

FROM CONFORMITY TO UNIFORMITY: THE RULES ENABLING ACT OF 1934 AND THE RISE OF FEDERAL JUDICIAL AUTHORITY

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In 1934, Congress passed the Rules Enabling Act, which granted the Supreme Court of the United States the authority to promulgate uniform rules of civil procedure for the federal courts. The Federal Rules of Civil Procedure—drafted by an advisory committee appointed by the Supreme Court and adopted by the Court in 1938—represented a major transformation not just of practice in the federal courts but also of the authority and influence of the federal judiciary.

The Rules Enabling Act was the product of an almost half-century movement on the part of the nation's elite lawyers and legal scholars to end federal court conformity with state civil procedure and replace it with a uniform set of civil rules for the federal trial courts. Since the 1792 Process Act, Congress had required circuit and district courts to follow the civil procedure of the states in which they sat. The Process Act did allow individual courts to alter the rules as they deemed necessary and granted the Supreme Court authority to prescribe rules for the trial courts as well, but the Supreme Court took no steps to produce separate federal rules. As John Marshall described the system in an 1825 opinion, "A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems."¹

The procedure in federal courts did not keep up with changes to state court procedure in the mid-19th century, however. The Process Act required conformity with state procedure as it existed in 1792 (Congress updated the date of conformity with a new act in 1828), not conformity with all future changes to state rules. By the late 19th century, many states had chosen to jettison the common law writ and pleading system in favor of the procedural code drafted for New York by David Dudley Field in 1848. Federal courts had the authority to adopt code procedure in states where it had been adopted, but the Supreme Court and a number of federal judges rejected the codes in favor of common law pleading. The result was a patchwork of civil procedure in the nation's courts. As of 1872, some states had code procedure in both state and federal court while others had code and common law procedure operating side by side.

In the Conformity Act of 1872, Congress reaffirmed its commitment to the use of state procedures in the federal courts, but true conformity between the courts was elusive. The Conformity Act required that the "practice, pleadings,

and forms and modes of proceeding" in civil cases in circuit and district courts "conform as near as may be" to those of the states in which they were held.² The Supreme Court, however, interpreted the phrase "as near as may be" as giving judges broad discretion to differ from state procedure when a judge deemed it necessary to do so. "While the act of Congress is to a large extent mandatory," the Court stated in an 1875 opinion, "it is also to some extent only directory and advisory."³ Some state procedures were also specifically superseded by congressional statute. In addition, federal judges had a difficult time keeping up with the revisions in state procedural codes. And the states certainly revised the codes. In 1876, the New York legislature adopted the so-called Throop Code, which expanded Field's original 390 sections to more than 3,000. In addition, Congress had long ago empowered the Supreme Court to establish rules for equity procedure in the federal courts, which the Court did in 1822 and 1842. Thus, not only did states' procedural rules differ from one another as state legislatures continually amended their codes, but individual federal courts also had rules that were distinct both from the courts of the state in which they sat and the federal courts in other districts.

Though difficult to achieve in practice, the goal of having federal courts share the procedure of their respective states was part of a belief held by the framers and 19th-century lawmakers that the federal courts should be embedded in local legal culture. The system of circuit courts—in which Supreme Court justices had to ride the circuit and hear trials—was driven by a desire to have members of the nation's highest court visit local jurisdictions to learn local law and procedure and interact with local lawyers and ordinary litigants. District boundaries were made co-equal with state boundaries; indeed, the attempt to draw districts without regard to state lines helped fuel the protest against the ill-fated Judiciary Act of 1801. Judges were appointed from judicial districts and required to live there.

Even as the federal courts gained in influence in the late 19th century—the Judiciary Act of 1875 granted the courts jurisdiction over federal issues and expanded the right of removal from state court—many members of Congress remained attached to the connection between federal courts and the local community. The chief rival plan during the 1880s to establishing the circuit courts of appeals—which was accomplished in 1891—was to allow



Supreme Court justices to hear appeals in panels of three so that they could have sufficient time to continue to visit the circuits. Even the abolition of the circuit courts in 1911, which turned circuit judges into appeals judges only, gave rise to protests from lawmakers who preferred that circuit judges continue to have contact with local communities through trial work.

Beginning in the late 1880s, lawyers who were members of the American Bar Association (ABA)—founded in 1878 and soon to represent the attorneys in the nation's largest law firms—began to call for replacing conformity with uniformity in the federal courts. In 1895, the ABA appointed a Committee on Uniform Procedure to examine existing procedure in state, federal, and English courts. In its 1896 report, the committee proposed a resolution asking Congress to appoint a commission to draft legislation to achieve uniform procedure in the federal courts. The resolution failed to pass, however, because many members protested that a congressional commission was likely to produce only a federal version of cumbersome state procedural codes.⁴

Growing criticism of state courts in the first decade of the 20th century helped to revive the movement for uniform federal procedure. In his now famous speech to the ABA in 1906, entitled “The Causes of Popular Dissatisfaction with the Administration of Justice,” Roscoe Pound cited the technicalities and inflexibility of both common law pleading and procedural codes as just one source of complexity, cost, and delay in civil litigation.⁵ In later writings, Pound complained about the “mechanical” and “formal” aspects of legal practice and the legislative restrictions placed on judges by state legislatures. Pound’s solution was for state legislatures to pass acts dealing with general practice issues that would leave the details of court procedure to be settled by general rules to be devised by judges. In 1910, Pound declared optimistically that, “after a period of rigidity in practice, in which substance has been sacrificed to means, we are evidently about to enter upon a period of liberality in which the substance shall prevail and the machinery of justice shall be restrained by and made strictly to serve the end for which it exists.”⁶

Pound’s focus was primarily on operations of the state courts, but it was not long before others began to highlight the need for procedural reform in the federal courts and to see in the federal courts a solution for the problems they

diagnosed in the states. President William Howard Taft, in his 1910 annual message to Congress, proposed that the U.S. Supreme Court be given the authority to draft rules of civil procedure for the federal courts. In 1911, Thomas W. Shelton, an attorney practicing in Virginia, became chair of the ABA Committee on Uniform Judicial Procedure and dedicated himself to achieving rulemaking authority for the Supreme Court. Shelton’s committee drafted an enabling statute in 1913 and had it introduced in Congress by Rep. Henry D. Clayton of Alabama. The bill received the endorsement of Taft and President Woodrow Wilson.

Shelton believed that federal uniform procedure would be “a standing invitation” for the states to adopt it.⁷ Shelton rejected Congress’ long-standing commitment to conformity, calling it a “sop thrown to state pride” and “a bit of politeness to be shown to the host by the ‘foreign’ court sitting in its midst.”⁸ He decried federal practice as a mish-mash of conformity, common law pleading, court rules, court interpretations, and statutory amendments. “The [1872 Conformity Act] has failed of its ostensible mission and must go the way of all useless things.”⁹

“Efficiency” and “expertise” were among the key words of the progressive movement in the early 20th century, and both were mobilized in support of rulemaking led by the Supreme Court. Shelton and others argued that rules devised by the Supreme Court were preferable to those made by states because the federal judiciary would prove to be more expert and flexible in responding to needed changes. Above all, supporters of new uniform federal rules had an abiding faith that the Supreme Court would create rules that would be simple and would present no challenge to lawyers used to practicing in state courts. “There will be no technicalities and no pitfalls to avoid,” the ABA’s Committee on Uniform Judicial Procedure assured legislators and members of the bar.¹⁰ No one today is likely to describe the process of analyzing and amending the Federal Rules of Civil Procedure as akin to enjoying a good novel. But Shelton assured members of the Senate Judiciary Committee that any issues arising from application of new federal rules “would be so interesting when they did come to the Supreme Court, and would have so much humanity in them, that the Supreme Court would enjoy, as much as they would enjoy reading a novel, considering these matters of changing their rules.”¹¹

Ironically, the political controversies surrounding the

federal courts in the first decades of the 20th century spurred on the movement to adopt rules devised by the Supreme Court. As the Supreme Court handed down controversial decisions that struck down state regulatory legislation and curbed the strike activities of labor unions, union leaders and progressive activists chastised the courts for preventing legislators from addressing the economic and social challenges of industrial capitalism. This critique reached fever pitch during the 1912 presidential campaign, when Theodore Roosevelt—now running as a third-party opponent of Republican William Howard Taft and Democrat Woodrow Wilson—called for granting the people the power to “recall” the constitutional decisions of the courts through popular referendums.

In an effort to deflect these popular attacks on the courts, leading members of the bar drew attention away from controversial political decisions to the difficulties in civil litigation that had been raised by Roscoe Pound and others. In a speech at the University of Cincinnati Law School in 1914, William Howard Taft—now out of the White House and serving as a law professor at Yale University and president of the ABA—distinguished between legitimate and illegitimate complaints against the judiciary. To Taft, the public was misguided in its attacks on judicial power and had been led astray by demagogues to support drastic changes to the courts. Taft argued that people did have “just” criticisms of the courts, and these were the cost and delay of litigation. Such problems, he contended, could be solved through practical, limited measures, like procedural reform.¹²

In his voluminous writings in favor of court-made civil rules, Thomas Shelton turned the issue of courts and politics on its head. Whereas supporters of judicial recall argued that the federal courts were infringing on the power of legislatures, Shelton contended that the courts—both state and federal—were the captives of the lawmakers. He argued that legislatures injected political influences into the judicial process and produced ineffective judicial administration, though it was the courts that were attacked by the public. Granting the Supreme Court authority over civil rules would move rulemaking “one step further from political influence” and place “procedure and practice upon a scientific basis.”¹³ Shelton believed that a uniform and flexible system of pleading and practice handed down by the Supreme Court would relieve the public from the hardships of litigation, give the federal courts more independence from the legislative branch, and restore public faith in the judiciary. “Let Congress set the Supreme Court free,” he proclaimed.¹⁴

Despite his confidence in the righteousness of his cause, Shelton’s campaign for uniform federal civil rules dragged on for decades and even outlived him. (He died in 1931). Sen. Thomas J. Walsh, a Democrat from Montana and a member of the Senate Judiciary Committee, saw in the reform a more radical change for the federal courts, and he emerged as the chief opponent of the measure. Walsh refused to believe that conformity worked as badly in practice as Shelton argued and contended that uniform federal rules would burden local “country lawyers” who

practiced largely within a single state. He argued that it was too much to expect lawyers who were well-versed in local procedure to have to master new rules in order to enter a federal courtroom. In an era in which most lawyers still practiced locally, Walsh and the other dissenting members on the Senate Judiciary Committee announced themselves “for the one hundred who stay at home as against the one who goes abroad.”¹⁵

Even though Shelton and the ABA had complete faith in the Supreme Court justices to devise optimal court procedures, Walsh and his allies on the Senate Judiciary Committee questioned whether the Court had the capacity, in addition to managing its growing caseload, to carefully study the rules and respond to concerns of the lawyers who practiced under them in the lower courts. Walsh also predicted that the Supreme Court would be unable to fulfill its rulemaking function without a great deal of assistance. “I am convinced,” he stated in a 1926 speech, “that the well-meaning proponents of the measure have no adequate idea of the magnitude of the task.”¹⁶ Walsh argued that Supreme Court justices were too far removed from ordinary litigants and would not be responsive to complaints about the operation of the rules. If litigants had a problem with state rules, he argued, they could petition their legislatures to solve it; even a code written by Congress would give the people a political channel for raising concerns about rules. Walsh emphasized that the justices of the Supreme Court had little to no interaction with the judges, lawyers, and litigants who operated in the trial courts. Finally, Walsh argued that the process of amending the rules would become a never-ending project for the Supreme Court.

The uniform federal rules bill failed to pass the Senate throughout the 1910s and 1920s, even with the vocal support of Chief Justice Taft. Taft supported uniform federal civil procedure as but one aspect of a broader campaign to establish the federal judiciary as a truly national system in the early 20th century. He saw federal civil rules as a way to knit the autonomous federal district courts more closely together. He linked uniform federal procedure with other goals for improved judicial administration and judicial branch independence. Taft’s plan, submitted to Congress just after he became chief justice in 1921, was to give the chief justice, along with a council of circuit judges, greater authority to assign judges throughout the country in order to use the judicial force efficiently. Taft believed that, by injecting what he called the “executive principle” into the courts, the federal judiciary would have the ability to use judicial resources more efficiently and exercise closer oversight of district judges. Taft’s lobbying eventually resulted in the creation of the Conference of Senior Circuit Judges, later renamed the Judicial Conference of the United States, in 1922. The movement of judges across districts and circuits provided another argument for abandoning conformity in procedure. If district judges could find themselves hearing cases in different states, many argued, then a single procedural system should follow them.¹⁷

By 1933, after years of failing to persuade the Senate to pass its bill, the ABA Committee on Uniform Procedure

resolved to cease lobbying for procedural reform and to disband. That year, however, Sen. Walsh, the long-time opponent of federal civil rules, was tapped to be President Franklin Roosevelt's first attorney general but died before taking office. In his place, Roosevelt appointed Homer Cummings, who was strongly in favor of the procedure bill and, with the support of Roosevelt himself, recommended its passage in 1934.¹⁸ In a March 1934 speech to the New York County Lawyers' Association, Cummings tied procedural reform to public concerns about the inability of the justice system to keep up with the court's growing criminal and civil caseloads. He saw uniform federal procedure as a tool for bringing order and efficiency to the federal courts in an era during which the machinery of justice faced serious challenges. With the absence of Walsh's strong criticism and the administration's support during the height of New Deal legislative activity, the procedure bill was reported favorably by the House and Senate judiciary committees and passed by both houses only a little over two months after Cummings' public endorsement. Under the statute, the new rules of civil procedure would become active if not rejected by Congress within 60 days of their adoption by the Supreme Court.

The connection between court procedure and court administration was frequently made during the 1930s, especially as the work on the new civil rules—completed in 1938—neared completion. Members of the Roosevelt administration, in justifying the infamous court-packing plan of 1937, often talked about the need for more broad-based reforms of the judiciary in order to realize the gains promised by the adoption of uniform procedure. Attorney General Cummings saw the civil rules as just one thread that would tie the various federal courts together. In support of the bill that would eventually create the Administrative Office of the U.S. Courts in 1939, Cummings argued that the district courts were far too isolated from one another and that “the Conformity Act [of 1872] was doubtless partly responsible for this relative isolation. The existence of forty-eight separate types of procedure constituted a disintegrating force, not a unifying one.”¹⁹

To draft the rules under the Enabling Act, the Supreme Court appointed an advisory committee made up of the nation's leading lawyers and legal scholars, which, in turn, relied on input from lawyers in each federal district. To build on the uniform rules, though, the Supreme Court and the senior circuit judges needed more tools of coordination, and these tools were a more powerful Judicial Conference, circuit councils, and annual circuit conferences. Cummings argued that these administrative bodies would help in the study and evaluation of procedural rules and would also contribute to fulfilling the flexibility and efficiency that supporters of federal rules had long promised.

The adoption of the Federal Rules of Civil Procedure profoundly changed practice in the federal courts. The Federal Rules ushered in a system of simplified pleading, broad discovery, and judicial discretion that embodied many of the principles called for by Roscoe Pound more than 30 years earlier.²⁰ The Federal Rules were also immensely important to the state courts, most of

which adopted the rules in some form over the next few decades.²¹ The dominance of the federal rules represented a key milestone in the growing importance of the federal judiciary in the 20th century. **TFL**

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Endnotes

¹*Wayman v. Southard*, 23 U.S. 10, 46 (1825), quoted in Edgar B. Tolman, *The Origin of the Conformity Idea*, 23 ABA J. 971, 972 (1937).

²17 Stat. 196.

³*Indianapolis and St. Louis Railroad Company v. Horst*, 93 U.S. 291, 301 (1876).

⁴ABA, 19TH CONFERENCE ANNUAL REPORT 411 (1896).

⁵Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA REPORT 395 (1906).

⁶Roscoe Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438 (1910).

⁷Thomas W. Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court Free* 73 CENT. L. J. 319, 321–322 (1911).

⁸*Id.* at 320.

⁹Thomas W. Shelton, *Uniform Judicial Procedure Will Follow Simplification of Federal Procedure*, 76 CENT. L. J. 207, 209 (1913).

¹⁰ABA, 45TH CONFERENCE ANNUAL REPORT 370 (1922).

¹¹*Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcommittee of Committee on the Judiciary, United States Senate*, 64th Cong. 1st Sess. 23–25 (1915).

¹²William Howard Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3 (1916–1917).

¹³Shelton, *supra* note 7.

¹⁴Shelton, *supra* note 9.

¹⁵Thomas J. Walsh, *Reform of Federal Procedure*, S. Doc. 105, 69th Cong., 1st Sess. (1926).

¹⁶*Id.* at 25.

¹⁷Edgar Tolman, *Origin of the Conformity Idea*, 23 ABA J. 971 (1937).

¹⁸Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1094–1098 (1982).

¹⁹Homer Cummings, *The Value of Judicial Conferences in the Federal Circuits*, 24 ABA J. 979 (1938).

²⁰Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

²¹John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2002–2003).