

THE CONTINUING GLOOM ABOUT FEDERAL JUDICIAL RULEMAKING

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ABSTRACT—In 2013, the Federal Rules of Civil Procedure turn seventy-five years old. The rulemaking process by which they are promulgated has been a source of gloom for a generation. Like a wayward Hollywood star, the process is in “crisis” and its fans are experiencing “malaise.” This Article addresses the reasons for that gloom and concludes that some level of crisis is inevitable. At the macro level, as Professor Redish has emphasized, judicial rulemaking is a legislative function being performed by an unelected body that is constitutionally empowered only to perform the task of deciding cases and controversies. At the micro level, the Rules Advisory Committee is subject to being second-guessed by Congress, is plagued by uncertainty about the statutory limits of its power under the Rules Enabling Act, and receives inconsistent signals from the Supreme Court concerning the desirability of rulemaking versus case law development.

These forces impel the Advisory Committee to avoid clashes with Congress and the Supreme Court by attending to minor matters. Instead of leading, as it is institutionally constituted to do, the Committee has become focused on wordsmithing. The result is an unjustified barrage of trifling changes that burden the bench and bar and squander opportunities to address topics meaningful to the administration of justice. Ultimately, then, the gloom attending the federal judicial rulemaking process is largely the Committee’s fault. Like the wayward star, it should change, a process that starts by understanding the burdens and costs imposed by every procedural change.

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INTRODUCTION

In 2013, the Federal Rules of Civil Procedure (Rules) turn seventy-five years old. Though the Rules themselves have earned their encomia, the process by which they are promulgated under the Rules Enabling Act (REA)¹ has been a source of gloom for more than a generation. Reading law review commentary about federal rulemaking is like reading tabloid headlines about a wayward Hollywood star. The favorite word, dating from 1975,² is “crisis.”³ Like the troubled star, the civil rulemaking process has engaged in “irresponsible experiment”⁴ and occasionally manifests a lack of real-world grounding.⁵ Its fans suffer “malaise”⁶ because the process is

¹ 28 U.S.C. § 2072 (2006).

² See Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 676 (1975).

³ See, e.g., Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 652–53 (2010); Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 299 (2008) (“[C]risis clamor seems fairly universal among academics . . .”); Cheryl L. Haas, Note, *Judicial Rulemaking: Criticisms and Cures for a System in Crisis*, 70 N.Y.U. L. REV. 135, 149 (1995).

⁴ Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 844 (1993). Specifically, Professor Burbank decried what he saw as an “irresponsible experiment with court access” by the 1983 amendment to Rule 11. *Id.*

⁵ Professor Burbank called for a moratorium on civil rulemaking until the Advisory Committee made provision for sufficient empirical data on which to base rule amendments. *Id.* at 841–42; see also Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67, 75–85 (1988).

⁶ Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 7 (1994). In that article, Professor Wright said he “was gloomier about the status of the rulemaking process than I had ever been.” *Id.* at 9.

“in disarray, if not in decline.”⁷ It has lost its influence as a role model,⁸ is “under siege,”⁹ and might “go the way of the French aristocracy.”¹⁰

People are gloomy for different reasons. To some, the problem is that the Supreme Court engages in amendment by case law instead of through the REA process.¹¹ Others cite the “politicization” of the process a generation ago, which took rulemaking out of the hands of elite experts.¹² Others believe the process does not take into account the sea change in the nature of litigation from a system based upon adjudication to one based upon settlement.¹³ Whatever the reasons, the sense of unease is palpable. Even defenders are not enthusiastic. About the best one finds, reflected in the title of an article by Professor Marcus, is that the federal rulemaking process is “Not Dead Yet.”¹⁴

In my view, the problem is that the process, in the hands of the Advisory Committee on Civil Rules (Committee),¹⁵ is *all too alive*. In the past two decades, the Committee has imposed too much new material to be processed meaningfully or assimilated smoothly. Moreover, that period has brought a new phenomenon: amendments that do nothing but wordsmith.¹⁶ So I am gloomy because a Committee well suited to lead and innovate on things that matter—as it did with electronic discovery—leads infrequently and seems to see itself as a platonic arbiter of style. It has lost the

⁷ Carl Tobias, *Opt-Outs at the Outlaw Inn: A Report from Montana*, 14 REV. LITIG. 207, 212 (1994).

⁸ Specifically, as a role model for state procedural provisions. See Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1184–88 (2005).

⁹ Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888 (1999).

¹⁰ Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

¹¹ See, e.g., Carrington, *supra* note 3.

¹² See, e.g., Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169, 1241 (1996) (noting that the REA “envisioned procedural rulemaking as an essentially technical undertaking best left in the expert hands of judges”); Mullenix, *supra* note 10, at 837 (“The reigning sensibility for fifty years of federal rulemaking has been an ethos of elitism and secrecy; of closeted, deliberative efforts by a committee of experts.”).

¹³ See, e.g., Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 334–37 (2008).

¹⁴ Marcus, *supra* note 3.

¹⁵ I limit my discussion to the Federal Rules of Civil Procedure.

¹⁶ In his transmittal letter to the Chief Justice, the Chair of the Committee on Rules of Practice and Procedure of the Judicial Conference said that the 2006 amendments to the Rules were intended to “clarify, simplify, and modernize their expression without changing their substantive meaning.” Memorandum from Judge David F. Levi, Chair, Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., to the Honorable John G. Roberts, Chief Justice of the U.S. 3 (Nov. 1, 2006), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1106/summary_proposed_amend.pdf.

opportunity, for example, to lead on the appropriate standard for pleading a claim. Worse yet, I believe, the Committee's hyperactive fiddling has done harm by imposing untoward burdens on bench and bar and expenses on litigants.

In this Article, I discuss some possible explanations for this gloomy state. The discussion must recognize that "judicial rulemaking" engages two levels of delegation: at the macro level, in the REA, Congress delegates legislative power to the judiciary; at the micro level, the Supreme Court delegates its power to the Committee. Each level raises its own problems.

The Article proceeds in three Parts. First, at the macro level, the entire enterprise under the REA is rife with tension concerning the roles of the legislative and judicial branches. As Professor Redish has argued, once we recognize that procedural rules affect the enforcement of substantive rights, the lodging of a legislative function in the Judicial Branch raises a potential constitutional question. So even if the Court itself actually discharged the role of drafting proposed Rules, we should expect nervousness, if not "crisis." Second, at the micro level, the Committee (as delegee of a delegee) faces at least four significant "pressure points" that render its job especially difficult. Specifically, it must deal with (1) lack of clarity regarding the validity of Rules under the REA, (2) congressional intermeddling, (3) politicization of the rulemaking process, and (4) inconsistent signals from the Supreme Court. In the aggregate, these pressure points may explain the Committee's recent general reluctance to tackle major issues and its retreat to stylistic tinkering. Third, I review some of the Committee's specific efforts in the past generation, which show that the Committee too often plays from behind and engages in trivial efforts that unduly burden the profession the Committee is supposed to serve.

I. THE MACRO LEVEL: THE INHERENT "CRISIS" IN FEDERAL JUDICIAL RULEMAKING

In the REA, Congress permits the Supreme Court to promulgate rules of procedure for the federal courts. It delegates to the Judicial Branch a legislative function.¹⁷ The process is inherently antidemocratic because the people responsible for this legislative product are not elected.¹⁸ It is also

¹⁷ Everyone seems to agree with this point, but as my friend Tom Arthur asks, why is it up to Congress to tell the Judicial Branch how to run its business? After all, no one has ever suggested that the Court has the authority to write the Senate Rules. Still, the Legislature has assumed a role in setting federal court procedure at least since the Conformity Act. Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197. That legislation instructed federal courts to employ the procedural law of the state in which they sat.

¹⁸ See Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303,

inherently awkward because the Constitution authorizes the people ostensibly performing the task¹⁹ to decide cases and controversies, and not to draft legislation.²⁰

The process caused few sleepless nights in the early years. When Congress passed the REA in 1934, the prevailing jurisprudential sense seemed to be that “substance” and “procedure” were hermetically separated things.²¹ The drafters of the REA certainly understood that Congress could not delegate to the judiciary the power to define substantive rights. Because the REA delegated only the authority to prescribe “procedural” rules, the thinking was, Congress retained the power to legislate on federal “substantive” matters.²² The Court reflected this view in 1941 in *Sibbach v. Wilson & Co.*, which appeared to treat substance and procedure as mutually exclusive fields.²³

At some point, however, everyone recognized that there is no hermetic seal; procedural provisions routinely affect the enforcement of substantive rights.²⁴ Thus, for instance, the compulsory counterclaim provision, Rule 13(a),²⁵ has a substantive impact by precluding the assertion of a claim that should have been filed in an earlier case. Pleading rules erect a barrier to entry that keeps some claims out of the litigation stream altogether. Discovery sanctions may result in the entry of default judgment against a defendant or dismissal of a plaintiff’s claim. Rule 23 permits aggregation of claims that may create opportunities for vindication of substantive rights that otherwise would not exist. By permitting interlocutory review of class action certification orders, Rule 23(f) affects the availability of the class

1303–08 (2006); see also Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284 (1978) (reviewing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977)); Mullenix, *supra* note 10, at 840–42.

¹⁹ The REA imposes the task on the Supreme Court. Of course, the Justices do not perform the task, but have long delegated it to the Committee.

²⁰ “[T]he Rules Enabling Act invests in the Supreme Court lawmaking power untied to the judicial process.” Redish & Amuluru, *supra* note 18, at 1305; see *id.* at 1319–27 (discussing the constitutionality of the REA).

²¹ *Id.* at 1311 (referring to the “widespread, albeit fallacious, assumption about the mutual exclusivity between matters of procedure and matters of substance”).

²² At least after *Erie Railroad v. Tompkins*, 304 U.S. 64, 78–79 (1938), left nonfederal substantive matters to the states.

²³ 312 U.S. 1, 11–12 (1941); see *infra* notes 35–42 and accompanying text.

²⁴ “No one today could seriously doubt that procedural rulemaking involves the weighing of substantial policy interests and dynamically alters the development of the substantive law.” Redish & Amuluru, *supra* note 18, at 1319; see also *infra* notes 43–56 and accompanying text. This point should have been clear when the Court decided *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958), although the case did not address the validity of a Federal Rule, and certainly by the time the Court upheld Rule 4 in *Hanna v. Plumer*, 380 U.S. 460, 463–64 (1965).

²⁵ All references in this paper to Rules are to the Federal Rules of Civil Procedure.

device in federal court.²⁶ Indeed, as Justice Scalia recognized in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, “most [Federal] Rules have some effect on litigants’ substantive rights or their ability to obtain a remedy.”²⁷

With this realization, judicial rulemaking became considerably more problematic. Indeed, at that point, Professor Redish argues, the REA process became not just awkward, but unconstitutional. Because Article III courts are politically insulated, the Constitution limits their lawmaking authority to the adjudicatory process; federal courts are permitted to make policy choices only in the context of resolving cases or controversies.²⁸ Because the REA vests courts with lawmaking power of a legislative variety and the judiciary is not responsible to the electorate, the REA, Redish concludes, “has undermined the essence of the democratic process.”²⁹

This theory is bold³⁰ and raises an existential crisis for judicial rulemaking.³¹ But Professor Redish is not only admirably bold as a scholar; he is admirably pragmatic. He recognizes that there is little chance the Court will question the constitutionality of the REA.³² Indeed, in *Shady Grove*, the Court showed no willingness to address the sorts of issues he raised. So Professor Redish offers a strong fallback position: the Court should recognize that the interplay of procedure and substance requires it to put some teeth in the *statutory* analysis of whether Rules are valid.³³ This statutory standard—specifically, how to interpret § 2072(a) and (b)—

²⁶ Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 19 (2007) (finding that 52% of cases in which courts of appeals undertook appellate review resulted in reversals of certification orders).

²⁷ 130 S. Ct. 1431, 1445 n.10 (2010).

²⁸ Redish & Amuluru, *supra* note 18, at 1305. Professor Redish recognizes that federal courts have the authority to undertake tasks beyond adjudication. What he calls “paradigm two” activities—hiring law clerks, holding conferences, and the like—“have no readily discernible impact on the lives of citizens beyond the four walls of the courthouse.” *Id.* at 1324. On the other hand, “paradigm one” activities consist of the judiciary’s authorized lawmaking function, which must be discharged through the decision of cases or controversies. *Id.*

²⁹ *Id.* at 1335.

³⁰ Redish himself characterized the argument as “unthinkable.” *Id.* at 1334.

³¹ One way to fix the problem would be to have the Committee report to Congress, which would then draft the Rules. *Id.* at 1326 (suggesting that finding the process unconstitutional “would mean, simply, that the Rules (at least those not of the housekeeping variety) would ultimately have to come from Congress and be signed by the President. Presumably, the Advisory Committee could still make recommendations, but to Congress, rather than to the Court.”).

³² *Id.* at 1331 (“To be sure, legitimate or not, the holding of the Act’s constitutionality is not likely to change in the foreseeable future.”).

³³ *Id.* at 1332 (“It is conceivable, however, that a parallel subconstitutional concern about the need for accountable policy makers should guide construction of the cryptic substance-procedure distinction imposed by the Act itself.”).

ultimately must guide the group that actually drafts the Rules. That group, of course, is the Committee. We turn now to challenges it faces in doing so.

II. THE MICRO LEVEL: THE COMMITTEE FACES SIGNIFICANT PRESSURE POINTS

In this Part, I address four things that make the Committee's job especially challenging and may, as a whole, cause it to shrink from boldness. The first of these is the point just noted: that the ultimate standard for determining whether a Rule is valid under the REA is unclear. Indeed, it is not even clear who is in charge of determining whether the standard is met. In addition, the Committee's job is made more difficult by the possibility of congressional interference, by a process that has opened the Committee to the kind of political pressure one normally associates with a legislative body, and by inconsistent signals from the Court about the desirability of rulemaking versus case law development.

A. *Lack of Clarity for Validity Under the REA*

Federal Rules must pass muster under the Constitution and the REA. Constitutionally, the Court has imposed a minimal requirement for validity under Article III, augmented by the Necessary and Proper Clause. Even a Rule that affects substantive rights is constitutional if it is “rationally capable of classification’ as procedure.”³⁴ That’s not much of a test. The rules under scrutiny, after all, are Rules of Civil *Procedure*.

Does the REA raise a higher hurdle? It sets forth two requirements. First, under § 2072(a), a Rule must deal with “practice and procedure” in the federal courts.³⁵ Second, under § 2072(b), a Rule “shall not abridge, enlarge or modify any substantive right.”³⁶ In *Sibbach*, the Court engaged in double conflation: it combined the two parts of the REA into one test and further equated it with the constitutional test. Rules 35 and 37³⁷ were valid under the REA for the same reason they were valid under the Constitution: they “really regulate[] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress.”³⁸

The *Sibbach* analysis is skewed. Putting to one side whether the constitutional and statutory tests should be coextensive, *Sibbach* asks only whether a Rule is procedural. It fails to address whether the Rule modifies

³⁴ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965)).

³⁵ 28 U.S.C. § 2072(a) (2006).

³⁶ *Id.* § 2072(b).

³⁷ Rule 35 permits the court to order a medical examination of a party as part of discovery. Rule 37 provides methods for enforcing the discovery provisions of the Rules, including Rule 35.

³⁸ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

a substantive right. In other words, it puts all the REA eggs in the § 2072(a) basket and gives no independent heft to § 2072(b).³⁹ Professor Redish has shown that this “redundancy construction” of the REA is consistent with—indeed, explained by—the notion that there is hermetic separation between substance and procedure.⁴⁰ So at the time of *Sibbach*, to say that a Rule “really regulated procedure” was to say that it *could not* abridge, enlarge, or modify any substantive right. By 1965, though, when it decided *Hanna v. Plumer*,⁴¹ the Court should have been willing to address the possibility (if not the likelihood) that § 2072(b) limits § 2072(a). Surprisingly, however, even at that late date it continued to embrace *Sibbach* and its conflation of § 2072(a) and § 2072(b).⁴²

Later, however, in cases such as *Burlington Northern Railroad v. Woods*⁴³ and *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*,⁴⁴ the Court recognized that procedural provisions do affect the enforcement of substantive rights.⁴⁵ It concluded that a Rule is valid so long as this impact on substantive rights is “incidental.”⁴⁶ In 2008, Professor Redish adumbrated a cogent approach to the question of what this means.⁴⁷ To assess whether an impact is “incidental,” Redish appealed to the underlying purposes of the REA: (1) to ensure that Congress remains responsible for substantive federal policy decisions and (2) to ensure a uniform system of procedure in federal courts.⁴⁸ He reasoned that Rules may affect substantive rights in two ways. First, rulemakers may promulgate what they think is a purely procedural provision that, in practice, has a substantive “spillover” effect on substantive rights.⁴⁹ Second, and more importantly, rulemakers draft provisions that foreseeably—indeed, in many cases intentionally—affect substantive

³⁹ At the time *Sibbach* was decided, the two provisions did not carry those subsection designations. The operative language, however, was the same. See 28 U.S.C. § 723b (1940).

⁴⁰ Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 28–29 (2008).

⁴¹ 380 U.S. 460 (1965).

⁴² Dean Ely noted that *Sibbach* recognized no independent role for § 2072(b). John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724–33 (1974).

⁴³ 480 U.S. 1 (1987).

⁴⁴ 498 U.S. 533 (1991).

⁴⁵ See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1107 (1982) (arguing that the Court was correct in not attributing independent significance to § 2072(b)); Ely, *supra* note 42, at 718.

⁴⁶ “Rules which incidentally affect litigants’ substantive rights do not violate this provision [§ 2072(b)] if reasonably necessary to maintain the integrity of that system of rules.” *Burlington Northern*, 480 U.S. at 5.

⁴⁷ Redish & Murashko, *supra* note 40.

⁴⁸ *Id.* at 55–57.

⁴⁹ *Id.* at 87–88.

rights. Such provisions are valid if the “impact on substantive rights is merely secondary to the primary procedural purpose.”⁵⁰

Redish explained, for example, that Rule 37’s provision for dismissal as a discovery sanction, which has an obvious and intended impact on plaintiffs’ substantive rights, is valid because it is aimed primarily at enforcing the discovery provisions of the Rules. Without such an “instrumental use[] of substantive consequences”—without such a “substantive club”—the discovery provisions “could not be assured of functionality.”⁵¹

But “incidental” is not a synonym for “insignificant.” A Rule’s impact on substantive law may be profound and yet still incidental, as demonstrated by the example of dismissal as a discovery sanction.⁵² The question is whether the “substantive club” is needed to enforce a procedural goal. Further, in making this assessment, Redish concluded, the court should not look to the content of the affected state law. The issue is whether the *federal* provision is aimed at a procedural objective.⁵³

Unfortunately, the Court in *Burlington Northern* and *Business Guides* failed to engage in analysis of this sort. One reason, Redish points out, is its unfortunate establishment of a presumption that the Federal Rules are valid. As early as *Hanna*, the Court placed great importance on the fact that the Rules go through multiple layers of review.⁵⁴ Amending a Rule requires seven steps and engages five bodies.⁵⁵ In *Burlington Northern*, the Court concluded that this gauntlet lends the Rules “presumptive validity” because of the “study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect.”⁵⁶

This presumption is unjustified for at least two reasons. One, it is not clear that any group actually reviews the Rules for validity under the REA. More likely, each assumes that another does the heavy lifting.⁵⁷ The Congress that passed the REA evidently assumed that the Supreme Court

⁵⁰ *Id.* at 89.

⁵¹ *Id.* at 90–91.

⁵² *Id.* at 40–41, 80–84, 91–93.

⁵³ *Id.* at 92 (“All that matters is whether the rules affect substantive rights incidentally . . .”).

⁵⁴ *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

⁵⁵ See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002) (explaining that a Rule proposal “undergoes at least seven stages of formal comment and review, in a process involving five separate institutions: the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, the Supreme Court, and Congress”).

⁵⁶ *Burlington N. R.R. v. Woods*, 480 U.S. 1, 6 (1987).

⁵⁷ See Haas, *supra* note 3 (“In upholding the rule [in *Hanna*], the Court, rather than undertaking its own independent review, relied on the assumption that someone must have considered the rule’s validity.”).

would undertake this review.⁵⁸ The Court's assessment of the Rules, however, is desultory at best.⁵⁹ Perhaps the Justices assume that the Committee or the Judicial Conference analyzes the provisions for validity under the REA. One gets the picture of a pop fly falling between the centerfielder, the shortstop, and the second baseman.

And two, presumptive validity ignores the fact that Congress's role here is reactive. When the Court sends a Federal Rule to Congress, it has changed the legal status quo. As Redish says: "Congress must overcome the serious (and intended) inertia against legislative action to alter or supplant the Rules' dictates."⁶⁰ In other words, if Congress does nothing, it does something. For this reason, Justice Frankfurter, dissenting in *Sibbach*, concluded that "to draw any inference of tacit approval from non-action by Congress is to appeal to unreality."⁶¹

The Court had the benefit of Redish's analysis when it decided *Shady Grove* in 2010. In that case, state law forbade class litigation of the substantive claim being asserted. The question was whether a federal court exercising diversity jurisdiction could nonetheless permit such claims to be asserted by a class. The Court held that Rule 23 governed and permitted the class, and that the provision is valid under the REA. It did so, however, in two opinions: the plurality of four by Justice Scalia and the concurrence of Justice Stevens. These opinions differed on the test for validity of a Rule under the REA and thus left the standard in doubt.⁶²

Though not citing the Redish article, there is much in Justice Scalia's opinion that is consistent with the Redish approach. Thus, a Rule is valid if its effect on substance is "incidental," and the court looks only to the federal provision (not state law) in making this determination.⁶³ Justice Scalia did not appear to rely on the presumptive validity of the Rules. And,

⁵⁸ Burbank, *supra* note 45, at 1137 ("[H]aving failed to address the problem at all systematically, the [Advisory] Committee was forced, and in most cases was quite content, to rely largely on judgments informed by a sense of the professional and political climate and by the hope that the Supreme Court would preserve it from error."). Professor Burbank also concluded that the original Reporter to the Committee "was more committed to the integrity of the Rules than he was to the Act's limitations." *Id.* at 1136.

⁵⁹ See Haas, *supra* note 3, at 146 ("[T]he Justices, by their own admission, heavily rely upon the advisory committee's suggestions.").

⁶⁰ Redish & Amuluru, *supra* note 18, at 1326.

⁶¹ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

⁶² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010). The plurality, as will be seen, adopted *Sibbach*. Justice Stevens embraced a more searching inquiry that would give greater importance to § 2072(b). The four dissenters, in an opinion by Justice Ginsburg, based their reasoning on *Erie* and thus did not address the validity of Rule 23 under the REA. See *id.* at 1460–61 (Ginsburg, J., dissenting).

⁶³ *Id.* at 1443–44 (plurality opinion). For Justice Stevens, assessment of validity under the REA requires consideration of the state law itself. In this regard, he undertook a functional analysis and concluded that the New York law did not implicate substantive interests. Thus, it would be trumped by Rule 23. *Id.* at 1450–60 (Stevens, J., concurring).

notably, he forthrightly recognized that procedure can affect substance: “The test is not whether the rule affects a litigant’s substantive rights; most procedural rules do.”⁶⁴ This recognition should undercut *Sibbach*, which, as we saw, was rooted in the view that substance and procedure are mutually exclusive. Once Justice Scalia admitted that the two overlap, it would seem impossible for him to limit his assessment to the question of whether Rule 23 “really regulates procedure.” Indeed, Scalia seemed willing to go there. He had addressed the distinction between § 2072(a) and § 2072(b), and even admitted that there is tension between *Sibbach* and § 2072(b): “[I]t is hard to understand how it can be determined whether a Federal Rule ‘abridges’ or ‘modifies’ substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist.”⁶⁵

Just as he was poised to engage in a meaningful analysis of whether Rule 23 modified state law, however, Justice Scalia pulled back. To him, *Sibbach* provides the *sole* test for validity of a Rule—under both § 2072(a) and § 2072(b). Rule 23 concerns the aggregation of claims. It thus “really regulates procedure” and, to Justice Scalia, is valid.⁶⁶ So we are back where we were: the test for validity of a Rule is merely whether the provision is arguably procedural. The conclusion is jarring.⁶⁷

As a policy matter, Justice Scalia defended the result because it ensures that class action procedure will be uniform in every federal district. If the REA required the federal court to refuse to follow a Federal Rule when it conflicted with a law the state considered “substantive,” federal practice would be inconsistent from district courts in one state to district courts in another.⁶⁸

No doubt this is true, and Congress did intend that practice be uniform among the federal courts. But, that is only one policy basis for the REA. In addition, the Act seeks to ensure that the elected branch is responsible for making significant policy decisions.⁶⁹ In *Shady Grove*, the defendant argued that permitting a class action in federal court for claims that could only be asserted individually in state court transformed the dispute from

⁶⁴ *Id.* at 1442 (plurality opinion); *see also id.* at 1443 (“Each of these rules had some practical effect on the parties’ rights . . .”); *id.* at 1445 n.10 (“[M]ost Rules have some effect on litigants’ substantive rights or their ability to obtain a remedy, but that does not mean the Rule itself regulates those rights or remedies.”).

⁶⁵ *Id.* at 1445–46.

⁶⁶ *Id.*

⁶⁷ What Professor Redish said years before *Shady Grove* proved prescient: “It is as if the Court, by relying on *Sibbach*, first validates the [REA] by implicitly invoking that decision’s faulty premise of procedural-substantive mutual exclusivity . . . and, having thus found the Act constitutional, readily acknowledges the faultiness of this essential premise.” Redish & Amuluru, *supra* note 18, at 1331 (footnotes omitted).

⁶⁸ *Shady Grove*, 130 S. Ct. at 1446 (noting “the very real concern that Federal Rules which vary from State to State would be chaos”).

⁶⁹ Redish & Murashko, *supra* note 40, at 55–56.

one concerning \$500 to one concerning \$5,000,000. The Court's holding in *Shady Grove* created litigation (and the risk of substantive liability) that state law would not have permitted. Even if one ultimately concludes that the impact of the federal provision is "incidental,"⁷⁰ the question of whether the result modifies a substantive right deserved the sort of hearing it gets in Redish's compelling book *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit*.⁷¹ The rote incantation of the *Sibbach* test failed to give the argument its due.

For present purposes, it is enough to note two things about the state of the law concerning validity of a Rule under the REA. First, because neither the Court nor Congress undertakes a meaningful assessment of whether a Rule is valid under the REA, it may be incumbent on the Committee to do so. Second, doing so is difficult because the Court has failed to prescribe a test beyond the "really regulates procedure" shibboleth of *Sibbach*. On the one hand, the lack of a meaningful standard for judicial review might counsel the Committee to be as bold as possible in promulgating new Rules. But there are other pressure points that seem to push in the opposite direction.

B. Congressional Action

Despite its general delegation of procedural rulemaking to the Supreme Court, Congress continues to prescribe civil procedure. It does so sporadically and unpredictably as the result of lobbying, and its work product is rarely admirable.

Sometimes Congress affects procedure as part of substantive legislation. For example, the Private Securities Litigation Reform Act imposed strict pleading requirements, detailed provisions for the appointment of lead plaintiff and counsel, and rules for overseeing settlements in securities class actions.⁷² Such efforts complicate matters for lawyers and judges, who must abide by statutory and Federal Rules provisions. They are also antithetical to the goal of procedural consistency across substantive areas.⁷³

⁷⁰ 130 S. Ct. at 1443.

⁷¹ MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009). The existence of the class action makes possible (if not likely) the assertion of claims that would never have been brought otherwise. The fact that negative-value consumer claims would not be brought individually is consistent with the maxim *de minimis non curat lex*. The fact that such claims actually are asserted in class actions trumps that maxim.

⁷² 15 U.S.C. §§ 77z-1, 78u-4 (2006).

⁷³ The Federal Rules are grounded on the notion that they apply equally to all cases; there are no specialized rules for certain types of cases. Congress's intervention in specific substantive areas challenges that principle. See Mullenix, *supra* note 10, at 837 (noting that interest group demands for substance-specific procedural rules threaten the goal of transsubstantivity).

Sometimes Congress changes procedure in legislation that is primarily jurisdictional. The best example is the Class Action Fairness Act (CAFA).⁷⁴ Though intended principally to funnel multistate class actions into federal court, CAFA imposes several procedural requirements concerning appointment of class counsel and awards of attorney's fees. Though CAFA is transsubstantive in that it applies potentially to any claim, it creates a confusing second layer of procedural rules for bench and bar.

Occasionally, Congress intervenes directly with Rules as forwarded from the Court. The watershed here concerned not the Civil Rules, but the proposed Federal Rules of Evidence in 1972. Congress rejected the proposals, took over the project, and wrote the Rules. To many, that signaled a turning point in the relationship between the two branches and the Court's "monopoly" on promulgation of procedure.⁷⁵

It also reflected the problems associated with permitting lobbying regarding procedural rules. In 1988, Congress unilaterally revised Rule 35, which permits court orders of medical examinations as part of discovery, to include examinations by psychotherapists.⁷⁶ It did so, apparently, because a Senator's daughter was a psychotherapist, and the Senator pushed the amendment.⁷⁷ Similarly, in 1983, Congress scuttled a proposed version of Rule 4, which would have permitted service of process by certified mail. It did so in response to lobbying by professional process servers.⁷⁸ Occasionally, Congress has also attempted to change provisions already promulgated, such as a 1993 effort in the House of Representatives to make sanctions mandatory under Rule 11.⁷⁹

The sense that Congress might be looking over its shoulder may influence the Committee to eschew significant revisions. In addition, the sort of lobbying we expect to see at Congress is now part of the process at the Committee level as well because of the transformation of the rulemaking process from one behind closed doors to an open one.

⁷⁴ 28 U.S.C. § 1332(d) (2006).

⁷⁵ Geyh, *supra* note 12, at 1227; *see id.* at 1169 ("In rulemaking . . . the past twenty-five years have witnessed a startling transformation of the judiciary's role.").

⁷⁶ *See* Carrington, *supra* note 3, at 623 ("Congress again joined in (or intruded into) our enterprise in 1988 by quietly enacting . . . a revision of Rule 35 authorizing mental examinations of parties by psychologists as well as psychiatrists.").

⁷⁷ Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 287 n.176 (2009).

⁷⁸ Bone, *supra* note 9, at 902–03; Mullenix, *supra* note 10, at 844–46.

⁷⁹ Redish & Amuluru, *supra* note 18, at 1317. Sometimes Congress appears to resent the Committee. "[S]ome in Congress seem anxious to rub the rulemakers' noses in the fact of their position of inferiority. For example, even as Rule 23(f) was headed toward implementation in 1998, bills before Congress sought to provide virtually the same thing. And some associated with congressional activity have bridled at awaiting or paying obeisance to the rulemaking process." Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 929 (2002) (footnote omitted).

C. The Change to an Open Process

For the first fifty years of federal rulemaking, the Committee worked out of the public eye. The early Committees consisted of academics and lawyers, without judges. Meetings were closed, and comments were made available only to those who could show a reason for access. Committees did not publish their proceedings or drafts. By the late 1970s, membership of the Committee had changed, and the process had become dominated by judges.⁸⁰ In 1983, the Standing Committee, reacting to the rejection of the Evidence Rules, published what it called its “evolved practice,” which included public hearings and publication of transcripts.⁸¹

Congress insisted on more and imposed it in the Judicial Improvements and Access to Justice Act of 1988.⁸² That Act requires public hearings, notice, an extended public comment period, and minutes recording what was considered, including negative public commentary. The result looks a good deal like agency rulemaking under the Administrative Procedure Act.⁸³ It changed the rulemaking process fundamentally from one in the hands of a cadre of experts to a participatory model.⁸⁴ The most worrisome aspect of this “politicization” was opening the Committee to lobbying. Unlike legislative lobbying, however—in which interest groups have electoral leverage over the targets of their efforts—members of the Committee are not running for office and need not pander for votes. Most members are Article III judges or the only group with a comparable form of tenure: university professors.

Notwithstanding, there is a risk that interest groups unable to persuade the Committee will take their fight to Congress.⁸⁵ This possibility may cause the Committee to shy away from big issues. Judge Weinstein cautioned that the Committee’s pushing too closely to the substantive side of things would lead Congress to take over and thereby “threaten[] the entire enterprise.”⁸⁶ One former Reporter concluded that the Committee should “listen and count the decibels,” meaning that it should not act whenever potential revision raises substantial pushback.⁸⁷ Such skittishness

⁸⁰ Carrington, *supra* note 3, at 609.

⁸¹ Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 468 (1993) (citing JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 66 (1983)).

⁸² Pub. L. No. 100-702, tit. IV, 102 Stat. 4642 (1988).

⁸³ 5 U.S.C. §§ 551–559 (2006).

⁸⁴ See, e.g., Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 165–66 (1991); Mullenix, *supra* note 10, at 799–800 (“[W]hat previously had gone on behind closed doors is now open to enhanced public participation and scrutiny . . .”).

⁸⁵ This happened with the 1983 amendments to Rule 4. See *supra* note 77 and accompanying text.

⁸⁶ Marcus, *supra* note 79, at 930.

⁸⁷ The then-Reporter urged that the Committee undertake only “sufficiently technocratic and apolitical” amendments. Memorandum from Reporter to Civil Rules Comm. 14 (Oct. 18, 1989); see Mullenix, *supra* note 10, at 836.

might embolden interest groups to raise a ruckus simply to get the Committee to forego potential changes.⁸⁸

One problem with the “decibel” test is that it equates popular reaction with *important*. Professor Marcus notes that several proposed amendments have created considerable outcry while ultimately not proving to be significant.⁸⁹ More critically, the decibel test runs the risk of equating topics that evoke substantial reaction with *substantive*. The fact that the Committee must avoid substantive rulemaking does not mean that it should shy away from important rulemaking.

Professor Carrington, who served as Reporter during implementation of the politicized process, records that the Committee was aware that “lobbying by the self-interested” had converted the Field Code, celebrated for its succinctness, to the bloated Throop Code of the 1880s.⁹⁰ Despite this awareness and efforts to avoid the problem, the work product of the Committee has come to look more like a legislative product. Rules have gotten longer and more complex, and Committee notes look increasingly like legislative history.⁹¹ Because it acts in the shadow of Congress—under the threat that those it disappoints can go to the Capitol—the Committee may have an incentive to stay away from topics that will push too many hot buttons. Moreover, because that decisionmaking is now spread more broadly, it may be more difficult to forge agreement regarding how to react to Supreme Court decisions.

D. Supreme Court Action

Some criticize the Court for changing procedure by case law and not through the rulemaking process.⁹² Though we may agree that rulemaking is best done holistically, it is difficult to fault the Court for deciding cases. That is its day job. When the Court decides a case affecting the application of a Rule, the big question is how the Committee should react. The answer reflects the political nature of the task because it will depend in some measure on what one thinks of the Court’s decision as a normative matter. We might expect that today’s more democratic, widespread process will be less effective at forging a normative response than would a cadre of experts.

⁸⁸ See Mullenix, *supra* note 10, at 837.

⁸⁹ Marcus, *supra* note 79, at 935.

⁹⁰ Carrington, *supra* note 3, at 616.

⁹¹ See Wright, *supra* note 6, at 5 n.18 (“One of the most pernicious developments in all federal rulemaking has been the change in Advisory Committee Notes. Instead of a brief indication of the source of a rule, as they were in the beginning, they have grown to be lengthy treatises on the subject dealt with by the particular rule.”).

⁹² See, e.g., Carrington, *supra* note 3, at 621.

Occasionally the Committee acts to “reverse” a holding. It did this after the 1986 decision in *Schiavone v. Fortune*,⁹³ in which the Court interpreted Rule 15 to deny relation back of an amended pleading. The result—that the plaintiff’s claim was barred—struck the then-Reporter as antithetical to the goal of Rule 15, which is to allow relation back when the party being added had timely notice.⁹⁴ The Committee proposed an amendment, which took effect in 1991.⁹⁵

The same Reporter had a negative reaction to the Court’s 1986 trilogy of summary judgment decisions.⁹⁶ In his view, the cases permitted courts to grant summary judgment “more freely than the text of the rule could reasonably be said to intend.”⁹⁷ This time, he was unable to persuade the Committee to undo case law. Instead, the Committee opted to “codify” the trilogy in an amended Rule 56. The Standing Committee rejected the effort. The Reporter concluded that the Standing Committee did not want to “trespass on a lawmaking role that the high Court had appropriated for itself.”⁹⁸ But there was another very good reason to reject the attempted codification. As Professor Wright explained: There is no profit in amending a Rule to restate (even in more elegant language) what it already is understood to say.⁹⁹

*Scott v. Harris*¹⁰⁰ raises a similar issue. There, the Court held that a videotape rendered one party’s version of the facts so improbable that the court should have ignored that party’s affidavits in ruling on summary judgment.¹⁰¹ Some observers believe that the case altered proper practice

⁹³ 477 U.S. 21 (1986).

⁹⁴ See Carrington, *supra* note 3, at 619–20. The Committee also considered the holding antithetical to the command of Rule 1, to achieve “the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1. Though these matters seemed clear in hindsight, the Rule as promulgated was susceptible to the interpretation in *Schiavone*.

⁹⁵ Carrington, *supra* note 3, at 620 & n.100. One wonders whether the same sorts of sentiment might lead the Committee on Appellate Rules to undo the holding in *Bowles v. Russell*, 551 U.S. 205, 208–13 (2007), to the effect that the time for appeal is jurisdictional and cannot be extended, even when the defendant is not prejudiced.

⁹⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁹⁷ Carrington, *supra* note 3, at 645.

⁹⁸ *Id.* at 647.

⁹⁹ “The draft was an elegant one. It reflected keen insight and great drafting skill But at a time when Rule 56 was working well, when three Supreme Court decisions had imposed an authoritative gloss on its meaning and application, it would have been a mistake to substitute a completely new rule.” Wright, *supra* note 6, at 5 (footnote omitted). Similarly, “[t]here is much to be said for sticking with a rule that three decades of experience and precedent have made workable rather than throwing away all the painfully accumulated learning by devising a new rule.” *Id.*

¹⁰⁰ 550 U.S. 372 (2007).

¹⁰¹ *Id.* at 378–81.

for weighing of inferences under Rule 56.¹⁰² Others, however, see the case as an appropriate application of extant law.¹⁰³ Should the Committee amend the Rule to abrogate the holding? Should the Committee amend the Rule to articulate the holding? When it amended Rule 56 in 2009 and 2010, it did neither.

Indeed, usually the Committee does not react to case law. In *Chambers v. NASCO, Inc.*,¹⁰⁴ the Court upheld a district court's inherent power to sanction lawyers and clients for abusive litigation conduct. Two years later, the Committee amended Rule 11 to restrict sanctions available under that provision. But the inherent power recognized in *Chambers* survives and opens a door for judges unhappy with the restrictions on Rule 11 sanctions.¹⁰⁵ The Committee has made no effort to blunt the impact of *Chambers*.

The Court sends inconsistent signals about whether it prefers that issues be addressed by Rule amendment or by case law. Sometimes it eschews rulemaking. For example, when it decided *Hickman v. Taylor*,¹⁰⁶ the case that established federal work-product practice, the Court had before it a proposed rule dealing with the same subject. It decided the case and rejected the Rule.¹⁰⁷ The Court did not promulgate Rule 26(b)(3) for more than two decades after deciding *Hickman*.

Sometimes the Court lets things percolate in the lower courts, as it did with the development of mass tort class actions. The Committee notes to the 1966 amendments to Rule 23 indicated that group's conclusion that the Rule 23(b)(3) class action would generally not be appropriate for such cases.¹⁰⁸ Through the years, however, lower courts started to certify mass tort classes.¹⁰⁹ The Court did not step in to stop the development. Scholarly

¹⁰² See, e.g., Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838–42 (2009) (expressing concern about the relative roles of judge and jury as fact finder).

¹⁰³ See, e.g., EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 6:5, at 27–28 (3d ed. Supp. 2011–2012).

¹⁰⁴ 501 U.S. 32, 55–58 (1991).

¹⁰⁵ See Wright, *supra* note 6, at 4 (“Many federal judges do not like the restrictions the 1993 amendments put on the power to impose Rule 11 sanctions.”); see also Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge Is Like an 800-Pound Gorilla*, 14 REV. LITIG. 195 (1994) (suggesting the use of inherent sanctions to overcome limitations imposed by Rule 11).

¹⁰⁶ 329 U.S. 495 (1947).

¹⁰⁷ See Richard L. Marcus, *The Story of Hickman: Preserving Adversarial Incentives While Embracing Broad Discovery*, in CIVIL PROCEDURE STORIES 323, 329–31 (Kevin M. Clermont ed., 2d ed. 2008).

¹⁰⁸ FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

¹⁰⁹ See 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1783, at 325 & n.9 (3d ed. 2005) (“[O]ther courts have ignored the Advisory Committee's doubts and have allowed mass-disaster cases to be brought under subdivision (b)(3)” (citing cases from 1972 through 1998)).

opinion on the issue changed.¹¹⁰ Eventually, the Court embraced the application of Rule 23(b)(3) in this context.¹¹¹

On other occasions, though, the Court seems to expect the Committee to act (or at least to think about an issue). One example may be *Schiavone*.¹¹² A more interesting possibility, however, concerns pleading. For years, commentators and courts noted that liberal pleading standards may make it too easy to subject litigants to the costs of discovery. As discovery became more expensive, some observers suggested that pleading rules might be invigorated to raise the barrier to entry to the litigation stream. Some lower courts imposed heightened pleading requirements in some cases, particularly those asserting violations of civil rights. The Court rebuffed these efforts and seemed to invite the Committee to get involved. Twice within nine years—in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*¹¹³ and *Swierkiewicz v. Sorema N.A.*¹¹⁴—it swatted back lower court efforts to raise the pleading bar. It said that any change in pleading standards “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”¹¹⁵

Yet, aside from ineffectual tinkering with the discoverability standard,¹¹⁶ the Committee did nothing. Five years after sending its second invitation to the Committee to consider pleading standards, the Court decided *Bell Atlantic Corp. v. Twombly*.¹¹⁷ It followed two years later with *Ashcroft v. Iqbal*.¹¹⁸ These cases have generated a breathtaking amount of commentary, much of it urging the Committee to undo the holdings.¹¹⁹ Professor Miller counsels Committee members to “determine whether they will reassert their role as independent architects of the Federal Rules, accept that an aspect of their responsibility now may be to codify the

¹¹⁰ See, e.g., Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 288 (“In the earlier 1960s we did not fully understand the implications of mass tort demands on our legal system.”).

¹¹¹ Though the Court rejected a certification class in *Amchem Products, Inc. v. Windsor*, it recognized that mass torts may be amenable to class treatment. 521 U.S. 591, 625 (1997) (“But the text of the Rule does not categorically exclude mass tort cases from class certification, and District Courts, since the late 1970’s, have been certifying such cases in increasing number.”).

¹¹² See *supra* note 93 and accompanying text.

¹¹³ 507 U.S. 163 (1993).

¹¹⁴ 534 U.S. 506 (2002).

¹¹⁵ *Leatherman*, 507 U.S. at 168.

¹¹⁶ See *infra* notes 149–53 and accompanying text.

¹¹⁷ 550 U.S. 544 (2007).

¹¹⁸ 556 U.S. 662 (2009).

¹¹⁹ “It would probably not be an overstatement to suggest that the combination of lower court confusion and intense scholarly controversy caused by two Supreme Court decisions concerning the Federal Rules over so short a time period is unprecedented.” Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, ENGAGE, Nov. 2011, at 145, 146.

Court's Federal Rule decisions, or simply remain silent and defer to case development."¹²⁰

The Committee faces two questions in the wake of *Twombly* and *Iqbal*. First, should it do anything or simply leave the matter to the Court or Congress? Second, if it does something, should it change or embrace the holdings? The first question implicates the decibel test. Pleadings determine access to judicial machinery, which is obviously an issue of political importance. One is not surprised, therefore, to see that Congress has entertained the possibility of reacting to the cases. But one hopes it will not. Pleadings are but one part of the overall litigation process, to be balanced with others, such as discovery. Congress is ill suited to strike the balance meaningfully.¹²¹ One hopes that the Committee, which is well suited to contemplation and long-term consideration, will be the body (if any) that deals with the matter.

The second question—what to do on the merits—has become more interesting with the passage of time. Had the Committee leapt in based upon early reaction to *Twombly* and *Iqbal*, it probably would have recast Rule 8 to abrogate the holdings. Initially, few people had anything good (or even neutral) to say about the decisions.¹²² Now, interestingly, scholarly opinion has evolved. Professor Redish makes a strong argument that *Twombly* and *Iqbal* are consistent with the notice pleading regime of Rule 8(a)(2).¹²³ Moreover, the Court has decided more pleading cases, including *Matrixx Initiatives, Inc. v. Siracusano*¹²⁴ and *Skinner v. Switzer*,¹²⁵ which may indicate that the sky is not falling. Courts of appeals have had a chance to reverse improper dismissals under Rule 12(b)(6).¹²⁶

¹²⁰ Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 87 (2010).

¹²¹ After all, Congress delegated the job of prescribing procedure to the Court in the REA.

¹²² See generally Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1296 (2010) (noting that *Twombly* and *Iqbal* have been “widely criticized as inconsistent with prior Supreme Court decisions, contrary to the text of the Federal Rules of Civil Procedure, and having destructive policy consequences in terms of litigants’ access to the federal courts”).

¹²³ Redish, *supra* note 119, at 150–53; see also Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1110 (2010) (“[L]ower courts could benefit from a framework for determining the plausibility of a complaint.”); Adam McDonnell Moline, Comment, *Nineteenth-Century-Principles for Twenty-First-Century Pleading*, 60 EMORY L.J. 159, 159 (2010) (*Twombly* and *Iqbal* are “consistent with the commonsense principles that Field first articulated in 1847 and Clark reaffirmed in 1938”).

¹²⁴ 131 S. Ct. 1309, 1313–14 (2011) (unanimously affirming the reversal of a dismissal of a securities fraud case).

¹²⁵ 131 S. Ct. 1289, 1293 (2011) (reversing the affirmance of a dismissal on the pleadings). The Court emphasized that the relevant question is not whether the plaintiff ultimately will prevail, but simply whether he may proceed in litigation. *Id.* at 1296.

¹²⁶ An empirical study by the Federal Judicial Center in 2011 suggests that there was no appreciable increase from 2006 to 2010 in the rate at which cases are terminated by motions to dismiss for failure to state a claim. Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After*

The prudent path now, the one the Committee is following, is to see whether a Rule amendment is required.¹²⁷ The problem, of course, is that whatever the Committee does now will be reactive. It had its chance to lead—to respond to the Court’s invitation in *Leatherman* and *Swierkiewicz*—but, for whatever reason, did not do so. So now, with pleadings at least, the Committee must play from behind.

We have seen that the Committee faces definite headwinds. Some of these may counsel it to refrain from tackling big issues. More than twenty years ago, Professor Mullenix predicted that the politicization of judicial rulemaking would channel that group’s efforts into noncontroversial, largely meaningless efforts.¹²⁸ I believe she was right. Nothing can be more noncontroversial—more certain to keep Congress from second-guessing—than tinkering with writing style. The contemporary Committee has spent too much time doing exactly that.

III. THE COMMITTEE IN ACTION

A. *Positioned for Leadership*

Over the past two decades, the Committee has positioned itself well for deep consideration of major issues. I refer to two process innovations for which the Committee should be commended. The first relates to empirics. In the 1990s, Professor Burbank criticized the Committee for acting without empirical data and called for a moratorium on rulemaking until the Committee established a mechanism for empirical consideration.¹²⁹ In response, the process has changed with access to data from the Federal Judicial Center, the Case Management/Electronic Court Filing System, and other sources.¹³⁰ Professor Marcus notes, for example, that such data manifested “considerable support” for mandatory initial disclosures, based upon experience under the Civil Justice Reform Act of 1990.¹³¹

The second innovation is the use of a consultative method to identify areas of potential Committee action. The Committee convenes conferences around the country to engage discussion on various topics. This sort of

Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules 12–16 (Mar. 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf); see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010).

¹²⁷ “The Committee agreed to keep pleading topics on the agenda for continuing active study and attention, but to continue to stay active development of specific proposals.” Civil Rules Advisory Comm., Minutes 32 ll. 1459–1461 (Nov. 7–8, 2011), <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Minutes/CV11-2011-min.pdf>.

¹²⁸ Mullenix, *supra* note 10, at 837 (“By evading responsibility, the Advisory Committee will become insignificant in the rulemaking process.”).

¹²⁹ See Burbank, *supra* note 4.

¹³⁰ Marcus, *supra* note 3, at 314.

¹³¹ Marcus, *supra* note 79, at 920.

broad-based engagement ties in with the politicization of the rulemaking process. It is less top-down than the methods used in the old days. Innovations in case management, limitation of discovery, and initial disclosure all found their way into the Federal Rules because of percolation from local experience.¹³² And despite the politicization, one insider reports that the Committee hearings and conferences are “relatively apolitical”¹³³ and “probably come a good deal closer to a seminar than many hearings in Congress.”¹³⁴

In my opinion, the Committee’s signature triumph in the past decade is the 2006 project on electronic discovery.¹³⁵ This effort was energized by these process improvements. It was at a consultative discussion on discovery generally that the Committee became aware of concern with electronic discovery.¹³⁶ The effort also shows the advantage of taking the lead and not playing from behind. The Committee seized e-discovery, declared expressly that electronically stored information is discoverable, and gave salutary guidance on how discovery of such material should be handled.¹³⁷ The effort may have averted disruptive decisions by some courts, bringing clarity to an area about which the bar was concerned. E-discovery shows the Committee at its best. And, like efforts in the so-called Golden Age of rulemaking, this one has inspired action in the states.¹³⁸

But there have been too few examples of such leadership. For whatever reason, the Committee missed the chance to lead on pleadings. And though we will never again see reform as we did with the original Rules, which have been characterized as the “Big Bang,”¹³⁹ there are plenty of big-ticket issues the Committee could address. One is Professor Redish’s fascinating argument that parties should not be required to pay the costs of

¹³² *Id.* at 916, 925 n.131.

¹³³ Marcus, *supra* note 3, at 314.

¹³⁴ Marcus, *supra* note 79, at 933.

¹³⁵ Among other things, the 2006 effort amended Rule 34 expressly to recognize electronically stored information (ESI) as discoverable matter and to permit the parties to determine the form in which ESI would be produced. It also amended Rule 26(f) to require parties to discuss discovery of ESI in their planning conference, changed Rule 33(d) to recognize that ESI could be provided in lieu of interrogatory answers, and provided a safe harbor in Rule 37(f) for loss of information through the good faith, routine operation of an electronic information system.

¹³⁶ *See* Marcus, *supra* note 79, at 917–19.

¹³⁷ Some have argued that discovery of ESI could have been handled by extant rules, merely by recognizing ESI as a form of “document.” Documents have always been subject to discovery. *See, e.g.*, Henry S. Noyes, *Is E-Discovery So Different that It Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585 (2004). There is something to the argument. On the other hand, the Committee’s bold leadership left no doubt on the matter and provided meaningful guidance on how ESI should be treated in discovery.

¹³⁸ *See, e.g.*, CAL. CIV. PROC. CODE §§ 2031.010–2031.510 (West 2007 & Supp. 2013) (Electronic Discovery Act).

¹³⁹ Marcus, *supra* note 3, at 300–01 (“We have all been brought up on the notion that the procedural Big Bang happened . . . with the adoption of the Federal Rules of Civil Procedure.”).

complying with discovery requests.¹⁴⁰ For the most part, though, the Committee has not pursued such topics. Instead of using its singular institutional advantages to think through big issues, the Committee has too often engaged in hyperactive tinkering.

B. *Much Ado About Little*

As an institution,¹⁴¹ the Committee has erred in two interrelated ways in the past two decades. First, it has imposed too much change. Second, too many of its amendments are busywork. Indeed, much of its recent activity is expressly aimed not at making procedure better, but at tinkering with terminology. The Committee seems unaware that its hyperactivity imposes significant burdens on the bench and bar and considerable expense on litigants. The Committee's focus on the pedantic also raises the specter of lost opportunities. If the talent and effort invested in "restyling" each rule in 2007 had been brought to bear on standards for pleading,¹⁴² we might have averted *Twombly* and *Iqbal*.

The Committee's level of activity in recent years is startling. In the first fifty-seven years of the Rules, through 1994, the Committee promulgated eighteen sets of amendments. This averages one set every three years or so.¹⁴³ This workload seems consistent with Judge Clark's early sense that "the amending process will operate with comparative infrequency."¹⁴⁴ It gives lawyers, judges, and academics a chance to respond to proposals and to digest changes.¹⁴⁵ In the sixteen years from 1995 through 2010, in contrast, the Committee unleashed fifteen sets of amendments.¹⁴⁶ Of course, not all sets of amendments are equally sweeping, but by any measure this is a remarkable amount of change for

¹⁴⁰ See Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773 (2011).

¹⁴¹ My criticism of the Committee is institutional, not personal. Committee members are an impressive lot, drawn from the top of the profession.

¹⁴² See *supra* notes 117–26 and accompanying text.

¹⁴³ Amendments were promulgated in 1946, 1948, 1951, 1961, 1963, 1966, 1967, 1970, 1971, 1972, 1980, 1982, 1983, 1985, 1987, 1988, 1991, and 1993. *Historical Note*, in FEDERAL RULES OF CIVIL PROCEDURE vii–xi (2011), available at <http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf>.

¹⁴⁴ Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 OHIO ST. L.J. 241, 242 (1953).

¹⁴⁵ Ironically, this more leisurely pace of amendment applied when there was no provision for public review of proposed changes. Perhaps a public process leads the Committee to conclude that it can promulgate change more frequently. After all, the thinking might be, the profession will need less time to adjust to changes to which it has had access throughout the pipeline.

¹⁴⁶ Amendments were promulgated in 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2005, 2006, 2007, 2008, 2009, and 2010. *Historical Note*, *supra* note 143, at xi–xii.

the profession to absorb. We need stability in the law, including procedural law.¹⁴⁷

Even if all of these amendments were salutary (and they were not), this level of activity runs the risk of fatiguing the intended audience. Lawyers and judges who might be willing—even pleased—to read drafts and comment on proposed changes every three or four years are less likely to go through detailed study year after year. I have no data, but the experience with the 2007 “restyling” project may be instructive. For that enormous task—the only time in which every rule was amended at the same time—two of the three scheduled public hearings were cancelled for lack of interest.¹⁴⁸ This fact might indicate widespread support for the project. On the other hand, it could demonstrate that a profession then numbed by eleven sets of amendments in twelve years had largely checked out. At least, the Committee should be sensitive to that possibility.

Another example involves the Committee’s addressing the scope of discoverability under Rule 26(b)(1) in the late 1990s. The Committee reacted to widespread concern about the breadth and expense of discovery.¹⁴⁹ This might have been a propitious time to consider the relationship between the pleading standard and discoverability, but the Committee did not undertake so broad a study. Effective in 2000, the Committee changed the discoverability standard from “relevant to the subject matter in the pending action” to “relevant to the claim or defense.”¹⁵⁰ Not surprisingly, some lawyers and judges—at that point trying to assimilate six sets of Rules amendments in six years—were wholly unaware of the new standard.¹⁵¹

¹⁴⁷ A judge who is a former member of the Committee says: “Another important interest is that of stability. If the rules are constantly changing, the players—parties, lawyers and judges—cannot possibly keep track of the ‘rules of the game.’” Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 219 (2010) (footnote omitted). In the wake of a flurry of changes to the Appellate Rules, Professor Wright admitted: “I found it very hard to know what rule was then in effect, or what rule was likely to be in effect in July when my book would be in print.” Wright, *supra* note 6, at 9. If Charles Alan Wright had trouble, what hope is there for the rest of us?

¹⁴⁸ Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 155 (2006).

¹⁴⁹ See Marcus, *supra* note 3, at 307–08 (discussing the context of the amendment regarding the scope of discovery).

¹⁵⁰ Compare FED. R. CIV. P. 26(b)(1) (1994) (amended 2000), with FED. R. CIV. P. 26(b)(1).

¹⁵¹ In the fourth edition of our civil procedure casebook (which had a shelf life of two years because of the restyling of every Rule in 2007), Wendy Perdue and I included an opinion from the Northern District of Illinois ruling on a motion to compel responses to discovery. The judge applied the old standard, “relevant to the subject matter of the action.” *Anderson v. Hale*, No. 00 C 2021, 2001 U.S. Dist. LEXIS 3774, at *4 (N.D. Ill. Mar. 29, 2001) (internal quotation mark omitted). The next case in the book was the same judge’s opinion two months later, in which he admitted that he was not aware that the standard for discoverability had changed seven months before. *Anderson v. Hale*, No. 00 C 2021, 2001 U.S. Dist. LEXIS 7538, at *3 (N.D. Ill. June 1, 2001) (“[T]his Court erred by applying old Rule 26(b)(1) instead of amended Rule 26(b)(1).”). He then undertook to apply the new standard. And though the motion came out the same way, the issue had to be briefed, argued, and decided. And litigants had to pay for all that.

Because the change to Rule 26(b)(1) was instituted in response to concern over the broad scope of discovery, a reasonable observer would assume that the amendment narrowed that scope. After years of litigation, however, it became clear that the new standard did not affect practice in any meaningful way.¹⁵² One commentator, reacting to the bar's worry about the perceived constriction of discovery, concluded, "Frankly, it was not a big deal"¹⁵³

The experience with Rule 26(b)(1) points out two ways in which the Committee seems to be out of touch. First, why would it promulgate a change in language that was not intended to work a change in operation? Do we want a Committee that is bent on making changes that are not "big deal[s]"? Stated another way, if a rule amendment is not a big deal, why should it be made? I am not saying that every change to the Rules must be epochal. But why bother making a change that does nothing?

Second, the amendment to Rule 26(b)(1) was indeed a big deal because (busy) real-world lawyers and (busy) real-world judges had to litigate and determine its meaning. And real-world parties had to pay for that litigation. As it turns out, every motion to compel that questioned the scope of the new rule was a waste of human capital and money. At the end of the day, no change was wrought. The profession would have been better off if the Committee had done nothing.

In contrast to the amendment to Rule 26(b)(1)—which may have been intended to result in change but in application did not—the past two decades have seen something new: amendments in which the Committee aspires to nothing more than wordsmithing. In 1991, the Committee amended Rule 50(a) to jettison "directed verdict" in favor of the hardly mellifluous "motion for judgment as a matter of law."¹⁵⁴ Judges and lawyers had been using "directed verdict" for centuries. There was no confusion in the profession about what the phrase meant or how the motion worked. The Committee felt, however, that the new phrase more accurately describes what a judge actually does when she grants such a motion.

This wholly stylistic change imposed costs of which the Committee seems unaware.¹⁵⁵ As a minor example, form files using "directed verdict" were rendered obsolete. More importantly, lawyers now were expected to use different terminology for the same motion in federal and state court. These may be small costs, but does the imposition of the Committee's stylistic ideal justify imposing them?

¹⁵² See Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 24–27 (2001).

¹⁵³ Marcus, *supra* note 3, at 307.

¹⁵⁴ At the same time, the familiar "motion for judgment notwithstanding the verdict" in Rule 50(b) was changed to the "renewed motion for judgment as a matter of law."

¹⁵⁵ See, e.g., Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 231 (1998) (noting a disconnect between judges, who dominate rulemaking, and practicing lawyers).

The absurdity of the exercise is demonstrated by the fact that now—over twenty years later—lawyers and judges still routinely use the phrase “directed verdict.”¹⁵⁶ As a leading treatise says, “[T]he old term is so convenient, and appears so often in the cases and the literature, that it is still used here.”¹⁵⁷ So what possible profit was there in the exercise?

The experience with Rule 50 suggests that the Committee learned nothing from its 1966 amendment of Rule 19, which addresses the joinder of what lawyers have always called “necessary” parties. Concerned that the term “necessary” had become talismanic, the Committee deleted it from Rule 19 when it established its functional analysis in 1966.¹⁵⁸ But it substituted the cumbersome phrase “needed for just adjudication.” Not surprisingly, everyone continued to say “necessary.” Over four decades later, the Committee replaced “needed for just adjudication” with “required.” Predictably, though, everybody still says “necessary.” In the final analysis, the change of terminology accomplished nothing.

The Committee structure probably contributes to hyperactivity. Any standing committee is probably under pressure to justify its existence. The problem is especially acute when members serve limited terms. No one wants to say, “I served on the Committee and during my years it sent forth no amended rules.” But the Committee does not exist for members’ professional gratification. It exists to serve the profession. Every amendment, no matter how small, imposes costs. Judges and lawyers must study each new version of a rule. This takes time and effort. The burden should not be imposed too often or for trivialities.

Moreover, all change runs the risk of unintended consequence and error. When it tinkered with Rule 50 to adopt its stylistic preference, the Committee inadvertently removed the provision that allowed plaintiffs to make the motion and also omitted any reference to a motion for partial judgment.¹⁵⁹ This led to two years of uncertainty about the scope of the new rule before another amendment fixed the problems.¹⁶⁰ This unnecessary

¹⁵⁶ See, e.g., *Gregg v. Ham*, 678 F.3d 333, 338 (4th Cir. 2012) (“The district court granted the defendants’ motion for a directed verdict on the intentional infliction of emotional distress claim.”).

¹⁵⁷ CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 94, at 671 (7th ed. 2011).

¹⁵⁸ The amendments to Rule 19 were part of a systematic overhaul of that provision and Rule 23, concerning class actions, and Rule 24, concerning intervention. There is considerable overlap among those Rules, as each addresses the potential harm to the interest of an absentee who is not joined in a pending case. In reaction to what had become a “jurisprudence of labels,” *id.* § 70, at 495, the 1966 amendments set forth pragmatic factors justifying the overruling of plaintiff’s party structure of a case, see generally Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1075–88 (1985). As a small part of these changes, the Committee deleted “necessary” from Rule 19(a).

¹⁵⁹ See Michael J. Waggoner, *New Rule 50 May End Directed Verdicts for Plaintiffs*, 22 SW. U. L. REV. 389, 389–90 (1993).

¹⁶⁰ See generally WRIGHT & KANE, *supra* note 157, § 94, at 671 n.7 (collecting cases and scholarly authority).

thrashing was necessitated by the Committee's original attempt to fix a problem that did not exist.

The archetype of stylistic tinkering is the restyling project, which went into effect in 2007. This massive effort, involving thousands of person hours, amended every Federal Rule and the subnumbering of most. The goal was to make the Rules more readily understood. I favor most efforts at plain language. They make sense, for instance, with jury instructions, which must be divined by lay people. But lay people do not use the Federal Rules. Professionals use them and invest a great deal of time and effort to understand them. Along the way, they become facile with the provisions' terminology and numbering.¹⁶¹

As a result of the restyling, lawyers and judges accustomed to certain language and subsection numbers and letters were required to consult the new provisions to see the new language and the new subsectioning. Every form file in every law firm for every motion in federal court was rendered obsolete. And the restyling ensured that every federal rule would be worded differently from its corresponding state rule.

Every page dealing with the language of every rule in treatises such as Moore's *Federal Practice* and Wright and Miller's *Federal Practice and Procedure* had to be changed. The authors of every civil procedure casebook and hornbook had to publish new editions to track the new language. Real-world people—lawyers, law students, and clients—had to pay for those new books. And the cost in human capital is remarkable. Countless people spent countless hours changing references from Rule 19(a)(2)(i) to Rule 19(a)(1)(B)(i), making sure that discussions of compulsory counterclaims cited Rule 13(a)(1) instead of Rule 13(a), and the like. Hardly rewarding or productive labor.

Consider too the impact on legal research. For instance, the restyling changed “cross-claim” with a hyphen to “crossclaim” without a hyphen.¹⁶² An electronic search for the phrase with the hyphen will not pick up cases using the phrase without the hyphen, and vice versa.¹⁶³ So lawyers searching the case law must know that the phrase was previously hyphenated and run searches to account for that. Those seeking cases about joinder of proper plaintiffs will need to know that what today is Rule 20(a)(1) was until 2007 simply Rule 20(a). Someone in the real world must pay for all those searches.

¹⁶¹ Defenders of the Rules as restyled in 2007 invariably argue that the new product reads much more clearly than the old. That would carry more force if every lawyer and judge in practice when the new Rules went into effect had retired the day before. But they didn't and so must relearn new language for what they have already learned.

¹⁶² FED. R. CIV. P. 13(g).

¹⁶³ For example, on November 2, 2012, a Lexis search of the federal courts library for “cross-claim and date (is 2012)” yielded 931 cases, while a search for “crossclaim and date (is 2012)” yielded 417 cases.

These burdens are all the more astounding when we remember that the purpose of restyling was to “clarify, simplify, and modernize their expression without changing their substantive meaning.” The restyling project, like the amendment to rid us of the phrase “directed verdict,” is part of a new phenomenon: changes to procedural rules that do not change procedure.¹⁶⁴ So all this effort and expense was incurred notwithstanding that the outcome of every motion in the federal courts should be unaffected.

Of course, there is something unreal about saying that. It is hard to imagine that the legal profession, based as it is upon language, will simply accept without question that massive linguistic changes are to have no meaning. So it will come as no surprise that the restyled Rules will create litigation and uncertainty.

Meaningless change and imposition of burden continue. Rule 56, as we discussed, remained unchanged even in the wake of the Court’s trilogy of summary judgment cases in 1986.¹⁶⁵ But that Rule has proven less hardy recently. In 2007, it got its facelift in the restyling project. Part of that effort changed the language that the court “shall” grant a motion under certain circumstances to language that the court “should” grant the motion. In 2009, the Committee changed “should” back to “shall.” In 2010, it amended the Rule again to change timing. Through its three amendments in four years, the standard for granting the motion bounced from the third sentence of Rule 56(c) to the second sentence of Rule 56(a). Even the Committee seemed embarrassed by this level of tinkering.¹⁶⁶ Of course, it was not so embarrassed that it could restrain itself.

CONCLUSION

For at least a generation, commentary on federal judicial rulemaking has been gloomy. The process, like the wayward Hollywood star, has inspired words like “crisis” and “malaise” and “decline.” Some of the problem is inevitable. At the macro level, the REA raises profound issues of separation of powers, as Professor Redish has written compellingly. Even at the micro level, structural components ensure difficulties: the Committee is subject to lobbying, and Congress may always look over the Committee’s shoulder when a constituency convinces it to. Moreover, the Court occasionally sends the Committee a clear message. Usually, however, it does not, and the Committee must decide whether a particular area is better suited to rulemaking or to case development.

¹⁶⁴ See Hartnett, *supra* note 148, at 156 (arguing that restyled Rules “do not seek to create a better procedure”).

¹⁶⁵ See *supra* note 96 and accompanying text.

¹⁶⁶ “There are constant complaints that the rules are changed too often. Acting one year later to retract amendments the bar has barely had time to master will add support for these complaints.” Civil Rules Advisory Comm., Draft Minutes 5 ll. 206–208 (Apr. 20–21, 2009), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2009.pdf>.

But the Committee is to blame for much of the troubled state. A group capable of leadership on significant issues has too often failed to lead. It has contented itself to splash in the shallow water and, through its hyperactivity, risks becoming more of a bother than a meaningful force. No one cares what the Committee's stylistic preferences are. They do not matter, and the Committee should not force busy people to do a lot of busy work to accommodate them. A Committee that focuses on pedantry sends the message that pedantry is its highest calling.

Like the wayward star, the Committee can change. Part of this process is an appreciation that every amendment to a Rule imposes costs and burdens on very busy people. This should lead to a reduction in the number of amendments promulgated. And this should lead to a focus on things that matter. If the effort put into changing "shall" to "must" and "Rule 13(a)" to "Rule 13(a)(1)" and deleting "indispensable" had been spent on something that would improve the administration of justice, the gloom would dissipate. We might be reading articles about rulemaking that featured "triumph" instead of "crisis."

Again, not every amendment will be transformative. There are technical things to be fixed from time to time. But every amendment should be calibrated to accomplish something for judges, lawyers, and litigants that justifies the cost and burden it imposes on them.

Amendments to the Federal Rules should be like faculty meetings: rare and purposeful.