

December 2020

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Recommended Citation

Mark R. Kravitz, To Revise, or Not to Revise: That is the Question, 87 Denv. U. L. Rev. 213 (2010).

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TO REVISE, OR NOT TO REVISE: THAT IS THE QUESTION

MARK R. KRAVITZ[†]

The *Denver University Law Review* is to be congratulated on organizing this wonderful issue on civil justice reform. The *Law Review* has compiled an exceptionally knowledgeable and talented group of authors, who have provided us with thoughtful and intriguing suggestions for changes to the Federal Rules of Civil Procedure. For example, Justice Rebecca Love Kourlis and her colleagues at the Institute for the Advancement of the American Legal System take head on the difficult and controversial subject of pleading standards at a time when practitioners, jurists, academics, and legislators are debating the meaning of the Supreme Court's decisions in *Iqbal* and *Twombly*.¹ Judge Lee H. Rosenthal, Chair of the Judicial Conference's Standing Committee on Rules of Practice and Procedure, discusses discovery and judicial control of discovery, which very well may lie at the heart of the controversy over pleading standards.² Indeed, it is the cost associated with the operation of the Federal Rules, and discovery in particular, that leads Professor Jay Tidmarsh to suggest that in designing and interpreting our procedural rules, we replace the vision on which our modern procedural system was built—

[†] United States District Judge, District of Connecticut. The author has served as Chair of the Civil Rules Advisory Committee since June 2007. Before that, the author served as a member of the Standing Committee on Rules of Practice and Procedure from 2001 to 2007. The sentiments expressed in this article are the author's alone and do not reflect the views of the Civil Rules Advisory Committee or the Standing Committee. The author wishes to thank Professor Edward H. Cooper, Reporter to the Civil Rules Advisory Committee, for his insights and assistance. Any errors or mistakes of judgment are the author's alone.

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548–49 (2007); Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 246 (2010) (“We need a civil justice system that encourages the filing of meritorious claims *and* one that allows those claims to be honed and resolved efficiently. We need, in other words, a process that begins to narrow and focus issues as soon as a legitimate claim is filed.”); *see also* Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (1st Sess. 2009) (“A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief.”); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (1st Sess. 2009) (“Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)”).

2. Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 231 (2010) (“Many studies and surveys analyzing the civil litigation system have concluded that the critical element in bridging the gap between the rules and their application is making the district judge more accessible to the lawyers, more involved in the details of discovery in cases that need such involvement, more *present* in the cases that require such supervision.”).

the principle that each case should be resolved “on its merits.”³ Professor Stephen Subrin, too, does not shirk from the task at hand—he challenges the underlying “transsubstantive” philosophy of the Federal Rules of Civil Procedure.⁴ In the midst of these challenges to the concepts that undergird our federal rules, Professor Samuel Jordan reminds us that the Civil Rules are not the only source of authority for procedural requirements.⁵ Inherent judicial power also plays a role in the procedural mix. Finally, Professor Jeffrey Stempel cautions us that rules aside, the quality of justice we provide litigants is based on the competence and integrity of our decision makers—the judges.⁶ These and many other terrific articles in this issue provide important suggestions for rule changes that certainly will be fodder for the Judicial Conference’s Civil Rules Advisory Committee for years to come.

Of course, this outpouring of proposed revisions to the Federal Rules of Civil Procedure raises a foundational question that is apparent from the title of this Introduction: When is it appropriate to change the rules? In other words, what principles should guide the Civil Rules Committee in deciding when it is time to revise a rule and how to revise it? Unfortunately, there is no guidebook or manual that provides an answer to that recurrent question. Instead, it is a matter of judgment. Yet the question remains: What factors and interests, beyond the simple merits of any particular rule change, should the Civil Rules Committee balance in exercising its considerable judgment to revise the rules? This Introduction proposes to explore those factors and interests but not as a matter of high theory. There will be no references to heuristics (moral, cognitive, or otherwise), game theory, or normative principles. I will leave such detailed analysis to the Academy. Rather, my observations are practical ones based on my seat at the rule-making table since 2001.

3. Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 DENV. U. L. REV. 407, 428 (2010) (“[D]espite its prominence in constructing our modern American procedural system, providing the parties a full opportunity to participate in litigating a case is not the foundation on which to build a procedural system.”).

4. Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Article on Adjusting the “One Show Fits All” Assumption,* 87 DENV. U. L. REV. 377, 377 (2010) (“I have argued for three decades that the underlying transsubstantive philosophy of the Federal Rules of Civil Procedure is flawed.”).

5. Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime,* 87 DENV. U. L. REV. 311, 311 (2010) (“But important though they are, the rules do not tell the whole federal procedural story.”); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (“[C]ertain implied powers must necessarily result [to the federal courts] from the nature of their institution,’ powers ‘which cannot be dispensed with . . . because they are necessary to the exercise of all others.’” (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812))).

6. Jeffrey W. Stempel, *Refocusing Away From Rules Reform and Devoting More Attention to the Deciders,* 87 DENV. U. L. REV. 335, 335 (2010) (“During the past quarter-century, the legal system has devoted an inordinate amount of time and energy revising litigation rules relative to . . . the more pressing problems of adjudication weakness related to the quality, temperament, neutrality, and support of the system’s judges and the resources devoted to the system.”).

The Rules Enabling Act—that marvelous treaty between the Judiciary and Congress—recently celebrated its seventy-fifth anniversary.⁷ The statute provides the Supreme Court with the “power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals,” so long as those rules do “not abridge, enlarge or modify any substantive right.”⁸ In 1935, the Supreme Court appointed a blue ribbon advisory committee to draft the rules of civil procedure, the first rules adopted under the Rules Enabling Act. Adoption of the Federal Rules of Civil Procedure in September 1938 is often described as the “Big Bang.”⁹ And for good reason. What Charles E. Clark (Dean of the Yale Law School and later Judge of the United States Court of Appeals for the Second Circuit) and his colleagues wrought was a complete re-making of the civil justice system in America.¹⁰

No similar revolutions are likely to recur anytime soon. Yet, as Judge Clark and his colleague Yale Law School Professor James W. Moore recognized, the wonderful rules that the blue ribbon committee fashioned could not remain unchanged. As they put it:

Unless some permanent machinery is provided whereby continual supervision and change can be made, little is gained over legislative control of the functioning of the Court. It must be recognized that procedure is not an end in itself, but merely a means to an end, a tool rather than a product, and that procedural rules must be continually reexamined and reformed in order to be kept workable. It is hoped, therefore, that the [Supreme] Court will develop some permanent

7. 28 U.S.C. § 2072 (2006). For a history of the enactment of the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

8. 28 U.S.C. § 2072(a)–(b).

9. See Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to the Revolution of 1938 Revisited: The Role and Future of Federal Rules*, 61 OKLA. L. REV. 257, 262–63 (2008); Richard L. Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 300 (2008); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1273 (1997).

10. Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 901–02 (2002) (“[T]hese giants are seen to have accomplished ‘a major triumph of law reform’ that ‘transformed civil litigation [and] . . . reshaped civil procedure.’ Beyond that, ‘they have influenced procedural thinking in every court in this land . . . and indeed have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.’” (alterations in original) (quoting Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, LAW & CONTEMP. PROBS., Summer 1998, at 229, 233; and David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989))); see also B.H. Carey, *In Favor of Uniformity*, 3 F.R.D. 505, 507 (1945) (stating that the Federal Rules are “one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law”).

means whereby changes and improvements in the rules may be suggested and adopted as experience points to their necessity.¹¹

In 1958, Congress created the Judicial Conference of the United States. The Judicial Conference consists of the chief judge of every judicial circuit, the chief judge of the Court of International Trade, a district judge from each circuit, and is presided over by the Chief Justice of the United States. Reflecting the sentiment of Judge Clark and Professor Moore, Congress charged the Judicial Conference with carrying on “a continuous study of the operation and effect” of the rules prescribed by the Rules Enabling Act, and with recommending “from time to time” such changes in and additions to those rules as the Conference “may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay.”¹² In practice, the Judicial Conference carries on its “continuous study” of the operation and effect of the rules through the Standing Committee on Rules of Practice and Procedure, and the various advisory committees that work under the direction of the Standing Committee.¹³ One of those advisory committees is the Civil Rules Advisory Committee, which studies and makes recommendations to the Standing Committee and the Judicial Conference regarding the Federal Rules of Civil Procedure.

I will not here describe at length the rule-making process.¹⁴ Suffice it to say that it is slow, deliberate and utterly transparent—and purposely so. As one commentator put it, “Today’s process . . . requires more steps to amend a Federal Rule of Civil Procedure than it does to amend the U.S. Constitution.”¹⁵ The Civil Rules Committee receives suggestions for rule changes from many sources, including lawyers, judges, bar groups and associations, academics, and even Congress.¹⁶ Most rules that make it through this process have been considered for at least three years; many rules are considered for quite a bit longer.

11. Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 392 (1935).

12. 28 U.S.C. § 331 (2006).

13. *Id.* § 2073.

14. For a comprehensive description of the rules process, see Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655 (1995); see also Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261 (2009).

15. Yeazell, *supra* note 10, at 229, 235; see also Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103 (2002) (“A proposed new Rule, or a proposed amendment to an existing Rule, 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.”).

16. Currently the Rules Committee is considering changes to Rule 45. The Committee’s Rule 45 effort was sparked entirely by suggestions from lawyers that the Committee needed to look closely at Rule 45. CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MINUTES: NOVEMBER 17 AND 18, at 9 (2008), <http://www.uscourts.gov/rules/Minutes/CV11-2008-min.pdf>.

Time is needed for a number of reasons. For one, all of the committees concerned with our procedural rules are committed to gathering empirical data about the operation of the rules and any proposed rule changes so that we better understand the likely effect of rule revisions.¹⁷ Gathering and analyzing empirical data takes time. For another, the rules committees seek to thoroughly canvass the bench, the bar, and the Academy about proposed rule changes. It is not unusual for the Civil Rules Committee to hold several “mini-conferences” with lawyers, law professors, and judges even before a rule revision is proposed by an advisory committee. Once a change is proposed, the advisory committee must hold several hearings on the proposed revision.¹⁸ Often, changes to existing proposals are made in response to those hearings, and on occasion, the rules committees decide to abandon a proposed change based on the input received at the hearings.¹⁹ Therefore, as the Supreme Court observed recently, “[T]he rulemaking process has important virtues. It draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions.”²⁰

Most of those associated with the rules process believe that little or nothing is to be gained by trying to shorten the process. The motto of the various rules committees derives from that of the medical profession: First, do no harm. Care must be taken in revising old rules and fashioning new ones, for unintended and adverse consequences abound. As Professor Tidmarsh reminds us, “All the rules . . . are interwoven. As with a

17. See, e.g., Laurens Walker, *Avoiding Surprise from Federal Civil Rulemaking: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569, 572–73 (1994); Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1124 (2002).

18. See 28 U.S.C. § 2071(b) (2006).

19. One commentator has proposed that the rules process be extended even further. The author suggests that Congress authorize the federal districts to test promising rules changes for five years if the proposal secures Judicial Conference approval. See Carl Tobias, *A Modest Reform for Federal Procedural Rulemaking*, LAW & CONTEMP. PROB., Spring/Summer 2001, at 283, 286–87 (“With the information that the rule amendment entities derive from that experimentation, the revisors could recalibrate contemplated alterations. Those responsible for rule amendment might then recommend formal modifications with greater confidence about how the nascent measures would operate practically, while members of the bench and bar, as well as litigants, could comment on the suggested changes in a manner informed by experience of how they actually function.”). In 1991, in response to the Civil Justice Reform Act, the Civil Rules Committee proposed amending Rule 83 to explicitly permit a district, subject to Judicial Conference approval, to adopt experimental local rules inconsistent with the Civil Rules, provided they were consistent with applicable federal statutes and limited in duration to five years or less. During the public comment period, the Committee received some criticisms of this proposal, but ultimately recommended adoption of the revision largely unchanged. Several months later, the Standing Committee recommitted this proposal to the Civil Rules Advisory Committee for further study. The proposed amendment never resurfaced. The published proposal appears in *Proposed Rules*, 137 F.R.D. 53, 72 (1991); *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 533 (1993) (letter to Hon. Robert E. Keeton); *id.* at 517 (communication from the Chief Justice).

20. *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009) (citation omitted); see also *id.* (“We expect that the combination of standard postjudgment appeals, § 1292(b) appeals, mandamus, and contempt appeals will continue to provide adequate protection to litigants ordered to disclose materials purportedly subject to the attorney-client privilege. Any further avenue for immediate appeal of such rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides.”).

spider's web, a tug on a single rule can collapse the entire structure."²¹ The rules committees must, therefore, take their time lest in revision, they do more harm than good.

Of course, the merits of any proposed rule revision is the central focus of the work of the Civil Rules Committee. The authors in this Issue have, quite predictably, made a good case for each of the particular revisions they propose. That often happens. The proponents of rule changes are persuasive in presenting their case. And when that happens, the Civil Rules Committee must look beyond the particular merits of any individual rule revisions to other factors and interests. In short, the Committee must balance several, often competing, interests and influences in deciding whether to propose a change to the rules, even one that on its face appears meritorious.

A preeminent consideration is always the Rules Enabling Act itself. That law provides the rules committees with authority to promulgate procedural changes, but enjoins them from abridging, enlarging or modifying "any substantive right."²² Much has been written about the often illusory distinction between procedure and substance,²³ and I will not venture into those waters here. But it is important to understand that the advisory committees and the Standing Committee are very much cognizant of their important, yet limited, roles. When a rules committee believes that a proposed change comes too close to the substantive line, it will, instead, suggest legislation for Congress to consider. That happened with class actions—a subject addressed by Elizabeth Cabraser in her article.²⁴ The Civil Rules Committee's suggestions prompted a change in the Judicial Conference position that contributed to the ultimate passage of the Class Action Fairness Act of 2005,²⁵ and there are many other

21. Tidmarsh, *supra* note 3, at 407.

22. 28 U.S.C. § 2072(b).

23. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 392 (1989) (acknowledging "the logical morass of distinguishing substantive and procedural rules" and that "this Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants"); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 889 (1999) ("Even supporters of court rulemaking at times conceded that procedure and substance were 'inextricably intertwined,' that ostensibly procedural rules sometimes involved policy choices, and that such choices had important substantive effects."); Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1289 (1977) (reviewing JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977)) ("This does not mean there are no interesting and engaging questions in locating the boundaries of 'procedure,' . . . These questions, however, are not different in kind or degree of significance from those arising out of rules such as the scope of 'standing to sue' or abstention, or deference to pending state court proceedings . . . rules that the Supreme Court must periodically reexamine . . .").

24. See Elizabeth J. Cabraser, *Apportioning Due Process: Preserving the Right to Affordable Justice*, 87 DENV. U. L. REV. 437, 448 (2010) ("Despite the class action—and plaintiffs' lawyer—bashing that attended the passage of [the Class Action Fairness Act], the Act itself, albeit plagued by internal inconsistencies and undefined terms, announced benign goals.").

25. Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1 *et seq.* (2006)).

similar examples.²⁶ Professor Spencer's suggestion for expanding federal court jurisdiction by abrogating Rule 4's territorial limitation on personal jurisdiction might qualify as a change that perhaps Congress should consider.²⁷ After all, Congress has, from time to time, enacted statutes providing for nationwide jurisdiction. Therefore, this is something Congress can do if it concludes that it is sensible to delink the personal jurisdictional reach of federal courts from the limits of state-court jurisdiction, and to provide for nationwide personal jurisdiction in federal courts.

I might add that this conversation between the rules committees and Congress is not a one-way street. Occasionally, Congress asks the rules committees to propose appropriate rules. Congress did so in victims' rights legislation, the recent bankruptcy reform statute, and the federal evidence rule regarding disclosure of privileged information.²⁸

Another important interest is that of stability.²⁹ If the rules are constantly changing, the players—parties, lawyers and judges—cannot possibly keep track of the “rules of the game.”³⁰ I dare say that many lawyers, and even judges, recall from memory what the rules say or said (perhaps from law school), and do not look them up each time a given rule is implicated in their case. There is nothing wrong with this simple

26. A recent example is the amendments to Rule 502 of the Federal Rules of Evidence, which were proposed by the Standing Committee and enacted by Congress. Act of Sept. 19, 2008, Pub. L. No. 110-322, 122 Stat. 3537 (addressing waiver of the attorney-client privilege and the work product doctrine). Recent amendments to various time provisions of federal statutes also followed suggestions by the Standing Committee for the statutory changes to accommodate recent changes on time computation rules, which went into effect on December 1, 2009. *See, e.g.*, Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16, 123 Stat. 1607; *see also* Proposed Amendments Submitted to the Congress (2009), <http://www.uscourts.gov/rules/supct0309.html>.

27. A. Benjamin Spencer, *Nationwide Personal Jurisdiction for our Federal Courts*, 87 DENV. U. L. REV. 325, 326 (2010) (“[W]hether the jurisdictional reach of state courts should be the measuring rod for the jurisdictional reach of federal courts is another matter.”). Rule 4(k)(2) of the Federal Rules of Civil Procedure provides for personal jurisdiction nationwide, but it is very narrow, applying only to a claim arising under federal law, and only to a defendant who has sufficient contacts with the United States as a whole to satisfy due process requirements, but who is, for whatever reason, not subject to jurisdiction in any state's courts of general jurisdiction. FED. R. CIV. P. 4(k)(2). As the Advisory Committee note acknowledges, the rule fills in a small gap. *Id.* advisory committee's notes to 1993 amendment. Rule 4(k)(2) is certainly of a different dimension than the rule Professor Spencer envisions.

28. *See, e.g.*, Crime Victims' Rights Act, 18 U.S.C. § 3771 (2006); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. § 101 *et seq.* (2006)); FED. R. EVID. 502; COMM. ON RULES OF PRACTICE AND PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE (Federal Rules of Criminal Procedure), http://www.uscourts.gov/rules/supct0108/Excerpt_ST_Report_re_CR_Rules.pdf; COMM. ON RULES OF PRACTICE AND PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE (Federal Rules of Bankruptcy Procedure), http://www.uscourts.gov/rules/supct0108/Excerpt_ST_Report_re_BK_Rules.pdf; COMM. ON RULES OF PRACTICE AND PROCEDURE, REPORT OF THE ADVISORY COMM. ON EVIDENCE RULES (Federal Rules of Evidence).

29. Charles Clark expressed the view that “the amending process will operate with comparative infrequency.” Charles E. Clark, “*Clarifying*” *Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241, 242 (1953).

30. *See* Stempel, *supra* note 6, at 346–47 (“[S]erial revision of the text of the Rules (‘tinkering’ to those less supportive) continues, without much evidence to suggest it has improved the federal adjudication process.”).

fact of life. Therefore, when the text of rules or their location constantly changes, that presents special problems for both lawyers and judges. The rule book must be stable and predictable.

There has been a fair amount of change recently. The Civil Rules were completely restyled; rules regarding electronic discovery were added; new rules on how time is computed went into effect as of December 1, 2009; and a new rule governing summary judgment—a rule that is implicated in many cases—was recently proposed with an effective date of December 1, 2010. These significant rule changes place a special burden on those proposing civil rule revisions to justify their need. For if the need is not great, then perhaps we should let lawyers and judges catch their collective breath and get comfortable with the current rule regime before changing the rules yet again. In short, stability should matter.

Changing technology often cuts against the need for stability, however. The electronic discovery rules are an object lesson. The rules spoke of “paper” at a time when the world was moving to electrons. Keeping the rules stable meant ignoring the vast changes that technology had already brought to those outside the courthouse.³¹ In the words of Judge Clark and Professor Moore, the rules were no longer “workable” when it came to electronic discovery. And so the rules had to change. The Civil Rules Committee is currently besieged by suggestions for tinkering with the electronic discovery rules. Some changes are suggested in this issue. Surely some revision will be needed. To date, however, the committee has decided to let the current electronic discovery rules continue to operate (at least for a while longer) both to promote stability and also to see how the rules operate in practice so that we have a good empirical base on which to consider any changes. As Judge Rosenthal, Chair of the Standing Committee, commented recently, “[W]e are always balancing the need to keep the system current without changing the Rules so often that it is disrupting.”³²

The Civil Rules Committee is always alert when a proposed rule change may favor one group of litigants over another. A proposed change may appear sensible on its face. But, if in practice the proposed change is likely to advantage one group at the expense of another, that fact may counsel against a change. That said, circumstances may emerge that require redressing an imbalance that has emerged in practice; some

31. See Rosenthal, *supra* note 2, at 229 n.14 (“[A] system of discovery control that fails to take account of the special needs and unique impact of the computer age is destined to fail.” (internal quotation marks omitted) (quoting Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 589–92, 628 (2001))).

32. *Celebrating a Masterpiece: The 75th Anniversary of the Rules Enabling Act*, THIRD BRANCH, Oct. 2009, at 6, available at <http://www.uscourts.gov/tb/2009-10/article01.cfm#>; see also Patrick Oot, Anne Kershaw & Herb Roitblat, *Mandating Reasonableness in a Reasonable Inquiry*, 87 DENV. U. L. REV. 533, 535 (2010) (“As technology continues to imbed itself in the social fabric of our lives, lawyers representing clients must take on the task of learning how technology works and how it affects us, both before and after litigation is commenced.”).

of the electronic discovery rules that the Committee adopted in 2006 may fall within that description. In short, the rules must not only be fair in their application, they also must be perceived to be fair by litigants. As Elizabeth Cabraser discusses in her article, due process must be shared equitably, and “[d]ue process does not exist if it is not shared among adversaries.”³³

Recently, while considering changes to Rule 56(a), the Civil Rules Committee found that a proposed change might favor either defendants or plaintiffs. The ambiguous word “shall” was replaced by “should” in the Style Project, encountering little resistance, even as the Committee Note expressly embraced discretion to deny summary judgment even when there is no genuine “issue” of material fact. When “should” was carried forward in the proposed Rule 56 revisions, defense counsel awoke and protested vigorously, arguing that the Committee should change “should” to “must.” Further research showed a real divide in case pronouncements. Therefore, defying the clearest of all the Style Project commands, the Civil Rules Committee restored “shall” to avoid favoring either defendants or plaintiffs.³⁴

The scope of any proposed rule change also matters. The Civil Rules Committee typically deals with essentially two types of changes. Some changes are really just clarifications or tweaking of the existing rules. Often, clarifications appear to be appropriate. But upon further review, the Committee learns that most judges have properly interpreted and administered the rule as written; the rule is being applied consistently and in an even-handed manner in most instances. The question at that point is whether to change the rule when few have it wrong. Before proposing rules changes, the Civil Rules Committee needs to know that there is some practice or approach that a change to the rule can improve or alter in a positive manner for a significant group of cases. Is the problem in the rule text, or in its application by a few judges?³⁵ If the latter, a rule change may not be needed if a significant number of cases will not be affected by the rule revision. In those circumstances, the hope is that over time the judges who got it wrong will see the error of their ways and the ship will right itself.

Even if the problem does in fact lie with the text of the rule, but not many cases would be affected by a change, the Civil Rules Committee may decide to postpone changes to see how case law develops. Alterna-

33. Cabraser, *supra* note 24, at 472.

34. CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT TO STANDING COMMITTEE: MAY 2009, at 20–21 (2009), <http://www.uscourts.gov/rules/Reports/CV05-2009.pdf>.

35. See Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery—Making it the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 527 (2010) (“[W]hile proportionality limits are available, in practice the guidelines are rarely used. Instead, proportionality takes a back seat to the strong presumption in favor of broad and liberal discovery.”); see also Subrin, *supra* note 4.

tively, the particular rule in question may not be used much in practice.³⁶ For example, the Committee has frequently been urged to consider changes to Rule 68 dealing with offers of judgment, and that subject remains on the Civil Rules Committee's agenda. Jay Horowitz's article focuses on Rule 68 and discusses several potential and important revisions.³⁷ The Committee recognizes that the text and structure of Rule 68 could be refined. But in practice, Rule 68 is currently used infrequently by lawyers—a fact noted in the title to Mr. Horowitz's article. Therefore, the Civil Rules Committee has not seen a need to act promptly on the many suggestions for changes in Rule 68. Furthermore, any likely changes to Rule 68 would entail dramatic revision, with the attendant controversy that comes with bold change—a subject addressed below.

Nevertheless, on occasion rules need to be tweaked to eliminate a latent or patent ambiguity, or to bring the rule into line with statutory changes or practice developments.³⁸ When such tinkering revisions are in order, the Civil Rules Committee wisely tends to do them in batches so that lawyers and judges do not have to remain on continuing alert to changes. Too many minor changes can undermine stability.

Large rule changes are often controversial to some degree and pose special problems. These are not tinkering changes but instead major changes to the way in which lawyers practice in the federal courts. Some large proposed rule changes may result in rather complex and complicated frameworks. Rule 1 of the Federal Rules of Civil Procedure commands that the rules be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”³⁹ In his article, Professor Bone suggests several textual improvements to what he terms this “master rule” to account for today's litigation

36. For example, in 2006 the Civil Rules Committee considered changes to Rule 15(c)(3)(B), dealing with relation back. The Committee decided not to make suggested amendments to Rule 15(c) because, as reported by Professor Cooper, the Committee's Reporter, the “committee had not found any significant problems with the current rule in practice, notwithstanding the theoretical problems that seem to lurk in the rule's text. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.” COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., MINUTES: JUNE 22–23, at 21 (2006), <http://www.uscourts.gov/rules/Minutes/ST06-2006-min.pdf>.

37. See Jay Horowitz, *Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements*, 87 DENV. U. L. REV. 485, 486 (2010) (proposing ways of remedying the “dysfunctional situation” posed by Rule 68 and making it “more useful”); see also William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, 39 N.M. L. REV. 349 (2009).

38. See JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 14 (1977) (“Rules, like legislation, permit a whole multitude of possible procedural and related issues to be decided at once, with a possible saving of judicial energy in individual cases.”). But see Hazard, *supra* note 23, at 1290 (“Rules as they are now developed—drafted by academic technicians, approved by a committee of expert practitioners, widely disseminated for comment, and submitted to Congress—represent the product of a process markedly superior to that currently used to develop delegated legislation of infinitely greater variety and complexity, but entitled to a strong presumption of validity.”). See generally Struve, *supra* note 15, at 1123–69.

39. FED. R. CIV. P. 1.

culture.⁴⁰ Professor Bone would change Rule 1 so that the rules would be construed and administered “to distribute the risk of outcome error fairly and efficiently with due regard for party participation appropriate to the case, due process and other constitutional constraints, and practical limitations on a judge’s ability to predict consequences accurately and assess system-wide effects.”⁴¹ I must say that I favor the simplicity and brevity of the current rule. Personal preferences aside, however, unless and until Rule 1 is revised, the Civil Rules Committee will likely continue to endeavor to follow the dictates of the master rule and will seek to reduce complexity, not increase it, so as to foster the just, speedy, and inexpensive determination of every action. Complicated constructs are, therefore, not particularly favored.

Some large revisions are truly revolutionary in nature, and raise for the Civil Rules Committee the question whether incremental change is better than a dramatic make-over. There will always be those who favor bold change. As one author put it:

[I]t is again time to consider *bold reforms* to our procedural system. Today our system faces pressures and challenges across numerous fronts, and modest tweaking of this rule or that doctrine cannot address the system’s fundamental crisis. . . . The time for clear-eyed critique and for imagination about the next procedural moment is now.⁴²

If a revolutionary change is controversial—and most are—it might well be better to adopt the entire change, rather than dragging out the controversy for years and years. As Judge Charles Clark once observed, “[H]alfhearted reform is worse than none at all—having all the vices of novelty and none of the virtues of lasting improvement.”⁴³

Certainly, the changes in pleading standards suggested in Justice Kourlis’s article are revolutionary and controversial, as are those suggested by Professor Tidmarsh.⁴⁴ Professor Subrin’s suggestion for abandoning the philosophical principle underlying the Federal Rules of Civil Procedure—that the same rules should apply to all cases regardless of the substantive laws that govern those cases—would also count as a “bold”

40. See Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287 (2010).

41. *Id.* at 300; see also *id.* at 301 (“My proposal guides and constrains not by dictating precise results—that would be impractical and inadvisable given the inevitability and desirability of some case-specific discretion—but by orienting the thought process of trial judges, framing the type of analysis they should conduct, and identifying the factors that should be taken into account.”).

42. Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 516–17 (2006) (emphasis added).

43. Charles E. Clark, *The Federal Rules of Civil Procedure 1938–1958: Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 451 (1958).

44. See generally Kourlis, Singer & Knowlton, *supra* note 1; Tidmarsh, *supra* note 3 (proposing alterations to pleading standards).

change.⁴⁵ Indeed, any effort to change that foundational assumption would certainly qualify as another “Big Bang.”

At the same time, incremental change can have benefits. It allows the Civil Rules Committee—not to mention the bench and bar—to see how a change works in practice before instituting further revision. Interested parties can thus become comfortable with the change and see the benefit of the next increment. In consequence, the controversy that attended the original proposal may well diminish or even vanish.

From time to time, the Civil Rules Committee also considers whether to embody best practices in the rules themselves. Some of the rule changes proposed in this issue could fit within that category. Consider, for example, Judge Rosenthal’s suggestions for two changes in Rule 16, for in-court hearings and for pre-motion conferences in connection with discovery disputes.⁴⁶ Consider also Daniel Girard and Todd Espinosa’s three intriguing suggestions for changes in the discovery rules designed to overcome judicial reluctance to enforce the current rule regime.⁴⁷ Yet in considering best practice changes, the Civil Rules Committee must balance whether it is best to have general rules that give judges and lawyers flexibility to adopt a variety of practices or whether to insist on a national, best practices model. It may be that a certain practice has become so entrenched that it should be included in the rules. However, sometimes one person’s best practice is another’s worst

45. See Subrin, *supra* note 4, at 394 (“There is no sensible reason why some cases cannot maintain the advantages of the Federal Rule wide-open, equity-based procedural system while others are handled with a more contained system that has the restraint advantages historically associated with common law procedure.”). Professor Burbank has put it this way:

The meaning of the Enabling Act aside, the normative question whether we are well served today by a rule-making enterprise that continues to frame rules and amendments for all cases filed in federal district court, no matter what the source or content of the substantive law, has been a subject of vigorous discussion and debate in the literature. Defenders of this foundational assumption have, by and large, ignored the fact that those questioning it are not calling for wholly different procedural regimes for different bodies of substantive law. The call in this respect has been for consideration of altering only discrete Federal Rules, or portions thereof, that do not satisfactorily implement the policies underlying a body of substantive law or a particular scheme of substantive rights, with all other Federal Rules remaining applicable.

Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 542–43 (2009).

46. See Rosenthal, *supra* note 2, at 242 (“Neither of these procedures is suggested as a rule. That would be inconsistent with the flexibility that Rule 16 embodies. But many judges already use these or similar procedures and have found them to be a helpful way of using the many tools that Rule 16 provides to identify, early in the case, opportunities for effective control of discovery.”).

47. See Daniel C. Girard & Todd I. Espinosa, *Proposed Amendments to the Federal Rules to Control Litigation Costs By Limiting Discovery Tactics*, 87 DENV. U. L. REV. 473 (2010) (proposing: (1) to revise Rule 26(b)(1)(B) to explicitly require the party or attorney to certify that the responses are not evasive; (2) to amend Rule 34(b)(2)(B) and Rule 37(a)(3)(B)(iv) to address the now common practice of producing rather than permitting inspection of documents; and (3) to add a provision to Rule 34(b)(2)(C) that requires the responding party to specify whether documents are being withheld on the basis of any asserted defense); see also Oot, Kershaw & Roitblat, *supra* note 32, at 535 (“Quite simply, litigants require tools and guidance to help them develop discovery processes to meet the standards of Rule 1 and provide a clear path to alternatives to traditional methodologies.”).

nightmare. Best practices also evolve over time. Perhaps, then, it is better to adopt rules that allow judges and lawyers flexibility so they can continue to experiment with practices that work best, rather than imposing a single best practices model.⁴⁸ Of course, the countervailing interest—and there always is one—is the need for national uniformity in what is supposed to be a uniform federal system.⁴⁹

I am certain that I have not exhausted the list of factors and interests the Civil Rules Committee must balance in deciding whether to change the Federal Rules of Civil Procedure. Nevertheless, I have tried to give a flavor of the balance the committee members must strike in deciding whether to exercise their considerable judgment to revise the rules, or not.

* * * * *

This is an important year for the Civil Rules Advisory Committee. In May 2010, the Committee and others will take stock of the state of civil justice in the United States courts at a major conference to be held at Duke Law School. In his great article about Professor Moore and his contribution to the Federal Rules of Civil Procedure, Professor Robert Cover wrote that Professor Moore “always envisioned the Federal Rules as a tool which embodies a practical philosophy of procedure, one which liberates the courts to achieve substantive ends.”⁵⁰ I like to think that is what the Civil Rules Committee continues to do to this day—to provide judges the procedures necessary to “liberate” them to decide individual cases on their substantive merits with competence and integrity. In this sense (and perhaps predictably, given my membership in the judicial “cult”), I take issue with the premise of Professor Stempel’s article, at least insofar as rulemaking is concerned, that “[w]e have accepted too much mediocrity in both the application of law and in legal outcomes.”⁵¹ And with apologies to Professor Tidmarsh, while we must not ignore the cost of operating our federal procedural system, I, for one, continue to believe that we need procedural rules in place that allow judges to re-

48. Several years ago, the Rules Committee considered a proposal on simplified procedure. See Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1800–01 (2002). This sensible proposal was not adopted in part because many members of the Committee felt that Rule 16 of the Federal Rules of Civil Procedure already allowed judges to adopt such procedures in appropriate cases with the consent of counsel. A new rule was not needed. Simplified procedure may yet again return to the Rules Committee’s docket.

49. See, e.g., David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rule-making*, 137 U. PA. L. REV. 1969, 1974 (1989) (“The hope of the rulemakers, I believe, was a good deal more ambitious. They wanted lawyers who went into any federal court (and a growing number of lawyers had practices that focused on the federal courts in a number of states, rather than on federal and state courts within a single state) to know what to expect and not to have to undergo an initiation period or to rely heavily on the wisdom of local practitioners. They wanted to eliminate petty haggling over pointless distinctions among types of cases, and to treat as many cases as possible under the same general rubric.”).

50. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 739–40 (1975).

51. See Stempel, *supra* note 6, at 345.

solve individual cases “on their merits,” in the sense in which Roscoe Pound used those terms. In its continuing effort to achieve the lofty goals Professor Moore set for the rulemakers, I am certain the Civil Rules Committee will want to consider, possibly within the framework I have set forth above, the proposals discussed in this important Issue of the *Denver University Law Review*.