PART II: THE CHANGING NATURE OF LEGAL ISSUES IN STATE AND FEDERAL COURTS

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FOREWORD: THE CHANGING ROLES OF JUDGES IN STATE AND FEDERAL COURTS

Changes in the nature of legal and factual issues in dispute in the various kinds of controversies that reach legal professionals for counseling, advice, help in negotiations, and help in dispute resolution inevitably change the roles of all legal professionals—lawyers, judges, professors, and students.

My purpose is to present a few illustrations that focus primarily where my current experience is—in a federal trial court. I will speak about the roles of professionals at the bar in the past and at present, and my speculations about their roles in the future. Also, of course, I will speak about the role of the federal trial judge—past, present, and future.

I. AN INTRODUCTION

Change is the order of the day in this last decade of the 20th century. Even more dramatic changes can be expected, just around the corner—or just beyond the turn of the century, if you prefer millennial metaphors.

A few weeks ago, when Roger Henderson graciously arranged an invitation for me to speak to a gathering of Insurance Law teachers at the AALS, I welcomed the opportunity to express some rather unfinished thoughts about two sets of changes in the world around us that have enormous and largely unexplored implications for the legal system.

One set of changes grows out of the changing world economy, with social, political, personal, and, of course, legal consequences.

The second set of changes—in our ways and means of communication incident to electronic technological developments—portends significant changes in your daily professional routine as law teachers, and mine as a trial judge.

For our discussion in this workshop, I propose that we consider the changing nature of legal issues incident to these changes in the world around us, stirred together with the views, interests, and objectives that we and other legal professionals (including the Bar and our students) will bring to bear.

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II. TORT LAW REFORM

As a starting point, consider that modest little topic, tort law reform.

Of course, you will understand that as a long-term torts teacher I believe the most fundamental truths about the legal system are revealed and aptly illustrated in tort law. So, in discussing developments in tort law reform, we will be discussing developments occurring elsewhere in the legal system, as well.

A. The Tension Between Creativity and Continuity

An interesting conflict of views about tort law reform exists right here in this room. More than that, it exists not only between and among different individuals in this group. Also, for many, if not everyone here, the conflict is within each of us individually—within our own minds and emotions.

The reason is that particular issues of tort law reform invoke the basic tension that is captured, if not perfectly at least approximately, in the expression, "creative continuity in the law."

The tension between creativity and continuity is likely to be evident in most proposals for law reform. It helps to account for our reaction, for example, to proposals for statutory caps on damages, or caps on damages of certain kinds. Reduce costs, and you cannot continue to provide the same benefits. Use bright-line, hard-edged rules to increase predictability of the reduced benefits, and you reduce benefits not only for the undeserving, but also for the deserving.

It is true, also, that a basic tension within most of us, as individuals, is invoked by proposals for statutory modification of joint and several liability, or for contribution and indemnity.

They cut costs. That's good.

They reduce benefits. That's bad.

The same internal tensions, as well as those among different persons and groups, are invoked by proposals to abrogate, restore, or expand immunities and privileges.

This is true also of more sweeping proposals for change to meet this or that perceived crisis of megadimensions.

Two generalizations we may draw from our reactions to these and other illustrations of proposals for law reform generally, and tort law reform particularly, are these:

First. Enough creativity to keep law in touch with changing social, economic, and political realities is essential to justice.

Second. Also essential to justice is enough continuity to keep law fair *in process,* as well as outcome, and reasonably predictable.

B. Whence, Whither, and How

Where are we heading in tort law reform? How well have we done the last few years? How well are we likely to do in the years just ahead? And how might we prepare ourselves for the ordeals we can now foresee, and those just a

little farther ahead about which we can only speculate at present?

In exploring these questions, I will try not so much to persuade you that the views I express are correct as to urge you to think seriously about the questions, not just for a few minutes now, but as an ongoing interest.

For several important reasons, I believe it makes a difference what you and I think and believe about law reform. Before I express these personal views, I pause for a sketch of the history of tort law reform. I will try to keep it more neutral in perspective than appears to me to be the current fashion in writing and speaking about history, including legal history. If you think my perspective is not neutral, will you be generous and credit me with being fashionable?

C. A 20th Century Sketch

1. The Purpose of the Sketch

This is a sketch of some key characteristics of tort law reform of the 20th century, as a prelude to speculation about what the key characteristics of tort law reform in the 21st century may be.

Focusing on a sketch, rather than a more detailed account, may have the advantage of drawing our attention, for the moment, away from controversial details so we see more clearly the broader developments underway.

2. Some Illustrations

(a)

Tort law was relatively stable from the turn of the century through the 1950s. Courts were rarely making any change other than the interstitial kind of change that is characteristic of the common law. When major changes occurred, they were accomplished by statutes. Workers' compensation, motor vehicle financial responsibility laws, and federal and state tort claims acts are examples.

(b)

Most of the tort law reform of the 1960s was accomplished by the decisions of state courts of last resort overruling precedents. In the decade from 1958 to 1968, I kept count. The count was up to 100 overruling decisions in state courts of last resort in that decade. Mostly these were decisions expanding liability here and there—for example, completely abrogating, or at least limiting, immunities for charitable and governmental entities.

(c)

The move to strict products liability, which was a major change of tort law in the 1960s and 1970s, was different. State courts of last resort did it, but without explicitly overruling anything.

(d)

Another change of the 1960s and 1970s occurred first in defamation and later was extended to other areas of tort law. This change was different in two

respects from most of the earlier 20th century changes in tort law.

First. It was accomplished not by state courts in the common law tradition but by the Supreme Court of the United States as a matter of constitutional law. The First Amendment privilege was applied initially to defamation, soon thereafter to privacy, and later to interference with advantageous commercial relationships (in *NAACP v. Claiborne Hardware*[1]) and intentional infliction of severe emotional distress (in *Hustler Magazine v. Falwell*[2]). In late December 1994, the Third Circuit invoked these precedents to bar civil-conspiracy and concert-of-action claims against an asbestos manufacturer for its participation in an asbestos trade association that allegedly tried to conceal asbestos hazards (in *In re Asbestos School Litigation*[3]).

Second. The invocation of the First Amendment in tort litigation was a change in a different direction. That is, the 20th century changes, up to that point, had expanded liability. This change expanded privilege and thus reduced liability.

(e)

In the 1960s and 1970s another significant change—the move to comparative fault—was accomplished partly by court decisions and partly by statutes.

(f)

An additional change of the 1970s—the development of no-fault insurance with an associated partial exemption from tort liability—was, of course, almost exclusively statutory, with only an occasional contribution by judicial decision, ordinarily by way of interpreting a statute or interstitially filling some small gap by answering a question of modest overall consequence, left unanswered in a no-fault statute.

(g)

In the 1980s, the direction of change was more often toward limiting than toward expanding liability. The method of change was primarily statutory. Nevertheless, some quite substantial changes in the law were made by judicial decisions. Examples are judicial changes in rules about contribution and indemnity to harmonize them with statutes on joint and several liability, comparative fault, and contribution. The judicial decisions were changing rules of tort law that were not explicitly changed by legislation but were analyzed as so fundamentally inconsistent with the apparent public policy choices made by legislatures as to require reconsideration if the courts were to respect the manifest statutory policy choices, as well as the specific statutory mandates.

3. Whither and Why

The experience of the 1980s with change initiated by statute and then developed judicially has taught us much about how tort reform may proceed in the future. Often a statutory initiative invites or even compels, sometimes

1. 458 U.S. 886 (1982).
2. 485 U.S. 46 (1988).
3. 46 F.3d 1284 (3d Cir. 1994).

wittingly and sometimes unwittingly, judicial reconsideration of cognate rules of tort law. That is, sometimes it appears the drafters and enactors implicitly extended an invitation to the courts to complete the lawmaking. Sometimes an unpolished text simply left no other choice to the courts, since courts must decide the cases before them.

III. METAPHORS ABOUT LAW

A. The Seamless Web

Rules of tort law as developed by the common law tradition are interwoven. In the classic metaphor, law is a seamless web.

Metaphors are figures of speech, and one should never expect a metaphor to express the whole truth.

B. The Cube of Cubes

I have recently been using a rather different metaphor in trying to explain to students of tort law some of the complexities of Supreme Court precedents bearing on the First Amendment privilege. First Amendment law about defamation is a cube of cubes.

We ordinarily think of a seamless web as two-dimensional. Of course, we can envision a spider who sets out to entwine judges and lawyers in a more artistic, multi-dimensional web. Or we can think of cubes. A defamatory statement may be made by a media-type defendant, or by some kind of public speaker, or by a private speaker. It may be about a public official, or a public figure, or a private person (or private entity). It may be on a subject of public interest, or special group interest, or private interest.

Think of how many cubic boxes we would have in a cube of cubes that covered all these options, with a set of rules in each box.

When a Supreme Court decision, or a statute, changes one or a few rules explicitly, it tends, as described in one metaphor, to pull askew many other rules in a seamless web of rules. In another metaphor, it tends to affect one or more rules in some of the cubic boxes in a cube of cubes, and makes us wonder about how well the sets of rules in other boxes now fit to produce good outcomes.

C. The Policy Prism

But that's not all. Think of another complexity and how we view it. Think of a policy prism—a translucent structure with three, or even more, faces. The body of law whose policy foundations we are examining cannot be fully understood until we have viewed it through all the different faces of the policy prism.

The explicit mandates of a statute are also usually associated with some kind of manifestations, explicit or implicit, about the underlying policy choices that motivated the legislation. The policy choices may be manifested in the set of explicit mandates themselves, or sometimes as well in an explicit declaration of statutory purpose. Other rules of tort law, not explicitly abrogated by the statutory mandates, may be inconsistent with the policy choices manifested by

the legislation. What should courts do, if anything, about the inconsistencies?

In other words, how far should courts go, in working out implications of statutorily manifested policy choices, as well as enforcing explicit statutory mandates? I will return to this question. Before doing so, I will express what I openly acknowledge to be personal opinions on controversial matters.

IV. DISCLOSURE OF PERSONAL BIAS

These are some personal views about things that I believe to be of fundamental significance. I hope you will think about these matters seriously, whether or not you are inclined immediately to agree with me.

First. I believe that both the individual liberties and the economic advantages that you and I enjoy in comparison with other peoples around the globe depend fundamentally on our legal system. You will recognize the perspective of an old torts teacher in my view that the root ideas underlying tort law are also the root ideas of justice. They concern equality, liberty, enterprise, and fair adjudication of claims for redress.

Second. I believe that the relative success of our legal system in achieving the aims of justice, compared with the degree of success of legal systems of other societies over the centuries and around the globe, depends to some extent on the constitutional organization of our democratic government into three coordinate and, shall I say, almost coequal branches.

The degree of independence of our Third Branch, and its putative (if not quite factual) coequality, are distinctively American. When I speak of the Third Branch in this context, I am referring not only to judges but to all the professionals who participate in the administration of justice. Advocates, especially, are active participants in the professional work of the Third Branch to which I refer.

Third. Issues of law reform, generally, and tort law reform more particularly, have in recent years put new stresses on the roles of each of the three branches of government, on the relationships among them, and on the independence and coequality of the Third Branch.

Fourth. No one else in our society understands, as well as lawyers and judges do, the first three propositions I have just stated, and their relevance to the future well-being of the United States and its citizens. These propositions are especially well understood by the lawyers and judges who are most actively involved in law in action—the law in contact with people and with preventing and resolving the controversies that arise from the growing complexity of human interactions incident to social and economic relationships of broader and broader scale.

Before I state my fifth, sixth, and seventh points, I acknowledge that the fifth and sixth may be not quite as fundamental and significant as the first four and the seventh. Nevertheless, for convenience, I am presenting them all in a single sequence of seven.

Fifth. Participation of interest groups in that part of the law reform process that goes on outside the courts has in recent decades, and even more so in very recent years, increased significantly. And there are hints and signs that interest-group participation may increase still more in the 1990s and beyond.

Sixth. As changes of tort law in the successive decades of the 20th century have progressed, legislatures and courts have made more and more use of subjective, state-of-mind, standards of legal accountability, rather than objective standards.

Seventh. Changes maturing in the 1980s and 1990s may be seen through one face of the policy prism as fashioning a new and expanded role for courts in lawmaking. Like it or not, it is happening. Whether, as a matter of governmental structure and policy, one approves the change or not, it is happening.

V. REFLECTIONS ABOUT INTEREST-GROUP PARTICIPATION

I turn now to some further reflections about the Fifth point—the increase of interest-group participation in law reform.

A.

One illustration of interest-group participation in legislative law reform is that more and more special interest groups have been organizing to press their views on tort law reform in the legislative arena on the opposing sides of various controversies.

Indeed, one might say the matter is more complex than a two-sided political process. Interest groups are organizing on many sides of multi-sided sets of issues that different interest groups perceive as affecting their special interests. They propose legislation. They show up at committee hearings. Through the political process, they urge enactment of statutes bearing on issues such as caps on damages, joint and several liability, and related problems of contribution, indemnity and comparative negligence.

B.

A second illustration of interest-group participation is one occurring outside tort law. It concerns interest-group participation in the federal rulemaking process.

Over the long term, and in the long view, one of the objectives of federal rulemaking from the perspective of the judiciary has been that procedural rulemaking should be substantively neutral.

That premise has been sharply challenged in relation to the most recent amendments of the Federal Rules of Civil Procedure, and more challenges are likely in the future. That is, whatever the objectives of rulemakers may be to keep rules of procedure neutral, members of an interest group may perceive the rules as biased against their interest, or they may perceive that rules could easily be amended to produce a bias in their favor, which they eagerly support. That is, as they see it, there are ways of changing procedure that would help the particular interest group substantively, and not merely give them an evenhanded chance at winning their substantive contention strictly on the merits, without a metaphorical thumb on the scales of justice.

C.

I have been speaking up to this point about interest-group participation in lawmaking by legislatures, where political processes are the norm, and in procedural rulemaking, where at least the judicial participants may be uneasy about how to behave when other participants want to use processes long familiar in legislatures but not in traditional, procedural rulemaking. Consider, now, a third kind of forum for lawmaking—Courts.

What have we believed, and what are we to believe in the future, about interest-group efforts to influence lawmaking in the courts?

What shall we do about encouraging, discouraging, or regulating amicus briefs?

About mass mailings to judges? About mass mailings that are subsidized by taxpayers through preferential postal rates?

I do not know how you define junk mail. I will tell you that my own personal experience is that abuses of preferential postal rates have reached the point that, presumptively, I expect anything that comes in one of those envelopes that shows a preferential postal rate to be junk mail.

What, if anything, should we do to control or regulate ex parte communication to judges through mass mailings?

About various kinds of entities offering "free" programs of education for judges?

Our judicial codes and rules for judges on such matters as these are full of ambiguities. Should we reexamine and refine them?

VI. CHANGES IN RULEMAKING

Again, though my purpose is to invite you to think about rulemaking in the entire legal system, I ask you now to take as a special focus that kind of rulemaking with which I have had the most experience recently—developing amendments to federal rules of practice and procedure.

A. Trends Affecting Rulemaking

The Judicial Conference of the United States is charged by statute with drafting and recommending rules that "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." The growing number and complexity of the controversies brought before the federal courts for resolution make this task increasingly difficult. Added delay and expense in litigation are outgrowths of the volume and complexity of case filings and add urgency to our responsibilities. Several trends contribute to the added numbers and complexity of cases.

First. Both total population and concentration of population continue to increase. Because of the effects of congestion, the numbers of disputes are increasing more rapidly than just proportionally to population increases.

Second. Our economy is changing fundamentally.

One kind of change that bears on lawmaking and the administration of justice concerns the nature of employment. Job descriptions of the work force

are changing. Job insecurity is another reason that the number of disputes is growing more than just proportionally to population increase.

Another set of economic changes has the effect that fewer and fewer economic enterprises are primarily local in character. More and more are national, or even international. This set of economic changes has an impact on both lawmaking and the administration of justice. The legislative and executive branches are confronted with more insistent pressures for national or even international legal solutions, supported by arguments for federal legislation establishing nationwide legal rules.

Third. The nature of litigation is changing. More rapid change is occurring in this decade than in any previous decade.

Gone are the days when most indictments had a single count and most civil complaints stated a single claim for breach of contract or tort.

Fourth. The legal profession is changing.

Changes in the legal profession have a bearing on litigation as well as representation of clients in drafting, counseling, and other contexts. More than ever before, distinguished and respected members of the bar are expressing concern about the ability of the profession—lawyers, judges, academics—to maintain the highest standards of professionalism, both in law practice generally and in litigation as well.

More than ever before, trial judges are hearing from many different sources in the bar, in the executive and legislative branches of government, and from fellow judges, that we must take time away from judging in order to spend more time and become more effective in managing cases and caseloads.

Also, more than ever before, the legislative and executive branches are hearing more from lawyers, and from different organized groups within the bar, because they perceive that proposed legislation—and even proposed amendments of procedural rules—affect in distinctive ways their substantive interests and those of their clients.

B. The Procedural Rulemaking Process

1. New Stresses on Rulemaking

The foregoing sketch of four trends that affect litigation is barely a thumbnail sketch of changes in the wind and associated challenges. I have spoken of this broader context as an introduction to the much narrower subject matter on which I now focus—the procedural rulemaking process.

I have started this way because I believe these larger developments help to explain some new stresses on rulemaking. They have a bearing on how representatives of the three branches of government may cope with new challenges—working together, respectful of the system of divided responsibility and checks and balances, wisely designed as part of our constitutional framework.

2. Strength of the Rules Enabling Act Process

I believe in the Rules Enabling Act process. Having made that statement just after referring to our constitutional framework of checks and balances,

perhaps I should hasten to recognize that the Rules Enabling Act process was not carved on stone tablets, or written into our Constitution, or written into the Amendments that we identify as the Bill of Rights.

The Rules Enabling Act is a 20th Century gloss on our constitutional framework for solving procedural problems of concern to all three branches of government. It is, nevertheless, faithful to the spirit of 18th Century insights. Also, I believe the Rules Enabling Act process is good not only for this decade of the 20th Century, but for the 21st Century as well. Let me explain briefly why I think so.

The Rules Enabling Act process, as most recently amended in the Judicial Improvements Act in 1988, is, I believe, the most thoroughly open, deliberative, and exacting process in the world for developing substantively neutral rules. By "neutral" I mean rules designed to cause cases to be resolved impartially—that is, on fact findings that are as close to the truth as it is humanly possible to make them, and under the law as interpreted and applied with fidelity to constitutions, statutes, and precedents.

As litigation grows more complex, we must expect that, somewhat more often than before, particular interest groups in the community generally, and even within the bar, may take more interest than in times past in trying to gain an edge for the future—that is, an edge in the process of resolving controversies yet to come before the courts. It would be possible, of course, to shape procedural rules to the advantage of one or another among various interest groups. I urge that we resist all pressures to do so. Instead, we should do our best, working together, to keep procedural rules substantially neutral.

The Rules Enabling Act process is well designed for that purpose.

3. Questions and Response About Federal Rulemaking

Consider some commonly asked questions about federal rulemaking. I acknowledge that in framing these questions I had the generous and thoughtful help of the Rules Staff of the Administrative Office of the United States Courts. I repeat here the responses I have expressed to a Congressional committee.

What is the Rules Enabling Act process for enacting and amending rules?

The first step of the rulemaking process is centered in the Third Branch. More specifically, it is centered in the Judicial Conference of the United States and six Rules Committees—the five Advisory Committees on Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules, and the Standing Committee on Rules of Practice and Procedure. The Standing Committee reviews all the recommendations of the Advisory Committees and, with any revisions it considers appropriate, forwards them to the Judicial Conference of the United States as proposed amendments to the Rules. If the Judicial Conference approves, it sends the proposed rules to the Supreme Court. If the Supreme Court adopts the rules, it sends them to Congress, ordinarily on or before May 1, to become effective on December 1 unless Congress disapproves or modifies them.

Who initiates proposals and what is the process for considering and perfecting drafts?

Anyone may initiate a proposal to amend or add a rule by sending a letter

to the Secretary to the Committees (currently Peter McCabe). The secretary sends each comment to the appropriate Advisory Committee for consideration.

The reporter to that committee analyzes the suggestions and, where appropriate, drafts proposed amendments to the rules and prepares explanatory Advisory Committee notes. The proposals are then discussed in detail by the members at committee meetings. When an Advisory Committee is ready to proceed with proposed amendments to the rules, and the Standing Committee approves publication, the Secretary mails the proposed amendments and Advisory Committee notes to more than 10,000 individuals and organizations across the country, seeking their comments. Also, the Advisory Committee holds public hearings.

The number of comments received from lawyers and from interested organizations has increased substantially in recent years. Partly, this may be because recent proposed rule changes have dealt with such controversial subjects as attorney sanctions and reduction of costs and delays in civil cases.

After considering the written comments and testimony from bench and bar, the Advisory Committee makes a fresh decision on the proposed amendments. Proposed amendments are then sent in final form through the Standing Committee to the Judicial Conference.

Does the process need to be so elaborate and lengthy?

The answer implicit in the Rules Enabling Act is YES, at least in general. The federal rules directly affect the daily business of all the district and circuit courts. They also serve as a pattern for many state procedural rules. The pervasive impact of the federal rules is good reason to make the process exacting and thorough.

Are observers allowed to be present?

Yes, at all stages. The process is very open. All meetings of the Standing and Advisory Committees are open to the public. The minutes of these meetings and the papers of the committees are a matter of public record and may be obtained through the secretary.

Are any long-range plans for rules changes under consideration?

Yes.

By statute the Standing Committee is required to review each recommendation of the Advisory Committees and recommend to the Judicial Conference such changes "as may be necessary to maintain consistency and otherwise promote the interest of justice." Some of the separate existing rules deal with the same or closely similar issues in different ways, in some instances just because they were drafted at different times by different drafters. Also, over time and with a succession of amendments, some rules have become unnecessarily complicated.

In 1991, as Chair of the Standing Committee, I appointed a Style Subcommittee, chaired by Professor Charles Alan Wright, to identify inconsistencies and work toward clarifying and simplifying the language of the rules. Professor Wright (at his request because of his new responsibilities as President of the American law Institute) left that position at the end of the June meeting of the Standing Committee in 1993. I was very pleased that Judge George Pratt agreed to succeed Professor Wright as chair of this

Subcommittee.

Working with the respective Advisory Committees, the Style Subcommittee now has nearly completed comprehensive draft revisions of the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure. These drafts significantly reduce the number of words, resolve inconsistencies and ambiguities, and make the rules much more readable. The committees must do additional work before these style changes (along with the substantive changes essential to resolving ambiguities) are ready for public comment. The committees have made a good start on improving the quality and readability of these sets of rules, and I hope drafts of one or both will be ready for publication soon.

In the long run, a closer integration of the five separate sets of rules could eliminate needless repetition as well as inconsistencies that leave a reader in doubt as to whether different meaning was intended and, if so, why.

Has consideration been given to organizing the process so amendments can be made less often?

Yes. There is a perception that the federal rules are amended too quickly and too often. The Standing Committee and the Advisory Committees are very sensitive to this concern. Indeed, many thoughtful and valuable suggestions never reach the public comment stage because they are not considered critical enough by the committees to warrant the serious step of amending the rules.

On the other hand, some court rulings and new legislation inevitably require amendment of rules—and in a few instances, prompt amendment.

The Judicial Conference Committees are also very mindful of their statutory obligation to evaluate continuously the operation and effect of the federal rules, to recommend rules changes to promote simplicity and fairness in procedure and to eliminate unjustifiable expense and delay.

4. Ongoing Concerns

Bills continue to be introduced in Congress to amend federal rules directly by statute, bypassing the Rules Enabling Act process. The Rules Committees and the Administrative Office do their best to persuade members of Congress (and any persons or groups who press Congress to enact rules by statute) that the Rules Enabling Act process is sound and fair, and should be used. Acceleration of the process, in particular instances, may be both feasible and appropriate. But the basic procedures for notice, comment, and meticulous care in drafting are especially appropriate for rules of procedure in the courts. The benefits of adhering to the process outweigh interests that might be served by quicker action that bypasses these safeguards.

The process is sometimes criticized on the ground that there is no opportunity for public comment after the Advisory Committee has developed its final draft. This argument, followed to its logical end, would result in a static body of Federal Rules. Critics would always like another opportunity to comment on the new draft that emerged from the committee's deliberations on the earlier comments.

If the process is delayed for republication each time any change is made, a serious risk of deadlock arises. The rulemaking process would be effectively

at a standstill while the committees tried to accommodate every constituency and every possible complaint about each new modification of the last published draft.

I submit that the better practice is the one currently followed. When the revised draft is in its nature a proposed amendment falling somewhere between the existing rule and the more substantial change proposed in the draft published for comment, republication for another round of comment and reconsideration is neither required nor appropriate.

As noted earlier, both Congress and the Rules Committees are regularly subjected to demands for more expedited action. I urge that we not adopt a practice of such repeated republication for comment that the process is disabled from responding reasonably promptly after a need for amendment is recognized and analyzed, and a neutral and promising solution is fashioned.

VII. A NEW ROLE FOR THE THIRD BRANCH

Finally, I turn to some further reflections about the seventh of the points I stated earlier in disclosing my personal bias—a new role for the Third Branch in lawmaking. Let us think about, and try to understand better, what has happened historically, in the last two decades.

The experience of the 1980s may be viewed as reshaping the role of courts—state courts especially—in relation to tort reform issues. Recall the observation that when a statute makes a significant change—for example, in the scope and terms of joint and several liability—inevitably it creates new questions about the relationship between the new rules it mandates and many other rules in the existing body of tort law. The questions are often interesting, challenging, and important to the administration of justice. The cases that present the questions must be decided, one way or another. The courts must answer any unanswered question that has to be decided to say who wins or loses the case before the court.

An agenda of this kind of change in tort law is already in place for the courts. Unanswered questions in law reform statutes of the 1980s and early 1990s will be popping up for at least another decade. And if more statutes are enacted, as seems quite likely in view of the forces at work in the political process, this source of cases that are at least new in emphasis, if not as well in kind, will be a factor working toward creating an even greater caseload for already overburdened trial and appellate courts as we enter the 21st century.

One might say cases of this type present issues about "judging statutes." To a mid-20th-century lawyer, a description of tort law as the product of judging statutes might have seemed self-contradictory. It might have seemed incongruent with the perceived wisdom of that time about the relationship between judging and legislating. But the phrase "judging statutes" may become an essentially accurate description of the work of courts in developing 21st century tort law. Already, it seems quite apt for a large part of the work of judges in the 1990s. Tort law is more the product of statutes today than ever before. But at the same time the law implementing and applying statutes is more the product of judicial decisions than ever before.

I venture the suggestion that what is true of tort law in this respect is true of law more generally. Most of you think of yourselves as more deeply

informed about, and committed to, some other body of law rather than tort law. I urge you to consider whether you do not agree that the observation I have made about tort law is true also of your favorite body of law.

A key challenge will be this: Can we keep that new body of developing law reasonably predictable? Can we make it certain, understandable, uncomplicated? Can we keep it from becoming so complex that the cost of litigation prices law out of the market?

If we are to succeed, in my view, a heavy part of the responsibility will fall on the lawyers and judges who perform their respective roles in an independent Third Branch that is committed, first, to respecting the legislative policy choices as well as the mandates of statutes, and committed, also, to responding to this evolving challenge to answer the questions that statutes leave unanswered.

Only with that dual commitment will it be possible to achieve the ideal of creative continuity in law.