advance the policy of

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51. Background Memorandum, *supra* note 4, at 7-8 (emphasis added).

52. *Cf.* Burbank, *supra* note 25, at 1011 (policies implicated in decisions about sanctions for litigation conduct).

avoiding expense and delay. Put another way, the 1984 proposal would redefine the relevant policies and would empower federal judges to reach compromises different from those reached by Congress.

When Congress determines that (1) a prevailing plaintiff ought ordinarily to recover attorney's fees from the defendant, as a means to stimulate the enforcement of substantive norms and the vindication of substantive rights,<sup>53</sup> and that (2) a prevailing defendant ought not ordinarily to recover such fees from the plaintiff, lest plaintiffs with plausible claims be deterred from asserting them,<sup>54</sup> Congress is making choices. Moreover, they are choices that are informed by an awareness of distributional inequalities—the effect of which is inevitably to prevent many defendants from recouping moneys spent on “unnecessary legal expense.”<sup>55</sup> The Advisory Committee apparently takes the view that the Enabling Act authorizes a rule empowering federal judges to displace the second means chosen by Congress to achieve its policy objectives, so long as the first is preserved and so long as the sanction label can be applied to the means chosen by the Advisory Committee to pursue *its* policy objectives.<sup>56</sup> The Committee's reliance on the trial judge's discretion to “assure that sanctions under this rule do not frustrate the various policies of the statutes”<sup>57</sup> provides little comfort.<sup>58</sup> Although the 1984 proposal might not deter potential plaintiffs from bringing actions, risk aversion as a result of their lack of resources and uncertainty on the sanctions question might very well induce them to accept settlement offers they reasonably deemed inadequate.<sup>59</sup> The perception of this problem alone warrants rejection of both the Advisory Committee's implicit premise that settlement is an adequate substitute for adjudication,<sup>60</sup> and its specu-

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53. See, e.g., S. REP. NO. 1011, *supra* note 47, at 4; *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968).

54. See, e.g., S. REP. NO. 1011, *supra* note 47, at 5; *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

55. See *supra* text accompanying note 51.

56. See proposed FED. R. CIV. P. 68 advisory committee note, 102 F.R.D. 436 (1984).

57. *Id.*

58. See Silverstein & Rosenblatt, *supra* note 11, at 964; *cf.* Note, *supra* note 16, at 731-33 (discretion under the 1983 proposal).

59. *Cf.* Fiss, *supra* note 13, at 1076 & n.12 (effect of 1983 proposal on distributional inequalities). See generally Rowe, *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter, 1984, at 139, 164-70.

60. See Silverstein & Rosenblatt, *supra* note 11, at 960-61; Note, *supra* note 16, at 740. The problem of distributional inequalities is not the only reason to reject the premise. See also Fiss, *supra* note 13.

lation that Congress would so regard it.<sup>61</sup>

When a Federal Rule confers substantial discretion on the trial judge, it is hard to understand why an exercise of that discretion should not be required to be consistent with federal statutes—that is, treated like federal common law.<sup>62</sup> For the present, of course, Congress must take the distinction very seriously, because, unlike a federal common law rule, a valid Federal Rule supersedes a previously enacted federal statute with which it is inconsistent.<sup>63</sup> This was not the problem in *Marek v. Chesny*,<sup>64</sup> which involved the interplay of existing Rule 68 with a subsequently enacted statute.<sup>65</sup> Moreover, for those who, in considering or reconsidering the 1984 proposal, are inclined to take comfort from the Court's decision in *Marek*,<sup>66</sup> it is worth noting some other obvious distinctions. The majority opinion in that case, holding that the "costs" to which Rule 68

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61. See *supra* text accompanying note 51; Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 839 n.58 (1985); see also Miller, *supra* note 3, at 106-08.

Professor Redish has aptly pointed out:

Usually, the federal courts have been provided jurisdiction for a purpose, and any reduction in either their jurisdiction or in litigant access to the courts will itself impose a cost. Moreover, if one myopically focuses upon the administrative dangers caused by docket size, one is likely to accept most judicial attempts to curb those dockets, for the very reason that they have that effect.

Redish, Book Review, 85 COLUM. L. REV. 1378, 1386 (1985).

62. See Burbank, *supra* note 17, at 1193 & nn. 762-63; cf. *Ilro Prod. Ltd. v. Music Fair Enters.*, 94 F.R.D. 76, 79 (S.D.N.Y. 1982) (local rule).

63. See 28 U.S.C. § 2072 (1982). Representative Kastenmeier's most recent bills to amend the enabling acts specifically prohibit supersession. H.R. 2633, 99th Cong., 1st Sess. § 2(a) (1985), reprinted in *1985 Rules Enabling Act Hearing*, *supra* note 48, at 95; H.R. 3550, 99th Cong., 1st Sess. § 2(a) (1985), reprinted in *1985 Rules Enabling Act Hearing*, *supra* note 48, at 104. I support that decision because of doubt that general supersession provisions entail substantial practical benefits after the 1948 revision of the Judicial Code, conviction that they entail substantial practical costs by putting pressure on Congress to block proposed Federal Rules, and concern that they are unconstitutional under *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983). See Prepared Statement of Stephen B. Burbank Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm. 2-7 (June 6, 1985), reprinted in *1985 Rules Enabling Act Hearing*, *supra* note 48, at 8-13; see also letter from Stephen B. Burbank to David Beier, Esq. (Sept. 20, 1985), reprinted in *1985 Rules Enabling Act Hearing*, *supra* note 48, at 280-82 (arguing that notions of "inherent judicial power" are an impediment to clear thinking in this context and suggesting a distinction between general supersession provisions and supersession provisions that identify the statutes to be superseded).

The House of Representatives passed H.R. 3550 on December 9, 1985. 131 CONG. REC. H11,399 (daily ed. Dec. 9, 1985).

64. 105 S. Ct. 3012 (1985).

65. The statute at issue in *Marek* was the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1982)).

66. See Miller, *Justices Again Focused on Jurisdiction and Fees*, NAT'L L.J., Sept. 2, 1985, at S-16.

refers include attorney's fees awardable under 42 U.S.C. § 1988, does not mention the Enabling Act.<sup>67</sup> Further, even assuming the majority's analysis is intended, *sub silentio*, to address the issue,<sup>68</sup> that analysis simply does not reach the 1984 proposal to amend Rule 68. It is one thing to conclude, in the case of a prevailing civil rights plaintiff who has refused a more favorable settlement offer, that the denial of that party's own post-offer attorney's fees is consistent with section 1988 and does not violate the Enabling Act.<sup>69</sup> It is quite another matter to conclude that, under the Enabling Act,<sup>70</sup> a Federal Rule can validly empower a federal judge to order (1) a prevailing civil rights plaintiff to pay the defendant's attorney's fees or (2) a losing civil rights plaintiff whose suit or its continuation was not "frivolous, vexatious or . . . for harassment purposes"<sup>71</sup> to pay the prevailing defendant's attorney's fees.<sup>72</sup>

Finally, even though the Enabling Act's supersession provision renders consistency with federal statutes irrelevant as such, that question would likely be of interest to Congress if the 1984 proposal to amend Rule 68 were laid before it. According to the

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67. See *Marek v. Chesny*, 105 S. Ct. 3012, 3014-18 (1985). Compare *id.* at 3031-32 (Brennan, J., dissenting) (addressing the Enabling Act question).

68. Judge Posner's opinion for the Court of Appeals included the alternative holding that, interpreted to include attorney's fees as "costs" in a case governed by 42 U.S.C. § 1988 (1982), Rule 68 would violate the Enabling Act. *Chesny v. Marek*, 720 F.2d 474, 479 (7th Cir. 1983), *rev'd*, 105 S. Ct. 3012 (1985).

69. The questions are analytically distinct. See *infra* note 70. In *Marek*, however, § 1988, the statute with which Rule 68, interpreted to include attorney's fees, was claimed to be inconsistent, was also the claimed source of substantive rights. In my view, the Court was probably correct in holding that "costs" as used in Rule 68 includes attorney's fees where a statute so provides. See letter from William D. Mitchell to Hon. Charles E. Clark (Oct. 13, 1937) (Charles E. Clark Papers, Yale University Library, box 111, folder 58). Moreover, in light of the Court's cases tying the award of attorney's fees under § 1988 to "the degree of success obtained," *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), there was no necessary inconsistency between Rule 68 and the statute, and similarly no necessary abridgment or modification of substantive rights—assuming rights to attorney's fees are such. See Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889, 903-05 (1984). The problem from both perspectives is that Rule 68 is mandatory, while an award of fees under § 1988 is discretionary. See *Marek v. Chesny*, 105 S. Ct. 3012, 3028 (1985) (Brennan, J., dissenting). When Rule 68 would deny a plaintiff post-offer attorney's fees to which he would otherwise be entitled under § 1988, as interpreted in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and other cases, the latter should control.

70. Assuming the constitutionality of the supersession provision in 28 U.S.C. § 2072, but see *supra* note 63, an amendment to Rule 68 need not be consistent with previously enacted statutes, unless those statutes make choices reserved to Congress under the Enabling Act that would be affected by the amendment.

71. S. REP. NO. 1011, *supra* note 47, at 5.

72. See *supra* text accompanying notes 43-48, 53-61; see also *Marek v. Chesny*, 105 S. Ct. 3012, 3023-24 (1985) (Brennan, J., dissenting).

Court in *Marek*, in considering section 1988, Congress sought to ensure "that civil rights plaintiffs obtain 'effective access to the judicial process'"<sup>73</sup> and was concerned that they "not be penalized for 'helping to lessen docket congestion' by settling their cases out of court."<sup>74</sup> Under the 1984 proposal, it is foreseeable that, because of distributional inequalities and the uncertainty bred by the large discretionary element in the proposal, some civil rights plaintiffs would feel compelled to accept inadequate settlement offers. Surely Congress would notice what had happened to "effective access to the judicial process." And surely Congress would remark how its concern that civil rights plaintiffs not be penalized for settling had been twisted into a warrant to penalize them for not settling.<sup>75</sup>

Legislation introduced by Representative Kastenmeier to amend the enabling acts has been chiefly directed to process reforms.<sup>76</sup> But, in introducing one of his bills, Representative Kastenmeier made clear his beliefs that the 1983 proposal to amend Rule 68 "would have crossed the line from procedural to substantive,"<sup>77</sup> and that "Congress conferred a substantive right by enacting the Civil Rights Attorney Fee Award Act."<sup>78</sup> Given the weakness of the rulemakers' response to objections prompted by the 1983 proposal, including both their analysis of those objections and the alternative proposed in 1984, the decision to proceed was a mistake. The question remains whether, recognizing that it would be possible to amend Rule 68 in ways that did not raise serious questions about validity or inconsistency with statutes,<sup>79</sup> the Committee should again change course. Unfortu-

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73. *Marek v. Chesny*, 105 S. Ct. 3012, 3017 (1985) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) and H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976)).

74. *Id.* at 3018 (quoting H.R. REP. NO. 1553, 94th Cong., 2d Sess. 7 (1976)).

75. The pressure on Congress to block a proposed Federal Rule promulgated by the Supreme Court because it is inconsistent with a federal statute is one of the costs of general supersession provisions. *See supra* note 63.

76. *See* H.R. 6344, 98th Cong., 2d Sess. (1984); H.R. 2633, 99th Cong., 1st Sess. (1985); H.R. 3550, 99th Cong., 1st Sess. (1985); *supra* note 63. *But see* H.R. REP. NO. 422, 99th Cong., 1st Sess. 20-23 (1985) [hereinafter cited as 1985 HOUSE REPORT] (limitations on supervisory court rulemaking).

77. 130 CONG. REC. H4104 (daily ed. Oct. 1, 1984).

78. *Id.* at 4105 n.3. The Act was there cited as an example of a statutory provision not subject to supersession by a Federal Rule. *See also* 1985 HOUSE REPORT, *supra* note 76, at 13. A task force for which the Reporter of the Advisory Committee also served as reporter recently concluded that "fees represent a substantive right created by Congress that should not be compromised." COURT AWARDED ATTORNEY FEES, REPORT OF THE THIRD CIRCUIT TASK FORCE 22 (1985), reprinted in 108 F.R.D. 237, 256 (1986).

79. Indeed, many features of both the 1983 and 1984 proposals are of this type. *See* proposed FED. R. CIV. P. 68 & advisory committee note, 98 F.R.D. 361-67 (1983); proposed FED. R. CIV. P. 68 & advisory committee note, 102 F.R.D. 432-37 (1984).

nately, the experience to date suggests that, where Rule 68 is concerned, the Committee has great difficulty limiting its agenda. That experience also suggests that any proposal that is not merely mechanical will provoke serious controversy, whether or not warranted. "Common prudence should tell the rulemakers that reaching for too much may cost them everything."<sup>80</sup> In this case, the rulemakers should be guided by awareness that "everything" may include more than Rule 68.<sup>81</sup>

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80. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 301 (1962).

81. At the end of July 1985, Representative Kastenmeier sent Judge Frank Johnson, the new Chairman of the Advisory Committee, a letter that included the following paragraph:

I would like to put you and the Members of the Committee on notice that I am very concerned about proposed changes to Rule 68 of the Federal Rules of Civil Procedure. I have reservations about whether any of the proposed modifications should be statutory or through the rules process. Due to the institutional importance of this subject to the legislative branch, my tentative feeling is that legislation to modify Rule 68 should be introduced, thereby squarely placing all issues on the legislative platter. Such legislation will be drafted after the August Congressional recess . . . .

Letter from Hon. Robert W. Kastenmeier to Hon. Frank M. Johnson, Jr. (July 31, 1985) (copy on file with U. MICH. J.L. REF.).

It has been reported that Judge Johnson cancelled a November meeting of the Advisory Committee in response to this letter but that "Rule 68 is still on the committee's agenda for its next meeting in April." *Legal Times*, Oct. 14, 1985, at 4, col. 3. Indeed, the Chief Justice has recently observed:

Most commentators believe that Rule 68 should have more teeth; some are concerned that it not have too many. The Judicial Conference Advisory Committee on Civil Rules will continue the careful study of the Rule and various alternatives. Somehow we must develop a workable solution to assure that those who cause unwarranted delay and expense will be subject to some kind of sanctions.

W. Burger, 1985 Year-End Report on the Judiciary 12 (copy on file with U. MICH. J.L. REF.).

On December 19, 1985, Representative Conyers introduced a bill providing that "the fourth sentence of rule 68 of the Federal Rules of Civil Procedure is amended by inserting '(as defined in section 1920 of title 28, United States Code)' after 'costs.'" H.R. 3998, 99th Cong., 1st Sess. (1985). The bill accomplishes Representative Kastenmeier's objective of putting amendments to Rule 68 "on the legislative platter." Letter from Hon. Robert W. Kastenmeier to Hon. Frank H. Johnson, *supra*. Moreover, if enacted, it would overrule *Marek v. Chesny*, 105 S. Ct. 3012 (1985). Finally, the bill provides additional evidence, were it needed, of congressional determination, as well as adequate justification, were it needed, for the rulemakers to sail another ship.