III. THE FEDERAL RULEMAKING PROCESS—THE REPORTERS SPEAK

MAKING RULES TO DISPOSE OF MANIFESTLY UNFOUNDED ASSERTIONS: AN EXORCISM OF THE BOGY OF NON-TRANS-SUBSTANTIVE RULES OF CIVIL PROCEDURE

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I. INTRODUCTION

The late Robert Cover questioned the Federal Rules of Civil Procedure thus:

> It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.[1]

Professor Cover continued. He suggested that the Rules might usefully forsake their "trans-substantive"[2] character in order to give more effective service to substantive rights. Professor Cover's questioning pro-

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[1] Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules,* 84 YALE L.J. 718, 732-33 (1975) (citation omitted).

[2] *Id.* at 733.

ceeded from a larger skepticism about the possibility of political neutrality of public institutions.[3] His vision has been echoed by other skeptics in the years since his writing,[4] but it has never been "trans-substantiated"[5] as a draft of procedure rules that might be considered as an alternative to the "trans-substantive" rules sometimes decried. It has survived as a ghost in the darkness surrounding academic discussions of the future of civil procedure.

This Article aims to test Professor Cover's vision against the major problem of contemporary procedural rulemaking. It concludes that judicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future.

Professor Cover is, of course, on high ground in pointing to the seamlessness of the relationship between substance and procedure. The difficulty associated with the maintenance of the distinction between substance and procedure has long been familiar[6] and is not questioned here. Nevertheless, the difference is not meaningless, and I have elsewhere attempted to contribute to our understanding of those terms as they are used in the Rules Enabling Act.[7] It is necessary to find meaning for them in part because Professor Cover's prescription is untenable, as this Article will attempt to demonstrate.

There are and will continue to be many significant variations in the uses made of procedure rules in different kinds of cases, including

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[3] "History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations." Cover, *Foreword:* Nomos *and Narrative, The Supreme Court — 1982 Term,* 97 HARV. L. REV. 4, 5 (1983) (citations omitted); *cf.* Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015, 1101 (1982) (declaring "historical . . . perspective [to be] essential to an understanding of the circumstances from which the language of the [Rules Enabling] Act drew much of its meaning").

[4] *See* Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law,* 63 NOTRE DAME L. REV. 693, 696-97 (1988); Resnik, *Failing Faith: Adjudicatory Procedure in Decline,* 53 U. CHI. L. REV. 494, 547-48 (1986); Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909, 985 (1987).

[5] Transubstantiation is the doctrine that at the sacrament of communion the wine and bread of the Eucharist are turned into the substance of Christ himself. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1365 (W. Morris ed. 1979).

[6] *See generally* Cook, *"Substance" and "Procedure" in the Conflict of Laws,* 42 YALE L.J. 333, 333-34 (1933) (discussing the difficulty of distinguishing substance from procedure in the area of conflicts of laws).

[7] *See* Carrington, *The Rules Enabling Act of 1988: Original Sin Resisted,* 1989 DUKE L.J. (forthcoming) (arguing that the temptation to view the four substance/procedure lines drawn in the Rules Enabling act as a constant must be resisted).

some noncontroversial accommodations to differences in the substantive natures of matters in dispute. New differentiations in procedure may be needed now and perhaps should be considered by civil rulemakers in the near future. But judicially-made procedure rules aiming to effect particular substantive outcomes are not viable. It will be a useful contribution to discussions of procedural reforms if that approach, suggested by Professor Cover, can be laid to rest.

Two matters will be considered to test the vision of non-trans-substantive procedure. One is the rulemaking process, its benefits and its limitations. Critical analysis of the existing process[8] shows that it is ill-suited to resolving political contests between competing groups who seek at the expense of their adversaries to advance their short-term interests in litigation outcomes. Process is therefore not competent to make rules intended to give particular advantages to, say, antitrust plaintiffs against antitrust defendants or vice versa.

All procedural systems share the second problem at all times: they must confront manifestly unfounded contention. To illuminate this ubiquitous problem, this Article will suggest a revision of Rule 56 of the Federal Rules of Civil Procedure. Advocates of a non-trans-substantive approach of civil litigation are here challenged to suggest variations in the rule that would be especially appropriate to a category of cases defined by the substantive rights to be enforced. This presentation concludes that substantively-based variations are not likely to be useful even if a process to draft and promulgate such rules could be devised.

II. RULEMAKING

A. *Assessing the Product, 1938-1988*

To appraise a process that has been in place for fifty years, we must assign a value to the product of that process. The correct question is: Are the Rules themselves a success or failure?

No knowledgeable person would claim the Civil Rules have achieved Rule 1's elusive aim "to secure the just, speedy, and inexpensive determination of every action." There are many shortfalls in performance, especially in the pursuit of "inexpensive" determinations.[9] To some extent, these shortfalls arise from the Civil Rules' failure to

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[8] The present process has evolved to include some of the steps here described such as open meetings and hearings. Open meetings are now required by the Rules Enabling Act of 1988, Pub. L. No. 100-702, 102 Stat. 4648, 4649 (to be codified at 28 U.S.C. § 2073).

[9] *See* Amendments to Fed. Rules of Civil Procedure, 446 U.S. 995, 997-1001 (1980) (Powell, J., dissenting).

deal effectively with the problem of unfounded contentions. The second half of this article discusses this subject.

Deficiencies in contemporary civil procedure notwithstanding, I view fifty years of federal civil rulemaking as a success. The aim of rulemaking to achieve the "just, speedy, and inexpensive determination of every action" is not fully attainable. Generic problems faced by any procedural system are enduring and intractable. Not only is perfection impossible, but even excellence is unstable, especially so in a system dependent on the adversary tradition, because of changing circumstances and the corrosive effect of perpetual exploration and exploitation of systemic weakness by adversaries.

One cause of dissatisfaction with contemporary federal practice is the elevation of our expectations relative to possibility. Our desire for "just" results requires dispositions based on truth insofar as we can know the truth of past events. There is an ever-increasing supply of available information bearing on past events, and perhaps an increasing supply of wisdom in the management of that information. Neither, however, is costless, and their relative costs may be rising.

Some of the expense of our system of litigation is related indirectly to the right to jury trial in civil cases. With jury trial as a paradigm, we are committed to the trial as a discrete and dramatic event rather than a series of interviews conducted over an extended period, as some systems allow.[10] The dramatic trial, in turn, creates the problem of surprise and the need for pretrial discovery.[11] Given the deep inculturation of the jury as well as its constitutional stature,[12] the Federal Civil Rules must proceed with these conditions, even if at times they may contribute to delay and cost.

Governments simpler than our own, in places where less is expected of the civil judicial process, are likely to use less expensive procedural systems.[13] Most legal systems regard civil procedure only as a

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[10] *See* Langbein, *The German Advantage in Civil Procedure,* 52 U. CHI. L. REV. 823, 826 (1985) (describing the German trial as "not a single continuous event" but rather as "the court gather[ing] and evaluat[ing] evidence over a series of hearings"); *cf.* B. ABEL-SMITH & R. STEVENS, IN SEARCH OF JUSTICE 209 (1968) ("It has been suggested that, instead of being scheduled as single events, trials could be broken down into component parts . . . . This system . . . would . . . avoid the psychological trauma of the one-shot battle . . . .").

[11] *See* Holtzoff, *The Elimination of Surprise in Federal Practice,* 7 VAND. L. REV. 576, 580 (1954) ("[T]he element of surprise sometimes frustrates the ends of justice."); *see also* Sunderland, *Scope and Method of Discovery Before Trial,* 42 YALE L.J. 863, 863 (1933) (noting that pleadings themselves are insufficient to eliminate surprise).

[12] *See generally* J. GUINTHNER, THE JURY IN AMERICA (1988) (investigating various aspects of the debate surrounding the jury system).

[13] *Cf.* Langbein, *supra* note 10, at 823-24 (describing the American civil litigation

means of dispute resolution. Few if any other democratic legislatures would perceive civil litigation as being also an important instrument of social, political, and economic regulation.[14] In contrast, as Kenneth Scott has described, our courts are engaged in "modifying behavior,"[15] especially that of corporations and individuals primarily attentive to the bottom line.

Important reasons that our Congress more often relies on civil litigation as a means of law enforcement include at least two found in the Federal Rules of Civil Procedure:[16] the discovery system established in the 1938 Rules[17] (a system that is truly the dread of the multi-national enterprise) and the class action device as amended in 1966.[18] If our courts are often less speedy and more expensive, they are also more likely to determine the reality of events in dispute than speedier and less expensive systems. In no other country will lawyers soundly advise citizens so frequently that engaging in conduct forbidden by national law will likely be discovered, if not by the government, then by private lawyers representing individuals harmed by the unlawful conduct.[19] In addition, as a result of the suits, courts will compel violators to compensate not merely a few aggressive individuals willing to invest treasure and heartache in litigation, but everyone protected by the national law. In this important respect, the United States Congress speaks with greater authority and effect than other legislative bodies.

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system as excessive and setting out the advantages of the German system). *But cf.* Gross, *The American Advantage: The Value of Inefficient Litigation,* 85 MICH. L. REV. 734, 742-48 (1987) (discussing advantages the American civil procedure system has over the German system).

[14] *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1282-84 (1976) (contrasting burgeoning public law litigation with the traditional concept of lawsuits as "a vehicle for settling disputes between private parties about private rights"); *see also* Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons,* 1987 DUKE L.J. 1002, 1004-16 (1987) (discussing the relative litigiousness of the United States and the United Kingdom).

[15] *See* Scott, *Two Models of the Civil Process,* 27 STAN. L. REV. 937, 938 (1975).

[16] Another cause of the effectiveness of American law as an instrument of public policy is the use of the injunction. *See generally* O. FISS & D. RENDLEMAN, INJUNCTIONS (2d ed. 1983). See also R. GOLDFARB, THE CONTEMPT POWER 1-2 (1963): "[t]o the lawyer from a non-common-law country the contempt power is a legal technique which is not only unnecessary to a working legal system but also violative of basic philosophical approaches to the relations between government bodies and people." *Id.* (citing Pekelis, *Legal Techniques and Political Ideologies: A Comparative Study,* 41 MICH. L. REV. 665, 671 (1943)).

[17] *See* FED. R. CIV. P. 26-37.

[18] *See* FED. R. CIV. P. 23.

[19] *See* Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 COLUM. L. REV. 669, 669 (1986) ("Probably to a unique degree, American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies.").

If Congress now was considering a new law to protect the environment, or investors, or consumers, or minorities, or managements threatened with hostile takeovers, or any other group of constituents, it likely would think of enforcing it through civil litigation in the federal courts rather than through an administrative agency. The same would not have been true in 1938,[20] and the change reflects a major development in our polity, for which the Federal Rules of Civil Procedure are responsible.

Moreover many state court systems have emulated the federal rulemaking process,[21] and state rulemakers have often tracked closely the evolving federal rules.[22] This phenomenon partly stems from a desire for uniformity between federal and state procedures, and may partly result from a failure of legal imagination,[23] but another factor is that the Federal Rules of Civil Procedure have more nearly reflected our aspirations for judicial decision-making than have any other schemes. As Geoffrey Hazard has put it: "The Rules may be Bleak House, but everyone seems to want to live there."[24]

Seen in these lights, federal rulemaking may be appraised in generally positive terms. One may view the Rules Enabling Act of 1934[25] as an accommodation in our constitutional scheme, a subconstitutional structure[26] designed to increase the long term effectiveness of the fed-

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[20] *See generally* J. LANDIS, THE ADMINISTRATIVE PROCESS (1938). James Landis, then Dean of Harvard Law School, wrote this book shortly after the beginning of the New Deal. The work is an optimistic appraisal of the effectiveness of administrative agencies in bringing about social change.

[21] *See* A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 91-145 (1949) (reviewing the extent to which the state courts have followed through with the ABA's recommendation that all courts "be regulated by rules of court"); McKusick, *State Courts' Interest in Federal Rulemaking: A Proposal for Recognition,* 36 ME. L. REV. 253, 253 (1984) ("At least thirty states, plus the District of Columbia and Puerto Rico, now have civil rules substantially identical to the federal rules.").

[22] *See* Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure,* 61 WASH. L. REV. 1367, 1367 (1986).

[23] See A. WATSON, FAILURES OF THE LEGAL IMAGINATION xiii-xiv (1988).

[24] Hazard, *Undemocratic Legislation,* 87 YALE L.J. 1284, 1287 (1978) (citing Kirkham, *Complex Civil Litigation — Have Good Intentions Gone Awry?,* 70 F.R.D. 199 (1976)).

[25] Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

[26] For a suggestion that rulemaking is an inherent constitutional power, see Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406, 412 (1950) (noting the inherent rule making power of courts in holding that under New Jersey's 1947 Constitution, the state legislature could not preempt rules proclaimed by the New Jersey Supreme Court). For a criticism of this opinion, see Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 254 (1951) (arguing the court should not have set itself up as immune from correction). *But see* Pound, *Procedure Under Rules of Court in New Jersey,* 66 HARV. L. REV. 28, 28-29 (1952) (criticizing Kaplan & Greene's article and supporting *Winberry*).

eral courts and thus indirectly of the legislative branch as well. The consequences of rulemaking are long-term, radiate in many directions, and relate to numerous other arrangements. While it is impossible to say what life for the last fifty years would have been, or what the next fifty would be, without rulemaking,[27] it is not wrong to suppose that, for all the faults it has produced in the system of litigation, the rulemaking process has produced widely shared benefits.[28]

B. *The Process, 1988*

The present rulemaking process bears a substantial resemblance to the one created by the Supreme Court pursuant to the Rules Enabling Act of 1934,[29] but conforms to a legislative scheme put in place as recently as October, 1988.[30] Since Congress's 1974 enactment of the Federal Rules of Evidence,[31] there has been controversy[32] regarding the process. Some observers have gone so far as to describe a counter-revolution against rulemaking.[33] To some extent, criticism of court rulemaking and advocacy of change in the process[34] may reflect misperception of the process and forgetfulness of the vices which that process aimed to correct. Appendix 2 to this Article sets out this insider's view of the existing process and its limitations, explicit and inherent.

It is worth noting at the outset, however, that in fifty years, the Supreme Court has never promulgated a Civil Rules amendment that

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[27] *But see* Rosenberg, *The Federal Civil Rules After Half A Century,* 36 ME. L. REV. 243, 243 (1984) (addressing the problem of improving the civil litigation process).

[28] *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1008 (1987) [hereinafter FEDERAL PRACTICE AND PROCEDURE]; Hazard, *supra* note 24, at 1287.

[29] Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. The history and political context of the 1934 Act are fully described in Burbank, *supra* note 3.

[30] Rules Enabling Act of 1988, Pub. L. No. 100-702, 102 Stat. 4648 (to be codified at 28 U.S.C. § 2073).

[31] *See generally* FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 5006 (1977) (discussing the drafting of the Federal Rules of Evidence).

[32] *See* J. BROWN, FEDERAL RULE-MAKING: PROBLEMS AND POSSIBILITIES v-vii (1981); J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 8 (1977); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis,* 27 STAN. L. REV. 673, 673 (1975); Lesnick, *The Federal Rule-Making Process: A Time for Re-examination,* 61 A.B.A. J. 579, 579 (1975).

[33] *See* Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment,* 54 BROOKLYN L. REV. 35, 35 (1988).

[34] *See Rules Enabling Act of 1985,* H.R. REP. No. 422, 99th Cong., 1st Sess. 4 (proposing legislation to revise the process by which rules of procedure used in federal judicial proceedings become effective); Kastenmeier & Remington, *A Judicious Legislator's Lexicon to the Federal Judiciary,* in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 54, 70-71 (R. Katzmann ed. 1988) (noting attempts to pass legislation to reform the rule making process).

the recommending committees expected would evoke organized political opposition. In fact, political activity by any group identified by a shared interest external to the process has been scarce. The organized political opposition in 1982 was limited to the professional organization of process servers.[35] This scarcity of conventional interest-group politics in rulemaking is not accidental.

C. *Political Neutrality, A Goal in Rulemaking*

Neutrality with respect to the interests of particular groups of disputants is an obvious objective, indeed perhaps a paramount value, of any enterprise engaged in dispute resolution.[36] It is perhaps more critical in other facets of the procedural system, such as the selection of judges or jurors. Article III of the Constitution reflects this point in its provision for appointment of judges "during good Behaviour."[37] It is an important value as well for the process that makes the rules which guide the resolution of disputes.

We are not likely to perfect neutrality in the rulemaking process or in the procedure rules themselves, any more than in other human institutions, and there should be no pretense that we have. There are, however, several reasons for continuing to pursue that ideal.

Procedure rules that are, or are even seen to be, designed to favor one set of litigants produce outcomes that are less acceptable to their adversaries. In the larger and most traditional senses of the phrase, Equal Protection of the Law[38] requires a "level playing field" in legal dispute resolution.

Moreover, if the procedure rules were the result of a test of strength among political organizations, it is obvious, at least in our political system, that rules would generally favor those litigants with the greater resources, especially those identifiable "repeat players"[39] who

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[35] The story is told in Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1197-1212 (1987).

[36] *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365 (1978) (stating that judges must be impartial).

[37] U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."). *See* R. WHEELER & A. LEVIN, JUDICIAL DISCIPLINE AND REMOVAL IN THE UNITED STATES 2 (1979) (stating that federal and state courts "seek to assure both the real and apparent independence of the judiciary to decide cases without extraneous pressure").

[38] *See* P. POLYVIOU, THE EQUAL PROTECTION OF THE LAWS 1-5, 31 (1980) (suggesting that, while the language of the equal protection clause conveys notions of equality before the law, equal protection and equality before the law are conceptually distinct).

[39] *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits*

have the larger stakes in procedure rules and hence the greater political energy. Procedural neutrality over the longer term corrects the political weakness of individuals whose rights are idiosyncratic or episodic and hence not organizable.

Also likely to be effective in a context of political organization are those groups having interests that are internal to the procedural system. The 1982 efforts of the organized process servers[40] stand as an example. There may be others.[41] While such interest groups may have benign motives and sound judgment, their organized influence is over time likely to result in rules that serve the convenience of the professionals with the greatest stakes in the system. There may in fact be considerable experience in England, the United States, and elsewhere to confirm this fear. Rulemaking, too, it must be conceded, can be subject to this vice in its inevitable tendency to protect the interests of judges.

For these reasons, the 1934 Rules Enabling Act expressed the aspiration for political neutrality in rulemaking. This aspiration underlies the Act's selection of the Supreme Court as the authority to promulgate rules. In conferring this responsibility on the Court rather than on conventional legislative committees, the Justice Department,[42] or an agency for court administration, Congress followed an English lead[43] previously pursued in several states.[44] In doing so, Congress placed rulemaking under the institution it perceived to be least responsive to interest group politics.[45] Commentators characterized this trans-

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of Legal Change, 9 LAW & SOC'Y REV. 95, 97 (1974) (distinguishing those with "only occasional recourse to the courts" from those "who are engaged in many similar litigations over time").

[40] *See* Sinclair, *supra* note 35, at 1197 (noting government and private process servers' role in formulation of Rule 4(c)).

[41] Professor Hazard states that "lawyer-legislators when confronted with questions of procedure often project the opinions of that part of the bar that is seldom in court and that therefore wants a system where relative amateurs can maintain sway." Hazard, *supra* note 24, at 1293.

[42] For a description of our extensive experience with the Justice Department in such a role, see S. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 91-162 (1973). During the period immediately following adoption of the Rules Enabling Act, the rulemaking project was conducted in the Department. *See* Burbank, *supra* note 3, at 1133 n.530.

[43] Court rulemaking was first authorized by the English Parliament in the Judicature Act of 1875. *See* S. ROSENBAUM, THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT 5-6 (1917). The American legislation was modeled on the British.

[44] *See* R. POUND, ORGANIZATION OF COURTS 171 (1940).

[45] *Cf.* Shelton, *Uniform Judicial Procedure — Let Congress Set the Supreme Court Free,* 73 CENT. L.J. 319, 322 (1911) (arguing that the Supreme Court should be charged with the reform of judicial procedure, as only it could "subdue the belligerent obstinacy that may be expected" in such an undertaking).

fer of authority to the courts to be a "first principle" of procedural law reform.[46] There was, indeed, active opposition to the idea of engaging Congress itself in writing national rules of practice and procedure; that opposition was based on experience with civil procedure provisions that democratically elected legislators wrote in response to occasional initiatives of special interest groups.[47]

In the context of our own Constitution, it was clear that neither the Court nor its judicial subordinates, in keeping with their role as the Third Branch, could enact laws aiming to advance particular short-term group interests. Judicial institutions can only enact rules framed by reference to larger and longer-term public interest in effective courts and procedural justice. The language of the Rules Enabling Act, restricting the Court to the making of rules of procedure, not substance, reflects the obvious corollary of the separation of powers principle.[48] It is not likely that anyone even in 1934 thought that the line between substance and procedure was a clean one,[49] but it was perhaps the best available to define a subconstitutional relationship between branches.

Because the Court can decide only "cases or controversies" and holds no commission in the constitutional scheme to enact laws or rules favoring or disfavoring specific groups of litigants, its role in rulemaking is to shield the process from the influence of organized groups seeking to shape the judicial process. Congress could not have supposed the Court would draft rules itself and must have expected the Court would delegate that duty to a committee of technicians. Even more than the Court, such technicians lack any possible qualification to consider the relative merits of competing political interests.[50] The interposition of

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It was also an attraction that the Supreme Court had promulgated the Federal Equity Rules that were generally regarded as superior in their simplicity and directness to the codes established in state legislatures. *See* Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 602 (1926) (comparing positive experience with the federal equity rules with the "exceptional ineffectiveness" produced by New York's legislative regulation of procedure).

[46] *See* Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438, 443 (1910).

[47] *Cf. id.* at 600 (attributing faults in New York's Code of Civil Procedure to leading New York attorneys' resistance to court rulemaking).

[48] To emphasize the distinction, the Act not only authorized the making only of rules of "practice and procedure," but also forbade the Court to make rules to "abridge, enlarge or modify any substantive right. . . ." 28 U.S.C. § 2072 (1982 & West Supp. 1988).

[49] *See* Cook, *supra* note 6, at 336 (declaring that, for some purposes, there is no basis for distinguishing between substantive and procedural law).

[50] Proposed amendments to the Rules Enabling Act aimed to make the Advisory Committee more "representative." *See* H.R. 3550, 99th Cong., 1st Sess., 131 CONG. REC. H11397-98 (daily ed. Dec. 9, 1985) (Rules Enabling Act of 1985) (§ 2073(a)(2) (states that committees shall consist of "a balanced cross section of bench and bar, and

the Judicial Conference of the United States makes little change in that.

Rulemakers who are also judges do have, in some respects, a stake in the rules that define their duties and are, of course, not innocent of political preferences, but they are not advancing personal agendas. Rulemakers who are lawyers have clients and law practices that may have stakes in particular procedural matters. Rulemakers who are academics have intellectual commitments as well as political preferences that may affect judgment. Yet "interests" of these kinds are substantially sublimated in a group comprised of judges, lawyers, and academics who are assigned the mission of writing rules that are just. Such a group is substantially immunized from the possibility of influence resulting from direct interest or coercive pressures brought to bear by organized groups.

Rule 1 expresses the aspiration, established by the Court, to the rulemaking process's political neutrality.[51] We can expect near universal support for the goals of justice, dispatch, and economy in litigation.[52] Even "repeat players" gaining undeserved advantage from the shortcomings of the system are not likely to express opposition to these aims. Indeed, almost all organized groups having rights protected by legislation prefer effective enforcement of law through civil litigation.[53]

The aspiration to neutrality is derived from and reinforced by the long tradition of judicial law reform giving rise to judicial rulemaking. That tradition descends from Roscoe Pound,[54] David Dudley Field,[55]

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trial and appellate judges"). The "balanced cross section" language was deleted from the bill enacted in 1988. *See* Rules Enabling Act of 1988, Pub. L. No. 100-702, § 401, 102 Stat. 4648, 4649 (to be codified at 28 U.S.C. § 2073). The Committee is now more diverse than it was, but representativeness in this context may be illusory.

[51] *See* FED. R. CIV. P. 1 (declaring that the Rules "govern the procedure in the United States district courts in all suits of a civil nature").

[52] *But see* Gross, *supra* note 13, at 734 ("[E]fficiency is a poor measure of the quality of a procedural system. . . ."); Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts,* 29 BUFFALO L. REV. 487, 489 (1980) ("Yielding to the call for swift and certain justice without carefully scrutinizing the implications of change has undermined a number of procedures important to the adversary process.").

[53] *Cf.* W. SHAKESPEARE, KING HENRY IV PART II, in COMPLETE WORKS 438, 466 (W. Craig ed. 1943) (speech of new King Henry V to the Chief Justice in final act, in which King Henry praises the legal system that had incarcerated him as heir apparent).

[54] *See, e.g.,* Pound, *The Causes of Popular Dissatisfaction with The Administration of Justice,* 40 AM. L. REV. 729, 739 (1906) (condemning "exaggerated contentious procedure" for giving "the whole community a false notion of the purpose and end of law").

[55] *See* DAVID DUDLEY FIELD: CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM (A. Reppy ed. 1949); Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision,* LAW &

Henry Brougham,[56] Jeremy Bentham,[57] and unnumbered others who have labored in pursuit of Rule 1's stated aims for at least a century and a half. Max Weber recognized this tradition of procedural law reform as a manifestation of the rationalization process of legal and social institutions. He identified the phenomenon as a central feature of Western culture linked to the advancement of its social and political aims.[58]

Rulemaking in this tradition must avoid the interest group politics that is the meat and drink of the parliaments of the world. The controversy over proposed amendments to Rule 68 recently illustrated this tenderness of rulemaking.[59] The concern of the civil rights bar,[60] whether expressed through Congress[61] or directly to members of the Civil Rules Committee, the Standing Committee, or the Judicial Conference, was sufficient to cause the rulemakers to abandon the subject of

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HIST. REV. 311 (1988).

[56] 2 SPEECHES OF HENRY LORD BROUGHAM 485 (1838) sets forth a flowered version of Rule 1 uttered in Parliament on February 7, 1828, endorsing the appointment of a commission to evaluate procedure in the English courts.

[57] *See generally* Dillon, *Bentham and His School of Jurisprudence,* 24 AM. L. REV. 727 (1890) (evaluating Bentham's contributions to law reform).

[58] *See generally,* A. KRONMAN, MAX WEBER 72-92 (1983) (analyzing Weber's theory of formal legal rationality, particularly Weber's views on the irrationality of oracular adjudication as an impetus for the rationality characteristic of Western legal systems). Rulemaking has even been used as a measure of the process that Weber described as the rationalization of our institutions. *See* T. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 288 n.5 (1987).

[59] The first proposal for reform of Rule 68 appeared in 1983. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure,* 98 F.R.D. 337, 361-67 (1983). That proposal was made partially in response to Delta Air Lines v. August, 450 U.S. 346, 352 (1981) (holding that Rule 68 applies only to "offers made by the defendant and only to judgments obtained by the plaintiff"). In light of the critical response to the draft, the Advisory Committee on Civil Rules tried again in the following year. *See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure,* 102 F.R.D. 407, 432-37 (1984). Hearings were conducted by the Committee on the 1984 proposal and a number of negative reactions were recorded. The Supreme Court made a controversial decision involving Rule 68 in Marek v. Chesny, 473 U.S. 1, 9 (1985) (finding attorney's fees granted under 42 U.S.C. § 1988 "subject to the cost-shifting provision of Rule 68"). Legislation was offered to reverse that decision, *see* H.R. 3998, 99th Cong., 1st sess. (1985). *See generally* Simon, *The Riddle of Rule 68,* 54 GEO. WASH. L. REV. 1 (1985) (discussing efforts to amend Rule 68 and setting forth a proposed amended version).

[60] *See* Simon, *supra* note 59, at 14-19 (describing the reaction of the civil rights bar to the 1983 and 1984 proposals to amend Rule 68)

[61] Professor Burbank attributes the withdrawal of Rule 68 proposals to Congressional action. In fact, he was one of many to communicate dissatisfaction with the proposals and to recommend that the Committee withdraw from its Rule 68 efforts. *See* Burbank, *Proposals to Amend Rule 68 — Time to Abandon Ship,* 19 U. MICH. J.L. REF. 425, 426 (1986) (suggesting that the Advisory Committee abandon its efforts to amend Rule 68).

Rule 68.[62]

In pursuit of political neutrality, rulemakers have generally been mindful of the following two principles of rulemaking that serve to deflect political attention.

1. The Principle of Generalism

One principle, implicit in the need to avoid substantive conflict, is that procedural rules should have general applicability. By the terms of the Rules Enabling Act, court rules must be "general."[63] Given the opaque legislative history of the Act, the author's intention for the word's meaning is uncertain, but given the universal relief which had just come with the abolition of the common law forms of action[64] and in the merger of law and equity,[65] "general" should be presumed to mean that rules promulgated by the Supreme Court should not be limited in their application either to a particular geographic area[66] or to a particular subject matter of dispute.

The intellectual posture that rulemakers should strive to achieve resembles that of John Rawls' person in the sky giving directions from behind a veil of ignorance.[67] The self-imposed ignorance of rulemakers pertains to the identities and stakes of litigants whose claims or defenses may be advanced specially by a proposed procedural arrangement.

Accordingly, Federal Rules of Civil Procedure are seldom written or promulgated in terms designed to operate differently according to the substantive nature of a claim or defense. There are, to be sure, rules specifically applicable to the representation of corporate shareholders,[68]

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[62] The Advisory Committee on Civil Rules tabled the 1984 proposal to amend Rule 68 at its April 21, 1986 meeting without plans to consider any new proposals. *See* Simon, *supra* note 59, at 89 n.359.

[63] 28 U.S.C. § 2072 (1982) (as amended by the Rules Enabling Act of 1988, Pub. L. No. 100-702, §401, 102 Stat. 4648) (to be codified at 28 U.S.C. § 2073) ("The Supreme Court shall have the power to prescribe by *general* rules . . . .") (emphasis added).

[64] *See* FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING (1848). For a description of the forms of action, see F. MAITLAND, EQUITY, ALSO THE FORMS OF ACTION AT COMMON LAW 293-375 (1909). There was surely no one active in the law reform movement in the twentieth century who was not fully cognizant of the experience with the forms.

[65] *See* F. MAITLAND, *supra* note 64, at 302, 375 (stating that the Judicature Act of 1873 effected the merger of equity and law).

[66] *Cf.* Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns,* 137 U. PA. L. REV. 1999, 2002-06 (1989) (describing the incentives for national uniformity in procedural rules).

[67] *See* J. RAWLS, A THEORY OF JUSTICE 136-42 (1971) (describing the original position of the rational decision-makers who choose the rules of society).

[68] *See* FED. R. CIV. P. 23.1.

suits in admiralty,[69] or proceedings in eminent domain.[70] These rules do not apply to litigation between individuals disputing liability for an auto accident. Such special rules are exceptional in their limited application.[71] No such exception has ever been made in the circumstance of a political contest between competing adversarial groups over a procedural advantage sought by one over the other.

No amendment presently under consideration gives any discernible advantage to any substantively defined group of litigants. Correspondents recently importuned the Civil Rules Committee to devise special pleading rules in cases arising under the civil liability provisions of the RICO Act.[72] The suggestions reflect a high degree of dissatisfaction with the Act and how some litigants use it.[73] The committee did not consider a rulemaking response because, perhaps among other reasons, the suggestions would have violated the principle of generalism and might therefore exceed the authority of the Court under the Rules Enabling Act.

In *Hickman v. Taylor*,[74] the Supreme Court emphasized the generalism of the rules in explaining discovery: "Discovery . . . may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant."[75]

Generalism in civil procedure is, in the Anglo-American tradition, about a century older than the Federal Rules[76] and is derived in part

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[69] *See Supplemental Rules For Certain Admiralty and Maritime Claims,* in 12 FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at §§ 3201-56 (1973 and Supp. 1988). These were adopted in 1966. There are, of course, also separate rules governing proceedings in bankruptcy before Bankruptcy Judges. For the origins of the present bankruptcy rules, see generally Kennedy, *The New Bankruptcy Rules,* 20 PRAC. LAW. 11, 12-13 (April 1974) (summarizing the scope of the changes brought about by the new rules).

[70] *See* FED. R. CIV. P. 71(a).

[71] In addition, some Federal Rules of Civil Procedure do have open-ended exceptions or qualifications, such as "when authorized by a statute of the United States." FED. R. CIV. P. 4(f). At least one rule has been interpreted to apply differently in diversity cases than in federal question cases. *See, e.g.,* West v. Conrail, 481 U.S. 35, 39 n.4 (1987) (so interpreting Rule 3). Anachronistic variations also persist in copyright procedure. *See* C. WRIGHT, LAW OF FEDERAL COURTS 409 (4th ed. 1983).

[72] 18 U.S.C. §§ 1961-68 (1982 & Supp. 1985).

[73] *See* Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,* 86 COLUM. L. REV. 433, 462 (1986) (noting that "limits imposed by the substantive law can frustrate efforts to facilitate dismissal of cases").

[74] 329 U.S. 495 (1947).

[75] *Id.* at 507.

[76] The Hilary Rules of 1836 effected this reform. They were the result of Herculean political effort by Brougham; the story is told in R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 43-46 (1952). The Hilary Rules,

from centuries of adverse experience with substance-specific procedures. The teaching of that adverse experience is that complexity resulting from categorization of procedures in courts of general or broad subject matter jurisdiction produces wasteful disputes as to which set of procedural rules controls.[77] The text of Rule 2, providing that there shall be one cause of action, confirms that this experience was prominently in the minds of the 1938 draftsmen.[78] This preference for simplicity affords an additional, and in some minds stronger,[79] reason for the transsubstantive nature of the Rules.

The generalist approach to rulemaking contrasts with the administrative procedures that materialized in the federal government in the early decades of this century. Specialized agencies were, or course, a centerpiece of the New Deal.[80] The administrative law approach to "behavior modification" linked special group interests with particular institutional arrangements. This change appeared to yield short-term effectiveness, but it is an approach now seldom favored because of the likelihood that the agency and the interest group will over time unite.[81] Moreover, agencies tend to lose the posture of triadic neutrality;[82] concern for this loss of disinterest is one basis for our conventional expectation that important administrative action is subject to judicial review.[83] In this respect, generalism in procedure rules for Article III courts may have constitutional roots in the fifth amendment.

2. The Principle of Flexibility

Rules drafted by the Civil Rules Committee generally bear a style

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however, presumed too much on the professionalism of judges and lawyers, and they were a fiasco: "[N]ever was a more disastrous mistake made." 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 325 (1926).

[77] *See* Carrington, *Civil Procedure and Alternative Dispute Resolution,* 34 J. LEG. ED. 298, 302 (1984).

[78] *See* FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.' ").

[79] *See, e.g.,* F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 81 (1936).

[80] *See* J. LANDIS, *supra* note 20, at 14 ("Following the economic breakdown of 1929. . . [a]s rapidly as . . . causes could be isolated and problems defined, administrative agencies were created to wrestle with them.").

[81] *See generally* Landis, *Report on Regulatory Agencies to the President-Elect,* U.S. Senate, Comm. on the Judiciary, 86th Cong., 2d Sess. (1960) (discussing the relationship between special interest groups and institutional behavior). For an account of the development of Landis' views, see T. MCCRAW, PROPHETS OF REGULATION 153-209 (1984).

[82] *See* Fuller, *supra* note 36, at 363 (discussing adjudication as a form of social ordering).

[83] *See generally* 5 K. DAVIS, ADMINISTRATIVE LAW TREATISE 253-460 (2d ed. 1984) (discussing reviewable action and the scope of judicial review).

that is related to generalism or trans-substantivity. The style is a loose texture of meaning designed to afford flexibility in the application of the Rules.

As a result, the committee consciously designed the 1938 Rules to leave much to the intelligence, wisdom, and professionalism of those who would apply them.[84] Often the Rules are explicit in conferring discretion on the district judge. Sometimes the discretion or flexibility results from diction open to interpretation; sometimes it is the product of brevity. Despite a persistent tendency of the Rules to lengthen,[85] they nevertheless fail to address many matters of detail.

The principle of flexibility, like that of generalism, reflects a theory of procedure based on experience.[86] Elaborate procedural principles carefully designed to prevent judges from falling into error become themselves centers of costly dispute tending to distract decision-making away from substantive merits to alleged procedural miscues.[87] Elaborate procedure rigorously enforced was the tradition of the Hilary Rules that gave us Baron Parke, who boasted that he had decided many volumes of cases without considering their merits.[88] The celebrated Baron was clearly in the minds of the 1938 draftsmen, as was the unhappy experience with the elaborate Throop Code of 1876 unwisely developed by the New York legislature[89] to replace the much simpler Field Code of 1848.[90] The lesson was that procedural complexity defeats substantive rights. Over time, complexity may even liberate

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[84] *Cf.* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 SYRACUSE L. REV. 635, 659 (1971) (discussing the discretion afforded by Rule 24).

[85] The 1988 Rules are half again as long as the 1938 Rules. This is a cause for minor but persistent concern of the Civil Rules Committee.

[86] *Cf.* Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence,* 57 TEX. L. REV. 167, 168-69 (1979) (articulating aspects of flexibility allowed to trial courts with respect to evidence).

[87] *See, e.g.,* Cole v. Ravenshear, 1 K.B. 2 (1907) (dispute arising from counsel's misinterpretation of procedural rules); J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 86-90 (1969) (discussing the cumbersome nature of civil procedure); Field, *Law Reform in the United States and Its Influence Abroad,* 25 AM. L. REV. 515, 529 (1891) (noting how the U.S. has suffered through lack of codification of procedure); Sunderland, *Character and Extent of the Rule-making Power Granted U.S. Supreme Court and Methods of Effective Exercise,* 21 A.B.A. J. 404 (1935) (referring to procedural complexities and technicalities as "the most prolific causes for delays and for the multiplication of objections and exceptions").

[88] *See* HAYES, CROGATE'S CASE: A DIALOGUE IN THE SHADES OF SPECIAL PLEADING REFORM (U.S. ed. 1926).

[89] *See* FIRST REPORT OF THE COMMISSION ON PROCESS, PRACTICE, AND PLEADING IN THE SUPERIOR COURTS OF COMMON LAW (1912); Hornblower, *Revision of the Code,* 53 ALBANY L.J. 150, 152 (1896) ("There is altogether too much minuteness in this Code. It was built up under a microscope.").

[90] *See* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 46-48 (2d ed. 1947) (discussing the changes wrought by the Throop Code).

judges from a sense of personal responsibility for the substantive merits of their decisions.

Thus, rulemakers have preferred to provide judges with simpler tools designed to expose the merits of cases, in the hope that their professionalism will cause the judges to use those tools to accomplish the substantive aims established by Congress and the Constitution. In this way, the Rules express an expectation of begetting a higher level of judicial performance than obtains when judges are required to perform "by the numbers." This style may reflect a longer term trend of the sort Weber found in the Anglo-American tradition of judicial law reform: perspicuous observers have detected in other maturing legal systems a movement "from rigidity to flexibility."[91]

Four consequences of procedural flexibility deserve notice here. One is that it facilitates categorical integration of substance and procedure through court-made law.[92] As courts struggle, with parties' help, to give effective enforcement of substantive rights, procedural rules sometimes take on subtly different contextual meanings.[93] In this respect, flexibility responds to the concerns of Professor Cover[94] and provides balance to the generalism of the rules. Flexible general rules of procedure can and do serve substance.

A second consequence of flexibility in procedure is growth of the role of the United States Courts of Appeals. The "final decision" requirement[95] was adopted by the first Congress[96] and retained for proceedings in the courts of appeals when those courts were established in 1891.[97] For at least four decades after 1938, courts of appeals exhibited a growing tendency to find methods to review interlocutory decisions having an important bearing on the substantive outcome of cases; generally they accomplished this by enlarging their use of the extraordi-

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[91] R. MILLAR, *supra* note 76, at 6.

[92] *Cf.* Hazard, *The Effect of the Class Action Device Upon the Substantive Law,* 58 F.R.D. 307, 307 (1973) (advocating "circumspect consideration of the appropriate role of the judicial institution in shaping the substantive consequences of procedures").

[93] *See* Hazard, *Forms of Action Under the Federal Rules of Civil Procedure,* 63 NOTRE DAME L. REV. 628, 639-44 (1988) (illustrating how procedural rules are given different effect depending on the substance of the litigation).

[94] *See generally* Cover, *supra* note 1.

[95] *See* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions. . . .").

[96] Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

[97] *See* Act of March 3, 1891, §626 Stat. 826, 828. For a history of the principle of appellate review, see generally Crick, *The Final Judgment as a Basis for Appeal,* 41 YALE L.J. 539 (1932) (describing methods and stages of appellate review process); Sunderland, *The Problem of Appellate Review,* 5 TEX. L. REV. 126 (1927) (discussing development of appellate process in state courts).

nary writ of mandamus[98] or of the more recently minted "collateral order" doctrine.[99] By these means, the courts of appeals established a pattern of review to preclude idiosyncratic exercise of the most important procedural powers conferred on district courts.[100] In the last decade, perhaps under the pressure of heavy appellate caseloads, this role of the courts of appeals may have weakened.[101] Nevertheless, it remains true that flexible, discretionary procedures have not resulted in much of the "one-judge decisions" that were common in the nineteenth century.[102] The resulting system is discretionary, but seldom arbitrary.

Third, the Civil Rules' loose texture has invited the development of somewhat elaborate local rules promulgated by district courts. Standing orders and local rules of court are largely products of the last two decades.[103] This development cuts against the grain of the 1934 aim to establish national rules,[104] and also sometimes offends the principles of

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[98] *See* 28 U.S.C. § 1651 (1982); Judiciary Act of 1789, ch. 22, 1 Stat. 73, 81. *See also* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959) (noting as settled law the use of mandamus to require a jury trial); La Buy v. Howes Leather Co., 352 U.S. 249, 254-55, 259-60 (1957) (noting appellate courts' discretionary power to issue writ of mandamus).

[99] *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (articulating the collateral order doctrine) (citing Bank of Columbia v. Sweeny, 26 U.S. (1 Pet.) 567, 569 (1828)); *cf.* Forgay v. Conrad, 47 U.S. (6 How.) 200, 204-05 (1848) (describing the role of interlocutory orders in American and English courts).

[100] *See* Carrington, *The Function of the Civil Appeal: A Late-Century View,* 38 S.C.L. REV. 411, 426 (1987) (noting circuit courts' use of *en banc* procedures to control idiosyncratic panels that might enter errant decisions). *See generally Federal Civil Appellate Jurisdiction: An Interlocutory Restatement,* 47 LAW & CONTEMP. PROBS. 13 (Spring 1984) (a comprehensive summary of appellate standards of review).

[101] *See, e.g.,* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980) (reversing mandamus action, and noting appellate court's desire to review encroaches on the policy against piecemeal review); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-76 (1978) (limiting the collateral order and "death knell" doctrines); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 667 (1978) (declaring an issuance of mandamus premature); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-43 (1976) (chastising court of appeals for reversing district court's imposition of sanction of dismissal).

[102] The "one-judge" decision was a complaint giving rise to the Evarts Act. *See* 21 CONG. REC. 3402 (1890); *see also* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 98-99 (1928) (discussing Evarts' version of the role of jurisdiction of the district and circuit courts); R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 385-86 (1941).

[103] The Supreme Court cautioned against localism in Miner v. Atlass, 363 U.S. 641, 650 (1960) (striking local rule that authorized discovery-deposition practice in admiralty cases as inconsistent with General Admiralty Rules), but opened wide the door in Colgrove v. Battin, 413 U.S. 149, 163-64 (1973) (upholding, as not inconsistent with Rule 48, local rule allowing 6-member juries in civil cases). *See generally* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, LOCAL RULES PROJECT (providing a full discussion of the various aspects of the local rules) [hereinafter LOCAL RULES PROJECT].

[104] *See* Subrin, *supra* note 66, at 2001; *Rules Enabling Act of 1985: Hearing on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the*

generalism and flexibility. Thus, some standing orders are not trans-substantive, nor perhaps even procedural; some may well violate not only the limits of Rule 83 which authorizes local rules, but also the Rules Enabling Act, and even the constitutional doctrine of separation of powers.[105] Other local rules may constrict tightly the discretion that the Federal Rules intended to confer on the individual judge confronting the particular case. In response to these concerns, Congress recently acted to subject local rules and standing orders to appropriate constraints.[106] On the other hand, it is perhaps possible to overstate the problem;[107] it is probably rare for a court to apply a local rule to impede consideration of substantive merits.

Fourth, flexibility in the rules reduces the level of political interest in procedural rules. A body of law that reflects no substantive agenda has no apparent consequences for any political interest group, and merely equips individual district judges to do their work according to their own opinions and professional standards, is not material of which political controversy can be made. In this way, flexibility is linked to generalism and to the objective of political neutrality in rulemaking.

D. *The Role of Congress*

The pursuit of political neutrality necessitated by the nature of rulemaking institutions, with the principles of generalism and flexibility derived from that pursuit, make the Federal Rules of Civil Procedure unfit to bear substance-specific provisions designed to advance in-

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Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 24-26 (1985) (statement of Professor Stephen B. Burbank, University of Pennsylvania Law School) (discussing the legislative history and initial Advisory Committee interpretation of the Rules Enabling Act of 1934).

[105] *See, e.g.,* Carter v. Clark, 616 F.2d 228, 230-31 (5th Cir. 1980) (holding that a local rule requiring inmates' pleadings be notarized conflicted with federal statute and therefore violative of 28 U.S.C. § 2071); Rodgers v. United States Steel Corp., 508 F.2d 152, 162-64 (3d Cir. 1975) (striking local rule empowering court to require prior judicial approval of plaintiff's or counsel's communication with actual or potential class members as violative of first amendment and Rule 23's underlying policy and as outside court's statutory authority). Additional cases are cited in 12 FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 3153 nn. 53-55 (1973 & Supp. 1988).

[106] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4650 (to be codified at 28 U.S.C. § 2074) (requiring the Judicial Conference to review, and to modify or abrogate if inconsistent with federal law, rules prescribed under 28 U.S.C. § 2071 (1982) by courts other than the Supreme Court and district courts).

[107] *See, e.g.,* Woodham v. American Cystoscope Co., 335 F.2d 551, 552, 557 (5th Cir. 1964) (referring to the local rules at issue as "a series of traps for the free-of-fault plaintiff" and holding that failure to comply with one of those rules did not warrant dismissal); *see also* C. WRIGHT, *supra* note 71, at 407 (quoting *Woodham* and stating that local rules "often provide 'a series of traps' for lawyers from other districts").

terests organized around external political aims. Thus, no Civil Rule or amendment finding its way up the long ladder of rulemaking has ever evoked a significant substantive political conflict in Congress. Nor is it likely that such an amendment could move through the existing system without fundamental change in the premises from which rulemaking proceeds.

If confronted by a politically organized group bent on using its power to reshape civil procedure to the disadvantage of the group's adversaries, rulemakers would have little choice but to refer the group to Congress and continue as best they could (in the semi-Rawlsian posture) to pursue procedural justice for all litigants with as little regard as possible for outcomes in specific classes of disputes.

There may be times when Congress should respond to cries for substance-specific procedural advantage. Clearly, procedure can affect substance and there are constituencies that Congress might wish to favor who could benefit from a legislated thumb on the procedural scales. If necessary to effect enforcement of a substantive right, Congress may be justified in building into substantive enactments specific procedural provisions.[108]

Yet there are reasons for Congress to proceed cautiously in doing so. First, it is difficult to foresee the secondary institutional consequences or the consequences for groups not represented at a legislative hearing of a special procedural arrangement. Second, Congress faces the risk that such an arrangement may in time create complexity that transforms the process into one preoccupied with procedural miscue rather than enforcement of the substantive laws that Congress has written. Finally, there is a longer-term risk that not only Congress but even the judges will lose their feel for the values of procedural justice that are the core of the present rules.

Are there nevertheless major problems of civil procedure that would yield more readily to multiple solutions such as Congress might provide, each fashioned to meet the needs of litigants asserting a particular substantive right? If so, what might they be? If this is, as I suspect, an empty set, then perhaps we proceduralists can redirect attention to making generalized and flexible rules as wisely as we can to fit the collective needs of all.

To provide a basis for the answer, let us turn to what is perhaps the most intractable problem of contemporary procedure and consider whether there should be one rule or many, dealing with the disposition

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[108] *See* HOUSE COMM. ON THE JUDICIARY, RULES ENABLING ACT OF 1985, H.R. REP. NO. 422, 99th Cong., 1st Sess. 16 (1985) (referring to Congressional enactment of legislation amending Rule 4).

of manifestly unfounded assertions. Would it be wise to ask Congress or its political surrogates to give us a special Rule 56 for antitrust, environmental, negligence, or school desegregation cases?

III. MANIFESTLY UNFOUNDED CONTENTIONS

A. *A "Trans-substantive" Problem*

The manifestly unfounded contention is an elementary problem faced in every procedural system in every kind of case. Some, even many, claims and defenses are so meritless that it is unjust to an adversary to accord them plenary consideration. Indeed, many assertions of litigants are advanced despite a party's almost certain knowledge that they will fail.

Familiar incentives abide among litigants in any legal process and produce manifestly unfounded contentions. Some of these contentions are irrational. Common meanness stimulated by an adversary's insistence on a legal claim or defense is illustrative; few situations rouse a deeper and more hostile response than to be in a dispute in which law and justice are on the other side. Anger and desperation are the parents of many false contentions, and professional lawyers are not immune to such feelings, especially when their clients feel them. Irrational contentions are presumably more likely to be made by litigants in situations evoking high levels of emotion.

Rational self-interest or simple greed may also be served by making ill-founded contentions. Even an unfounded contention may require time and treasure of an adversary. Threat of such costs may enhance a bargaining position, sometimes substantially. Because the surest consequence of making an unfounded contention is the delay that results, and because most defendants benefit from delay, defendants are perhaps more likely than plaintiffs to make such tactical unfounded contentions, but even a groundless complaint may prove to have "nuisance" value to the plaintiff. A stronger party can gain a great advantage particularly if the adversary has few resources to invest in the dispute. "[M]ight," as Dickens had it, has the means of "wearying out the right."[109]

These familiar incentives, deeply rooted as they are in less admirable but widely-shared human traits, are endemic and ubiquitous, affecting in varying degrees conduct in all manner of cases at all times. Indeed, it seems likely that all legal systems must make some provision to

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[109] C. DICKENS, BLEAK HOUSE 2 (1956).

control the wasteful and destructive tendencies of adversaries.[110] Although any provision will have different effects in different classes of cases, designs to prevent these incentives from playing out their destructive courses is a task suitable to rulemakers who do not consider substantive categories.

That a system must inhibit the making of unfounded contentions is a function of the gross economic costs that disputants are otherwise able to impose on one another.[111] In a system that resolves disputes quickly at very low cost, the harm caused by unfounded contentions is less and the need to inhibit them is accordingly reduced. Contemporary litigation in the federal courts stands at the opposite pole; the costs that federal litigants can impose on one another are sometimes truly heroic,[112] and seldom insubstantial. Modern discovery and liberal rules of joinder[113] weigh especially in this balance.

These and other features bearing on the contemporary legal profession's structure and reward system inflate the incentives to make unfounded contentions, both as claims and as defenses, thus enhancing the need for the system to inhibit the impulse. There is wide recognition that this universal problem is especially acute in federal practice[114] and is seldom questioned.

The architects of 1938 did not foresee many developments that contribute to the high cost contemporary federal litigation. They did not take into account, for example, the voluminous records required by the Internal Revenue Code, our numerous regulatory schemes, the rise of the expert witness, the inventions of the duplicator, or the computer and the cathode-ray tube. Each of these developments, and others, has

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[110] In rural or primitive systems, the deterrent may be moral suasion, although in some primitive cultures, there may be no deterrence practiced. *See, e.g.,* M. GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA 21 (2d ed. 1967) (describing the tribal courts' conception of "relevance" in dispute settlement).

[111] *See, e.g.,* Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979) (noting the need for courts to "be especially alert to identify frivolous claims brought to extort nuisance settlements" in class actions); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740-41 (1975) (discussing costs imposed on defendants in securities cases brought under Rule 10b-5 and attributing these costs to such cases' inherent settlement value, regardless of merit, and often-extensive discovery).

[112] *See, e.g.,* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 575-77 (1986) (a case involving 21 corporate defendants, spanning 12 years, and producing published opinions sufficient to "fill an entire volume of the Federal Supplement").

[113] *See* FED. R. CIV. P. 18-25.

[114] *See* Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, Stewart, and Rehnquist, JJ. dissenting); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough,* 1981 B.Y.U. L. REV. 579, 579-82.

created weaknesses in the system by elevating its potential cost. Lawyers, when they can, turn such weaknesses to adversarial advantage, transforming them into endemic sources of injustice.

Contributing to an apparent, but unanticipated, increase in the exploitative impulses of some members of the bar have been the national phenomena of urbanization, growth in the size of and increasing specialization of the bar, the near universalization of hourly billing rates by large law firms, the growth of many law firms to the size of small armies, and the enactment of fee-shifting statutes.[115] At the same time, the supply of mutual trust or professional fraternity that can serve to constrain the mutually destructive tendencies of adversaries is diminished.[116] Also a factor is the increasing indeterminacy of federal law, arising in part from the structural weakness of the appellate hierarchy, that makes a federal appeal more like a Las Vegas gaming device than we care to admit.[117] Such indeterminacy weakens the constraints of professionalism on lawyers as they find it harder to distinguish groundless claims or defenses from marginal ones.

The deficiencies of the process are now sufficiently well recognized to have begotten a large scale reaction in the movement to alternative dispute resolution. That movement reflects the widely shared sentiment that contemporary litigation is too expensive.[118] The Federal Rules of Civil Procedure may have contributed to this dissatisfaction; they certainly have not prevented the development that caused it.

In response, for the last decade rulemakers have searched anew for means to reduce the frequency with which lawyers use their skills to impose needless costs on adversaries, but every corrective considered has had its own independent costs. Thus far, those methods tried have not given satisfaction to users of the federal courts or to those involved in

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[115] For further discussion of the relationship of FED. R. CIV. P. 56 to fee-shifting, see *infra* note 232 and accompanying text.

[116] *See generally* Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses,* 1980 AM. B. FOUND. RES. J. 787, 832-39 (discussing a survey of attorneys' views on discovery, in which survey respondents reported that, in over half of their cases, evasive, incomplete, or dilatory responses impeded discovery efforts).

[117] *See* Address by Dean Paul Carrington, U.S. Courts of Appeals and U.S. District Courts: Relationships in the Future (Oct. 25, 1988) (Bicentennial Conference, Federal Judicial Center).

[118] *See* Banks, *Alternative Dispute Resolution: A Return to Basics,* 61 AUSTRALIAN L.J. 569, 571 (1987) (attributing the growth of alternative dispute resolution in the United States in part to corporate defendants' efforts to promote less costly alternatives to litigation); Lieberman & Henry, *Lessons From the Alternative Dispute Resolution Movement,* 53 U. CHI. L. REV. 425, 425-26 (1986) (defining alternative dispute resolution as, in part, "a set of practices and techniques that aim[s] . . . to reduce the cost of conventional litigation").

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B. *Rule 56, The Instrument of Choice*

Our traditional tool for addressing this problem was, of course, the demurrer. At common law, the demurrer took two forms, the more familiar demurrer to the pleading[119] and the more antiquated demurrer to the evidence.[120] Our procedural system retained the demurrer to the pleading in nineteenth-century code practice,[121] but nearly abandoned it in 1938 because experience taught that pleading motion practice was inefficient, perhaps even counterproductive, often providing opportunity for delay and harassment, but seldom providing effective means to dispose of unfounded contentions.[122] Indeed, Charles Clark, the first Reporter and draftsman of the 1938 Rules, would have preferred to eliminate pleading motion practice altogether as a waste.[123] He was, however, obliged to yield to the Advisory Committee's judgment, and Rule 12 retained a modern analogue to the demurrer to the pleadings. That vestige remains, alive and well, and some claim it causes much waste.[124]

The 1938 rulemakers placed primary reliance on Rule 56 providing for summary judgment as the means to extinguish unfounded allegations, claims, and defenses. This device was not a 1938 invention; it bore some resemblance to the old demurrer to the evidence, and to other devices in use in the nineteenth century.[125] Its familiar but important feature was, and is, that it is not limited in its inquiry by what the parties say in their pleadings, but affords a means by which the court can observe the realities of potential proof underlying those contentions.

There is no need here to review Rule 56's familiar history from 1938 to date. Rule 56 failed to meet the need adequately,[126] becoming

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[119] *See* R. MILLAR, *supra* note 76, at 172-78.

[120] *See id.* at 298-99.

[121] *See* C. CLARK, *supra* note 90, at 502, 504-12.

[122] *See id.* at 540-45.

[123] *See* Clark & Moore, *A New Federal Civil Procedure II. Pleadings and Parties,* 44 YALE L.J. 1291, 1308 (1935); Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure,* 85 YALE L.J. 914, 918 (1976).

[124] *See* Marcus, *supra* note 73, at 434-36, 451-53, 492-93 (arguing that pleading motion practice tends to be a waste of time).

[125] *See* Bauman, *The Evolution of the Summary Judgment Procedure,* 31 IND. L.J. 329, 329-43 (1956).

[126] *See* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 YALE L.J. 745, 746 (1974) (arguing that "some useless trials" are conducted because a "useful rationale" is lacking in summary judgment adjudications); McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule,* 6 J. LEGAL STUD. 427, 459 (1977) (discussing the disturbingly differential effects of the rule's use depending on which party uses it); Sonenschein, *State of Mind and Credibility in the Summary*

perhaps itself a tool for delay,[127] while, as we have noted, other features of the 1938 rules and post-1938 developments elevated the need to constrain the making of unfounded contentions.[128] As Donald Elliott has described it, there was "a fundamental imbalance in the Rules between the techniques available for developing and expanding issues and those for narrowing or resolving them prior to trial."[129]

If the summary judgment rule had fulfilled the hopes of the 1938 draftsmen, there would have been little reason to develop most of the procedural adaptations that have been made in the last decade or so. It would seem that the development of managerial judging techniques,[130] recognized in the 1983 amendment of Rule 16, has been in part a response to Rule 56's failure.[131] A similar response was the development in 1983 of sanctions under Rules 7, 11, and 26;[132] all changes designed to contain the metastasis of litigation by proliferation of unfounded contentions.[133] Likewise, the aborted effort to develop settlement incentives under Rule 68[134] was, in an important sense, responsive to the failure of Rule 56.

Judgment Context: A Better Approach, 78 NW. U.L. REV. 774, 774-76 (1983).

[127] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 576-82 (1986) (reviewing the case's 12-year history, most of which involved defendants' summary judgment motion); Bauman, *supra* note 125, at 354-55.

[128] *See supra* text accompanying notes 114-18.

[129] Elliott, *Managerial Judging and the Evolution of Procedure,* 53 U. CHI. L. REV. 306, 319 (1986).

[130] *See, e.g.,* Miller, *The Adversary System: Dinosaur or Phoenix?,* 69 MINN. L. REV. 1, 19-22 (1984) (noting the growth and acceptance of increased judicial management of cases as a means of controlling the litigation process's excesses); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding A Case from Filing to Disposition,* 69 CALIF. L. REV. 770, 770-73 (1981) (suggesting that judges as case managers, especially in the pretrial realm, have increased federal courts' efficiency in the face of burgeoning caseloads); Resnik, *Managerial Judges,* 96 HARV. L. REV. 374, 376-80 (1982) (describing judges' increasing interest in managing their caseloads, especially during the pretrial phase).

[131] *See generally* A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (Federal Judicial Center, 1984) (discussing managerial judging and rule 16).

[132] For comment on the amendments and their effect on the litigation process, see generally Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11,* 137 U. PA. L. REV. 1925 (1989); Nelken, *Sanctions Under Amended Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment,* 74 GEO. L.J. 1313 (1986); Schwarzer, *Rule 11 Revisited,* 101 HARV. L. REV. 1013 (1988); Comment, *Sanctions Under Amended Rule 26 — Scalpel or Meat-ax? The 1983 Amendments to the Federal Rules of Civil Procedure,* 46 OHIO ST. L.J. 183 (1985).

[133] The 1983 amendments were effective August 1. *See generally* A. MILLER, *supra* note 131 (discussing the objectives of the rule amendments, their implementation, and their advantages).

[134] *See supra* note 59 and accompanying text.

Because the 1983 reforms may be inadequately effective, overly intrusive on the role of parties and counsel, or both, a search for better solutions to the problem of unfounded contentions remained on rulemakers' agendas. When the proposals to amend Rule 68 encountered difficulty, the Civil Rules Committee began to consider the possibility of reviving the original 1938 conception of Rule 56. The Committee's interest in Rule 56 was stimulated by the publication of articles by Judges Stuart Pollak[135] and William Schwarzer;[136] Judge Schwarzer also provided a very helpful rewrite of the Rule's text.[137]

Summary disposition rightly evokes concern that decisions may be inaccurate and hence unjust. Indeed, the understandable anxiety about aborting meritorious claims or defenses appears to have caused Rule 56's failure. On the positive side, *summary* disposition offers the promise of being more "speedy and inexpensive" and hence more just.

Summary judgment has attractions as an alternative both to sanctions and to managerial judging. With respect to sanctions, summary disposition seems preferable because the court judges the claims, defenses, or issues directly, not the motives or professionalism of their advocates. With respect to managerial judging, summary disposition makes the court more accountable on review for its actions. Moreover, both sanctions and managerial judging threaten the judge's neutrality in the traditional trial, while summary disposition does not. The Committee was not wrong, therefore, to begin serious reconsideration of Rule 56 in 1985.

C. *The Events of 1986*

While the Civil Rules Committee in 1986 pondered Judge Schwarzer's drafting and explored additional enhancing changes in Rule 56, the Supreme Court handed down a trilogy of decisions interpreting and applying the rule.[138] It is not necessary here to review

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[135] *See* Pollak, *Liberalizing Summary Adjudication: A Proposal,* 36 HASTINGS L.J. 419, 419 (1985) (noting counsels' belief in the slim chances of prevailing in a summary judgement motion as a major reason for reform).

[136] *See* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465 (1984).

[137] *See* Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56,* 110 F.R.D. 213, 214-15 (1986) (offering a revised text to the rule which eliminates "unnecessary, confusing, and contradictory verbiage").

[138] The cases were Celotex Corp. v. Catrett, 477 U.S. 317, 322-26 (1986) (holding summary judgment proper if pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show no genuine issue of material fact), Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) (requiring a "clear and convincing" evidentiary standard in a summary judgment motion in a libel action), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986) (rejecting lower

those cases. In sum, they apparently revived summary judgment as a tool for dealing with the problem of unfounded contentions. The Court explained that:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of every action." Fed. Rule Civ. Proc. 1 . . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.[139]

Perhaps the most impressive indication of the decision's consequence was a Second Circuit response noting that:

> It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time. . . .[140]

In short, it is possible that the trilogy has made Rule 56 a more powerful engine than the Civil Rules Committee contemplated when it first commenced re-study of the rule in 1985.

It is still early to evaluate the trilogy's effect on the realities of federal practice. It is surely possible that the effort to provide the balance that Donald Elliott describes the 1938 Rules as lacking[141] could be taken too far. Given the very heavy docket burdens that district judges now face,[142] it is a reasonable concern that some may be tempted to

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court's direct evidence to defeat summary judgment claim as irrelevant and requiring consideration of plausible motive to engage in predatory pricing in antitrust action).

[139] *Celotex,* 477 U.S. at 327.

[140] Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied,* 480 U.S. 932 (1987).

[141] *See supra* note 129 and accompanying text.

[142] *But see* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4, 61-66 (1983) (arguing that legal elites foster the myth of the "litigation explosion" by focusing solely on increases in the number of cases filed, without considering the marked growth in pre-trial dispute resolution); Galanter, *The*

overuse the devices of sanctions, summary judgment, and managerial judging to clear their civil dockets of large numbers of cases, including many, perhaps, that are meritorious, or at least sufficiently meritorious to deserve plenary attention.

Under the circumstances, the Civil Rules Committee may postpone further consideration of Rule 56 until smoke clears from the Supreme Court trilogy. On the other hand, with the threat that the share of our national wealth invested in federal civil litigation may continue to rise,[143] the shared concern about the cost of federal litigation has not abated, and the alternative dispute resolution movement proceeds apace as a response. It is not certain that the matter will ever be more clear than it is now. Perhaps, on this occasion, valor is the better part of discretion, and the rule should now be revised to make yet one more effort to use judicial action to control the making of manifestly unfounded contentions.

With the possibility of amending Rule 56 a real one, this Article is intended to serve a secondary purpose of attracting comments on a draft revision of the rule even from those not inclined to the "non-trans-substantive" approach to the problem. Moreover, if revision of the rule is timely, minor blemishes can be corrected at the same time. As Judge Schwarzer has demonstrated,[144] the text of Rule 56 is not felicitous. While it has generally been the wise policy of the Civil Rules Committee not to rewrite a rule for only cosmetic reasons, there is a willingness to transform the text of a rule to make it more useful and accessible while effecting significant reform. For these reasons, no suggestion for the improvement of Rule 56 would be untimely.

IV. REWRITING RULE 56

A. *Establishment of Fact and Law*

The most promising proposal to make Rule 56 more effective is to make the device provided by subdivision (d) more available. Subdivision (d) authorizes a court to ascertain "what material facts are actually and

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Day After the Litigation Explosion, 46 MD. L. REV. 3, 5-28 (1986) (refuting claims of a "litigation explosion" in state and federal courts).

[143] While Professor Galanter has raised substantial doubts about the seriousness of a general "litigation explosion" in the United States, *see supra* note 142, there is little reason to doubt that the federal caseloads are heavy, or that federal civil litigation is expensive. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 59-95 (1985) (discussing the extent and causes of the caseload explosion); *cf.* Atiyah, *supra* note 14, at 1009-12 (noting that the total cost of tort suits in the United States is at least ten times higher *per capita* than in the United Kingdom).

[144] *See* Schwarzer, *supra* note 137, at 213-14.

in good faith controverted," and then to specify "the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just." The present rule also provides that at trial "the facts so specified shall be deemed established."[145]

The utility of this device is presently diminished because judges may use it only as a response to a motion for *dispositive* summary judgment,[146] but there is no sufficient reason to limit the device in this way. At least one court has held that the procedure may be used where summary disposition of the case is clearly inappropriate, if apparent economies would accrue.[147] Given the 1983 amendment to Rule 7, if a pleading has one triable issue a summary judgement motion would fail; hence a court is obliged to deter a party from making the motion. This is true even if the moving party might reasonably expect to secure establishment of every other fact seemingly disputed by the pleadings, and thereby confine the range of discovery. While Rule 16(c)(1) presently authorizes disposition of non-disputed issues, it is not explicit in authorizing the court to dispose of issues over the objection of a party. Accordingly, one possible change that might be made is to make subdivision (d) independent of efforts to dispose whole cases.

In addition to authorizing a court to "establish facts" not genuinely in dispute, it may also be useful to authorize a similar ruling to "establish law." Many dispositions on summary judgment rest purely on legal determinations.[148] It is, moreover, not uncommon in a complex case for the parties to conduct prolonged discovery and pretrial litigation regarding factual disputes that are ultimately legally immaterial. Where the risk of such waste appears substantial, it would serve the

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[145] FED. R. CIV. P. 56(d). *See, e.g.,* Gore v. Northeast Airlines Inc., 373 F.2d 717, 727 (2d Cir. 1967) (providing that "the facts found by the judge would . . . [be] established"); 10A FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2737 (1983 and Supp. 1988) (noting that "[a]t the trial on the remaining issues, the facts determined under Rule 56(d) will be deemed to be established").

[146] *See, e.g.,* Arado v. General Fire Extinguisher Corp., 626 F. Supp. 506, 509 (N.D. Ill. 1985) (stating that Rule 56(d) allows granting appealable "judgments" only if they dispose of entire claims); 10A FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2737 & n.5.1.

[147] *See* Wilmington Trust Co. v. Manufacturers Life Ins. Co., 749 F.2d 694, 696 (11th Cir. 1985); *see also* Elliott, *supra* note 129, at 316-18 (discussing the possible damages of arbitrary practices by managerial judges).

[148] Clark and Samenow treat the stipulated record as the paradigm case for summary judgment. *See* Clark & Samenow, *The Summary Judgment,* 38 YALE L.J. 423, 471 (1929). *See generally* Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process,* 49 OHIO ST. L.J. 95, 135 (1988) (interpreting Clark and Samenow's work on summary judgement).

needs of justice and efficiency to resolve a legal issue on which the materiality of the fact in dispute may depend. If the controlling law is in substantial doubt, the device of establishing law could be linked usefully to certified interlocutory review of controlling questions.[149]

It would appear useful to prescribe that an order establishing facts or law be made in writing and signed by the judge.[150] This would protect against the risk that a judge's casual or unguarded comment on the probative material be taken by a party as a solemn judicial act.

B. *Material Used to Establish Fact*

Subdivision (e) of Rule 56 presently governs the quality of the material required to establish facts to support summary judgment. There appears to be no reason to make substantial change in that provision, but there are several significant modifications that might be appropriate.

First, it would seem useful to stop requiring parties to attach all documents necessary for an establishment of fact to the moving papers.[151] It would ease practice to allow incorporation by reference so long as parties attached the appropriate excerpt and the means of confirmation. Similarly, a revision might conform the rule to the Federal Rules of Evidence[152] by allowing charts, summaries, and calculations of voluminous materials in the moving papers.

Second, a revision should expressly allow declarations under penalty of perjury as an explicit alternative to Rule 56 (e)'s present affidavit requirement. This change would conform the rules to the 1976 legislation authorizing alternate use of this device.[153]

Third, it may be desirable to require a party relying on a document to specify where to find the probative material in the document. This alteration would deter the dilatory tactic of filing voluminous documents in response to a motion to establish a fact, thereby making the adversary and court conduct a search while the opposing party saves

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[149] *See* 28 U.S.C § 1292(b) (1982 & Supp. 1986) (allowing a district judge, in entering an order not otherwise appealable, to state in writing to the court of appeals that an immediate appeal from the order may substantially advance the course of the litigation).

[150] Certain judgments, such as general verdicts of a jury, can be signed by the clerk. *See* FED. R. CIV. P. 58.

[151] "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." FED. R. CIV. P. 56(e).

[152] "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." FED. R. EVID. 1006.

[153] *See* Pub. L. No. 94-550, § 1(a), 90 Stat. 2534 (1976), *codified at* 28 U.S.C. § 1746 (1982).

(or stumbles upon) a substantial point to be disclosed for the first time on appeal.[154]

C. *The Standard Applied in Establishing Facts*

If a provision is to be made for establishing fact and law more frequently, the committee will face an opportunity, and perhaps an obligation, to clarify the standard for establishing facts on the basis of the evidentiary material supplied by the parties. Presently Rule 56(c) provides little guidance. It states that summary judgment shall be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." This language, even as illuminated by a half century of experience, may not be helpful to courts performing the task of disposing of a manifestly unfounded assertion.

Perhaps a clearer standard would embolden judges to grant summary judgement more frequently when assertions are unfounded. In the past, Rule 56 has been enfeebled by courts reluctant to take responsibility for assessing the genuineness of contentions. At one time, we were witness to the "slightest doubt" test[155] requiring plenary trial if there was the slightest possibility that a party opposing an establishment of fact might have access to favorable probative evidence.

More recently, the Supreme Court has usefully analogized the standard to be applied in establishing facts prior to trial with the standard applied after trial in directing a verdict.[156] The test cannot be identical because the post-trial determination is made on the basis of a compiled record, not an apparent record that is yet to be made and can

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[154] *See, e.g.,* Stepanischen v., Merchants Dispatch Trans. Corp., 722 F.2d 922, 927 (1st Cir. 1983) (noting this phenomenon in the case of the court having to decide a summary judgment motion without information from one party's counsel, who filed substantially more papers on appeal).

[155] *See, e.g.,* Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945) ("A litigant has a right to a trial when there is the slightest doubt as to the facts . . . ."). This test had its analogue in the older "scintilla rule." *See, e.g.,* Danner, *The Scintilla Rule in Ohio,* 7 U. CIN. L. REV. 237, 237 n.5 (1933) (defining the scintilla rule as requiring that a case go to the jury if there is "any evidence, however slight, *tending* to support a material issue"). The demise of the older rule was signalled in Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871) (noting abandonment of the scintilla rule), and Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 120-122 (1874) (same). *But see* Galloway v. United States, 319 U.S. 372, 399-406 (1942) (Black, J., dissenting) (arguing against constriction of seventh amendment rights through disposition by the courts).

[156] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986); *see also* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983) ("[G]enuine issue" test used for summary judgment is very close to "reasonable jury" rule applied to directed verdict.). *But see* Stempel, *supra* note 148, at 125 (criticizing the analysis in footnote 11 of *Bill Johnson's*).

therefore be appraised only with somewhat greater caution.[157] Yet the issues are fundamentally the same at both times: If a fact cannot be rejected by a reasonable trier of fact on the basis of the evidence presented or available, the fact may be established by the court.[158] When a party seeks to establish facts prior to trial, or to treat facts as established at trial without regard for the trier of fact's decision, the court must allow every reasonable inference from the evidence and reserve for the trier of fact to decide whether any particular reasonable inference or interpretation is appropriate in the case at hand.[159] It may therefore be helpful to express this concept in the text of the rule, thus: "A fact may be established only if there is no evidentiary basis for a reasonable trier of fact to reject it."[160]

One advantage in linking the standard for establishing a fact with the standard for directed verdict is that it avoids any possible seventh amendment issues.[161] To put the matter obversely, the right to jury trial applies only to facts which, by definition, cannot be established under the directed verdict standard.[162]

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[157] *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 5.19 (3d ed. 1985) (noting reasons for caution in granting summary judgment); 10 FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2713.1 (2d ed. 1983); Louis, *supra* note 126. at 762-63, 767-69 (arguing that summary judgment standard needs to permit reasonable excuses for inability to produce evidence and prospect of obtaining more).

[158] *Compare* Galloway v. United States, 319 U.S. 372, 386 (1943) (on motion for directed verdict, lack of evidence regarding five-year period precluded finding total and continuous disability during that period) *with* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (summary judgment is appropriate where it appears that party bearing burden of proof lacks evidence to support case). *See generally* Currie, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. CHI. L. REV. 72, 79 (1977) (reviewing case law dealing with directed verdicts and summary judgment, and concluding that the "purpose of Rule 56 requires" that the same standard be applied); Sonenschein, *supra* note 126 (arguing that directed verdict standard should be applied in all summary judgment dispositions, even if state of mind or credibility are implicated).

[159] *Compare* Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 661 (1873) ("If, upon any construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified," then a directed verdict is improper) *with Anderson,* 477 U.S. at 249 (defeating summary judgment motion requires only that sufficient evidence " 'be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial" (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968)) *and* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) ("On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." (citation omitted)).

[160] *See* Appendix 1, *infra* at 2117, § (e)(1).

[161] *Cf.* Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 320 (1902) (upholding, against seventh amendment challenge, procedural rule requiring filing of affidavit that states specific grounds of defense before court will consider right to trial by jury to have accrued).

[162] *See* Galloway v. United States, 319 U.S. 372, 388-96 (1943) (rejecting seventh amendment challenge to directed verdict); Baltimore & Carolina Line v. Redman, 295

There is, of course, no reason to believe that such a codification of the standard for determining genuineness will resolve many cases; such a standard would be intended only to guide the judgement of the court. As Edward Cooper said of the seventh amendment, such a rule

> does not sanctify any particular linguistic formulation of the standards elaborating its basic command. It does not even prescribe mandatory answers to the relatively restricted range of control questions susceptible of categorical answer. Federal courts may legitimately accord greater factfinding and law applying freedom to juries in some areas than in others, depending on the strength of the desire to keep pure the legal rules involved and on the nature of the consequences of jury error.[163]

The standard would thus be true to the traditions of generality and flexibility discussed above.[164]

The general standard for establishing a fact should not vary materially when the law being applied is state law rather than federal law. With respect to the directed verdict standard, this has been the holding of most courts of appeals, even in cases in which jurisdiction is based on diversity of citizenship.[165] Exception may appropriately be made where a special standard is an explicit embodiment of the substantive law, state or federal, that is being enforced in a federal court action.[166]

Nor should the standard vary materially when the issue of fact is to be tried on a paper record.[167] If the available evidence is conflicting, the proceeding should be plenary with respect to that factual issue. If the case is tried without a jury, the court should make a finding of fact as required by Rule 52 rather than anticipating it by establishing the

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U.S. 654, 659-61 (1935) (holding that whether evidence is sufficient is question of law to be resolved by the court and does not implicate seventh amendment).

[163] Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 990 (1971).

[164] *See supra* notes 63-107 and accompanying text.

[165] This rule is rooted in the seventh amendment's applicability to diversity litigation. *See* Herron v. Southern Pac. Co., 283 U.S. 91, 94-95 (1931). *See generally* 9 FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2525 n.69 (1971 & Supp. 1988) (stating that the federal test is applied to determine questions of sufficiency).

[166] *See generally* Cooper, *supra* note 163, at 978-89 (discussing this question as applied to directed verdicts, in terms of balancing state and federal interests in their respective standards).

[167] Compare in this respect FED. R. CIV. P. 52(a) (findings of fact in cases tried without a jury shall not be set aside unless clearly erroneous, whether based on oral or documentary evidence). *See also* Sonenschein, *supra* note 126, at 809-10 (arguing that same summary judgment standard applies when state of mind or credibility are at issue, despite increased importance of demeanor evidence to such issues).

fact prior to trial. Finally, to the extent that summary judgment is sometimes used merely to give a calendar preference to a documents case, it is more appropriate to proceed pursuant to Rule 40, and to find facts under Rule 52, than to establish them under Rule 56.

D. *The Burden of Producing Evidence; Access to Discovery*

Much of the difficulty with summary judgment practice over five decades has related to the burden of producing evidence, or, more precisely, apparent evidence.[168] The Supreme Court seems to have clarified the matter by holding that a fact is not genuinely in dispute if the party bearing the burden of producing evidence of that fact is unable to point to any available material that might be used as proof to bear that burden.[169] In an appropriate case, an inference from the available material that is plausible enough for substantiating a finding may satisfy the non-moving party's burden.[170] Because it has no burden of production, however, the moving party may bear a lesser burden, which requires only a review of the available material and an assertion (under the constraints of Rule 7)[171] that the opposing party cannot produce any probative evidence with respect to the fact to be established.[172] It might be useful to clarify these matters in the text of the rule governing the establishment of fact.

One difficulty with the burden of producing evidence is that courts address establishment of facts, like summary judgment, not merely before trial, but sometimes even before the opposing party has exhausted discovery. The present Rule 56(f) gives the court discretion to

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[168] *See, e.g.,* Adickes v. S.H. Kress & Co., 398 U.S. 144, 148, 153 (1970) (requiring defendant-movant to show absence of genuine issue of material fact, thus reversing district court's determination that plaintiff bore burden of alleging facts from which conspiracy might be inferred). *See generally* 10A FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2727 (2d ed. 1983 & Supp. 1988) (discussing burden of proof and presumptions on motion for summary judgment).

[169] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (declaring that summary judgment may be properly entered against "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

[170] *See Adickes,* 398 U.S. at 158 ("If a policeman were present, we think it would be open to a jury" to infer a conspiracy, thereby rendering summary judgment inappropriate.); Louis, *supra* note 126, at 759 (noting that a judge may not, on a summary judgment motion, reject favorable inferences that may be drawn).

[171] FED. R. CIV. P. 7(b)(3) requires "[a]ll motions [to] be signed in accordance with Rule 11." Rule 11, in turn, provides that the lawyer's signature warrants that a reasonable inquiry has been made and that the signer believes the motion (or other pleading) to be "well grounded in fact and warranted by existing law or a good faith argument for the extension of existing law." FED. R. CIV. P. 11.

[172] *See Celotex,* 477 U.S. at 325 (declaring burden on moving party met by movant pointing out absence of evidence that supports nonmovant's case).

grant a continuance to a party opposing summary judgment when pertinent affidavits or evidentiary material are not yet available.[173] It may be an abuse of discretion to withhold such a continuance when discovery promises to relieve a need.[174]

An important use of the establishment of fact is to terminate discovery that meanders expensively through warehouses of records and weeks of depositions in the hope, perhaps manifestly forlorn, that some scraps of probative material will appear and enable the discovering party to make a genuine issue of a fact otherwise appearing to be suitable to establishment.[175] A system promising "speedy and inexpensive" justice is surely obliged to protect parties from the cost of inept discovery, desperation discovery, or discovery better calculated to punish an adversary or extort a nuisance settlement than to illuminate a "genuine" issue.[176]

Yet if use of the device is to expand in this way, the rules should explicitly address the opposing party's entitlement to at least some unconstrained opportunity for using discovery to uncover the material necessary for opposing an establishment of fact. Rule 36(a) gives parties thirty days to respond to an admission request, and it seems that an opposing party should be assured at least that much time for using

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[173] *Compare* Tarleton v. Meharry Medical College, 717 F.2d 1523, 1535 (6th Cir. 1983) (summary judgment should not ordinarily be granted before discovery is completed) *and* Hotel & Restaurant Employees Union, Local 25 v. Attorney General, 804 F.2d 1256, 1269 (D.C. Cir. 1986) (plaintiff's failure to file affidavits does not automatically justify refusal to grant continuance where outstanding discovery requests identify specific facts sought) *with* SEC v. Spence & Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980) (summary judgment may not be avoided by vague assertions that additional discovery will produce unspecified needed facts) *and* Hancock Indus. v. Schaeffer, 811 F.2d 225, 230 (3d Cir. 1987) (plaintiff not filing affidavit and giving no explanation of what facts they hoped to uncover was not entitled to continuance). *See generally* 10A FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2741 (discussing sufficiency of reasons for Rule 56(f) continuance).

[174] *See, e.g.*, Glen Eden Hosp. v. Blue Cross & Blue Shield, 740 F.2d 423, 428 (6th Cir. 1984) (holding withholding continuance abuse of discretion where defendant had not been forthcoming in discovery and plaintiff sought additional discovery on certain issues).

[175] Under the present rule, unpromising discovery should not delay entry of judgment. *See, e.g.*, Otto v. Variable Annuity Life Ins. Co., 814 F.2d 1127, 1138 (7th Cir. 1986) (holding refusal of continuance was not an abuse of discretion where plaintiff failed to demonstrate how documents she sought would have aided her resistance to summary judgment motion).

[176] *See generally* Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450 (1981) (reviewing results of American Bar Foundation study of pretrial discovery problems); Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (concluding that adversary system encourages discovery geared toward partisan pursuit of clients' interests rather than toward courts' interest in truth-finding).

discovery.[177] As usual in the Rules, courts should be given discretion to allow longer time if the opposing party can suggest a feasible course of discovery that might yield probative material in a reasonable time and at a reasonable cost to the adversary. Another option would be to shorten the period in cases in which there are no possible factual disputes.[178]

Moreover, especially if the device's use is to be expanded, the Rules should assure that opposing parties are given adequate notice that probative material will have to be produced at a certain time prior to trial. The present rule provides ten days of notice before hearing on a motion for summary judgment.[179] Despite the clarity of that requirement, some courts have granted summary judgment against the moving party[180] or *sua sponte* at a pretrial conference.[181] This should not occur where the moving party has not been specifically challenged to disclose the basis for that party's own contentions.[182] A provision assuring at least thirty days to discover would clarify this entitlement of a party who perhaps mistakenly supposes that she is entitled to a favorable summary disposition and overlooks a need to discover evidence required to bear her own burdens.

A number of district courts have promulgated local rules establish-

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[177] At present, Rule 56 assures an opposing party only 10 days. *See infra* note 179 and accompanying text; *cf.* FED. R. CIV. P. 12(c) (requiring that all parties be given "reasonable opportunity to present all material made pertinent" when the court converts a motion on the pleadings into a motion for summary judgment by considering matter outside the pleadings).

[178] Such discretion can, however, be implied. *See* 10A FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2728 (discussing inferred judicial discretion under Rule 56).

[179] *See* FED. R. CIV. P. 56(b).

[180] *See, e.g.*, Procter & Gamble Indep. Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 190 (2d Cir. 1962); Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311 (9th Cir. 1982); *see also* Clark, *The Summary Judgment,* 36 MINN. L. REV. 567, 570-571 (1952) (noting, approvingly, "trend of rulings in the district courts" holding formal motion unnecessary). *See generally* 10A FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2720 (discussing entry of summary judgment against moving party in absence of other party's motion).

[181] *See, e.g.*, Portsmouth Square Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869-70 (9th Cir. 1985). *See generally* 10A FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2720 (discussing entry of summary judgment in absence of formal motion).

[182] *See* McBride v. Merrell Dow & Pharmaceuticals, Inc., 800 F.2d 1208, 1212 (D.C. Cir. 1986); Williams v. City of St. Louis, 783 F.2d 114, 116 (8th Cir. 1986); Memphis Trust Co. v. Board of Governors, 584 F.2d 921, 924 n.6 (6th Cir. 1978).

This concern is especially acute where the opposing party appears *pro se. See* Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule,* 55 FORDHAM L. REV. 1109, 1115-28 (1988) (arguing that *pro se* litigants should be specially advised of requirements under summary judgment proceeding).

ing a presumptive limit of 120 days on the period available for discovery.[183] Arguably, such rules are not authorized by Rule 83[184] but the provision may be a sound one. An amendment to Rule 16(b) to incorporate that presumptive limit suggested by the Local Rules Project[185] of the Standing Committee would be congruent with the possible changes suggested in the provision that is presently Rule 56(f).[186]

E. *Burden on Party Moving for Judgment as a Matter of Law*

Rule 56 might also become more effective by providing additional clarity about each party's burden when one party moves for judgment. In light of *Celotex Corp. v. Catrett,*[187] it now appears that a moving party, whether or not it has the burden of producing evidence on the issues, must at least specify the facts that are appropriately taken as not genuinely in dispute (and hence suitable for establishment), and explain the legal basis for the disposition of a claim or defense. Movants can rely upon their adversaries' pleadings to demonstrate the absence of genuine dispute, unless the opposing party comes forward with amendments or affidavits suggesting the existence of contrary evidence.

Similarly, an opposing party should be required, regardless of who bears the burden of producing evidence, to identify any triable issues that would justify retaining the case on the court's trial docket. The previous decisions made the proponent of judgment disprove the availability of evidence to the adversary, even where that adversary would, at trial, bear the burden of producing evidence and experience an adverse judgment by failing to do so.[188] On the other hand, while the opposing party has no burden to respond, neither the movant nor the court should be required to search for an unasserted reason to deny a motion for judgment.[189]

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[183] *See* LOCAL RULES PROJECT, *supra* note 103, pt. 4, at 6.

[184] *See* FED. R. CIV. P. 83 (allowing formulation of local rules not inconsistent with the Rules). *See generally,* Subrin, *supra* note 66, at 2019-21 (discussing proliferation of local rules in light of the conformity goals of the Federal Rules).

[185] *See* LOCAL RULES PROJECT, *supra* note 103, pt. 4, at 6.

[186] FED. R. CIV. P. 56(f) (allowing the court to refuse the application for judgment, order a continuance, or "make such other order as is just").

[187] 477 U.S. 317, 324 (1986).

[188] That line of cases was based in part on Supreme Court dictum in Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970).

[189] *Compare* Hotel & Restaurant Employees Union, Local 25 v. Attorney General, 804 F.2d 1256, 1269 (D.C. Cir. 1986) (finding "sensible" the practice of considering outstanding discovery requests in assaying Rule 56(f) contention) *with* Stepanischen v. Merchants Dispatch Transp. Corp., 722 F.2d 922, 927 (1st Cir. 1983) (expressing frustration at the court's having to decide a summary judgment motion in the absence of assistance from counsel in the case).

F. *Explained Decisions*

While established facts should not be mistaken for a judge's findings of fact made in accordance with Rule 52, the facts, in combination with established law, may similarly ensure that a disposition made under Rule 56 is adequately explained to the parties and to the appellate court. Ironically, Rule 52(a) requires a court rendering judgment after trial to explain the decision, yet a disposition made without hearing evidence requires no explanation at all. This situation may create a problem if the reviewing court misperceives the basis for the decision, and it may evoke the mistrust of a party whose case is lost quickly and without stated reasons.[190] Requiring an explanation of the application of established law to established facts would engender more trust.

Although pretrial establishment of fact resembles fact finding in form, an establishment is not based on an assessment of evidence at trial and is therefore not entitled to Rule 52's protection of restraint on review.[191] It might be useful for the rule's text to require an establishment of fact to be treated as a ruling on a question of law; a similar prescription is found in the present Rule 44.1.[192]

G. *Needed Constraints on Rule 56 Motion Practice*

A major problem in fashioning the kind of tool contemplated here is that, like many other procedural tools, the change itself might become the instrument of cost and delay. If establishment motion practice became a feature of almost every case, courts would either have to consider probative material to establish facts that are, in the end, immaterial in light of the court's view of the law, or the courts would have to establish law to illumine the materiality of facts that cannot possibly be proven at trial. Some motions would be filed merely to impose cost on an adversary and to increase the number of bargaining chips piled up at the settlement table.

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[190] *Cf.* Carter v. Stanton, 405 U.S. 669, 671 (1972) (describing the district court's order as "opaque and unilluminating as to either the relevant facts or the law with respect to the merits of appellant's claim"); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (citing appellate court error in reading statute leading to improper summary judgment); P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 31-33 (1976) (stating that opinions are indispensable to public confidence, but that resource constraints often require shorter opinions); Fuller, *supra* note 36, at 387-88 (discussing the necessity of accompanying judicial decisions with explanations).

[191] *Cf.* Bushman v. Halm, 798 F.2d 651, 656 (3d Cir. 1986) (appellate court exercising plenary review on appeal from an order granting summary judgment).

[192] FED. R. CIV. P. 44.1 (court determination of foreign law "shall be treated as a ruling on a question of law").

The text of the rule might permit pretrial establishment only in specified circumstances, and thereby prevent misuse of the device. Appropriate circumstances would be: at a pretrial conference as presently provided in Rule 16(c)(1), in response to a motion for judgment as presently provided in Rule 56(d) or Rule 12,[193] or in response to an independent motion made only after the court found the case to be sufficiently complex that such motions should be invited in the interest of economy and dispatch. Absent such an invitation, or a reasonable basis for a motion for judgment, a party would have to await a pretrial conference to secure the court's ruling on a proposed establishment of law or fact. Moreover, the rule could, explicitly, vest discretion in the court to withhold such rulings when they may be unneeded[194] or when the court perceives that further development is not likely to be fruitful.

Two minor problems pertaining to motions under the present rule should be addressed. The present ten-day time allowance for motions under Rule 56(c) is not realistic and seems rarely if ever employed; ten days is plainly insufficient time to respond to a motion for judgment. The twenty-day waiting period required by Rule 56(a) is likewise inconsequential because the period begins to run when the action is filed, not when the motion is served.

V. IMPLICATIONS FOR RELATED PROVISION

A. *Relation to Rule 12*

Allowing orders establishing law or fact to control further proceedings would have substantial implications for Rule 12 motion practice. Revisions for Rule 12 should accompany any Rule 56 amendment along the lines here proposed.

Richard Marcus has commented on the "revival" of practice under Rule 12.[195] He contends that this revival exceeds the role of Rule 12 that the 1938 rulemakers intended.[196] For several decades following the promulgation of the Rules, tension existed between district judges

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[193] FED. R. CIV. P. 12(c) authorizes a motion for judgment on the pleadings. An establishment of law could be a useful partial ruling made in response to such a motion.

[194] FED. R. CIV. P. 56(d) is mandatory in its language. *See* Citizens Envtl. Council v. Volpe, 364 F. Supp. 286, 290 (D. Kan. 1973). A failure to make such a determination would appear, however, to be non-reviewable because the issue would be mooted by trial. *See* Stewart Title & Trust v. Ordean, 528 F.2d 894, 898 (9th Cir. 1976).

[195] *See* Marcus, *supra* note 73, at 444-51; *see also* Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 390 (1980) (suggesting modifications of standing doctrine).

[196] *See* Marcus, *supra* note 73, at 437-54.

steeped in the previous tradition, who persistently granted Rule 12 motions, and federal appellate courts, who persistently reversed judgments based on pleading rulings.[197] The Supreme Court in 1957 gave support to the prevailing view that pleading is an unsatisfactory basis for judgment and that pleading serves only to provide an adversary with general notice regarding the nature of the claim.[198] The conventional, indeed, the correct, view of the Rules came to be that the appropriate means of resolving disputes is trial,[199] unless either the parties submit their case as one raising no factual issues or the apparent evidence so lacks a basis for trial that summary judgment is appropriate.[200] The 1938 objective of reducing the volume of pleading motion practice was based on long experience with unsuccessful efforts to use pleadings as a tool for disposition.[201] Nevertheless, in recent decades, lower federal courts appear to have entertained Rule 12 motions with increasing frequency, especially in a few substantive classes of cases.

In part, this revival of Rule 12 practice may reflect a tendency that Charles Clark forecast as a "kind of Gresham's law," by which bad procedure drives out the good.[202] In part, it may reflect dissatisfaction with summary judgment's ineffectiveness as a tool for dealing with unfounded contentions.[203] In part, of course, adversaries use motion prac-

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[197] *See, e.g.,* Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506-08 (5th Cir. 1971) (discussing Rules 8(a) and 12(b)); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (same).

[198] *See* Conley v. Gibson, 355 U.S. 41, 47 (1957). *But cf.* Butz v. Economou, 438 U.S. 478, 507 (1978) ("Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss.").

[199] *See* Clark, *The Handmaid of Justice,* 23 WASH. U.L.Q. 297, 318-19 (1938); Kaufman, *The Federal Rules of Civil Procedure and the Pursuit of Justice,* in HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 221 (S. Strickland ed. 1967).

[200] *See* 21 FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 5025.

[201] *See* Cook, *Statements of Fact in Pleading Under the Codes,* 21 COLUM. L. REV. 416, 416 (1921); Marcus, *supra* note 73, at 437-38.

[202] *See* Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules,* 3 VAND. L. REV. 493, 498 (1950). Judge Clark, for this reason, would have favored eliminating pleading motion practice altogether. *See* Smith, *supra* note 123, at 917-18.

[203] For example, Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962) cautioned that summary judgment should be used sparingly in antitrust litigation, and may thereby have stimulated the use of higher pleading standards in that area. *See, e.g.,* Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984), *cert. denied,* 407 U.S. 1054 (1985) ("[I]nvocation of antitrust terms of art does not confer immunity from a motion to dismiss; to the contrary, . . . conclusory statements must be accompanied by supporting factual allegations."). *See generally,* Durham & Dibble, *Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation,* 1978 B.Y.U. L. REV. 299 (discussing certification as an alternate means of reducing costly and unnecessary discovery).

tice to influence the settlement process, or, alas, in some situations, to increase billable hours on both sides.[204] In part, more constructively, it may respond to a reality that some cases can be terminated on the basis of pleadings, at least if counsel undertakes the professional responsibility imposed by Rule 11. It is, however, also true that any case properly terminable on a Rule 12 motion could also be properly terminated under Rule 56. Professor Marcus has concluded that contemporary pleading practice "is little better than an expensive waste of time."[205]

By affording a more constructive outlet for the need to make such rulings, changing Rule 56 invites attention to the possibility of reducing this waste. One might, indeed, be tempted to reconsider the early Clark proposal[206] and simply eliminate subdivision (b)(6) and (c) from Rule 12. Doing so would effectively require that all dispositions be made in the form of a judgment as a matter of law, without distinction among those made "on the pleadings," those made on affidavits and other material, or those made on account of the absence of such indicia of evidence available for trial.

Less radically, it might be appropriate to authorize the court, on its own motion, to treat a pleading motion as one addressed to the factual material as well as the law, and to call on the parties to brief both legal and factual aspects of the case. This process would enable the court to order the establishment of law or fact in a complex case at a sufficiently early stage to achieve significant economies.[207]

With or without these amendments, the availability of an order establishing law would present a court ruling on a Rule 12 motion with an alternative that presumes not to dispose fully of the case, but merely to shape future proceedings. Such a partial response to a Rule 12 motion may facilitate settlement and reduce waste in discovery, even if it does not forthwith dispose of the case.

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[204] *Cf.* Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment,* 57 ST. JOHN'S L. REV. 680, 727-29 (1983) ("The economic incentives for discovery abuse have also been increased by hourly billing practices.").

[205] *See* Marcus, *supra* note 73, at 493.

[206] *See* Smith, *supra* note 123, at 927-28 (noting Clark's proposed elimination of Rule 12(b)(6)).

[207] An additional suggestion to consider is the elimination of only subdivision (b)(6). The defendant would have the duty to make a timely answer, not to be postponed while the motion to dismiss is pending. The court could then have both complaint and answer in sight when deciding whether to rule on the pleadings motions or whether to enlarge the scope of the inquiry to include factual material.

B. *Relation to Rule 16*

As noted, facts and law might be established at a pretrial conference conducted under Rule 16(c)(1), provided that adequate notice was given the opposing party. An order embodying establishments of fact or law could constitute a pretrial order under Rule 16(e).

C. *Relation to Rule 36*

Factual issues that could be resolved by establishment would often be better resolved by careful pleading, by stipulation of the parties, or by means of an admission under Rule 36(a). Indeed, a party should normally be expected to request, under Rule 36, an admission of an undisputed fact before proposing that the court establish the fact. A request for an admission should, however, usually suffice as notice to the party on whom the request is made that the serving party contends that the fact is material and not subject to genuine dispute. An establishment of that fact might thereafter be properly made at a pretrial conference without further notice to the party served.

The relation between a revised Rule 56 and the present Rule 36 may depend in part on the res judicata effect that would be given to an establishment of fact. An admission made under Rule 36 is clearly not preclusive in later litigation,[208] whereas an establishment of fact might be. To the extent that an establishment is preclusive, the revised Rule 56 may give an incentive to admit, thereby enhancing the effectiveness of Rule 36 as a device to control the making of unfounded assertions.

It is pertinent, therefore, to consider the principles of issue preclusion. We are told that "[o]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."[209] Inasmuch as an establishment of fact is a determination that the fact cannot be rejected on the basis either of the evidence or of the probative material available prior to trial, the established fact appears to have been fully litigated and the party against whom the determination is made appears to have had "full and

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[208] *See* FED. R. CIV. P. 36(b) ("Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.").

[209] Montana v. United States, 440 U.S. 147, 153 (1979). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

fair opportunity to litigate" it.[210] In this respect, an established fact resembles a finding of fact made under Rule 52(a).

On the other hand, by traditional principles, an established fact would not have preclusive effect unless and until it is embodied in a final judgment of the case. An establishment of fact that is merely interlocutory would lack res judicata effect.[211] If that fact later proves to be immaterial to the disposition of the case or if settlement preempts a final judgment in the case, there would be no preclusion. Indeed, it seems clear that later settlement of a case may, by its terms, dispel the preclusive effect of any antecedent determinations of undisputed facts.[212]

Yet strict finality may not be required by contemporary standards.[213] "As long as the determination was definitive, [an establishment] may be treated as final for purposes of issue preclusion."[214] The factors to be weighed in determining whether an establishment of fact is sufficiently definitive to be preclusive are the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review.[215] Thus, issue preclusion may sometimes be based on an establishment of fact, but an establishment ruling will not be reliably preclusive in future litigation even between the same parties.

D. *Relation to Rule 50*

As noted, a significant relationship between Rule 56 and Rule 50 derives from the similarity between the standard to be applied for establishing a fact and the standard for directing a verdict or entering a judgment notwithstanding the verdict. Some suggestions for reforming Rule 50[216] are connected to the problem of unfounded claims. Consid-

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[210] Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481 (1982).

[211] *See, e.g.*, Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265, 1269-72 (5th Cir. 1986).

[212] *See* Nestle Co. v. Chester's Market, 756 F.2d 280, 282-84 (2d Cir. 1985). *See generally* Note, *Avoiding Issue Preclusion by Settlement Conditioned upon the Vacatur of Entered Judgments*, 96 YALE L.J. 860 (1987) (arguing that settlement conditioned on vacatur should be prohibited in cases giving rise to the possibility of issue preclusion against a common plaintiff).

[213] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13.

[214] *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 14.9, at 659 (1985); *cf.* Luben Indus. v. United States, 707 F.2d 1037, 1039-40 (9th Cir. 1983) (discussing finality and issue preclusion); Dyndul v. Dyndul, 620 F.2d 409, 412 (3d Cir. 1980) (discussing finality); Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961) (listing factors bearing on the preclusive effect of a judgment, regardless of its finality).

[215] *Lummus*, 297 F.2d. at 89.

[216] *See, e.g.*, Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812, 824 nn.14-15 (2d Cir.

eration of Rule 56 therefore prompts attention to Rule 50 as well.

The concern with Rule 50 is not that it sends too many or too few cases to a jury, or that too many or too few verdicts are being disregarded at the point of judgment. The concern is rather that Rule 50 and the practice under it are anachronistic, too complex, and a trap for the unwary.

An old rule of questionable value requires a motion for directed verdict under Rule 50(a) as a predicate for a motion for judgment notwithstanding the verdict under Rule 50(b). The rule rests on the fiction that denial of a motion for directed verdict automatically reserves the issue for reconsideration when the post-verdict motion is made.[217] Courts interpreted a 1913 decision[218] to require the fiction, but a 1935 holding substantially undermined the 1913 ruling.[219] Also questionable is the old rule, possibly abiding, that a party waives a motion for directed verdict by presenting evidence.[220]

These otherwise anachronistic rules protected opposing parties from being surprised by a motion for a judgment notwithstanding the verdict based on a legal theory or a factual contention not previously raised or considered. Absent these provisions, parties might have been tempted to save an objection to the legal sufficiency of an adversary's case until it was too late to cure the defect by submission of additional evidence on a fact not previously recognized by the adversary as material.[221]

On the other hand, requiring a formal motion for directed verdict has several unfortunate consequences. It is a trap: Failing to make a timely motion that a judge very likely would have denied could force a party to undergo a new trial. The refusal to consider a motion for judgment notwithstanding the verdict on the sole ground that the party did not make a motion for directed verdict is an empty formalism out of keeping with the Rules. Moreover, the requirement forces some parties to make motions contrary to their own tactical interests; in doubtful

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1984) (arguing against the necessity of renewing a motion for directed verdict at the close of the case).

[217] *See* Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 249 (1940).

[218] *See* Slocum v. New York Life Ins. Co., 228 U.S. 364, 398-400 (1913) (trial court may rule with respect to the sufficiency of the evidence and direct a new trial, but may not determine issues of fact and direct a judgment based thereon).

[219] *See* Baltimore & Carolina Line v. Redman, 295 U.S. 654, 659-61 (1935) (insufficiency of evidence is matter of law, and trial court in such a circumstance may direct a verdict in defendant's favor).

[220] *See* Home Ins. Co. v. Davila, 212 F.2d 731, 733 (1st Cir. 1954).

[221] *See, e.g.*, Farley Transp. Co. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1345-46 (9th Cir. 1985) (noting that failure to renew an earlier motion for directed verdict may unfairly lull the opposing party into believing that a challenge to the sufficiency of evidence has been abandoned).

cases, litigants may prefer sending their cases to the jury in the hope of a favorable factual termination rather than risking a reversal of a directed verdict resulting in yet another trial. A number of courts have used techniques designed to avoid the effect of the requirement[222] and in the process they have created some complex doctrine.[223]

With the revisions of Rule 56 considered here, there may be advantage in uniting the terminology of Rules 50 and 56. If the standards are essentially the same, having one term, *judgment as a matter of law,* applicable to all circumstances effects greater clarity. That term might be the title of a revised Rule 56. This unified device might be employed at any time after the close of pleadings through the post-trial period within which a Rule 50 motion must now be made.[224]

Such a unified device should be applied more cautiously early in a case when factual material has not been fully developed by discovery. Caution may diminish as the case proceeds through trial to the point after trial when a decision would be made whether to enter judgment as a matter of law on the proof presented at trial despite a contrary verdict. In this sense, and to this degree, the standard applied would not be constant through the proceeding. Perhaps this plasticity would be a source of confusion to counsel, but, on the other hand, the unification would focus attention on the central issue of dealing with unfounded claims: Is the uncertainty created by a contention of a kind that provides a role for the trier of fact? When that question is answered in the negative, there are benefits, often sizeable, in laying the contention to rest.

The secondary benefit of unifying Rules 50 and 56 would be the elimination of the present Rule 50's anachronisms. Because the motion for judgment as a matter of law would not formally interfere with the work of the jury, the old *Slocum*[225] rule, formalistic as it is, would not defeat a post-verdict judgment even if no pre-judgment motion were made.[226]

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[222] *See, e.g.,* Benson v. Allphin, 786 F.2d 268, 274 (7th Cir. 1986) ("[T]his circuit has allowed something less than a formal motion for directed verdict to preserve a party's right to move for a judgment notwithstanding the verdict."); Sojak v. Hudson Waterways Corp., 590 F.2d 53, 54-55 (2d Cir. 1978) (court must review sufficiency of evidence and order a new trial to prevent manifest injustice or plain error).

[223] *See generally* 9 FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2537 (reviewing requirements for obtaining judgment notwithstanding the verdict).

[224] FED. R. CIV. P. 50(b) requires that a motion for judgment notwithstanding the verdict must be made no later than 10 days after entry of judgment.

[225] Slocum v. New York Life Ins. Co., 228 U.S. 364, 388 (1913) (court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact).

[226] *Cf.* Ebker v. Tan Jay Int'l, Ltd., 739 F.2d 812, 824 nn.14-15 (2d Cir. 1984) (arguing against the necessity of renewing a motion for directed verdict at the close of

Further, unification of the two rules would effect new procedural safeguards bearing on the establishment of facts. Because a judgment as a matter of law could be entered only if based on established facts, such judgments could not be entered without notice and opportunity to be heard. In this way, Rule 56 could perform the functions of the anachronisms of Rule 50 practice, but with greater clarity because direct attention would be given to the problems of notice and opportunity to be heard.

E. *Relation to Rule 59*

It would be useful to allow the establishment of law or fact during or after plenary trial. At those times, establishment would be informed by the actual evidence presented, not merely by the probative material, for example, affidavits, available before trial.

Establishing fact or law during trial would abbreviate further proceedings and thereby achieve economy. Particularly in complex cases, it may almost never be too late to consider whether further elaboration of an issue is needed or dispensable.

A post-trial establishment of fact or law may be useful where the court is exercising its prerogative to order a new trial.[227] When a case has been fully tried, even if mistried, economies may be achieved by confining retrial to those factual issues perceived as genuine in light of the first trial. Of course, if an action is not tried to a jury, such an option is available under the present rules in cases in which the judge is able to make some findings of fact under Rule 52(a), but even in a case tried to a jury, the evidence submitted at trial may be sufficiently clear on some points that some facts could be established under Rule 56 and thus foreclosed from dispute on re-trial.

F. *The Integral Character of the Rules*

The demonstrated interrelationship of Rule 56 and other rules supports another point regarding the possibility of multiple rules 56 applying to different categories of cases defined according to the substantive rights involved. It is apparent that any significant change in

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the case).

[227] FED. R. CIV. P. 59(a) provides that a new trial may be granted "on all or part of the issues." *See* 11 FEDERAL PRACTICE AND PROCEDURE, *supra* note 28, at § 2814 (1971 & Supp. 1988); *cf.* Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 499 (1931) (in directing a new trial with respect to damages, the judgment on the main cause of action need not be disturbed, and the issues on retrial should be restricted to those left in doubt by both the record and the verdict).

Rule 56 bears not only on all of the provisions of that rule, but on others as well, because the steps in a developed procedural system are interrelated. Early steps in the process rest on anticipation of what is to come, and later steps clearly flow from preceding ones. It would be difficult to break out a Rule 56 for antitrust litigation materially different from other Rules 56 without breaking apart related Rules 11, 12, 16, 36, 50, and 68. After commencing down a trail to substantive variations in rules, Congress would find it hard to stop short of complete differentiation that would seriously complicate federal court practice in the manner that the common law procedure did.

A parallel point may be made about the substantive law by paraphrasing Professor Cover:

> It is by no means intuitively apparent that within the arena of antitrust litigation the procedural needs of horizontal restraint cases, vertical restraint cases, and merger cases are sufficiently identical to be usefully encompassed in a single set of rules which make virtually no distinction among such cases in terms of available process.[228]

It is perhaps no more to say than that law is seamless, yet the point is worth making here. Once differentiated procedure is made stylish, there is no reason not to distinguish between such subtleties as the various forms of antitrust or of *assumpsit,* and it is safe to suppose that the various involved interest groups would find reasons to argue for such distinctions.

G. *Substantive Variation*

Let us then reconsider the concept of civil procedure divided according to the substantive nature of the dispute at hand. Assuming, as I think we must, that the Article III rulemaking process is unfit to propose multiple Rules 56, should Congress nevertheless seriously consider devising them, or creating some other agency to devise them?

One way to test further is to imagine that the draft rule presented as Appendix 1 to this article is proposed for adoption by Congress as a rule to be applied only in consumer protection cases or only in securities fraud cases. Perhaps then one could envision a robust debate between consumer advocates and manufacturers, or between the securities industry and investors, over the text of their special Rule 56.

Until we have actually heard such a debate, it is premature to say, categorically, that no special considerations indicate that Rule 56

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[228] *Cf. supra* note 1 and accompanying text.

should be written differently to meet the needs of such disputants. One can anticipate, however, that consumers and manufacturers, or brokers and investors, would not be of one mind on what the rule applied to them should be.

In what kind of forum should such a matter be resolved? If not in a Committee of the Judicial Conference, would a legislative committee welcome the task, or would it seek to delegate to a drafting committee, or to the Department of Justice? Creating an appropriate drafting group of consumers and manufacturers, or of brokers and investors, would be an uncertain task requiring much political energy.

Indeed, considering the difficulty even of devising a process to develop a procedural system for their particular class of cases, consumers and manufacturers or brokers and investors might well unite only in the choice to have their cases decided in accordance with "general" rules of procedure applicable to all and crafted to guide judges to be as wise as they can be. In doing so, they would but act on a truth discovered long ago by Bentham and Brougham and Field and Pound and Clark and many others, one celebrated by Weber, but not always remembered.

H. *Other Variations*

Just because the present structure of both the rules and the rulemaking process precludes major divisions of the rules on the basis of substantive law does not mean that Rule 56 in its present or future form is either inflexible or incapable of adjustment to recognize differences in litigation situations.[229] It may well be that some cases should be handled differently with respect to the disposition of manifestly unfounded claims because of the low stakes involved.[230] Perhaps adjustment should be made for weaker litigants, especially those appearing *pro se*.[231] Perhaps adjustment should made as well for cases subject to a

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[229] Thus, the Supreme Court once suggested that Rule 56 should be used with special caution in complex antitrust litigation. *See* Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962). *See generally* 6 J. MOORE, FEDERAL PRACTICE ¶ 56.17 (2d ed. 1982) (examining the grant or denial of summary judgment in a variety of different actions and concluding that the same basic principles apply to all types of claims).

[230] "Cadillac-style procedures are not needed to process bicycle-size lawsuits, yet that is what the rules often appear to require." Rosenberg, *supra* note 27, at 247.

[231] *See, e.g.*, 28 U.S.C § 1915 (1982); FED. R. CIV. P. 4(c)(2)(b)(i). *See generally* Duniway, *The Poor Man in the Federal Courts,* 18 STAN. L. REV. 1270 (1966) (reviewing federal statutes and decisions relating to the plight of the indigent civil litigant); Maguire, *Poverty and Civil Litigation,* 36 HARV. L. REV. 361 (1923) (discussing English rules regarding representation for poor persons and suggesting reforms in the American system designed to increase accessibility to civil courts by lowering finan-

fee-shifting statute.[232]

This last adjustment may have special promise as a means of dealing with some immediate concerns. It is, however, a difficult problem. In providing for fee-shifting, Congress has singled out certain classes of plaintiffs for especially favorable treatment in order to encourage their suits. On the other hand, the fact of such legislation could possibly affect the frequency with which manifestly unfounded contentions are made; conversely, the apparent possibility of over-contending may cause judges to be especially mistrustful of contentions made with resulting over-reaction in disposing of them. One may perhaps therefore reasonably argue that screening devices such as Rule 56 should operate with greater *or less* effect in fee-shifted cases. Whether there may be merit in a different procedure for cases subject to fee-shifting is, however, beyond the compass of this article.

VI. CONCLUSION

The aims of any revision of Rule 56 are already stated in Rule 1. No assurance, however, can be given that any amendment, past or present, will effect the intended benefit or avoid unintended cost.[233] Law reformers should always remember the famous dictum, widely attributed, that things are bad enough without reform; they should be careful to practice the medical injunction: First, do no harm.

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cial barriers).

[232] *See, e.g.*, 42 U.S.C. § 1988 (1982). For a compilation of statutes, see Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 260 n.33 (1975). *See also* Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321 (1984) (giving historical and descriptive survey of state fee-shifting statutes). *See generally* Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982) (identifying six rationales for fee-shifting and discussing the merits of each).

[233] *Cf.* Risinger, *supra* note 33, at 36 n.5.

APPENDIX 1: REVISED RULE PROPOSAL

Rule 56. Judgment as a Matter of Law; Establishment of Fact and Law

(a) Judgment on Established Law and Facts

On motion, the court shall render judgment with respect to any claim, counterclaim, or cross-claim, if it finds that the moving party is entitled to judgment as a matter of law on established facts. In rendering such a judgment, the court shall establish the law and the material facts in conformity with subdivisions (d) and (e).

(b) Motion for Judgment and Response

(1) A motion for judgment as a matter of law may be made at any time not later than 10 days after entry of judgment as prescribed in Rule 58, and shall specify the judgment sought, the law and the facts on which the moving party is entitled to judgment, and the basis on which the material facts can be established under subdivision (e) of this rule. If the motion is made before trial, the motion shall be accompanied by any supporting material authorized by paragraph (e)(4) that the proponent can supply.

(2) The opposing party shall be allowed 30 days in which to file and serve a memorandum in opposition accompanied by any supporting material that the opponent can supply, and specifying those issues previously identified by the moving party as suited to establishment under subdivision (e) on which the opposing party intends to present evidence. The opponent may also make a cross-motion. If the opposing party makes a response, the proponent shall be allowed 10 days for reply before any ruling on the motion or cross-motion is made. For good cause, the court may with notice shorten the times for response and reply.

(c) Motion and Order to Establish Law or Facts to Control Further Proceedings

To secure the speedy, just, and inexpensive determination of an action, the court may at any time after the close of the pleadings establish law or facts to control further proceedings and to be applied in the final decision on a claim, counterclaim, or defense. An order of establishment shall be in writing and signed by the court. Such an order may be made

(1) at or after trial,

(2) at a pretrial conference conducted under Rule 16,

(3) in response to a motion for judgment under paragraph (b)(6) or subdivision (c) of Rule 12,

(4) in response to a motion for judgment pursuant to subdivision

(a) of this rule, or

(5) in response to a motion invited by the court upon a finding that the case is so complex that economy and dispatch will be served by the entertainment of such motions.

(d) Establishment of Law

An establishment of the law controlling the action shall bind all parties having an opportunity to present timely legal argument to the court with respect to the law establishing, and shall be modified only to avoid error of law.

(e) Establishment of Fact

(1) A fact may be established only if there is no evidentiary basis for a reasonable trier of fact to reject it.

(2) No establishment of fact shall be made over the objection of a party who has not

(A) been a party to the action for at least 45 days.

(B) received notice, at least 30 days prior to action by the court, of the contention that the fact is material and cannot be rejected by a reasonable trier of fact, and

(C) had a reasonable opportunity to discover evidence that would enable a reasonable trier of fact to find contrary to the fact to be established.

For good cause stated, the court may extend or shorten the time limitations stated in subparagraphs (e)(2)(A) or (e)(2)(B).

(3) An establishment of fact shall be supported by explicit reference to

(A) a pleading or other admission of the fact by the party contesting the establishment of that fact,

(B) an affidavit or declaration, as provided in paragraph (e)(4) of this rule, that reveals evidence that will be available for trial and that cannot be effectively contested,

(C) the absence of any affidavit or declaration, as provided in paragraph (e)(4) of this rule or other material available to the parties, that indicates probative evidence that could be presented at trial by the party bearing the burden of producing evidence of that fact at trial,

(D) evidence presented at trial which was not genuinely contested, or

(E) an absence of probative evidence presented at trial by the party bearing the burden of production of evidence with respect to that fact.

(4) An affidavit or declaration under penalty of perjury signed in the form authorized by 28 U.S.C. § 1746 may be sufficient to support

an establishment of fact under subparagraph (e)(3)(B) or to resist an establishment of fact under subparagraph (e)(3)(C) if it is based on personal knowledge, sets forth facts that would be admissible in evidence, and shows affirmatively that the affiant or declarant is competent to testify to the matters stated therein. If facts referred to in an affidavit or declaration are contained in another document, a copy of the document or the relevant excerpt shall be attached and the affidavit or declaration shall contain a specific reference to the document and the location therein where any such excerpt can be found. Voluminous documents need not be attached to the affidavit or declaration and may be presented in the form of a verified chart, summary or calculation, provided that such documents are available for review by the parties and the court; voluminous documents shall be produced if the court so orders. An affidavit or declaration may be supplemented by depositions, answers to interrogatories, admissions, and pleadings, but a party opposing an establishment of fact may not rely upon that party's own pleading to show that there is a genuine dispute.

(5) An establishment of fact shall be treated as a ruling on a question of law, and shall be modified only to prevent manifest injustice.

APPENDIX 2: PROCESS OF RULEMAKING

The public, the general bar, and even litigators whose work is inextricably involved with the product rarely see the work of the Committee that initiates revisions of the Federal Rules of Civil Procedure. Yet, while the Committee has worked quietly, it has never avoided the attentions of those interested in that work.

The Advisory Committee on Civil Rules (the "Civil Rules Committee") is a creature of the Judicial Conference of the United States. It is a descendant[1] of the Advisory Committee that was appointed by the Court in 1935,[2] and that reported directly to the Supreme Court. The ancestral committee drafted the 1938 rules, and the present committee sits continuously to refurbish that work in light of changing circumstances.

Placing the rulemaking function under the Judicial Conference created a significant change in the composition of the Advisory Committee. The original Advisory Committee included only lawyers and law professors; Judicial Conference committees are comprised mainly of judges. The present membership of the Committee includes one United States Magistrate, three circuit judges, four district judges, one state court judge,[3] a representative of the Justice Department, two private lawyers, and two law professors. Committee members serve for three year terms,[4] and turnover on the committee is substantial; four persons have chaired the committee in the last five years.[5]

The Civil Rules Committee progresses at a very deliberate speed because of the layered review of its efforts. Even for the most technical of amendments, rulemaking usually requires at least three years.[6] Amendments are reviewed by a significant number of interested profes-

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[1] There was no Committee from 1956 to 1959: the Committee advising the Court was discharged by the Court on October 1, 1956. Order Discharging the Advisory Committee, 352 U.S. 803 (1956). The advisory function was re-established in the Judicial Conference of the United States by Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356, whereupon a committee to advise the Judicial Conference was promptly established. 1958 JUD. CONF. OF THE U.S. ANN. REP. 6.

[2] Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

[3] State court judges are appointed to the Advisory Committee in recognition of the potential effect of Rules amendments on state courts. *See* McKusick, *State Courts' Interest in Federal Rulemaking: A Proposal for Recognition,* 36 ME. L. REV. 253, 256 (1984).

[4] The short term is an innovation of Chief Justice Rehnquist in 1986.

[5] Judge Walter R. Mansfield (1977-1985), Judge Frank M. Johnson, Jr. (1985-86), Judge Joseph F. Weis, Jr. (1986-87), Judge John F. Grady (1987-date).

[6] In contrast, only two years passed from the initial Advisory Committee's appointment and its transmission to the Supreme Court of a completed draft. *See* C. WRIGHT, LAW OF FEDERAL COURTS 404 (4th ed. 1983).

sionals and professional groups, and by five groups that play official roles in approving amendments before they become law.

The Civil Rules Committee meets twice a year at publicly announced times and places;[7] financial constraints preclude meeting more frequently. Committee meetings are now open,[8] but sparingly attended by non-members.

Rules amendments commence with suggestions, generally submitted by judges, lawyers, bar organizations, or law professors. One proposal from a United States Senator and one from a member of the House of Representatives have been studied in 1988.[9] In recent years, the Department of Justice has urged amendments to lighten the financial burdens of the United States Marshals Service.[10] In 1988, about thirty possible amendments were in various stages of consideration,[11] each initiated by a suggestion coming from outside the committee.

The Civil Rules Committee considers every suggestion made directly to it,[12] and the Reporter reviews the published literature for additional suggestions. Manifestly unsound suggestions are peremptorily discarded, and suggestions inappropriate for consideration under the Rules Enabling Act are either discarded[13] or, occasionally, referred to Congress.[14]

The Committee is most likely to defer a suggestion for later consideration if the suggestion pertains to a rule that has recently been amended; packaging groups of amendments for presentation every several years facilitates public comment and discussion of proposals, and lightens the burdens on lawyers and judges who must observe rule changes. The Committee's current agenda of matters under active consideration is sufficiently large that new proposals, if not urgent, are likely to be retained for study in connection with a later round of

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[7] Effective publication of the time and place is a problem. The information is available through the Federal Register or by inquiry at the Judicial Conference.

[8] The first open meeting was held in 1986; a requirement of open meetings is a feature of the Rules Enabling Act of 1988, Pub. L. No. 100-702, 102 Stat. 4648, 4649 (amending 28 U.S.C. § 2073(c)(1) (1982)).

[9] One of these was enacted by Congress as a rider to the Drug Bill of October 25, 1988. Anti Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

[10] *See* Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c),* 73 VA. L. REV. 1183, 1198 (1987).

[11] The Committee has seen in 1987 or 1988 draft amendments on Rules 4, 5, 6, 12, 15, 16, 26, 30, 35, 40, 42, 44, 45, 47, 48, 50, 56, 63, 64, 65, 69, 72, 77, and 84, and Admiralty Rules C and E.

[12] Interested persons can communicate with the Committee through the Reporter or by addressing it at the Administrative Office of the United States Courts.

[13] *See* Carrington, *The Rules Enabling Act of 1988: Original Sin Resisted,* 1989 DUKE L.J. (forthcoming).

[14] Most recently, this was the action taken in response to proposals from the American Bar Association regarding provisional remedies and FED. R. CIV. P. 64.

amendments.

The Civil Rules Committee strives to relate proposed amendments to the text of the rule directly involved, to other provisions of the Federal Rules of Civil Procedure, and to pertinent provisions of the Judicial Code. In considering amendments, the Committee has access to the services of the Federal Judicial Center,[15] which can sometimes provide the illumination of empirical study. Some of the Center's work is published.[16] The Committee, through the Reporter, also strives to use the substantial body of professional and academic writing about the Rules.[17]

The Reporter prepares drafts of possible amendments with proposed Advisory Committee notes. These then circulate, often before they are considered by the Committee, to law professors known to have particular interest in them.[18] They also circulate to bar organizations maintaining an active interest in judicial law reform and manifesting a willingness to devote professional energy to the study of proposals. The Reporter carries on a significant correspondence with scholars, judges, and lawyers having an interest in the effectiveness of federal civil proce-

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[15] *See* 28 U.S.C. § 620 (1982).

[16] The Center's published works include: R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW (Federal Judicial Center 1980); J. BROWNING, C. SEITZ & C. CLARK, ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY (Federal Judicial Center 1986); P. CONNOLLY & R. LUMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (Federal Judicial Center 1980); S. OLSON, CALENDARING PRACTICES OF THE EASTERN DISTRICT OF NORTH CAROLINA (Federal Judicial Center 1987); R. RHODES, K. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE (Federal Judicial Center 1981); T. WILLGING, TRENDS IN ASBESTOS LITIGATION (Federal Judicial Center 1987); T. WILLGING, ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES (Federal Judicial Center 1985).

[17] The Committee has recently used Brussack, *Outrageous Fortune,* 61 S. CAL. L. REV. 671 (1988) and Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision,* 85 MICH. L. REV. 1507 (1987).

[18] This process sometimes leads to premature comment. The concluding pages of Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process,* 49 OHIO ST. L.J. 95, 187-193 (1988) attack "the response" of the Civil Rules Committee to recent Supreme Court cases. There had been to date no response at all. Professor Stempel had access to an earlier draft of some imagined rule revisions prepared by the Reporter to evoke helpful comments from those known to be interested in the subject. That draft was briefly discussed by the Committee in early 1987, and again briefly in late 1988, but action with respect to Rule 56 has yet not been the subject of serious discussion by the Committee. Meanwhile, another imagined revision of Rule 56, based on much advice and criticism, is appended to this article. Only in April, 1989, did the Committee take an active interest in the rule. It then recommended to the Standing Committee that a draft similar to, but different from, that set forth in Appendix 1 be published for comment by the bench and bar. No action has been taken on the recommendation at the time of publication.

dure or in procedural justice. Rarely does a received communication identify a constituent group by the substantive nature of its claims or defenses.

If a proposal receives tentative approval of the Civil Rules Committee, it is next presented to the Standing Committee on Rules. The Standing Committee meets twice a year to hear recommendations from its several advisory committees.[19] Its composition is similar to that of the subordinate Civil Rules Committee, differing only in that Standing Committee members are generally veterans of one of the several subordinate committees. The Standing Committee often remands, with suggestions, recommendations of an advisory committee for further consideration.

With tentative approval from the Standing Committee, proposed amendments to the Civil Rules are published for comment.[20] Hearings are announced and held, generally in several cities.[21] A plan to conduct such hearings, when feasible, at the time and place of professional meetings (e.g., those of the American Bar Association Section on Litigation, the Association of American Law Schools Section on Civil Procedure, and the American College of Trial Lawyers) is being considered. After hearings, the Civil Rules Committee reconsiders its recommendations in light of comments received. Substantial change will require a new set of comments and hearings. A recommendation is then sent to the Standing Committee for final approval.

If the Standing Committee approves, a proposed amendment is forwarded to the Judicial Conference of the United States for its approval.[22] If the Judicial Conference approves, the proposal is transmitted to the Supreme Court for promulgation.[23] So far, the Supreme Court has promulgated every rule change recommended to it by the Civil Rules Committee and the Judicial Conference, although not always without dissent. Justices Black and Douglas were especially regular in their dissents.[24]

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[19] Proceedings of the annual Judicial Conference (published annually).

[20] The first publication of proposed amendments appears in *Report of Proposed Amendments to Rules of Civil Procedure,* 5 F.R.D. 433 (1946); subsequent proposals have been routinely circulated as inserts to West Publishing Company advance sheets for the *Federal Reporter*, the *Federal Supplement*, and the *Federal Rules Decisions.*

[21] This practice was established in 1984.

[22] 28 U. S. C. § 331: "The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law."

[23] *See* 28 U.S.C. § 2072 (1982).

[24] *See* Order of April 29, 1980, 446 U.S. 997 (Powell, Stewart, and Rehnquist, JJ. dissenting from 1980 amendments); Order of March 1, 1971, 401 U.S. 1019 (Black and Douglas, JJ. dissenting from 1971 amendments); Order of March 30, 1970, 398

Amendments are not effective until they have remained "on the table" of Congress for a prescribed period.[25] This period permits Congressional oversight, which constrains the making of rules having adverse effects on groups identified by their substantive stakes in litigation. Such groups are given at least six months in which to arouse Congressional interest in a rule they regard as adverse.[26] This oversight function could be perceived as a denigration of the status of courts, especially inasmuch as the rules are promulgated by the Supreme Court, the head of a branch of government having constitutional status equal to that of Congress. That rules of court supersede procedural provisions of earlier legislation,[27] however, may justify the arrangement.

In 1982, Congress rejected, for the first time, a recommendation from the Civil Rules Committee[28] and enacted its own proposal for an amendment to Rule 4.[29] Individual Senators and Congressmen have sponsored bills to effect other changes; this sort of activity may be increasing. In 1988, the "drug bill" was enacted with a rider that amended Rule 35 to allow courts to order mandatory mental examinations by clinical psychologists.[30] This is the only instance in fifty years in which Congress has acted wholly on its own to amend a Civil

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U.S. 979 (Black and Douglas, JJ. dissenting from 1970 amendments); Order of February 28, 1966, 383 U.S. 1089 (Douglas, J. dissenting in part from 1966 amendments); Order of January 21, 1963, 374 U.S. 865, 870 (Black and Douglas, JJ. joining in dissent from 1963 amendments, and recommending that responsibility be transferred from the Court to the Judicial Conference); Order of April 17, 1961, 368 U.S. 1012 (Black and Douglas, JJ. separately dissenting from 1961 amendments); Order of December 28, 1939, 308 U.S. 642, 643 (Black, J. dissenting from 1940 amendment to the effective date provision); Order of December 20, 1937, 302 U.S. 783 (Brandeis, J. dissenting from 1938 promulgation of the Rules).

[25] 28 U.S.C. § 2074(a) (1982) now provides that the Court "shall transmit to the Congress not later than May 1 of the year in which a rule . . . is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 . . . ." Rules Enabling Act of 1988, Pub. L. No. 100-702, 102 Stat. 4648, 4649.

[26] Such Congressional oversight is not imposed on administrative agency rules, many of which have greater substantive portent than rules of judicial procedure.

[27] "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. 2074. This provision has seldom been applied and is limited in its scope by the requirement that rules be "procedural," a term likely to be given a restricted meaning in the circumstance of any application of the supersession provision. *See generally* Carrington, *supra* note 13.

[28] Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246 (eff. Aug. 1, 1982). The proposed Federal Rules of Evidence, disapproved by Congress in 1972, were originated by a committee on Evidence Rules.

[29] Act of Jan. 12, 1983, Pub. L. No. 97-462, 96 Stat. 2527 (eff. Feb. 26, 1983). *See* Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions,* 96 F.R.D. 88, 88 (1983).

[30] Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181, 4401.

Rule.[31] More frequently, Congress has simply acquiesced in the promulgation of Civil Rules amendments. This passivity partly reflects a benevolent Congressional self-restraint; Congress has the unquestioned power to dissolve not only the rulemaking apparatus, but also the federal courts themselves.[32]

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[31] Such legislative incursions are more frequent with respect to amendment of the Federal Rules of Criminal Procedure. *See* C. WRIGHT, *supra* note 6, at 410.

[32] Federal courts other than the Supreme Court are established under Article III of the Constitution and can therefore be substantially controlled by Congress. *See Ex Parte* McCardle, 74 U.S. 506, 513 (1868). *See generally* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953) (discussing the validity of Congressionally-imposed limits on federal courts' jurisdiction); Van Alstyne, *Legislation to Limit the Jurisdiction of the Federal Courts,* 96 F.R.D. 275 (1983) (same). For an opposing view, see Wigmore, *Legislature Has No Power in Procedural Field,* 20 J. AM. JUDIC. SOC'Y 159, 159 (1936) (arguing "that the legislature (federal or state) exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties").