The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure

Karen Nelson Moore
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by

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During the last decade the Supreme Court has become increasingly fond of using the plain meaning doctrine\(^1\) to interpret the Federal Rules of Civil Procedure. Indeed, during the last several terms of the Court, a number of key decisions interpreting the Federal Rules of Civil Procedure, especially those interpreting infamous Rule 11,\(^2\) have hinged on a majority's view of the plain meaning of a Rule's language. Although this development parallels a similar development in statutory construction, it is particularly puzzling in the context of the Federal Rules,\(^3\) which are created under the Court's supervision and are approved by the Court before becoming effective.

While the Court has been heading towards a plain meaning approach to analyzing the Federal Rules, the rulemaking process has been undergoing some change. In the past, the Advisory Committees, which formulate the initial drafts of proposed Rules, operated somewhat in the background and with little public attention. Recent statutory amendments, however, have broadened the process, effectively resulting in a sunshine law for the promulgation of the Federal Rules. In light of these changes in the promulgation process, it is especially important to examine the appropriate role for the Supreme Court in interpreting the Federal Rules.

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1. The plain meaning doctrine requires courts to focus on the text of a statute and usually to reject reference to legislative intent, history, or policy goals. See infra notes 156-167 and accompanying text.

2. FED. R. CIV. P. 11. This rule establishes duties of investigation and certification by attorneys and imposes sanctions for noncompliance. It has produced substantial controversy. See infra Part II.A.

3. Throughout this Article the terms "Federal Rules" and "Rules" will be used to refer to the Federal Rules of Civil Procedure.
This Article proposes that the Supreme Court should take a more activist role in interpreting the Federal Rules by including an analysis of purpose and policy and should refrain from excessive reliance upon the plain meaning doctrine. The Court's interpretation of the Federal Rules does not involve the same separation of powers issues inherent in cases involving normal statutory construction, because the Court is interpreting rules Congress empowered it to create, not statutes created by a coequal branch.

A more activist role in interpretation is consistent with the spirit of the Federal Rules, as enunciated in Rule 1's admonition that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Indeed, the failure to heed this admonition and the concomitant adoption of a literalist or plain meaning approach may result in an unduly stingy interpretation of a Rule, requiring an unnecessary amendment. A more activist role for the Court in interpreting the Federal Rules is also consistent with the congressional intent behind the Rules Enabling Act—that the Court promulgate rules of procedure subject to the constraint that the rules not modify substantive law. Moreover, a more activist approach is not inconsistent with Congress's recent revamping of the rulemaking framework.

Part I of this Article explores the basic framework for procedural rulemaking. Section A explains the relationship between the Supreme Court and Congress in the promulgation of the Federal Rules. This relationship, established by the 1934 Rules Enabling Act, involves a delegation by Congress to the Court of the power to promulgate procedural rules, subject to oversight by Congress. Congress's oversight of and involvement in the rulemaking process has increased in the last two decades. Section B focuses on the role of the judicial branch in promulgating the Federal Rules. It describes the role of committees in drafting proposals, the modern efforts to improve communication regarding proposals, and the views of the Justices concerning their rulemaking function. Section C concludes that, notwithstanding some recent change in the relationship between the Court and Congress in the rulemaking framework, the Court must continue actively to interpret the Federal Rules.

Part II addresses the Court's recent approach to interpreting the Federal Rules, with its emphasis on the plain meaning doctrine. Section A illustrates the Court's use of plain meaning analysis to interpret a particular Federal Rule, Rule 11. Section B compares the Court's use of

plain meaning analysis in cases interpreting federal procedural statutes. Section C develops the argument for rejecting the use of the plain meaning doctrine in interpreting the Federal Rules. Finally, Section D proposes a preferred analysis that includes factors such as purpose and policy, as well as textual language, and demonstrates how this analysis would work in interpreting a Rule.

I. The Basic Rulemaking Framework

The basic framework for rulemaking was first established in the Rules Enabling Act of 1934 and has been modified by subsequent legislation. For purposes of this Article, two aspects of the rulemaking framework are critical to understanding the Court's rulemaking role: the relationship between the Supreme Court and Congress in the promulgation of the Rules, and the mechanisms employed by the Court pursuant to its statutory mandate to promulgate the Rules.

A. The Relationship Between the Supreme Court and Congress in the Promulgation of the Federal Rules

1) The Rules Enabling Act

The Rules Enabling Act in its current formulation provides, "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals." This modern formulation, enacted by Congress in 1988 as part of the Judicial Improvements and Access to Justice Act, was part of an effort "to modernize the statutory framework for the Federal court rulemaking process" by providing a uniform mechanism for developing rules of procedure and evidence. In essence the modern formulation...

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carries forward the concept of the original Rules Enabling Act of 1934, by which Congress delegated to the court the power to promulgate the Federal Rules of Civil Procedure.

The Supreme Court's power to prescribe rules of procedure has been limited from the beginning by the requirement that "[s]uch rules shall not abridge, enlarge or modify any substantive right."9 The impact of this requirement has been a source of substantial controversy in the courts and among commentators over the years.10 One aspect of the controversy is the extent to which the second sentence of the Rules Enabling Act, prohibiting the modification of substantive rights, differs from rather than duplicates the first sentence, mandating the creation of practice and procedure rules.11 Another aspect of the controversy is whether the restriction against affecting substantive rights was intended to further federalism principles or to further separation of powers principles. In other words, was the restriction against affecting substantive rights intended primarily as a limit on the federal government vis-a-vis the states, or as a limit on the Supreme Court vis-a-vis Congress?12

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10. The Court has explored the limits of its rulemaking powers in a series of cases, notably Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941), and Hanna v. Plumer, 380 U.S. 460, 472 (1965). In Hanna the Court wrote:

[H]e constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id. at 472.


11. Compare Ely, supra note 10, at 718-40 (discussing the interrelationship between the first and second sentences of the Rules Enabling Act and criticizing the merging of two concepts into one) with Burbank, Rules Enabling Act, supra note 5, at 1107-08 (concluding that second sentence was surplusage). This debate does not directly affect the determination of the Court's proper role in interpreting the Rules.

12. Compare, e.g., Ely, supra note 10, at 718-40 (focusing on federalism principles) with
The major Supreme Court cases construing the Rules Enabling Act, particularly *Sibbach v. Wilson & Co.*\(^\text{13}\) and *Hanna v. Plumer*,\(^\text{14}\) focused on federalism principles as the primary reason for the restriction against affecting substantive rights. In these cases the Court was concerned mainly with the possible impact of the Federal Rules on substantive rights conferred by the states and viewed the Rules Enabling Act's requirements in light of these federalism concerns.\(^\text{15}\)

Despite the Court's apparent preoccupation with federalism, commentators have placed recent emphasis on the relationship between Congress and the Court in the rulemaking process as the source of the restriction against affecting substantive rights. Integral to this change in emphasis is Professor Stephen Burbank's thesis that the lengthy history of the 1934 Rules Enabling Act itself reflects a primary concern with allocating the power to make law between the legislative and judicial branches.\(^\text{16}\) Professor Burbank's detailed review of the history behind the original legislation supports the theory that the major purpose of the limiting language in the Rules Enabling Act was to confine the Court to the procedural arena and restrain it from making substantive law, which was to remain the prerogative of Congress. This theory is particularly sensible in light of the fact that the *Erie*\(^\text{17}\) doctrine, with its emphasis on federalism principles, was not created until 1938, four years after the Rules Enabling Act was passed. When the Rules Enabling Act was promulgated, *Swift v. Tyson*\(^\text{18}\) counseled that the federal courts were free to fashion federal common law when neither the state legislature nor Congress had acted, making federalism issues relatively unimportant.

This recent emphasis on the allocation of power between Congress and the Court in the original Rules Enabling Act became a focal point in the amending and modernizing of the legislation in the late 1980s. Although the language of the 1988 amendment tracks the original language regarding the dichotomy between substance and procedure,\(^\text{19}\) the legislative history of the amendment addresses at some length the need to confine the Court to its appropriate procedural rulemaking role and to

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\(^\text{13}\) 312 U.S. 1 (1941).

\(^\text{14}\) 380 U.S. 460 (1965).


\(^\text{17}\) *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

\(^\text{18}\) 41 U.S. (16 Pet.) 1 (1842).

\(^\text{19}\) See supra note 9 and accompanying text.
leave substantive lawmaking to Congress. Based on its perception that the Court had in recent years "overstepped the bounds of its rule making authority," the House Committee on the Judiciary was concerned that neither the Court's past decisions nor the language in the Rules Enabling Act of 1934 was sufficiently clear concerning the limitations on power delegated by Congress to the Court. As a result, the Committee endeavored to express its views on the limitations on judicial power encompassed in Congress's delegation of rulemaking power under the 1988 version.

The 1985 Report of the House Committee on the Judiciary clearly asserted Congress had the power to limit judicial rulemaking and had done so in the Rules Enabling Act by delegating "only a portion of [its] power" to the Court. Speaking specifically to the restriction against interference with substantive rights, the Committee read the Rules Enabling Act as restricting the Court from promulgating rules that "necessarily and obviously define or limit rights under the substantive law."


21. According to the Committee, the language in the Rules Enabling Act authorizing the creation of rules of practice and procedure which do not abridge, enlarge, or modify any substantive right, [as] interpreted by the Court, . . . has little if any determinative content. As a result, the rules enabling acts have failed to provide guidance to the rulemakers or to Congress in considering the validity of proposed rules.

It appears that, as used in the Rules Enabling Act of 1934, the restriction regarding substantive rights was intended to emphasize some of the limitations on the delegation of prospective lawmaking power thought to inhere in the notion of court rules of "practice and procedure." Because there is no shared conception of such limitations today, the Committee believes that it must take some care in stating its views on the scope of Congress' delegation under proposed section 2072.

Id. at 20-21 (citations omitted).

22. Id. at 21.

23. Id. According to the Committee:

[T]he bill does not confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law. The protection extends beyond rules of substantive law, narrowly defined, however. At the least, it also prevents the application of rules, otherwise valid, where such rules would have the effect of altering existing remedial rights conferred as an integral part of the applicable substantive law scheme, federal or state, such as arrangements for attorney's fees under 42 U.S.C. § 1988.
or that "necessarily and obviously require consideration of policies extrinsic to the business of the courts." With these restrictions, the Court could promulgate rules governing matters "peculiarly within the competence of judges," and Congress could focus on matters within its competence in light of its democratic nature. These views were reaffirmed by the House Committee on the Judiciary in its 1988 Report accompanying the bill that became the Rules Enabling Act of 1988.

Thus, embedded in this outwardly simple statutory framework for the promulgation of the Rules is the resolution of a major separation of powers controversy: Who should have the power to promulgate rules of procedure for the federal courts and how is that power limited? The view of the House Committee is not inconsistent with the received wisdom that Congress has the power to prescribe general rules of procedure for the federal courts under Articles I and III of the Constitution.

Id. at 21-22 (citations omitted). Thus, the Committee gave a broad reading to the scope of substantive law, which the Court was precluded from regulating, and retained for Congress rulemaking powers in the arguably substantive areas.

24. Id. at 22. The Report stated:

More generally, proposed section 2072 is intended to allocate to Congress, as opposed to the Supreme Court exercising delegated legislative power, lawmakership decisions that necessarily and obviously require consideration of policies extrinsic to the business of the courts, such as the recognition or non-recognition of a testimonial privilege. In the absence of congressional choices, prospective regulation is left to the States.

Id. (citations omitted). Here and elsewhere in the Report, Professor Burbank's Rules Enabling Act is cited as support. See also id. at 6 n.5, 7 (describing Burbank as "the leading academic authority in the area").

25. Id. at 22. Again the full language of the Report is instructive:

So viewed, proposed section 2072 leaves to the Supreme Court primary responsibility for prospective federal regulation of matters peculiarly within the competence of judges. It reserves to Congress decisions concerning prospective federal regulation of matters peculiarly within its competence, having regard to Congress' representative nature and to its experience in prospective lawmaking that variously affects its constituencies in their out-of-court affairs. Further refinement of the scope of delegation will undoubtedly prove necessary. The Committee believes, however, that such refinement should come in the first instance from those responsible for proposing rules. Conscientious attention to the purposes of, and limitations on, the delegation should prevent controversy of the sort that has plagued federal supervisory court rulemaking in recent years.

Id.


27. See, e.g., Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States.") (footnote omitted). See generally Laurence H. Tribe, American Constitutional Law 50 (2d ed. 1988) ("Consistent with constitutional limitations, Congress clearly has authority to fix the rules of procedure, including rules
Since Article III provides for the creation of the Supreme Court and for "such inferior Courts as the Congress may from time to time ordain and establish," Congress's power to create the lower federal courts has been viewed as including the power to establish rules of procedure for such courts. Moreover, Article I of the Constitution specifically mentions the power of Congress "[t]o constitute Tribunals inferior to the supreme Court" and authorizes Congress to make any laws necessary and proper to execute its powers or other powers vested by the Constitution in the U.S. government.

Coexistent with this general view that Congress has the power to promulgate rules of procedure for the federal courts is the understanding that, at least when Congress has not acted, the federal courts have the authority to enact rules for their internal governance and for the process or conduct of litigation before them. Of course, when Congress has not acted, there are no separation of powers problems occasioned by the federal courts establishing rules of procedure because under Article III the federal courts have this inherent power.

Congress's decision to delegate rulemaking powers to the Court is within its constitutional powers. The delegation is made to an appro-
priate body, and the legislation includes adequate standards for delega-

34. Moreover, by retaining the power to review proposed Rules, Congress has ensured that it will have the opportunity to review compliance of the rulemaking body with the standards for delegation.35

The House Committee's view, that Congress delegated only a part of its rulemaking power, is arguably a more limited view than the Court's interpretation of the original Rules Enabling Act in *Sibbach* and *Hanna*. Both *Sibbach* and *Hanna* contain language suggesting the Court may have viewed the Rules Enabling Act of 1934 as a full delegation to the Court of Congress's constitutional powers to regulate procedural rulemaking for the federal courts.36 Moreover, in those cases, the Court extended the scope of Congress's power over procedural rulemaking beyond clearly procedural rules to include rules "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."37 Apparently, the Court believed that it would be constitutional for Congress to delegate fully its rulemaking powers to the Court and that it had done so in the Rules Enabling Act.38

Since the House Committee interpreted the 1988 Rules Enabling Act as delegating to the Court a more circumscribed rulemaking power, it is critical in understanding the Court's proper rulemaking role to ascertain the authority of the House Committee and to determine the weight to give its comments.39 In the absence of other committee reports

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34. *Id.* at 438.
35. *Id.*
36. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) ("[T]he new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."). Several passages in *Hanna* suggest the Court viewed the constitutional limitations and the delegation by Congress in the Rules Enabling Act as coextensive. See *Hanna v. Plumer*, 380 U.S. 460, 470-74 (1965). The Court in *Hanna* never attempted to distinguish constitutional limitations on rulemaking from limitations in the Rules Enabling Act. See generally *Burbank, Rules Enabling Act*, *supra* note 5, at 1034; *Landers*, *supra* note 27, at 850-55.
39. As is discussed in more detail in Part II, see *infra* text and accompanying notes 156-167, the weight to be given to legislative history is currently subject to substantial debate. Justice Scalia and other textualists would ignore committee reports and other legislative history and would rely entirely upon the text of statutes. See, e.g., *Blanchard v. Bergeron*, 489
or authoritative sources, the House Committee's view of restricted delegation is the best available indication we have of the intent of Congress. However, it is only the report of one committee. Unfortunately, determining the weight to give committee reports in statutory interpretation is a perennially troubling issue.

To resolve this issue it is important to determine whether the Committee Report reflects an unusual agenda or an unrepresentative bias of the Committee or its staff. Recent research suggests generally that the likelihood of committee reports reflecting aberrational views is relatively low. Moreover, there is no evidence to suggest the House Committee


40. The Senate's discussion of the legislation suggests relatively meager attention to these issues. Therefore, the House Committee Report apparently provides the only available insight within Congress. See, e.g., 134 CONG. REC. S16,294 (daily ed. Oct. 14, 1988) (statement of Senator Heflin noting that there would be no committee report and that a more lengthy explanation would be submitted later); id. at S16,300 (daily ed. Oct. 14, 1988) (analyzing bill provisions as carrying forward scope of present law); see also Burbank, Hold the Corks, supra note 10, at 1034-35 (describing Senate expectations as unclear concerning impact of 1988 congressional activity on continued statutory language and giving strong weight to interpretation of House Judiciary Committee).

41. See William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 GEO. L.J. 523, 553-54 (1992) (concluding that the likelihood of "outlier" committees is not great) (citing KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 105-50 (1991)); see also George A. Costello, Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 DUKE L.J. 39, 43 (noting that committee reports are "the most reliable and persuasive element of legislative history" although they lose some persuasive force when the report differs from the statutory text); Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423, 444-52 (1988) (evaluating arguments against the use of legislative history and concluding that the work of relevant committees should not be excluded from consideration in interpreting statutes); Abner J. Mikva, A Reply to Judge Starr's Observations, 1987 DUKE L.J. 380, 385 (stating that the committee report is usually the "most useful" aspect of legislative history and "represents the synthesis of the last meaningful discussion and debate on the issue"); Arthur Stock, Note, Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses, 1990 DUKE L.J. 160, 174-75 (identifying congressional rules ensuring that committee reports fairly reflect viewpoint of committee). However, others have stated, often without support, that legislators are unfamiliar with the content of Committee Reports. See, e.g., Note, Why Learned Hand Would Never Consult Legislative History Today, 105 HARV. L. REV. 1005, 1014-15 (1992) [hereinafter Note, Rejecting Legislative History] (stating that "no one would claim that legislators who vote for a bill necessarily have examined committee reports to see if they agree with the opinions in it," and that "the most that can be said is that committee members would have endorsed these propositions if they had thought about them"). This is Justice Scalia's view. See, e.g., Blanchard, 489 U.S. at 97 (Scalia, J., concurring in part and concurring in the judgment); Costello, supra, at 60-61 (summarizing Justice Scalia's approach to committee reports).
was acting in a fashion disapproved by the Congress in this area. Some caution must be exercised in according weight to the House Committee Report, however, because the portion of the Report that discusses restricting the scope of the Court's power to promulgate Rules occurs in the context of a statutory amendment leaving intact the preexisting statutory grant of rulemaking authority to the Court. Since the Court has assumed full delegation of rulemaking powers in the 1934 Rules Enabling Act, Congress should have expressed its intent to restrict those powers through a change in the language of the 1988 Act rather than only through comments in the House Committee Report.

Whether or not there are limitations on the scope of the delegated rulemaking authority as suggested by the modern interpretation of the Rules Enabling Acts described above, Congress has given the Court the power within this sphere to promulgate rules of procedure that do not modify any substantive rights. However, even within this procedural sphere, the Supreme Court does not have unfettered discretion to promulgate the Rules. Congress has retained the power to consider and reject Rules of which it does not approve. Thus, in the current framework, in order for a rule or rule amendment to become effective by December 1, the Court must transmit it to Congress by May 1. This schedule provides Congress with a seven-month period to study the proposal and reject any part of which it disapproves. Since Rules that become effective

42. The statements made during the House Committee hearings tend to support, not contradict, the House Committee Report. See, e.g., Rules Enabling Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st and 2d Sess. 130-31, 135, 151 (1983 and 1984) (statement of Burt Neuborne, Legal Director, American Civil Liberties Union). There were no Senate Hearings and no Senate Committee Report. Thus there are no legislative materials discrediting the House Committee Report. See generally Farber & Frickey, supra note 41, at 450 ("[W]hen a fundamental aspect of legislative history, such as a committee report, is unimpeached by other interpretive sources and is consistent with the apparent coherent legislative equilibrium, it should be an important, though not conclusive, interpretive source.").

43. Cf. Costello, supra note 41, at 66-68 (cautioning against reliance on Committee Report when detailed committee language is not tied to statute).

44. 28 U.S.C. § 2074(a) (1988). The 1934 Rules Enabling Act did not require reporting rules for actions at law to Congress. Reporting to Congress was required, however, for rules uniting procedures for cases in equity with those for actions at law. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. See generally Burbank, Rules Enabling Act, supra note 5, at 1026, 1069-77 (suggesting that for political reasons, Chief Justice Taft inserted language in a proposed bill requiring congressional notification of united rules for law and equity). As the Rules Enabling Act language has evolved, aspects of this reporting process have changed. See, e.g., Act of May 10, 1950, Pub. L. No. 81-510, § 2, 64 Stat. 158 (allowing Court to report to Congress no later than the first of May, with effectiveness 90 days after submission, unless objected to by Congress). The reporting duty is discussed in more detail in Burbank, Rules Enabling Act, supra note 5, at 1075-77 n.268.

45. 28 U.S.C. § 2074(a) (1988). Interestingly, § 2074 does not explicitly authorize Con-
supersede existing conflicting statutory provisions under the Supersession Clause, reporting to Congress is particularly important when proposed Rules differ from, and will supersede, existing statutory provisions. Reporting is required for all proposed Rules, however, whether or not they will supersede existing statutes.

In understanding the scope of the Court's rulemaking powers, the provision in the Rules Enabling Act known as the Supersession Clause is particularly significant because of its implications for the allocation of power between the Court and Congress and also because of the rulemaking controversy the clause has engendered. The Supersession Clause was originally incorporated in the 1934 Rules Enabling Act in order to assure that a variety of existing procedural statutes would be replaced by
the new Rules and that there would be no conflict with the old Conformity Act. Congress has recently debated the wisdom of and necessity for maintaining the provision. In 1985, the House Committee on the Judiciary determined there was no longer a need for supersession because procedural statutes that were in conflict with the Rules had been eliminated and because Congress legislates today in light of the Rules. Furthermore, the Committee was concerned that the Supersession Clause might violate the separation of powers principles underlying INS v. Chadha, which required conformity with Article I in the repeal of statutes. However, despite the House's adoption of the House Committee's proposal to eliminate the Supersession Clause, the Senate refused to eliminate the Clause. The Senate apparently believed the Clause "has worked well since its creation in 1934. It provides a sense of stability and uniformity to the Federal Rules of Procedure." The House receded, at least in part relying on the promise of the Chief Justice to act carefully

50. See 1985 House Report, supra note 20, at 16 (citing Burbank, Rules Enabling Act, supra note 5, at 1050-54). The Conformity Act, Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197, repealed by the 1934 Rules Enabling Act, required that a district court follow the procedure of the state in which it was located in cases at common law.


53. 1985 House Report, supra note 20, at 17, 23. The Committee did not conclude that Chadha mandated elimination of the Supersession Clause. Instead, it argued that Chadha placed a "constitutional cloud" over the Clause. Id. at 17. The Committee also stated, "Chadha has raised again the question whether general supersession provisions are constitutional. On one view, the Supreme Court purports to authorize the repeal of a federal statute by a process other than that prescribed by Article I of the Constitution." Id. at 23. However, the Committee continued, "The Committee does not believe that, whatever the constitutional status of general supersession provisions, Chadha prevents Congress from specifically identifying statutory provisions that may be superseded by rules promulgated pursuant to a valid delegation." Id.


56. Id.

57. 134 Cong. Rec. H10,440 (daily ed. Oct. 19, 1988) (remarks of Representative Kastenmeier). Representative Kastenmeier characterized repeal of the Supersession Clause as "the single most important reform contained in the House-passed bill." Id. He viewed the "authority to abrogate congressional prerogatives . . . [as] unwise and potentially unconstitutional. I am disappointed that the Senate has chosen to perpetuate a conflict between the branches that is unnecessary." Id. (footnote omitted).
when proposed Rules might supersede statutes, and left the Supersession Clause in the current statute.

The resolution of the supersession debate makes it unlikely that the Court would precipitously propose amendments to Rules that would supersede statutes. Retention of supersession authority is important, however, when strong policy reasons favor judicial rulemaking solutions to procedural problems. For example, adopting a procedural Rule that supersedes a statute may be particularly desirable when circumstances have changed since an initial congressional enactment, or when a Rule change will enhance a conflicting congressional policy. Retaining the Supersession Clause facilitates rulemakers’ consideration of procedural rules that may conflict with existing statutes, and thus facilitates a broad scope for modern judicial rulemaking.

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58. Representative Kastenmeier expressed the hope that the Judicial Conference and the Supreme Court would avoid promulgating rules on substantive matters and would indicate in advisory committee notes any laws that would be superseded by a proposed rule. Id. He also attached to his remarks a letter from Chief Justice Rehnquist to Chairman Rodino of the House Committee on the Judiciary, in which Justice Rehnquist promised that the Judicial Conference and its committees would be “circumspect in superseding procedural statutes. At the very least, we will undertake to identify such situations when they arise so that the Congress will have every opportunity to examine these instances on the merits as part of your review.” Id. at H10,441.


60. But see Burbank, Hold the Corks, supra note 10, at 1037-41 (criticizing reliance on Chief Justice Rehnquist’s promise in light of past actions of rulemakers that disregarded possible conflicts of Rules with statutes).

61. See Whitten, supra note 27, at 60-66. Professor Whitten describes a number of factors that should be considered in evaluating whether a Rule should supersede a conflicting statute. These factors include the detail with which Congress has regulated a procedural area, how long Congress has regulated, the apparent importance of the congressional policy, the timing and purpose of the delegation of rulemaking power vis-a-vis the statutory regulation, the extent to which the Rules will have an impact on the statute, and the extent to which the Rules will further other important statutory policies. Id. His basic thesis is that the Court’s rulemaking powers under the Rules Enabling Act are limited by separation of powers principles, even when Rules are purely procedural, if Congress has occupied the particular field. Id. at 115.

62. Whitten, supra note 27, at 66-70 (stating that “if Congress may not authorize the Supreme Court to make rules that supersede statutes, the entire modern Court rulemaking enterprise is jeopardized,” id. at 66, and concluding that the better view is that “supersession
The rulemaking structure established by the 1934 Rules Enabling Act is complicated. Although Congress has delegated the procedural rulemaking function to the Court subject to limited congressional oversight, developments in the 1980s, notably the legislative history accompanying the 1988 statute, demonstrate a possibly more circumscribed delegation of rulemaking. The extent of Congress’s actual involvement in supervising its delegation of rulemaking power is explored in the following section.

(2) Congress’s Involvement in Rulemaking

Congress had acquiesced in all of the Court’s proposals for the Federal Rules of Civil Procedure prior to 1973, when it suspended the effectiveness of the Supreme Court’s proposed Federal Rules of Evidence and certain related Federal Rules of Civil Procedure. Since 1973, however, Congress has occasionally acted to delay the implementation of proposed Rules, to disapprove certain proposed Rules, or to enact its own variations of Rules. These situations are important to review, for they demonstrate a new willingness on the part of Congress to become involved in the rulemaking process in particular instances.
In 1980 Congress provided for certain prevailing parties to recover attorney's fees and other expenses against the United States government. At the same time, Congress repealed Rule 37(f), which had prohibited an award of fees or expenses against the United States for discovery abuses, except to the extent permitted by statute. According to the relevant Committee Reports, "This change reflects the belief that the United States should be liable for fees the same as other parties when it abuses discovery."

In 1982 Congress first delayed the effective date of proposed amendments to Rule 4, instead enacting its own version in 1983 as a statutory amendment to Rule 4. This was the first time that Congress had directly amended a Federal Rule. The amendment was the result of a dispute between Congress and the Court concerning the proper mechanism for shifting the burden of service of process from federal marshals to parties and counsel. Although Congress agreed with the Court that the usual mechanism for service of process should be shifted from personal service by federal marshals to service by mail, Congress viewed the Court's proposed amendment as unsatisfactory in three important


67. Equal Access to Justice Act § 205. Rule 37(f) had provided, "Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule."

68. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 19 (1980); S. Rep. No. 253, 96th Cong., 1st Sess. 22 (1979); see also S. Rep. No. 253, at 4. In 1979 the Judicial Conference's Standing Committee excluded a rule proposed by the Advisory Committee (Rule 37(h)) that would have authorized judges to notify the Attorney General or other federal officers if a federal officer or attorney failed to cooperate in good faith with discovery. 80 F.R.D. 323, 347-48 (1979). See Winifred R. Brown, Federal Rulemaking: Problems and Possibilities 26 n.61 (1981). Apparently viewing this provision as inappropriately included in the rule, the standing committee instead included it in the advisory committee notes to Rule 37. 85 F.R.D. 521, 532-34 (Revised Preliminary Draft of Proposed Amendments 1979). This note was approved by the Judicial Conference and the Court, was submitted to Congress by the Court on April 29, 1980, and became effective August 1, 1980. See 446 U.S. 997 (1980).

69. Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246. The President "reluctantly" signed this bill, expressing concern that "the United States Marshals Service needs prompt relief from the burden of serving process for private parties in civil actions, relief these amendments would provide." President's Statement on Signing H.R. 6663 into Law, 18 Weekly Comp. Pres. Doc. 982 (Aug. 2, 1982). He was confident, however, that Congress would act promptly to provide a comprehensive solution. Id.


71. See 4 Wright & Miller, supra note 63, § 1061, at 220.
ways,\textsuperscript{72} and enacted its own Rule 4 amendment to resolve these problems.\textsuperscript{73}

Congress acted on its own initiative and not in response to any Court proposal when it enacted an amendment to Rule 35 in 1988. The amendment added a provision allowing psychologists to perform mental examinations of parties.\textsuperscript{74} Congress's amending of the rule is somewhat troubling. Apparently, Congress wanted to allow licensed or certified psychologists to examine mentally diseased criminal offenders pursuant to an analogous criminal statute.\textsuperscript{75} The House analysis of the bill amending the criminal statute noted the parallel question of the types of examiners qualified in a civil proceeding under Rule 35, but concluded that a change to the language of Rule 35 should be undertaken according to the normal rulemaking process, rather than by an enactment of Congress.\textsuperscript{76} The Senate, however, supported the inclusion of a statutory amendment to Rule 35 that allowed psychologists to perform mental examinations in civil cases,\textsuperscript{77} and the House ultimately accepted this statutory change.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{72} H.R. REP. No. 662, 97 Cong., 2d Sess. 2-4 (1982). The House Judiciary Committee observed that the Court's formulation of the amendment to Rule 4(c)(2)(B) might have failed to achieve the goal of relieving marshals from their service of process duties, that the Court's proposed Rule 4(d) amendment requiring service by certified or registered mail could result in unfair default judgments, and that the proposed Court version of the new Rule 4(j), which required dismissal if service was not made within 120 days, contained ambiguities that might necessitate litigation to resolve. \textit{Id.}
\item \textsuperscript{73} Federal Rules of Civil Procedure Amendments Act of 1982. The legislative history describes Congress's amendments as supported by both the Department of Justice and the Judicial Conference. 128 CONG. REC. H30, 931-36 (Dec. 15, 1982) (statement of Representative Edwards); \textit{id.} at H30, 936-37 (statement of Representative McClory).
\item \textsuperscript{75} See 133 CONG. REC. H5336 (daily ed. June 22, 1987) (discussing H.R. 2182, 100th Cong., 1st Sess. § 142 (1987)).
\item \textsuperscript{76} \textit{Id.} ("In deference to the Rules Enabling Acts, no change is being made to Rule 35(a). ... It would be appropriate for the Judicial Conference's Advisory Committee on Civil Rules to address whether Rule 35(a) should be amended to include licensed or certified psychologists.").
\item \textsuperscript{78} 134 CONG. REC. H11,254 (daily ed. Oct. 21, 1988). While the House Judiciary Committee still "believes that, as a general rule, changes in the Federal Rules of Civil Procedure ought ordinarily to be made through the process established by the Rules Enabling Act," \textit{id.}, the amendment to Rule 35 was viewed as consistent with other law. In addition to being consistent with the amendment to the criminal statute, 18 U.S.C. § 4247(b) (1988), the amendment was believed to make Rule 35 coordinate with \textit{Fed. R. Evid.} 702, which allowed a psychologist to testify at trial as an expert concerning a party's mental state. 134 CONG. REC. H11,254 (daily ed. Oct. 21, 1988).}
\end{itemize}
Thus, the amendment to Rule 35 became part of the Anti-Drug Abuse Act of 1988.

The 1988 Anti-Drug statute was also troubling because it incorporated in statutory form two other changes to unrelated rules that had already been proposed by the Supreme Court and were awaiting automatic enactment. The Supreme Court had transmitted two technical changes to Rules 17 and 71A to Congress in April 1988. Instead of simply allowing these technical amendments to become effective automatically, Congress included these technical corrections in the unrelated 1988 Anti-Drug statute. There was no valid reason for these two technical changes to be enacted in statutory form, especially since the statute was unrelated to the substance of the rules. There is no meaningful distinction between these Rules and the vast bulk of the Rules that are not incorporated in statutes and become effective simply through the operation of the Rules Enabling Act.

In 1991 Congress acted to cure technical errors that had been mistakenly embedded in the 1991 Supreme Court proposals for amending the Federal Rules. These errors would have become part of the Federal Rules had Congress not acted. The rulemakers requested that Congress take this action in order to avoid confusion of litigants and lawyers. This scenario illustrates cooperation between the judicial and legislative branches in rulemaking.

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79. 485 U.S. 1044, 1044-45 (1988). The technical changes involved the amendment of Rule 17(a) to assure gender neutrality and the amendment of Rule 71A(e) to cure a punctuation error.

80. This enactment of technical changes to Rules (having to do with gender neutrality and placement of an apostrophe) by statute seems completely misplaced. This might be attributable to the Supreme Court's failure to transmit the technical corrections recommended by the Advisory Committee in its submission to Congress. See 133 CONG. REC. H5331 (daily ed. June 22, 1987) (H.R. 2182, 100th Cong., 1st Sess. §§ 144, 145 (1987)). This provision was ultimately incorporated into the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7049, 7050, 102 Stat. 4181, 4401, which, ironically, Congress passed the day before passage of the 1988 Rules Enabling Act.


82. Id. at 23-24 (letter from L. Ralph Mecham, Director of the Administrative Office of the U.S. Courts, to Congress requesting that Congress enact a statute to cure drafting problems involved in amendments to the Federal Rules transmitted by the Court to Congress in 1991).

83. The 1991 legislation also included an amendment to 28 U.S.C. § 2107 designed to
Apart from the cooperative intervention of Congress in 1991, since 1975 Congress's involvement in the process of amending Rules has been troubling. In the situations involving Rule 35 and Rule 37(f), Congress acted on its own, without allowing consideration through the usual rulemaking process of the desirability of the specific amendments. In another instance, when Congress substituted its own proposal in place of the Court's amendments to Rule 4, Congress made its own assessment of a basically procedural problem. In these three instances, Congress did not adequately interact with the Court or with the normal rulemaking process.

Of the three problematic amendments, the statutory amendment of Rule 35 to include mental examinations by psychologists is particularly questionable. This amendment appears to be a political response to the pressures of a discrete interest group rather than a carefully crafted response to procedural inadequacies of the prior Rule. This amendment unnecessarily and improperly propelled the legislative branch into a new role as a "quick fix" for drawbacks of the Rules perceived by interested persons or groups. Given the structure established for Rules changes, a structure established by Congress itself, there was no justification for Congress's unilateral enactment of this amendment.

The repeal of Rule 37(f), which eliminated the United States' immunity from monetary sanctions for discovery abuse, was a more suitable topic for congressional action. Congress did not appear to be reacting to special interest groups, and the United States' potential liability for monetary sanctions is an area of concern to Congress, which is responsible for raising funds for government expenditures. It is, therefore, desirable that any provision resulting in the possibility of direct imposition of fees or expenses against the United States be the result of explicit congressional action and presidential approval. However, a preferable approach

coordinate the statute with then-pending amendments to Rule 4 of the Federal Rules of Appellate Procedure concerning extension of time to file notices of appeal. See id. at 5-6, 10. This is another illustration of the possible cooperation between the two branches in the procedural arena.

84. See Paul D. Carrington, The New Order in Judicial Rulemaking, 75 JUDICATURE 161, 165 (1991) [hereinafter Carrington, New Order] (stating that Rule 35 was amended directly by Congress because of personal interest of a particular Senator).

would have involved some consultation with the bodies involved in the usual rulemaking process prior to the enactment of the statute to take advantage of their special expertise when rules impacting procedural considerations are involved.\textsuperscript{86} Moreover, a statutory provision explicitly authorizing imposition of fees would have avoided ambiguity, clarified authority, and been more desirable than simply repealing a Federal Rule.\textsuperscript{87}

In the third of these problematic congressional amendments, Congress’s role in rejecting the Court’s proposed amendments to Rule 4 and enacting its own variation appears, at least on first analysis, to be troublesome because Congress seemed to be involving itself in quintessentially procedural issues best left to the rulemakers. Under this view, if Congress were troubled by the Court’s proposed amendments, it should have identified its concerns and remanded the proposal to the Advisory Committee for redrafting.

Upon full examination, however, Congress’s involvement appears more appropriate. The rulemakers’ proposed revision of the Rule, which attempted to address problems posed by the old formulation of the Rule, had not been widely circulated.\textsuperscript{88} Congress responded to criticisms lodged against the proposed amendments\textsuperscript{89} first by delaying the effective

\textsuperscript{86} A review of the hearings on the legislation that repealed Rule 37(f) reveals no discussion concerning the repeal of the Rule and no testimony by those involved in the rulemaking process. Exchanges with the representative of the Judicial Conference did not involve Rule 37(f). \textit{See Equal Access to Courts: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess.} 55 (1978) (testimony of Carl B. Rubin, U.S. District Court Judge, Southern District of Ohio, who represented the Judicial Conference of the United States, discussing general effects on federal court system and procedures for attorney’s fees payments).

\textsuperscript{87} \textit{28 U.S.C.} § 2412 (1988), which codifies much of the 1980 statute authorizing fees for certain prevailing parties against the government, does not include a specific reference to awards of expenses for discovery abuse.


\textsuperscript{89} \textit{See} Siegel, \textit{supra} note 88, at 91-92 (describing some problems with the Court’s pro-
date of the Court's proposal. Congress subsequently enacted its own version, but only after consulting with interested groups and individuals and after securing the approval of representatives of the Judicial Conference and the Justice Department. Some might argue this response is exactly what was envisioned in the Rules Enabling Act's provisions that require notice to Congress and a hiatus period before the Rules amendments become effective. However, it should be noted that even the version enacted by Congress suffers from substantial problems of interpretation. These might have been cured by a remand back to the rulemakers and full reconsideration through public advisory committee meetings.

The events of the last decade suggest that Congress is moving to reclaim some degree of involvement in the rulemaking process, notwithstanding the continued broad delegation of rulemaking power to the Court. To the extent that Congress is supervising its delegation of rulemaking powers to the Court, this new involvement has some benefit. Indeed, this is perhaps the way a proper delegation of authority should operate. However, the scattershot aspects of Congress's activity, exemplified particularly by its involvement in amending Rule 35, suggest the occurrence of something more distressing: Congress is reacting on occasion to isolated pressures and is not acting with a vision of the procedural system as a whole.

posed amendment of Rule 4 as presented to Congress). Professor Siegel complains that the Court's proposed changes to Rule 4 were not generally available, or even available to interested attorneys, before their submission to Congress. Id. at 916. This lack of availability necessitated that constructive criticism of the Court's proposal be presented in the first instance to Congress. See also Sinclair, supra note 88, at 1197-1204 (discussing the origins and flawed operation of Rule 4(c)). Sinclair's study suggests that in 1981 Chief Justice Burger cooperated with the Justice Department and others to propose legislation to Congress designed to reduce the process-serving role of marshals and later pressured the rulemaking committees to act speedily to amend Rule 4. Id. at 1201-02. Paul Carrington's alternative explanation is that the congressional action was the result of successful lobbying by the National Association of Process Servers. Carrington, New Order, supra note 84, at 164.


91. Although speedy implementation of a change from service by marshals was desired, see supra note 69, the procedural ambiguities lurking in the area might have warranted some additional time for reviewing Congress's proposal. Some of the problems with the framework enacted by Congress are described in Siegel, supra note 88. See also Sinclair, supra note 88, at 1212-88 (criticizing the structure and operation of Rule 4).

92. See Carrington, New Order, supra note 84, at 162-63; Carrington, Substance and Procedure, supra note 10, at 282. Paul Carrington asserts that courts should engage in rulemaking because "complex technical issues of judicial practice cannot sustain attention through the political process. ... [I]f such issues are to receive thoughtful attention at all, such attention must come from outside the usual channels of democratic politics." Carrington, Substance and Procedure, supra note 10, at 282. Carrington develops a series of principles that he believes are furthered by judicial rulemaking: the depoliticization of judicial procedure, the de-
Rule 35, may itself be relatively insignificant when viewed independently, the potential exists for a series of changes with fundamental, although perhaps unintended, effects on the entire procedural system.

It should also be noted that the recent actions of Congress interjecting itself in the rulemaking process have primarily involved discrete procedural issues rather than issues that have a significant substantive effect.\(^9\) A principal reason for delegation of rulemaking power to the judicial branch is its relative expertise in procedural matters.\(^9\) Even the current opinion expressed in Congress urging a congressional role in rulemaking has focused upon the need for legislative input when substantive policies are at stake.\(^9\) Thus, Congress's rulemaking activity of the last decade raises concerns about the effectiveness of the delegation to the judicial branch of rulemaking authority and about the propriety of congressional involvement in procedural matters.

The 1988 revision of the Rules Enabling Act and its accompanying Report of the House Committee on the Judiciary calling for a circumscribed judicial role in rulemaking, coupled with Congress's involvement in the statutory amendments to the Rules in the 1980s, demonstrates a new activism on the part of Congress. Such activism by Congress estab-

\(^9\) An exception is the repeal of Rule 37(f) as part of Congress's effort to make the government as accountable as private parties in litigation. See supra text accompanying notes 66-68.

\(^9\) See Weinstein, supra note 31, at 94-95 (discussing the expertise of the courts in rulemaking and providing guidelines for congressional review that focus on rules with substantive effects); Jack H. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 673, 673-74 (1975) (describing Supreme Court's role in rulemaking as spectacular until it began to act simply as a conduit, and arguing that the legislative process is unsuited to procedural reform); Geoffrey C. Hazard, Jr., Undemocratic Legislation, 87 Yale L.J. 1284, 1292-94 (1978) (reviewing Weinstein, supra note 31, and comparing the success of judicial rulemaking with congressional mishandling of rulemaking in connection with the Federal Rules of Evidence).

\(^9\) This view has also been suggested by earlier commentators. See, e.g. Weinstein, supra note 31, at 94 (rules with substantive effect should be more carefully reviewed by Congress than purely procedural rules); Charles A. Wright, Book Review, 9 St. Mary's L.J. 652, 654 (1978) (reviewing Weinstein, supra note 31, and suggesting Congress rather than rulemakers propose Rules with "important side effects on substantive rights").
lishes the modern background for examination of the Court’s role in the promotion and interpretation of the Rules.

B. The Role of the Judicial Branch in the Promulgation of the Rules

Under the Rules Enabling Act, the Supreme Court itself has the power to prescribe the Federal Rules, subject to both the acquiescence of Congress and the other constraints discussed thus far. However, rather than trying to create Rules independently, the Court has always relied upon a series of Advisory Committees to draft proposed Rules. As part of its recent attention to rulemaking, Congress has enacted legislation allocating roles and responsibilities in the rulemaking process. Despite this effort to clarify roles in rulemaking, the Supreme Court’s actual role in rulemaking still involves some debate, both inside and outside of the Court.

Congress established the basic framework for the modern rulemaking process in 1958, when it imposed on the Judicial Conference the duty to study continuously the Federal Rules and to recommend proposals for addition and amendment to the Supreme Court. The Supreme Court retained responsibility for recommending proposed Rules to Congress and was not required to embrace the proposals of the Judicial Conference. Both the Court and Congress sought the continuous involvement of the Judicial Conference because of the need for constant

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97. The Judicial Conference is composed of the Chief Justice, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit who is chosen by the district and circuit judges in the circuit. 28 U.S.C. § 331 (1988). It must meet at least annually. Id.

Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

Id.
evaluation of the Rules and the inability of the Court to engage in effective, independent rulemaking.

In the 1988 Judicial Improvements and Access to Justice Act, Congress specified procedures for the Judicial Conference and other bodies involved in recommending and considering proposed rules. Many of these procedures had evolved since 1958, when the Judicial Conference undertook its duty to review and recommend proposed modifications of the Rules.

The legislation enacted in 1988 directs the Judicial Conference to appoint a standing committee on rules of practice, procedure, and evidence. This standing committee is required to review recommendations of all other committees on rules created by the Judicial Conference, including the Advisory Committee on Civil Rules. Thus, under the current framework, after the proposed changes in the Federal Rules are drafted by the Advisory Committee, they are reviewed first by the Standing Committee, then by the Judicial Conference, and finally by the Supreme Court before being submitted to Congress.

The 1988 legislation mandates that the committees appointed by the Judicial Conference open their meetings to the interested public and hold


104. 28 U.S.C. § 2073(b) (1988). Although just recently required pursuant to statute, this framework has been followed since 1958. See generally Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech. L. Rev. 323, 324-33 (1991) (describing the historical and current mechanisms for development of Rules). See also Carrington, Making Rules, supra note 63, at 2119-24 (describing in some detail how the modern Advisory Committee on Civil Rules operates). Baker is a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference, and Carrington is the Reporter for the Advisory Committee on the Civil Rules. The current framework involves the Standing Committee on Rules reviewing recommendations by the Civil Rules Committee. Recommendations of the Standing Committee are forwarded to the Judicial Conference and then to the Supreme Court. According to Carrington, “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.” Id. at 2122. In 1990, however, the Court did not transmit amendments to Rule 4 and other related provisions that had been suggested by the Judicial Conference. H.R. Rep. No. 322, 102d Cong., 1st Sess. 5 (1991). A letter from L. Ralph Mecham, Director, Administrative Office of the U.S. Courts, to Representative William J. Hughes suggested that the Court omitted proposed amendments after concern expressed from Department of State regarding extraterritorial aspects. Id. at 23-24.

them only after adequate notice.106 Notice and openness were added to insure widespread opportunity for public participation in the rulemaking process, which was perceived to have been lacking in the past.107 The statute also provides that every committee "shall consist of members of the bench and the professional bar, and trial and appellate judges."108 This is a somewhat awkwardly framed provision aimed at assuring broader participation in the rulemaking process.109

In order to facilitate clear and intelligent rule proposals, the legislation also mandates that any "body" making a recommendation for a proposed rule must supply both an explanation of the rule, and of the majority and minority views.110 This full reporting provision presumably


107. Some movement towards openness and more public participation had already been undertaken by the Judicial Conference before the 1988 legislation. See, e.g., H.R. REP. No. 889, 100th Cong., 2d Sess., pt. 1, at 27-28 (1988) (recognizing that the Judicial Conference had broadened participation in the rulemaking process but concluding that further action was required to assure openness); 1985 HOUSE REPORT, supra note 20, at 12 (acknowledging criticisms of the rulemaking process). The House Judiciary Committee vividly summarized its conception of the problems in the rulemaking process:

Critics have asserted that the process lacks openness, including inadequate notice about proposed rules, insufficient public participation, closed meetings, and inadequate access to decision-making documents. The rule-making process has also been criticized for many years for the absence of a published set of rules for the judiciary to follow. This deficiency was recently cured, but only several years after the need for such a change became obvious.

Id. These problems with the rulemaking framework had been observed in a number of important studies. See, e.g., WEINSTEN, supra note 31, at 106-115 (calling for a reexamination of the rulemaking process); Howard Lesnick, The Federal Rule-Making Process: A Time for Reexamination, 61 A.B.A. J. 579, 580 (1975) (identifying four areas of the rulemaking process that require reexamination).


109. See, e.g., 134 CONG. REC. S16,296 (daily ed. Oct. 14, 1988) (statement of Senator Heflin); 1985 HOUSE REPORT, supra note 20, at 4 (stating that "[t]he purpose of the legislation is to revise the process by which rules of procedure used in federal judicial proceedings, and the Federal Rules of Evidence, become effective, to the end that the rulemaking process provides for greater participation by all segments of the bench and bar"); id. at 24 (describing need for representation of various groups and interests in committees, but deciding not to impose specific requirements for committee composition and stating that the House Judiciary Committee "expects that the Conference will act promptly to rectify the concerns about representativeness of the committees"). These reforms had also been advocated by many prior proponents of reform. See, e.g., Lesnick, supra note 107, at 581-82 (calling for a composition of advisory committees that is more representative). But see Hazard, supra note 94, at 1291-92 (criticizing arguments in favor of representation of diverse groups in rulemaking process).

110. 28 U.S.C. § 2073(d) (1988). Specifically this section requires that, "[i]n making a
applies not only to the committees appointed by the Judicial Conference, but also to the Judicial Conference and the Supreme Court.\footnote{111}

Requiring open meetings of the committees and full explanation of recommendations and minority views at each stage of rulemaking are relatively new practices that respond to the problems associated with the relatively closed past practices. These reforms will help to assure full discussion and development of proposed rule changes before they are presented to the Supreme Court.\footnote{112} The provisions concerning open meetings do not apply to either the Judicial Conference or the Supreme Court, which remain free to decide how open to make their meetings.\footnote{113}

This leads to the significant question of the Supreme Court’s actual role in the rulemaking process. Direct knowledge of the Supreme Court’s role can come only through specific comments from the Supreme Court Justices themselves. However, their deliberations on proposed rule changes are secret.\footnote{114} The only specific information comes from individual Justices through scattered statements in United States Reports when the Supreme Court transmits its proposals to Congress. These spo-
radic comments suggest that the role of most Supreme Court Justices is essentially supervisory, with the Court only occasionally exercising a veto over submissions from the Judicial Conference.\textsuperscript{115}

From the beginning, individual Justices have dissented from proposed Rules transmitted by the Court to Congress. The initial set of Rules was transmitted to Congress with the notation, "Mr. Justice Brandeis states that he does not approve of the adoption of the Rules,"\textsuperscript{116} but without explanation of his rationale. In subsequent years proposed amendments to the Rules were sometimes transmitted to Congress without any dissent mentioned.\textsuperscript{117} At other times, certain individual Justices simply noted their disapproval.\textsuperscript{118} When particular Justices have expressed their rationales for dissenting, their commentaries have offered

\textsuperscript{115} See Carrington, Making Rules, supra note 63, at 2122 (stating that the Court has promulgated every rule change recommended to it by the Civil Rules Committee and the Judicial Conference). This is no longer true, since the Court did not forward to Congress proposed amendments to Rule 4 in 1990. See supra note 104. See also Weinstein, supra note 31, at 100 (stating that the Court's amendments to rules have been "minuscule" but noting that the Court did not forward to Congress the Advisory Committee proposal regarding the work-product rule proposed in 1946; rather, it handled the issues through Hickman v. Taylor, 329 U.S. 495 (1947)). But see Clark, supra note 92, at 252 (stating that the record of the Court in rulemaking "is one of careful and responsible supervision, . . . a supervision which would become active when necessary, but would in general leave details to the 'informed judgment' of a carefully chosen Advisory Committee").

\textsuperscript{116} 302 U.S. 783 (1937).


an insight into the Court's process for approving amendments to the
Rules and into fundamental issues about procedural rulemaking.

The first reasoned dissent from the Court's proposed Rules came in
1961, when both Justices Black and Douglas stated that the matters in-
volved should be decided by Congress as a matter of legislative policy. Justice Black generally refused to approve the proposed Rules because he believed "that it would be better for Congress to act directly by legisla-
tion on the matters treated by the Rules." Justice Douglas urged the
rejection of a proposed Rule concerning the burden of establishing the
continuation of a controversy with a successor of a governmental officer
originally sued. In opposition, Douglas stated that, "language so care-
fully tailored by Congress is now rejected by the professional group who
constitute our advisors in these matters. I do not think we should allow
a known and established congressional policy to be so readily
abrogated."

In 1963, Justices Black and Douglas also objected to the proposed
amendment of more than a dozen Rules, arguing that many of the pro-
posals "determine matters so substantially affecting the rights of litigants
in law suits that in practical effect they are the equivalent of new legisla-
tion" and that both the Constitution and the Rules Enabling Act require
Congress to enact such legislation. The two Justices were particularly
concerned that the restrictions of the Rules Enabling Act were not satis-
fied and noted that changes in the directed verdict provisions of Rule 50
encroached upon the right to jury trial. They advocated repeal of
Rule 49 special verdicts because they interfered with the constitutional
power of juries. They also urged major amendment to Rule 41, concern-
ing dismissal of actions, to protect plaintiffs against their attorneys' mis-
takes. Finally, they urged that the amendment of Rule 4 that allowed
service outside the state by garnishment or attachment when permitted

119. Order of Apr. 17, 1961, 368 U.S. 1012 (1961) (amending Rules relating to substitution of parties in suits against public officials, entry of judgment in suits involving multiple claims or multiple parties, and stays of judgment as to multiple claims or multiple parties).

120. Id.

121. Id. at 1014. Justice Douglas relied on particular statutory provisions and Committee Reports he felt demonstrated the appropriateness of having Congress, rather than the Court, amend Rule 25. Id. at 1013-14. He described the other proposed changes as "picayune and harmless, yet hardly worth making apart from any overall revision of the Rules." Id. at 1012.


123. Id. at 866-67. Similarly, they objected to the amendment of Rule 56(e) because it made it more difficult to protect against summary judgment, thereby letting judges rather than juries resolve more cases. Id. at 867.

124. Id. at 868.
by state law was unjustified, unwarranted, and inappropriate absent a congressional finding.\textsuperscript{125}

Despite their objections to the proposed Rules, Justices Black and Douglas simply concluded that the Rules Enabling Act should be amended to place the duty of recommending Rule changes on the Judicial Conference rather than on the Court.\textsuperscript{126} This recommendation was odd, in that it did not address the fundamental nature of the two Justices’ objections to the specific Rules proposed. Instead, the Justices commended the Judicial Conference and its Committees for their work in preparing amendments of the Rules and noted that usually the Court approved the work of the Judicial Conference and only occasionally vetoed proposals.\textsuperscript{127} Thus, as described by the two Justices, the Court’s involvement in the drafting process was nonexistent.\textsuperscript{128}

In subsequent years, Justices Douglas and Black echoed their concerns that proposed amendments to the Federal Rules unconstitutionally involved the Court in lawmaking. They also raised objections to particular proposed amendments on various grounds.\textsuperscript{129} For example, in 1966 Justice Black objected to Rules amendments that gave district judges

\begin{itemize}
  \item \textsuperscript{125} Id. at 869.
  \item \textsuperscript{126} Id. at 869-70.
  \item \textsuperscript{127} Justices Black and Douglas wrote:
    \begin{quote}
      The present rules . . . are not prepared by us but by Committees of the Judicial Conference designated by the Chief Justice, and before coming to us they are approved by the Judicial Conference . . . . It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid.
    \end{quote}
  \item \textsuperscript{128} Id. at 870. This is really the first public description of the Court’s involvement in the modern rulemaking process.
  \item \textsuperscript{129} But see \textbf{4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE} § 1004, at 25-26 (2d ed. 1987) (“Although for obvious reasons of necessity the Court has left much of the actual work of drafting and research to the Advisory Committee, it has provided a continuous leadership and supervision that too frequently has been misunderstood and minimized.”).
\end{itemize}
greater power to use pretrial procedures to dismiss cases on the ground that such dismissals could impair due process protections by not providing opportunities for full trials on the merits. Justice Black's dissent included a memorandum he had distributed to the other Justices in an effort to encourage their examination of the proposals before transmittal to the Congress. At the same time, Justice Douglas reiterated his belief that the Judicial Conference rather than the Court should promulgate the Rules and indicated his dissatisfaction with the Court's role as a mere conduit. In 1972 Justice Douglas objected to the submission of the proposed Federal Rules of Evidence on the grounds that they were not within the scope of the Rules Enabling Act's authorization of rules of practice and procedure. Again, Douglas felt it was improper for the Court to act simply as a conduit for the rules.

Since the departure of Justices Black and Douglas from the Court, statements dissenting from proposed Rules have been filed on two occasions. The first of these two dissents was based on grounds very different from those of Black and Douglas. In 1980 Justice Powell, joined by Justices Stewart and Rehnquist, objected to proposed amendments of the rules governing discovery on the grounds that the proposed changes were inadequate to deal with serious problems of discovery abuse. These Justices feared that if the proposed amendments were accepted by Congress, there would be no further or effective reform of discovery for another decade. They recommended rejection of the amendments and a reexamination of the entire discovery process by the Judicial Conference. In passing, these three Justices mentioned the formalistic role of the Court in developing the Rules, almost inviting Congress not to defer to the Court.

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130. 383 U.S. 1031, 1034 (1966). He also objected to changes in the Rules on class actions because of the great discretion they gave to trial judges, and to Rule 41 on the grounds that dismissals should not operate as an adjudication on the merits. He suggested that an additional amendment to Rule 41 should be included to protect parties from their counsel's mistakes. Id. at 1032-37.
131. Id. at 1035-37.
132. Id. at 1089-90. Speaking of proposals to amend the Federal Rules of Criminal Procedure, Justice Douglas wrote, "I cannot be only a conduit. I think that placing our imprimatur on the amendments to the Rules entails a large degree of responsibility of judgment concerning them." Id. at 1090.
135. Id. at 997-1001.
136. Justice Powell wrote in a footnote:

This Court's role in the rulemaking process is largely formalistic. Standing and advisory committees of the Judicial Conference make the initial studies, invite comments on their drafts, and prepare the Rules. Both the Judicial Conference and this Court
Most recently, in April 1993, two major statements were filed regarding proposed amendments to the Federal Rules that were being transmitted. The statement of Justice White explored the history of the Court’s involvement in rulemaking and concluded that the role of the Court was quite limited. The dissenting statement of Justice Scalia, joined by Justice Thomas and by Justice Souter in part, objected to amendments to Rule 11 and to the discovery rules. Furthermore, the Chief Justice’s transmittal letter suggested a limited rulemaking role for the Court.

Justice White’s statement, made on the eve of his retirement after thirty-one years on the Court, agreed with the assessment that the Court’s role in rulemaking is limited. Specifically, he wrote:

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necessarily rely upon the careful work of these committees. Congress should bear in mind that our approval of proposed Rules is more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves.

Id. at 997-98 n.1. He then cited several of the dissenting opinions of Justices Black and Douglas discussed above. See supra notes 119-131.


140. Chief Justice Rehnquist’s transmittal letter to the Speaker of the House stated: “While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.” 146 F.R.D. 403 (1993) (letter from Chief Justice William H. Rehnquist to Speaker of the House Thomas S. Foley, Apr. 22, 1993).

141. Justice White noted that the Court usually transmitted the proposals submitted by the Judicial Conference without dissent (aside from Justices Black and Douglas). Id. at 4391. He expressed agreement with the suggestion of Justices Black and Douglas that the Court should be relieved of rulemaking function. Id. Acknowledging that Congress had continued the Court’s role in rulemaking, he wrote:

But most of us concluded that for at least two reasons Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference. First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some us, [sic] and I remain of this view, were quite sure that the Judicial Conference and its committees, “being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we.” 383 U.S. 1089, 1090 (1966) (Douglas, J., dissenting).

Id. As a result, he determined that, “[a]t the very least, we should not perform a de novo review and should defer to the Judicial Conference and its Committees as long as they have some rational basis for their proposed amendments.” Id. at 4392.
As I have seen the Court’s role over the years, it is to transmit the Judicial Conference’s recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. . . . This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had serious questions about the wisdom of particular proposals to amend certain rules.\textsuperscript{142}

These proposed rules met that test, but he concluded with the warning not to assume that the Court had more than a limited role in transmitting proposed rule amendments.\textsuperscript{143}

Justice Scalia, writing a dissenting statement objecting to the content of the proposed changes to Rule 11 and to the discovery rules, took a completely different approach than Justice White. With respect to Rule 11, he believed:

The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day “safe harbor” within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.\textsuperscript{144}

According to Justice Scalia, the proposals for discovery reform, particularly the requirement of a duty to disclose relevant information to opposing counsel before any request, will increase the discovery burdens on parties and judges, and will conflict with the lawyer’s role in an adversary system.\textsuperscript{145} Moreover, the proposal was hotly criticized, and change should await the results of ongoing experimentation.\textsuperscript{146} Justice Scalia believed that these were “not matters of expert detail, but rise to the level of principle and purpose. . . . It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.”\textsuperscript{147} Thus Justice Scalia’s dissent reflects a willingness to be more active in rulemaking, or at least in the evaluation of rulemaking, than Justice White or perhaps the other Justices.

\textsuperscript{142} Id.
\textsuperscript{143} Id. See also supra note 140 (Chief Justice’s transmittal letter stating Court’s limited role).
\textsuperscript{144} Dissenting Statement of Justice Scalia, 61 U.S.L.W. 4392 (Apr. 27, 1993). He explained at some length the basis for his objections, concluding that the proposed changes “gutted” an effective Rule. Id. at 4393. Justice Scalia did not object, however, to the amendment making law firms liable for their attorney’s conduct, id. at 4393 n.1, despite the fact that this provision overturned his decision in Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989). See infra notes 168-176.
\textsuperscript{145} Dissenting statement of Justice Scalia, 61 U.S.L.W. at 4393.
\textsuperscript{146} Id. at 4393-94.
\textsuperscript{147} Id. at 4394.
Despite the arguments by Justices Black and Douglas, now echoed by Justice White, that the Supreme Court should not be engaged in the rulemaking process and that the Supreme Court’s role as a conduit is inappropriate, the basic framework requiring proposed rules to travel from committees to the Judicial Conference, to the Supreme Court, and finally to Congress has been retained. In a sense, the limited role of the Court reflects the reality of the Court’s workload.\textsuperscript{148} Significant additional work on the drafting of proposed rules is not likely to be embraced by the current Justices, who have occasionally sought measures to reduce their workload in other areas.\textsuperscript{149} Although respected commentators have long advocated alternatives to the Court’s current limited rulemaking role,\textsuperscript{150} the continuation of this limited role reflects a certain reality. Even though the role of the Court is most frequently that of a conduit, it does afford the Court the opportunity for occasional direct participation in the rulemaking process. Moreover, the current system preserves the perception that the highest component of the third coequal branch has reviewed the proposed changes and supports (or at least does not object to) their adoption.\textsuperscript{151}

Despite the Court’s limited rulemaking participation, a possible conflict exists between the Court’s role as rulemaker and as adjudicator of the validity of Rules.\textsuperscript{152} This dilemma arises because the Court may be

\textsuperscript{148} See, e.g., Statement of Justice White, 61 U.S.L.W. 4390 (Apr. 27, 1993) (stating that Court could not be substantially more active in rulemaking since it “would take an inordinate amount of time” and “would be inconsistent with the demands of a growing caseload”); BROWN, supra note 68, at vi (quoting statement of Chief Justice Burger questioning the ability of the Court to study closely proposed Rules and wondering whether Court’s role in rulemaking was meaningful); WEINSTEIN, supra note 31, at 192 n.382 (suggesting that the Court be more involved in rulemaking is “unrealistic in view of the Court’s heavy workload”). \textit{But see} Friedenthal, supra note 94, at 685-86 (urging that the Court could and should take a more active role in the rulemaking process and should not merely act as a conduit).


\textsuperscript{150} See, e.g., WEINSTEIN, supra note 31, at 106-115 (recommending that the Judicial Conference review proposals of the advisory committees and forward them to Congress, bypassing the Court, and that Congress confine itself to significant policy issues rather than details of rulemaking). An alternative to having the Judicial Conference promulgate the Rules would be to create an independent commission, comprised of members selected by Congress and the judiciary, to engage in rulemaking. \textit{See, e.g.}, Lesnick, supra note 107, at 582-83. \textit{But see} Clark, supra note 92, at 256-57 (criticizing any rulemaking body other than Court and objecting particularly to the Judicial Conference as ultimate rulemaker).

\textsuperscript{151} \textit{Cf.} Clark, supra note 92, at 257-58 (supporting the role of the Judicial Conference and the Supreme Court in adopting rules); Lesnick, supra note 107, at 582-83 (advocating delegation of rulemaking to an independent commission appointed by Congress, with leaders chosen from both the legislative and judicial branches).

\textsuperscript{152} The potential for conflict between these roles was perceived by Justices Black and Douglas in the context of the Federal Rules of Civil Procedure and by Justice Frankfurter in
required in the context of subsequent litigation to consider the validity of a Rule that it had previously approved and submitted to Congress. This problem was glossed over by the Court in Hanna, but it has troubled commentators for years. The problems associated with the Court's dual roles were presented to Congress during the course of the debate on the revision of the Rules Enabling Act. Congress, however, did not deem them compelling enough to warrant removing the Court from its rulemaking role.

Thus, the modern role of the judicial branch in the promulgation of the Rules remains substantially formalistic. The Court reviews and approves the Rules before their transmission to Congress, but it does not become deeply involved in the drafting process. By requiring a statement of minority as well as majority views and a statement of changes made during the course of the rulemaking process, the 1988 legislation may yield more detailed explanations by the Court of any changes it makes to the recommendations of the Judicial Conference. Possibly, these new reporting requirements will induce more activism by the Court in the rulemaking process. However, the overall workload of the Court makes this possibility appear slim.

the context of the Criminal Procedure Rules. See 323 U.S. 821, 821-23 (1944) (Justice Frankfurter dissenting from the Order of Dec. 26, 1944 regarding criminal rules amendments because of the danger of prejudging issues that might later arise in litigation); supra notes 119-131.

153. Hanna v. Plumer, 380 U.S. 460, 471 (1965) (stating that promulgation of a Rule is a "prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions").

154. See generally BROWN, supra note 68, at 75-78. See also WEINSTEIN, supra note 31, at 98-99; Lesnick, supra note 107, at 582. But see Hazard, supra note 94, at 1288-89 (contending that it is not different from the position of the Court whenever it fashions common law rules, and also arguing that to the extent that the Court acts as a conduit, it has not lost its objectivity in later determinations of rule validity).

C. Conclusions on Rulemaking

The relationship between the Court and Congress in the rulemaking process is undergoing some transition, the full extent of which remains unknown and unpredictable. Congress has recently expressed, at least at the committee level, a desire to restrict the scope of the Court's rulemaking to purely procedural topics, somewhat more constricted than the scope of possible congressional authority. On sporadic occasions, Congress has also become more active in the rulemaking process. However, Congress has generally retained the framework of the original Rules Enabling Act and remains committed to delegating basic rulemaking functions to the Court.

The rulemaking process has been opened up, with requirements of open committee meetings and reporting by rulemaking bodies of the majority and minority rationales. These changes will result in a more conscious consideration of the limitations on rulemaking inherent in the Rules Enabling Act and of the competing factors relevant to the selection of a particular Rule.

The modern rulemaking framework will, nonetheless, still produce Rules that require interpretation in litigated cases. Courts will have to confront ambiguities in particular Rules and situations in which the arguably plain language of a Rule may produce unforeseen or undesirable results if the Rule is applied literally. Thus, the Court will continue to face, notwithstanding the modern rulemaking framework, questions about appropriate standards for interpretation of Rules, which are analyzed in Part II of this Article.

II. The Court's Recent Approach to Interpretation of Federal Rules in Litigation: The Emphasis on "Plain Meaning"

In the last decade, the Court has increasingly relied on a "plain meaning" analysis to dispose of difficult questions involving the interpretation and application of various Federal Rules. The cases using plain meaning analysis concern diverse provisions of Federal Rules, ranging from technical and relatively mundane issues to significant policy determinations. This application of plain meaning analysis to the Federal Rules parallels the renaissance of the doctrine in the statutory interpretation context, which has generated significant, mostly critical commentary.156

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156. See, e.g., infra note 167.
In the statutory interpretation arena, the increasing focus on plain meaning analysis is most commonly attributed to Justice Scalia.\(^{157}\) However, it has also been embraced to varying degrees by other Justices,\(^{158}\) and draws from a rich history.\(^{159}\) In essence, the adherents of the plain meaning doctrine emphasize that it is the duty of the courts to interpret the text of statutes; when the text is clear, there is no legitimate reason for the courts to inquire into legislative intent, to look at legislative history, or to consider whether the plain meaning of the statute furthers the legislature's policy goals. Rather, the courts must only apply the plain meaning of the statute.\(^{160}\) This approach is also called a textualist approach,\(^{161}\) or "the new textualism."\(^{162}\)

Plain meaning adherents often find that statutory language is clear, even when others argue that the same statutory language is ambiguous. Thus, they are seldom confronted with an opportunity to explore legisla-

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158. See Randolph N. Jonakait, The Supreme Court, Plain Meaning, and the Changed Rules of Evidence, 68 TEX. L. REV. 745, 761-62 (1990) (concluding that all nine Justices apply plain meaning standard without consideration of the Rule's purpose when interpreting Federal Rules of Evidence); Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 SUP. CT. REV. 231, 246, 249 (arguing that plain meaning analysis is not limited to Justice Scalia, but is applied by every member of the Court).


160. See, e.g., West Virginia Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138, 1147 (1991) ("The best evidence of [congressional] purpose is the statutory text, . . . [which cannot] be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."). This opinion is significant because it was a majority opinion written by Justice Scalia and joined by all of the Justices except Justices Stevens, Marshall, and Blackmun. Justice Scalia has expressed similar views in a number of individual opinions. See, e.g., Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).


tive intent or legislative history. However, in the rare case when a literal interpretation would produce an absurd result, even Justice Scalia would not require blind adherence to the plain meaning and would permit consultation of legislative history to ascertain congressional intent. 163

Scholars have attempted to understand, justify, and criticize the development of the plain meaning doctrine during the last decade. Some justify the doctrine's growth by looking at the practicalities of the legislative process, specifically the suspected efforts of members of Congress and their staffs to manipulate the development of legislative history in order to affect subsequent judicial interpretation of statutory text. 164 This argument fails to recognize the equally likely possibility that other members of Congress will react to counteract an attempted distortion of legislative history. 165 Other scholars have described the development of the plain meaning doctrine as reflecting a search for a common ground among Justices with widely varying views. 166 Most, however, have decried the burgeoning emphasis on the plain meaning doctrine in the context of statutory interpretation. 167 These criticisms of the plain meaning

163. See Green v. Bock Laundry Mach. Co., 490 U.S. at 527 (Scalia, J., concurring). As others have noted, it is not clear why Justice Scalia would countenance the use of legislative history in these situations, in light of his other objections to the use of legislative history. See, e.g., Wald, Sizzling Sleeper, supra note 159, at 296-97.

164. See, e.g., Note, Rejecting Legislative History, supra note 41, at 1012 (stating that legislative history is distorted because of expectation of legislators that judges will rely on legislative history). But see Robert A. Katzmann, Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory, 80 Geo. L. J. 653, 668 (1992) (concluding that Congress and its Committees and staff are not aware of many court decisions and do not generally frame statutes or legislative history with a view toward influencing subsequent judicial interpretation).

165. An interesting illustration of efforts to use legislative history to explain contradictory views of a statute's meaning is found in the 1991 Civil Rights Act, discussed briefly in Note, Rejecting Legislative History, supra note 41, at 1018-19. This situation, however, is unusual and involves a highly political issue with great visibility. Congress could only attain agreement on certain provisions, and different groups in Congress were attempting to convey their views on highly charged topics through the development of legislative history. There is no basis for believing that this is the typical situation with respect to the development of legislative history.

166. Schauer, supra note 158, at 232, 254-56 (describing renaissance of plain meaning doctrine as "a solution to a coordination problem, substitut[ing] a second-best coordinating solution for a theoretically optimizing but likely self-defeating search for first-best solutions by multiple decisionmakers with different goals and different perspectives").

167. See generally Eskridge & Ferejohn, supra note 41, at 552-53 (criticizing textualists for depriving the courts of useful information regarding the meaning of statutes); Farber & Frickey, supra note 41, at 452-61 (rejecting the "four corners rule" as applied to the interpretation of ambiguous statutes); John Ferejohn & Barry Weingast, Limitation of Statutes: Strategic Statutory Interpretation, 80 Geo. L. J. 565, 572 (1992) (criticizing Justice Scalia for requiring so much specificity and foresight by Congress that it will be difficult to enact adequate legislation); McNollgast, supra note 39, at 738-40 (criticizing textualists for ignoring a vital source of information and evidence regarding interpretations that would have been chosen by the legisla-
doctrine are especially appropriate when interpretation of the Federal Rules is at issue.

Section A of this Part of the Article will explore the recent decisions of the Court applying the plain meaning analysis to cases involving interpretation of Rule 11, a rule involving significant policy issues. In Section B, these decisions will be compared with the Court's recent use of the plain meaning doctrine to analyze procedural statutes promulgated by Congress. Section C establishes that the plain meaning doctrine is particularly inappropriate in cases construing the Federal Rules. Finally, Section D offers an alternative method of analyzing the Federal Rules, which includes consideration by the Court of the purpose and policies of a Rule as well as its text, and applies this analysis to the Rule 11 cases.

A. The Recent Rule 11 Cases: Cases Involving Significant Policy Determinations

A series of cases decided between 1989 and 1991 involving Rule 11 illustrates the Court's development of a plain meaning approach in the context of a Rule fraught with major policy implications. In the first of these cases, Pavelic & LeFlore v. Marvel Entertainment Group,168 the Court addressed the question of whether the Rule's authorization of sanctions on the "person who signed" a pleading or other paper permitted a court to impose sanctions not only against the attorney who actually signed the paper but also against the attorney's law firm. Justice Scalia, joined by all members of the Court except for Justice Marshall,169 concluded that the plain meaning of the quoted language, in the context of the whole rule, meant sanctions could be imposed only against the individual signing the document.

Justice Scalia's plain meaning framework for analyzing the Federal Rules bears some scrutiny. First, he established as a touchstone that the
Federal Rules should be given their plain meaning. Analogizing to statutory interpretation principles, he stated that when the terms of a Federal Rule are unambiguous, "'judicial inquiry is complete.'"\(^{170}\) He conceded that the phrase "person who signed" is ambiguous when standing alone. He concluded, however, that when considered in the context of the entire Rule, the phrase permitting sanctions to be imposed on "the person who signed it, a represented party, or both"\(^{171}\) must be interpreted to permit sanctions only against the individual attorney who signed, and not the attorney's law firm. Justice Scalia wrote:

> In other contexts the phrase "the person who signed it" might bear the somewhat technical legal meaning of the natural or juridical person in whose name or on whose behalf the paper was signed; but in a paragraph beginning with a requirement of individual signature, and then proceeding to discuss the import and consequences of signature, we think references to the signer in the later portions must reasonably be thought to connote the individual signer mentioned at the outset. . . . Just as the requirement of signature is imposed upon the individual, we think the recited import and consequences of signature run *as to him.*\(^{172}\)

Justice Scalia then proceeded to reject the alternative interpretation of the Rule, which would have allowed sanctions against the attorney and the attorney's firm. He argued that such an interpretation conflicted with the Rule's specificity in permitting sanctions against either the attorney or the represented party or both.\(^{173}\)

Justice Scalia's opinion in *Pavelic & LeFlore* firmly rejects the possibility of a policy analysis informing the interpretation of the Rule's text. In a critical passage in the opinion, Justice Scalia wrote:

> Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it.\(^{174}\)

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\(^{170}\) 493 U.S. at 123 (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

\(^{171}\) FED. R. CIV. P. 11.

\(^{172}\) 493 U.S. at 124.

\(^{173}\) Although Justice Scalia was firmly committed to a pure textual analysis, he inserted several comments about the reasonableness of his interpretation and the import of the language of the Rule. His comments suggested that the Rule's meaning is perhaps not so plain or unambiguous as might otherwise appear. Thus, for example, in rejecting the argument that principles of partnership and agency might make all members of a partnership liable for the acts of a partner, Justice Scalia concluded that because the signature of an attorney constitutes a certification that the attorney has determined that the paper is well grounded in fact and law, and since this duty is nondelegable, "one may reasonably expect [the text of the Rule] to authorize punishment only of the party upon whom the duty is placed. We think that to be the fair import of the language here." *Id.* at 125.

\(^{174}\) *Id.* at 126.
This rejection of policy analysis is partially dependent on the perception that any other reading of the Rule's text would be terribly unnatural. Nevertheless, the message is clear: The Court's duty is to apply the text, regardless of the policy implications.

Despite Justice Scalia's rejection of policy analysis when the text is unambiguous, he nonetheless proceeded to provide a policy evaluation. He conceded that a sanction imposed upon the partnership would be more likely to secure the compensation for the innocent party. However, he emphasized that the purpose of this provision was to sanction the wrongdoer, not to reimburse the victim, and that "the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, non-delegable responsibility." Since in his view these purposes might be better achieved by sanctions against the individual attorney alone, a policy analysis would not "compel the conclusion that the Rule does not mean what it most naturally seems to say." Interestingly, Justice Scalia cited no sources whatsoever in his policy discussion. He was apparently content to speculate on the likely purposes of the Rule and on the likely effects of the varying interpretations. This made it much easier to reject totally the significance of policy analysis and to focus exclusively on the text of the Rule.

In many ways Justice Scalia's opinion is typical of plain meaning analysis. Although it does not entirely focus on the literal text of a single phrase in the Rule, it concludes that the text, when taken in the context of the whole Rule, has a plain meaning that can be interpreted without an evaluation of the purposes of the Rule. This conclusion is typical of a variety of cases using plain meaning analysis to interpret statutes.

Justice Marshall's approach to the issues in Pavelic contrasted sharply. Eschewing a simple plain meaning analysis, Justice Marshall first demonstrated that the Court's interpretation was not the only reasonable interpretation consistent with the text of the Rule. According to Justice Marshall, an interpretation of the Rule's phrase "the person who signed" that encompassed all persons, including legal entities such as partnerships, was just as plausible as the majority's restrictive inter-
pretation, and was consistent with the Rule’s broad purposes.\textsuperscript{180} Justice Marshall contended that the policy of Rule 11 permitting trial judges great flexibility in imposing sanctions for abusive filings would be best served by allowing the trial judge the opportunity to decide the appropriate sanctions in a given case. Unlike the majority, Justice Marshall referred several times to the Advisory Committee’s Notes on Rule 11 to bolster his conclusion that Rule 11 should be read to permit flexibility on the part of trial judges.\textsuperscript{181}

Later during the same Term, the Court considered three other aspects of Rule 11 in \textit{Cooter & Gell v. Hartmarx Corp.}\textsuperscript{182} Although superficially endorsing the plain meaning analysis of \textit{Pavelic & LeFlore}, the Court appeared to be much more sensitive to allowing policy and other considerations to inform its analysis. Justice O’Connor, writing for a unanimous Court on this issue, stated: “We . . . interpret Rule 11 according to its plain meaning, see \textit{Pavelic & LeFlore} . . . in light of the scope of the congressional authorization [in the Rules Enabling Act].”\textsuperscript{183} She then noted that the Rule must be interpreted in light of the problems encountered under the prior version of Rule 11 and in light of the central purpose of the 1983 version—to deter abusive filings in the district courts.\textsuperscript{184} As contrasted with the rigid textual analysis of Justice Scalia, this seems to be a much more comprehensive and flexible approach; yet none of the Justices, not even Justice Scalia, expressed difficulty in switching to the more reasoned tenor.

In resolving three separate issues concerning the application of Rule 11, the Court in \textit{Cooter & Gell} stressed the policy implications and purposes of the Rule. The Court concluded that a district court had the power to impose Rule 11 sanctions after the filing of a notice of voluntary dismissal under Rule 41(a)(1) because such power was consistent with the policies of both Rules to deter abuses of the judicial system.\textsuperscript{185} The

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\item \textsuperscript{180} \textit{Id.} at 127-29.
\item \textsuperscript{181} \textit{Id.} at 130.
\item \textsuperscript{182} 496 U.S. 384 (1990).
\item \textsuperscript{183} \textit{Id.} at 391 (emphasis added). All Justices joined the opinion, but Justice Stevens dissented with respect to one part of the opinion. No other Justices wrote separate opinions.
\item \textsuperscript{184} \textit{Id.} at 392-95.
\item \textsuperscript{185} The Court cited a variety of sources, including comments from members of the Advisory Committee, supporting its analysis of the purposes and policies behind Rules 11 and 41(a)(1). \textit{Id.} Interestingly, the Court noted Rule 11’s silence concerning a time frame for ordering sanctions and then cited Advisory Committee comments suggesting sanctions should usually quickly follow disposition. \textit{Id.} at 398. Nonetheless, the Court approved the imposition of sanctions in this case more than three years after the voluntary dismissal. \textit{Id.} at 409. The Court did not suggest any specific reason for making an exception to the usual desirability of timeliness in imposing sanctions. \textit{Id.} at 398.

Justice Stevens wrote a separate opinion dissenting with regard to this portion of the
Court also concluded that the terms of Rule 11, which state that a district judge "shall impose" sanctions for violations, were consistent with this interpretation. On the second issue, the Court again focused on the purposes and policies of Rule 11 to conclude that a reviewing court should apply an abuse of discretion standard of review for all aspects of a trial court's Rule 11 decision. Finally, the Court concluded, attorney's fees were not available under Rule 11 for the expenses of defending a Rule 11 award on appeal on the grounds that limiting the applicability of sanctions to proceedings in the district court was consistent with the language of Rule 11, the Advisory Committee Notes, the interplay between the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, and basic policy considerations.

The issue of whether the opinion in Cooter & Gell signalled that the Supreme Court was backing away from a strict plain meaning analysis in Rule 11 cases, or that there simply was not precise enough language to resolve the problems presented, was resolved the next Term in Business Guides, Inc. v. Chromatic Communications Enterprises, Inc. In a five to four opinion, the Court again endorsed a plain meaning analysis, referring numerous times to the plain meaning of the terms of Rule 11 and rejecting any alternative readings of the language as less plausible or less natural from a textual perspective. In an amazing shift of position, the majority opinion, with its emphasis on a plain meaning analysis, was written by Justice O'Connor. The dissent, written by Justice Kennedy, was joined by Justices Marshall, Stevens, and in part by Justice Scalia.

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186. Justice O'Connor wrote:

Rule 11's policy goals also support adopting an abuse-of-discretion standard. The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence . . . . In light of our consideration of the purposes and policies of Rule 11 . . . an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. Id.

187. Id. at 404-05.


189. For example, the majority opinion states, inter alia: "the meaning of the Rule seems plain," id. at 541; "[w]e find nothing in the full text of the Rule that detracts from the plain meaning of the relevant portion quoted initially," id. at 542; "[t]he plain language of the Rule again provides the answer," id. at 548; and "[g]iving the text its plain meaning . . . ," id. at 551.

190. Justice Scalia did not write separately to explain why he joined the dissent, or why he refrained from joining the portion of the dissent addressing rulemaking power concerns.
The reason for the shifting of coalitions is unexpressed and unclear.\(^\text{191}\)

The issue in *Business Guides* was whether Rule 11 requires represented parties who sign papers to satisfy an objective standard of reasonable inquiry into the factual basis for the papers. Rule 11 provides:

The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . .\(^\text{192}\)

According to Justice O'Connor, writing for five Justices, the meaning of this sentence is plain: Parties, as well as counsel, shall be sanctioned if they sign papers without first undertaking a reasonable inquiry into their factual and legal basis. These mandatory sanctions apply to signing parties even though parties who are represented by counsel are not required to sign most documents.\(^\text{193}\)

Justice O'Connor also applied plain meaning analysis to conclude that a single objective standard, requiring a reasonable inquiry into the facts and law before signing a paper, applies both to counsel and to parties.\(^\text{194}\) Rejecting an argument that a subjective bad faith standard was more appropriate for evaluating parties' conduct, Justice O'Connor wrote, "[T]his Court is not acting on a clean slate; our task is not to decide what the rule should be, but rather to determine what it is. Once we conclude that Rule 11 speaks to the matter at issue, our inquiry is complete."\(^\text{195}\)

Although Rule 11 had previously used a subjective stand-
dard, the 1983 amendments drafted by the Advisory Committee that expanded coverage to include parties also switched the standard to an objective one. According to Justice O'Connor, "[e]ven if we were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside of the rulemaking process. 'Our task is to apply the text, not to improve upon it.' "

Despite its reliance on plain meaning analysis, the majority suggested that policy considerations, if relevant, would support its conclusion. The majority believed the client should be required to make a reasonable inquiry into the facts because often the client would be better able than the attorney to investigate the facts. With respect to the party's duty to make a reasonable inquiry into the legal basis for a paper, Justice O'Connor noted that the Advisory Committee Notes establish a standard of "reasonableness under the circumstances." Thus, the Court held that the Rule provides the applicable test: All signers, whether attorneys or parties, should be held to an objective standard of reasonable inquiry that may vary with the circumstances.

The dissenting opinion, written by Justice Kennedy, focused on interpreting the key sentence of Rule 11 in the context of the entire Rule. Referring to the approach used in Pavelic & LeFlore, Justice Kennedy concluded the text of Rule 11 as a whole demonstrated that the drafters sought to mandate a reasonable inquiry into the basis of a paper only by those whose signatures were required by the Rule. His conclusion,

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196. Id.
197. Id. (quoting Pavelic & LeFlore, 493 U.S. at 126).
198. Id.
199. Id. at 551 (emphasis omitted) (quoting Notes of Advisory Committee on Rules-1983 Amendment, 28 U.S.C. app. at 576 (1988)).
200. Id. The majority also concluded that this component of Rule 11 did not violate the principles of the Rules Enabling Act. It noted that Rule 11 "is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental." Id. at 552. Moreover, the Rule did not create a federal common law of malicious prosecution, but was designed to deter abusive practice. Id. at 553.
201. Id. at 556 (Kennedy, J., dissenting). Justice Kennedy's textual analysis began by noting that the first two sentences of the Rule require the signature of the attorney for a represented party, or of an unrepresented party itself. Id. at 555. The consequences of these signatures are spelled out in the Rule; however, signatures of represented parties are not contemplated by the Rule. Id. Moreover, the last sentence of the Rule, authorizing sanctions on "the person who signed, a represented party, or both" suggested to Justice Kennedy that the person who signs is separate from the represented party. Id. at 556 (quoting Fed. R. Civ. P. 11).

Justice Kennedy also noted a conflict between the decision in Business Guides and that in Pavelic & LeFlore. Id. at 563. In Pavelic & LeFlore, the Court concluded that only the individual signer could be sanctioned, not the law firm of the attorney. Id. Yet in Business Guides,
based on the certification requirement, pertains to attorneys and unrepresented parties, but not to represented parties whose signatures are not required. Extending the Rule to impose a reasonable inquiry upon represented parties who have voluntarily signed papers constituted an unnecessary extension of the Rule, unsupported by either the purpose of the Rule or the Advisory Committee Notes. Moreover, the majority's imposition of duties on represented parties who voluntarily sign papers creates a trap for the ill-advised client.

Justice Kennedy's dissent also analyzed the implications of the majority's subjecting of verified complaints and affidavits to the requirements of Rule 11. Rule 11 itself abolished verification or affidavit requirements unless otherwise provided by rule or statute. Because wrongful verification could already be sanctioned in a prosecution for perjury, additional Rule 11 sanctions were unnecessary, and indeed were not addressed specifically in the Rule. The majority's inclusion of affidavits within the scope of Rule 11's language applying to "pleadings, motions, or other papers," would result in every represented party's affidavits requiring the signature of the attorney as well as the party. Moreover, by imposing Rule 11 on affidavits submitted in support of summary judgment motions, the majority rendered Rule 56(g) sanctions for bad faith affidavits irrelevant and unnecessary, even the Court concluded that the signature of an individual employee of the represented corporate client would result in the imposition of sanctions for violations of Rule 11 on the corporation itself. According to Justice Kennedy, "signer" should mean the individual signer, whether referring to the attorney or to the represented party. Not only do the Notes fail to specify that represented parties may be sanctioned for their own signatures, but they also imply that represented parties can be sanctioned when their attorneys violate the Rule. The Advisory Committee Notes were also interpreted by Justice Kennedy as supporting his conclusion that the reasonable inquiry requirement pertains only to counsel and unrepresented parties. Not only do the Notes fail to specify that represented parties may be sanctioned for their own signatures, but they also imply that represented parties can be sanctioned when their attorneys violate the Rule. (quoting Notes of Advisory Committee on Rules-1983 Amendment, 28 U.S.C. app. at 575-76 (1988)).

202. Id. at 555-58. Justice Kennedy believed that the purpose of the Rule was to control litigation abuse by counsel. Id. at 556. In 1983, unrepresented parties were brought within the ambit of the Rule to ensure that every paper filed in court was signed by someone having a duty of reasonable inquiry into the factual and legal basis for the paper. Id. at 558. These purposes would not require represented parties to be governed by the same certification requirements. Id.

203. Id. at 560.

204. Id. at 561-62.

205. Id. at 562.

206. Rule 56(g) requires that a party shown to have submitted affidavits in bad faith or solely for delay shall be ordered to pay reasonable expenses, including attorney's fees, incurred as a result by the other party. See infra text accompanying notes 284-285.

207. 498 U.S. at 562.
though one Rule should not be read to render another Rule superfluous.\textsuperscript{208}

Justice Kennedy also raised the federalism and separation of powers concerns of the Rules Enabling Act as prudential factors supporting his interpretation of the language of Rule 11. According to Justice Kennedy, the majority’s application of an objective standard of inquiry to a represented party has the effect of operating like an attorney fee-shifting provision that potentially deters meritorious suits.\textsuperscript{209} Such an effect should be left to Congress to legislate, rather than implied by the Court when the scope of the Rule is uncertain.\textsuperscript{210} Moreover, by going well beyond the state tort law causes of action of malicious prosecution and abuse of process, the majority’s interpretation implicates federalism concerns.\textsuperscript{211} Based on these concerns, Justice Kennedy concluded that the Rule and its objective standard of reasonable inquiry should not be read to apply to represented parties.\textsuperscript{212} Instead, those parties should simply be governed by “some subjective bad-faith standard.”\textsuperscript{213}

These three recent Rule 11 decisions demonstrate the pitfalls of plain meaning analysis and suggest some factors that the Court should employ to interpret the Rules. First, as the two primary dissents in \textit{Pavelic \& LeFlore} and \textit{Business Guides} indicate, the meaning of a particular provision in a Rule is often not plain. When there is legitimate disagreement about the meaning of a Rule provision, the proper resolution is not to assert that the meaning is plain or clear, but rather to analyze the implications of the different readings of the Rule’s language. In other words, it is not appropriate or adequate to focus exclusively on a plain meaning analysis, except in those rare cases in which the Rule’s text is unquestionably explicit with respect to the issue in question.

Second, recognizing the usual complexity of a Rule’s language, the Court must interpret the text of a Rule in light of its conformity with other aspects of the particular Rule, and the Rules as a whole. Even if a Rule is acknowledgedly explicit on a particular point, the Rule may still have to be read in light of the policies and purposes behind that particu-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.} at 566.
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textit{Id.} at 566. Justice Scalia did not join the portion of the dissenting opinion addressing federalism and separation of powers concerns. However, he joined the remainder of Justice Kennedy’s opinion and did not write separately.
\item \textsuperscript{212} \textit{Id.} at 570.
\item \textsuperscript{213} \textit{Id.} Justice Scalia joined in the portion of the dissent concluding that represented parties should not be sanctioned when they have acted in good faith. The dissenters also concluded that there was no attorney violation of Rule 11 in the case. \textit{Id.} at 569.
\end{enumerate}
\end{footnotesize}
lar Rule and the Federal Rules in general in order to avoid absurdities or to achieve just results. In undertaking this analysis, the Court should not shy away from its responsibility to develop a cohesive civil procedure framework in order to achieve the systemic goals of fair, efficient, and just litigation. Indeed, because the Court is interpreting Rules that are supposed to be at least in part its own work product, such interpretation does not implicate congressional powers in the way that statutory interpretation does. Except for instances in which it may be exceeding its power under the Rules Enabling Act, the Court has a clear duty to determine, within the framework of the particular Rule and the Federal Rules as a whole, how best to effectuate the various and sometimes competing policy interests involved.

B. Recent Analysis of Procedural Statutes by the Court Using Plain Meaning Doctrine

Why has the Court adopted a plain meaning analysis in Rule 11 and other Federal Rule cases? The most likely explanation is the Court has simply decided to apply the plain meaning analysis that it has developed in the context of statutory interpretation. This decision is misguided, unwarranted, and inappropriate.

The development of the plain meaning doctrine in the general statutory arena has been well documented and critiqued. Its recent use in the context of statutes with a procedural orientation is worth special attention here, for it is in this context that the doctrine is arguably most relevant to guide interpretation of the Federal Rules.

The dispute between plain meaning enthusiasts and those who would also consider policy issues in determining the contextual meaning of a statutory procedural provision is most graphically illustrated in the recent decision of *West Virginia University Hospitals, Inc. v. Casey*. The issue before the Court was whether the prevailing party in a

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215. See generally Eskridge, *New Textualism*, supra note 157; Schauer, *supra* note 158, at 238 (analyzing all cases involving statutory construction decided by Court in 1989 Term and concluding that there is "a consistent theme of taking the plain meaning of statutory terms as dispositive if clear, and primary even if not"); Wald, *Sizzling Sleeper*, *supra* note 159.

216. This Article focuses on the relatively recent cases. Other commentators have also noted the unwarranted application of the plain meaning doctrine to procedural statutes. See, e.g., Douglas A. Kahn, *The Supreme Court's Misconstruction of a Procedural Statute—A Critique of the Court's Decision in Badaracco*, 82 Mich. L. Rev. 461 (1983) (criticizing application of the plain meaning doctrine to resolve question of limitations period in a tax case).

§ 1983\textsuperscript{218} action could recover fees paid to experts hired to help prepare the lawsuit and to testify, pursuant to § 1988's allowance of an award of "a reasonable attorney's fee as part of the costs."\textsuperscript{219} A separate statutory provision authorized a judge to tax as costs certain items, including "[f]ees and disbursements for . . . witnesses,"\textsuperscript{220} and a further provision limited the amount of witness fees to $30 per day.\textsuperscript{221} Under a prior decision, \textit{Crawford Fitting Co. v. J.T. Gibbons, Inc.},\textsuperscript{222} the Court had held the latter two statutory provisions expressed Congress's intent to authorize a shift of litigation costs, and any further shifting would require "explicit statutory authority."\textsuperscript{223} In \textit{West Virginia Hospitals}, the six Justice majority opinion, written by Justice Scalia, found no authority in § 1988 to shift expert fees. Therefore, the Court limited the shifting to $30 per day, applicable only to experts who testified and only for their time testifying.\textsuperscript{224} According to the majority, § 1988 only authorized the shifting of attorney's fees, and should not be interpreted to include expert fees as part of attorney's fees.

Simply put, the majority opinion rejected all arguments in favor of reading the language "attorney's fees" in § 1988 to include expert fees. First, the majority catalogued a variety of fee-shifting statutes that referred separately to attorney's fees and to expert fees, and concluded this "record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost."\textsuperscript{225} Second, the majority could not find a single case in which a court had interpreted the term "attorney's fees" to include expert fees.\textsuperscript{226} Finally, in the most significant part of the opinion, Justice Scalia and the majority rejected the argument that the congressional purpose behind § 1988

\textsuperscript{221} 28 U.S.C. § 1821(b) (1988).
\textsuperscript{222} 482 U.S. 437 (1987).
\textsuperscript{223} \textit{Id.} at 439. \textit{Crawford Fitting} involved the question of whether a prevailing party could obtain more than the $30 fee for amounts paid to its own expert witnesses. This issue is arguably distinguishable from the issue in \textit{West Virginia Univ. Hosps.}, since explicit statutory language limited witness fees to $30 per day in \textit{Crawford Fitting}. Of course, one could wonder whether Congress intended the $30 limit to pertain to expert witnesses, who are known generally to charge more than $30 per hour.
\textsuperscript{224} 111 S. Ct. at 1148.
\textsuperscript{225} \textit{Id.} at 1141. The Court remarked that if attorney's fees were held to include expert fees, "dozens of statutes referring to the two separately become an inexplicable exercise in redundancy." \textit{Id.} at 1143.
\textsuperscript{226} \textit{Id.} at 1143-46. The majority acknowledged that in some cases courts had allowed shifting of expert fees, but concluded that this was a separate exercise of those courts' equitable powers, not a conclusion by those courts that attorney's fees included expert fees. \textit{Id.}
should be considered in determining the meaning of the term "attorney's fees" within the statute. Justice Scalia wrote:

The best evidence of [congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. Congress could easily have shifted "attorney's fees and expert witness fees," or "reasonable litigation expenses," as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction.227

Justice Scalia also addressed what the Court's proper role would be if subsequent legislation were to include expert fees explicitly. Expanding on Justice Brandeis' admonition that "[t]o supply omissions transcends the judicial function,"228 Justice Scalia concluded that it was inappropriate for the Court to usurp Congress's power by determining that Congress simply forgot to provide explicitly for expert fees when it enacted § 1988.229

The primary dissent, eschewing the literalist approach, also drew upon the words of a great judge for guidance in interpreting the statute. Justice Stevens quoted Judge Learned Hand's observations:

All [legislators] have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose.230

Evidence of the purposes of Congress—to preserve access to the courts, to encourage public interest litigation, and to make the prevailing party whole—as well as examination of the historical context, led the dissent to conclude that the prevailing party should be fully compensated for expert fees.

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227. Id. at 1147 (citations omitted).
228. Id. at 1148 (quoting Iselin v. United States, 270 U.S. 245, 251 (1926)).
229. Id.
230. Id. at 1155 (quoting Learned Hand, How Far Is a Judge Free in Rendering a Decision?, in THE SPIRIT OF LIBERTY 103, 106 (Irving Dilliard ed., 1952)). Justice Stevens' opinion was joined by Justices Marshall and Blackmun. Justice Marshall also wrote a separate dissenting opinion, in which he observed that the literalist approach of the majority usurped congressional power when it failed to implement congressional intent. 111 S. Ct. at 1148-49 (Marshall, J., dissenting).
fees under a proper interpretation of § 1988. The dissent analogized a literalist interpretation here to situations in which Congress has subsequently acted to overturn the Court's interpretation.

Other 1991 decisions also relied on plain meaning doctrine to varying degrees when analyzing procedural statutes. One of these, Melkonyan v. Sullivan, was written by Justice O'Connor for a unanimous Court. Melkonyan concerned the Equal Access to Justice Act, which permits an award of attorney's fees in a civil action to a party who prevails against the United States in certain circumstances if the prevailing party submits an application for fees "within thirty days of final judgment in the action." The precise question in the case was whether an administrative decision issued upon remand from the district court is a final judgment within the meaning of the statute. The statute describes a final judgment as one "that is final and not appealable." The Court held that the requirement of filing within thirty days of "final judgment in the action" plainly refers back to the civil action ... in any court in (d)(1)(A). The plain language makes clear that a final judgment under § 2412 can only be the judgment of a court of law. The Court termed this the most natural reading, and viewed this as an "unambiguous requirement of judgment by a court." With respect to another issue con-
cerning the scope of the district court's remand powers, the Melkonyan Court also employed a plain meaning analysis, bolstered by reference to the legislative history.\textsuperscript{238}

Despite the Court's frequent use of plain meaning analysis in 1991, two unanimous 1991 decisions considered matters beyond plain meaning to interpret procedurally oriented statutes. One case, \textit{International Prim-}
mate Protection League \textit{v. Administrators of Tulane Educational Fund},\textsuperscript{239} concerned whether a federal agency could remove a case to federal court pursuant to a federal statute that permits removal by a defendant who is

\begin{quote}
[a]ny officer of the United States or any agency thereof, or person act-
ing under him, for any act under color of such office or on account of
any right, title or authority claimed under any Act of Congress for the
apprehension or punishment of criminals or the collection of the
revenue.\textsuperscript{240}
\end{quote}

In a unanimous opinion by Justice Marshall,\textsuperscript{241} the Court concluded only an officer and not an agency of the United States could remove a case to federal court.\textsuperscript{242} The Court essentially relied on the language, structure, and grammar of the statute to reach this conclusion. Believing the statutory language excluded agencies from the scope of the removal power, the Court also analyzed the punctuation of the statute, subsequent phrasology in the statute, the legislative history, and the statute's context to reach its conclusion.\textsuperscript{243}

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\item 238. \textit{Id.} at 2164. The Court concluded that Congress intended to limit remands to the two situations specified in the statute. The Court based its conclusion on the "plain language of § 405(g) . . . supported by the legislative history," \textit{id.}, and stated that the structure of the statute and the legislative history show "Congress' clear intent to limit courts to two kinds of remands in these cases." \textit{Id.} at 2165.
\item 239. 111 S. Ct. 1700 (1991).
\item 241. Justice Scalia did not participate.
\item 242. 111 S. Ct. at 1705.
\item 243. Justice Marshall began with a narrow focus on the statutory language and then broadened his analysis. He wrote:
\begin{quote}
The starting point in every case involving construction of a statute is the language itself. . . . We continue to recognize that context is important in the quest for [a] word's meaning . . . and that [s]tatutory construction is a holistic endeavor. We find that, when construed in the relevant context, the first clause of § 1442(a)(1) grants removal power to only one grammatical subject, ["a]ny officer," which is then modified by a compound prepositional phrase: "of the United States or of any agency thereof."
\end{quote}
\begin{quote}
Several features of § 1442(a)(1)'s grammar and language support this reading. The first is the statute's punctuation . . . . Secondly, the language that follows ["a]ny officer of the United States or any agency thereof" confirms our reading of that clause.
\end{quote}
\end{itemize}
\end{footnotesize}
In *Kay v. Ehrler*, the Court construed a procedural statute without relying on the plain meaning doctrine. *Kay* addressed whether the Civil Rights Attorney's Fees Awards Act of 1976 authorized an award of attorney's fees to an attorney who represented himself in a successful civil rights case. The relevant statute was silent with regard to this question, and the Court viewed the legislative history as unclear. The Court was therefore forced to consider policy issues, but did so tersely, concluding that the purpose of Congress was to ensure effective prosecution of meritorious civil rights claims and that this could best be accomplished by awarding attorney's fees only to independent counsel and not to pro se litigants who happen to be attorneys. Since the statute was silent on this issue, plain meaning analysis could not be used.

The foregoing two cases demonstrate that the Court may occasionally look beyond a close textual interpretation of procedural statutes. However, in the arena of procedural statutes, it is in general fair to conclude that the Court has warmly embraced plain meaning analysis. Just-
Justice Scalia’s opinion for the Court in *West Virginia University Hospitals* demonstrates the powerful attraction of the plain meaning analysis to members of the current Court in the context of procedural statutes.

C. Rejection of Dependence on Plain Meaning Analysis for Interpretation of Federal Rules

As we have seen, the plain meaning approach to interpreting statutes, endorsed by Justice Scalia and applied recently by a shifting majority of the Court, requires narrow focus on a statute’s text. It rejects inquiry into legislative intent and legislative history, in part because legislative intent is difficult if not impossible to ascertain, and in part because legislative history is subject to manipulation by both members of Congress and committee staffs. Justice Scalia’s argument also rests on the constitutional requirements that Congress may act only by passing statutes, and that neither legislative intent nor legislative history constitutes a statute under Article I.

This plain meaning or textualist approach fails to recognize that legislative intent and legislative history can be important resources for understanding what Congress meant in its enactment of particular statutory language. In most instances, the meaning of a statute must be derived

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249. *Cf.* Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 833 (1991) (stating that Justices Scalia and Kennedy are firmly attached to the plain meaning doctrine and are often joined by Justice White, Justice O’Connor, and Chief Justice Rehnquist, but concluding that it is too early to determine whether this will be the dominant analysis); Schauer, supra note 158, at 248-49 (arguing that all Justices view plain meaning analysis as a strong factor in their decisional process, especially in duller, less policy charged cases).


251. *See, e.g.*, Stock, supra note 41 (describing and criticizing Justice Scalia’s textualist approach toward statutory interpretation); *see also* Note, *Rejecting Legislative History*, supra note 41 (discussing issue of manipulability of committees).


253. *See generally* Farber & Frickey, supra note 41, at 448-52 (criticizing Justice Scalia’s refusal to consider legislative intent and legislative history, arguing that public choice theory warrants a flexible approach to statutory construction which includes evaluation of legislative
not only from its text, but also from a more general context. This more general context should include consideration of the legislative history (including committee reports and other expressions of legislative intent), the relationship of the provision to the statute as a whole and to other statutes, and the policy and purpose furthered by the statute. The plain meaning doctrine focuses narrowly on the text of a provision and is guided more by general dictionaries than by legislative history and intent. This focus results in an unduly crabbed approach to interpreting statutes that ignores much of the relevant and rich context in which they were enacted. 254

The asserted justifications of Justice Scalia and others for the textualist focus in interpreting statutes become less persuasive when the Court is interpreting the Federal Rules. 255 Significantly, there is no separation of powers concern if the Court includes an analysis of purpose and policy in interpreting the Rules. As is discussed in Part I of this Article, Congress has given the Court a role in the promulgation of the Rules through the Rules Enabling Act: The Court has the power to promulgate Rules, subject to the possibility that Congress may override a rule by statute. Thus, when interpreting the Rules, the Court, pursuant to a delegation from Congress, is acting under its own Article III powers, 256 and is not interfering with Congress’s own separate powers. Restricting the Court’s

254. The modern literature on statutory construction is growing exponentially and reflects enormous diversity. In addition to the sources cited passim, an array of other viewpoints should be recognized. These include the views of Dean Calabresi and Professor Eskridge, who each urge courts to go beyond legislative history and intent to consider and evaluate the current context. See Guido Calabresi, A Common Law for the Age of Statutes (1982); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479 (1987). These recommendations for judicial evaluation of current needs are evaluated in Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 Geo. L.J. 353 (1989). See also Sunstein, supra note 167 (criticizing textualism, but also criticizing the traditional contextual approach and providing his own set of interpretative principles); Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 Harv. L. Rev. 892, 914 (1982) (advocating a common law interpretation approach that would allow a court to “look to the age of a statute, the risks of alternative interpretations, the specificity of a statutory scheme, the likelihood that Congress both foresaw and spoke to the particular controversy before the court, and more generally, the demands of statutory integration, . . . and social goals and policies that have come into existence since a particular statute was passed”).

255. Other justifications are also inappropriate in the Rules context. Thus, for example, Professor Schauer, supra note 158, at 254, justifies the use of the plain meaning analysis as a “suboptim[al] second-best solution” appropriately used when the Justices lack expertise in the subject area. However, as lawyers, judges, and participants in the promulgation process, the Justices do have some expertise in the subject matters of the Rules.

256. See Bauer, supra note 248, at 729 (concluding that there are no separation of powers problems raised by Court’s interpretation of Rules). See generally Harold J. Krent, Separating
power to interpret the Rules by limiting consideration of purpose and policy would unreasonably constrain the judicial branch and potentially interfere with the powers of the judiciary.\textsuperscript{257}

Beyond separation of powers concerns, the Court's role in promulgating the Rules is relevant to the power it has in interpreting the Rules. The Rules Enabling Act provides the Court a unique role in rulemaking that is not paralleled in the creation of statutes. The judiciary plays no role in statutory promulgation; statutes are passed by the House and Senate and approved by the President. Although the Court's actual role in the rulemaking process is relatively minimal, nonetheless the Court must at least approve the proposed Rules before they are transmitted to Congress.

Thus, the Court's imprimatur is placed on the Rules; the Court has an opportunity to reject whatever Rules it believes are inappropriate and to provide further clarification, detail, or changes of any kind to the proposed Rules. Given these substantial, although largely unexercised, powers of the Court in the promulgation process, a more activist role in the interpretative stage, one that considers purpose and policy, is appropriate.\textsuperscript{258} Congress has explicitly delegated to the Court rulemaking power, and it is not inconsistent to imply the Court has greater power to interpret Rules than it does to interpret statutes.

It is useful to compare the proper roles of legislative history in the context of statutory and rule interpretation. In the rules context, the legislative history consists of the comments of the Advisory Committee and the other bodies involved in the promulgation process; in other words, the legislative history is really rulemaking history. There is rarely any actual legislative history from Congress concerning a Rule. However, the 1988 legislation requires that each committee and group explain the reasons for its positions and provide an explanation of minority and other views.\textsuperscript{259} Thus, in the future there is likely to be more extensive rulemaking history from the bodies that have drafted a new Rule or amendment.

\textsuperscript{257} The refusal to consider the purposes and policies behind the Rules would also freeze the Rules into a more rigid state than is necessary or intended. \textit{Cf.} \textit{Fed. R. Civ. P. 1} (providing that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

\textsuperscript{258} \textit{Cf.} Bauer, \textit{supra} note 248, at 728 (suggesting that the Court should have broad freedom in interpreting the Rules that it has itself created, and that it "need ask no more than what the promulgating authority itself sought to accomplish").

\textsuperscript{259} \textit{See supra} note 110.
This rulemaking history should not be ignored, for it provides useful information regarding the drafters' understanding of the purposes and policies behind the Rule. However, this rulemaking history does not have the same weight that nontextualists give to the legislative history of a statute.\textsuperscript{260} Since, absent action by Congress, the Court itself is the final stage in the promulgation process for the Rules, the views of lower bodies merely constitute useful information regarding purposes and policies. It is possible that the Court, in adopting a particular Rule, had a different view of purpose or policy that may or may not have been expressed publicly and that should be considered when interpreting a Rule. The Court should not be bound by the expressions regarding purpose or policy by the lower bodies,\textsuperscript{261} but it should certainly be informed by those expressions.

Because the refusal to consider the purposes behind the Rules would freeze them into an unreasonably rigid state, the plain meaning analysis should be rejected as the model for the interpretation of the Federal Rules. The plain meaning doctrine tends to preclude the useful evaluation of policy and purpose in determining the meaning and application of the Rules.\textsuperscript{262} Affording the Court flexibility in considering policy is particularly important when the issue in a case concerns matters unanticipated at the time of the framing of the Rule. Of course, this factor is important in statutory construction as well, but again the Court's dual roles as promulgator and interpreter make flexibility at the interpretation

\textsuperscript{260} See Bauer, \textit{supra} note 248, at 728-29 (arguing that the views of the Advisory Committee are entitled to limited weight, similar to the opinions of distinguished scholars or judges).

\textsuperscript{261} The 1988 legislation can be viewed as requiring the Court to explain its divergences from the reports of the lower bodies. \textit{See supra} notes 110-111 and accompanying text. The statute simply requires the Court to "provide a proposed rule, an explanatory note on the rule, and a written report explaining the [Court's] action, including any minority or other separate views." 28 U.S.C. § 2073(d) (1988). However, the House Committee Report's requirement of "gap reports" suggests that the Court has a duty to express itself when it differs from lower rulemaking bodies. This would substantially burden the Court by requiring it to involve itself in great detail in the rulemaking process and in the development of the rulemaking legislative history. The Court may be unwilling and arguably unable to assume this burden. However, reliance on rulemaking history created by the lower rulemaking bodies may be problematic. \textit{Compare} Dissenting Statement of Justice Scalia, 146 F.R.D. 507, 507-10 (1993) (decrying proposed Rule 11(c) making sanctions discretionary) \textit{and} Advisory Committee Note, 146 F.R.D. 587, 590 (1993) (stating that sanctions are discretionary under proposed Rule 11) \textit{with} letter from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice and Procedure (May 1, 1992), 146 F.R.D. 519, 524, 525 (1993) (stating that Advisory Committee was retaining mandatory sanctions).

\textsuperscript{262} See Jonakait, \textit{supra} note 158, at 783-84 (criticizing plain meaning standard when applied to Federal Rules of Evidence because of the effect of freezing the law of evidence and eliminating the dynamic aspect of the common law's development of evidence rules).
stage especially appropriate. Rules should be interpreted to reflect changed circumstances.

Requiring the Court to apply a Rule rigidly without permitting the Court to consider the policies behind the Rule would deprive the litigants of a fair and just result in their case, thereby violating the central goal of the Rules expressed in Rule 1. This would be true even if the Rule is subsequently amended to serve those policy interests, because amendments have to work their way through the often time-consuming rulemaking process. As Professor Leo Levin has written in another context, "We are dealing with the dynamic of procedural progress." Rigidly interpreting the Rules without considering policy or purpose is detrimental to that dynamic of progress and is unnecessary in the context of the Rules because the Court is promulgator as well as interpreter.

In some ways, going beyond a plain meaning analysis involves the Court in the development of federal common law regarding the Rules. In both the statutory and Rules arenas, there is a continuum between the interpretation of a text and the development of federal common law. In the Rules arena, an arena in which Congress has delegated a large measure of the rulemaking power to the Court, the blending of the proper standards for interpretation of the text of a Rule and for the development of federal common law is particularly appropriate and warranted.

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263. See supra Part I.B.
264. Cf. Sunstein, supra note 167, at 493-97 (arguing that statutes should be interpreted to reflect changed circumstances).
265. Fed. R. Civ. P. 1 (providing that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").
267. See generally Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 889-96 (1986) (arguing that there is no significant difference between creation of federal common law and interpretation of federal statutes; the question in any case is whether court has power to formulate law, under explicit or implicit provisions of Constitution or federal statutes); Merrill, supra note 31, at 7 (arguing for a broad definition of federal common law, to include "ordinary' statutory construction"). Compare the totally different approach of a textualist, Judge Frank Easterbrook, who would preclude courts from creating common law to construe statutes unless Congress had given express authorization. Easterbrook, Statutes' Domain, supra note 250, at 544. Judge Easterbrook's approach is criticized by many. See, e.g., Sunstein, supra note 167, at 443-44.
268. As discussed thus far, the constraints of the separation of powers doctrine do not preclude the Court's adoption of a common law approach—considering policy and purpose when interpreting the Rules. Cf. Merrill, supra note 31, at 12-32 (developing four limitations on lawmaking powers of federal courts—federalism, separation of powers, electoral accountability, and Rules of Decision Act—and concluding that these limitations do not preclude federal courts from formulating procedural rules; also noting that Congress has exercised its
Hence the plain meaning doctrine should be rejected as an unduly narrow approach for cases involving interpretation of the Rules. The views of the lower bodies involved in the rulemaking process are worth attention, but should not be binding on the Court. The central goal of the Court in interpreting the Rules in a particular case should be to construe the Rules so as to comport best with their purposes and the policy considerations behind them.269

D. Preferred Analysis of Federal Rules: The Rule 11 Cases Reconsidered

The Court’s goal in interpreting or applying a Federal Rule should be to construe and apply it in a fashion that furthers the purposes and policies of the specific Rule in light of the structure of the Federal Rules as a whole and the fit between the Rules and the overarching procedural system. Specifically, after starting with an analysis of the language of a rule, the Court should evaluate four significant factors:

(1) What was the purpose of the Rule in question, and how can that purpose best be achieved? The Court can gather information regarding the Rule’s purpose from comments of drafting bodies and the Court, the Court’s own knowledge of the rulemaking process, academic commentary, and other judicial opinions.

(2) What policies was the Rule designed to further, and what policies should it further in light of current conditions? This policy analysis may include consideration of changed circumstances, the experience with the Rule, and the ambiguities or gaps in the Rule.

(3) Should problems presented by a Rule be corrected in a particular case? If there have been difficulties with the interpretation or application of a Rule, should those problems be corrected now, or is there reason to delay until further rulemaking can occur? Fairness and due process concerns for the litigants in the particular case are relevant considerations.

(4) How does this Rule fit within the structure of the entire Federal Rules and the overarching federal procedural system? Interpretation and application of a particular Rule must be part of a coherent procedural system that the mandate in Rule 1 for a just, speedy, and inexpensive determination of every action requires.

269. Cf. Jonakait, supra note 158, at 785-86 (condemning plain meaning standard as applied to Federal Rules of Evidence for failing to consider policy goals of evidence law).
This approach goes beyond a contextualist approach by recognizing the formative role the Court may play in the development of the Rules. The primary advantages of this approach include: avoiding the unnecessary freezing of the Rules, promoting the purposes and policies behind the Rules, and recognizing the Court's permitted role in the promulgation of the Rules.

This approach, like an open-ended approach to statutory construction, could be criticized for failing to give precise answers in Rule (i.e., statutory) form. However, a set of exceedingly precise Rules might well jeopardize the flexibility sought in the original concept of the Federal Rules. Moreover, if the Court errs under this flexible approach to interpretation, the normal rulemaking process or direct congressional intervention (in rare instances) would be available to put the Rules back on track.

How would this suggested approach affect the outcomes of the three cases involving Rule 11? Consider first the issue of sanctioning the individual attorney's law firm decided in Pavelic & LeFlore. Under the recommended approach, the analysis should proceed as follows: Pursuant to Rule 11, when a paper is signed in violation of the Rule, an appropriate sanction shall be imposed “upon the person who signed it, a represented party, or both.” The language of this portion of Rule 11 would allow two interpretations. The first possibility is that the person who signed means the person who physically signed his or her name. A second possibility is that the person who signed means the person or legal

270. See generally Sunstein, supra note 167, at 424-34 (describing a contextualist approach as involving consideration of context, structure, purpose, intent, and legislative history of a statute).

271. Moreover, it is not as complicated as Professor Sunstein's structure for interpretive norms for statutes. See id. at 462-503. However, many of his principles of statutory interpretation are relevant to the Court in construing and applying the Rules, e.g., avoidance of constitutional problems, consistency, consideration of systemic effects, and avoidance of injustice and irrationality.


273. See Carrington, Making Rules, supra note 63, at 2082-83 (arguing that the Court should have more leeway in interpreting the Rules than the plain meaning analysis would allow; that undue detail or complexity in the Rules may defeat substantive rights; and that the courts should be given discretion to interpret the rules in the cases before them to effectuate the substantive goals in statutes and the Constitution). But see Stephen B. Burbank, Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law, 63 NOTRE DAME L. REV. 693, 715 (1988) [hereinafter Burbank, Rules and Discretion] (criticizing “the trend of modern procedural law [that] has been away from rules that make policy choices towards those that confer on trial courts a substantial amount of normative discretion”).

274. FED. R. CIV. P. 11.
entity on whose behalf the signature was made. In other sections, the Rule uses the term “signer” to refer to the attorney who signs the paper, but here it uses the term “person who signed.” This difference in phraseology was not addressed by either the Advisory Committee in its Notes or other proceedings, or by the Court in its official statements approving the 1983 amendments to Rule 11 that contained this language.

The scope of entities that can be sanctioned under Rule 11 raises important policy issues. The generally accepted primary purpose of Rule 11 is to deter abusive filings—papers filed in court that lack a reasonable basis in fact or law. This purpose is achieved by threatening and imposing appropriate sanctions on those who file papers without undertaking a reasonable inquiry into their factual or legal basis. On the one hand, limiting sanctions to the individual attorney signing the paper will compel that individual to bear the full cost of sanctions and may be particularly effective in ensuring individual compliance with Rule 11. On the other hand, allowing the individual attorney’s law firm to be sanctioned as well as (or instead of) the individual may cause the law firm to institute measures to ensure that its attorneys will comply with the Rule and to monitor its attorneys’ behavior. In light of Rule 11’s mandate giving broad discretion to the district judge in fashioning sanctions, and given the absence of any empirical evidence supporting either hypothesis as to the effects of imposing sanctions upon the firm, it should

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276. The Rule requires the trial judge to impose an “appropriate sanction.” FED. R. CIV. P. 11.

be within the trial judge’s power to impose sanctions on a law firm as well as (or instead of) the individual attorney signer.\(^{278}\)

This suggested approach to rule interpretation is consistent with the approach taken by Justice O’Connor in *Cooter & Gell*. This is not surprising, since the *Cooter & Gell* Court went beyond a plain meaning analysis, perhaps because there was no relevant portion of Rule 11 directly addressing the three questions before it. Thus *Cooter & Gell* illustrates that the plain meaning analysis is not a useful tool when there is ambiguity or silence in the Rule itself.\(^{279}\) However, the Court’s decision may

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\(^{278}\) In 1991 the Advisory Committee proposed amendments to Rule 11 that included permitting the imposition of sanctions on an attorney’s law firm, thereby removing the restrictions imposed by *Pavelic & LeFlore’s* interpretation of Rule 11. *Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence* (August 1991), reprinted in 137 F.R.D. 53, 80 (1991) [hereinafter *Comm. on Rules*]. This proposal could be viewed as suggesting that the Court’s plain meaning analysis in *Pavelic & LeFlore* did not adequately reflect the purpose and policy behind the Rule.

In 1992 the Advisory Committee, after considering comments and suggestions, proposed an amendment to Rule 11 which overturned *Pavelic & LeFlore* and clarified that normally a law firm should be jointly liable for violations by its employees. *Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure and Forms*, (May 1992), reprinted in 146 F.R.D. 535, 581 (1993). See also id. at 588-89 (explaining that proposed Rule 11(c)(1)(A) would “remove the restrictions of the former rule,” citing *Pavelic & LeFlore*, and explaining that “it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency”); id. at 525 (transmittal letter from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules to Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, May 1, 1992, explaining addition of language in proposed Rule 11 (c)(1)(A) to clarify liability of law firm). No further changes to this provision were made in the rulemaking process.

Thus, on April 22, 1993, the Court transmitted to Congress proposed the amendments to Rule 11 that provide: “Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.” Proposed Rule 11(c)(1)(A), 61 U.S.L.W. 4365, 4370 (Apr. 27, 1993). Therefore, if Congress accedes to the proposal, the result in *Pavelic* will in fact be overturned by rule amendment. It is interesting that Justice Scalia, the author of *Pavelic*, did not object to this proposal, although he vehemently dissented from what he viewed as the watering-down of Rule 11 in other ways. 61 U.S.L.W. 4393 n.1. See supra note 144.

\(^{279}\) There are other very current examples of cases in which the Court does not consider a plain meaning analysis of a particular Rule to be appropriate, even when the entire opinion revolves around a Rule. A recent example of this phenomenon is the opinion of Justice Marshall for a unanimous Court in *Fristier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269 (1991). In *Fristier Mortgage*, a notice of appeal was filed after the district judge announced his intention to grant summary judgment, but before the actual entry of judgment and before the parties responded to the court’s request to submit proposed findings of fact and conclusions of law. The issue was whether this procedure complied with the provisions of *Fed. R. App. P. 4(a)(2)* that a notice of appeal “filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof,” thereby making the notice of appeal timely for preserving the right to appeal. Es-
still be criticized for its resolution of the particular policy issues involved.\textsuperscript{280}

Finally, the Business Guides opinion would be analyzed differently under the preferred approach. Rule 11 provides that "[t]he signature of an attorney or party constitutes a certificate by the signer that the signer" has made reasonable inquiry and is satisfied that the paper is well grounded in fact and law. It is plausible that this language, in the context of the Rule as a whole, refers either to all signing parties or simply to parties who are unrepresented and whose signatures are therefore required. The policy behind Rule 11, however, is to deter filings that have no reasonable foundation in fact or law.\textsuperscript{281} This deterrence policy is best achieved by imposing a duty of reasonable inquiry upon every person who signs a paper that is filed in court and that is otherwise within the scope of Rule 11.\textsuperscript{282} The reasonableness of the inquiry will depend on the nature of the person signing the document. For example, a lawyer's duty to investigate may be more substantial than that of the client with respect to the law, and on some occasions the client's duty to investigate may be more substantial with respect to the facts.\textsuperscript{283}
The scope of papers encompassed within Rule 11 must be determined in light of other Rules governing certain specialized papers. Affidavits are governed by Rule 56(g) with respect to summary judgment motions. Rule 56(g) specifically provides that if "affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay," the wrongdoer shall pay expenses including reasonable attorney's fees incurred by the other party.284 Absent amendment to Rule 11 or 56(g) clarifying the scope of each, the Court should apply Rule 56(g) to the extent it is relevant. To do so would limit Rule 11's application in the context of affidavits in summary judgment motions. Otherwise, Rule 11 applies to all papers filed in court, including affidavits filed in support of other motions.285

When alternative interpretations of a Rule's language are possible, evaluating the different policy implications of the alternatives is sensible. It permits the interpretation of a Rule to comport with the basic policy interests motivating the adoption of the particular Rule. It is appropriate for the Court as rule interpreter to consider the policy implications of alternative interpretations of Rules it has participated in promulgating.

This approach will also permit an interactive role in the rulemaking process, facilitating the ongoing amendment process of the Rules. For example, in 1991 the Advisory Committee on Civil Rules proposed sev-
eral amendments to Rule 11. After notice and comment, the Advisory Committee substantially revised its proposed changes and submitted final proposed amendments to the Standing Committee on Rules of Practice and Procedure in 1992. The proposed amendments to Rule 11 were then transmitted to Congress by the Court on April 22, 1993. One proposal would require a party to be notified in writing that its conduct may possibly violate Rule 11 before sanctions could be imposed. This would afford the party an opportunity to respond or alter its behavior to avoid sanctions. Another proposed change would permit parties to...

286. Comm. on Rules, supra note 278, at 53. These proposals have themselves generated substantial controversy. See, e.g., Bench-Bar Proposal to Revise Civil Procedure Rule 11, 137 F.R.D. 159 (1991); Sam D. Johnson et al., The Proposed Amendments to Rule 11: Urgent Problems and Suggested Solutions, 43 Baylor L. Rev. 647 (1991) (suggesting revision of proposed amendment to Rule 11); Randall Samborn, Rule 11 Reforms Are Criticized, Nat'L L. J., May 25, 1992, at 3 (discussing criticisms of Rule 11 reforms); Vairo, Where We Are, supra note 280 (criticizing the rule as a tool to limit advocacy in federal courts).

287. Letter from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992), reprinted in 146 F.R.D. 519 (1993). Attachment B to the letter discusses the criticisms received and the changes made by the Advisory Committee in reaching its final proposal. Id. at 521.

288. Proposed Rule 11, 146 F.R.D. 405, 419-424 (1993). The proposals are pending before Congress, and will become effective if no change is made by Congress before December 1, 1993. The proposals for change to Rule 11 remain controversial; Justice Scalia, joined by Justice Thomas, dissented from the amendment of Rule 11, complaining that it “gutted” the Rule. Id. at 513.

289. The amendment provides in relevant part:

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

1. How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(B) On Court’s Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.


290. As transmitted by the Court to Congress, proposed Rule 11(c)(1)(A) allows a party twenty-one days to withdraw or correct the offending paper to avoid the imposition of sanctions. See supra note 289. Technically, this proposal delays the filing of a motion for sanctions with the court for twenty-one days from the service of the motion for sanctions on the offending party. This results in a three-week “grace” period in which the offending party may avoid sanctions by withdrawal or correction of the paper.
make assertions in court documents that they expect will have an evidentiary basis "after a reasonable opportunity for further investigation or discovery," rather than requiring that the evidentiary basis be evident at the time of filing the paper. 291 A third proposed change would limit sanctions "to what is sufficient to deter," providing somewhat more guidance than the current standard of "appropriate" sanctions. 292

These three proposed changes now transmitted to Congress illustrate the modern operation of rulemaking. They all suggest, albeit in somewhat different respects, that the Court's involvement at an earlier stage—by interpreting the current language of the Rule—could permit implementation of evolving policies. Take, for example, the proposed amendment to limit sanctions to those that are sufficient to deter. Such a limitation could have been read into the current language of the Rule by the Court in a case defining "appropriate" sanctions. The Court could have interpreted the language of the existing rule in several different ways, including defining "appropriate" sanctions as those that constitute the greatest possible deterrent consistent with due process limitations. Alternatively, the Court could have developed a concept of minimal deterrence, or of sufficient deterrence. Thus, there is substantial leeway for an interpreting body in defining the scope of sanctions that provide deterrence. Moreover, the Court could have shifted its focus from the deterrence approach to a punitive or compensatory approach that includes sanctions which penalize the wrongdoer or compensate the victim for the harm suffered. These latter ideas of punishment and compensation expand beyond the generally understood original purpose of Rule 11 to deter abusive practice. 293 However, it would be appropriate for the

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291. The proposed amendment provides:

[A]n attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.


292. The language provides: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Proposed Rule 11(c)(2), 146 F.R.D. 405, 422-23 (1993).

The proposed amendments make other significant changes to Rule 11, notably providing that sanctions will be discretionary rather than mandatory. The current Rule's language stating that the court "shall impose... an appropriate sanction," Fed. R. Civ. P. 11, will be changed to permissive language, so that "the court may... impose an appropriate sanction." Proposed Rule 11(c), 146 F.R.D. 405, 421 (1993). Justice Scalia (joined by Justice Thomas) dissented from this change from mandatory to discretionary sanctions. Id. at 507.

293. See supra note 275 (describing that the generally understood original purpose of Rule 11 was to deter abusive filings). Recently, the punitive purpose and features of Rule 11 have
Court's interpretation of "appropriate sanctions" under Rule 11 to evolve with experience under the Rule. A broad-based analysis of policy and purpose when interpreting Rules would afford flexibility and would complement the rulemaking process.

Consider the new proposal to require notification before a party files a motion to sanction the other party for Rule 11 violations. This new procedural requirement is not mentioned in the current Rule. However, the Court could have adopted a similar kind of notification requirement as a method of assuring due process if a case arose in which a party would not be on notice that its conduct potentially violated Rule 11 until sanctions were sought. Even though the plain language of the Rule does not address this matter, it would be appropriate for the Court to create such a requirement in its decisional role,

been noted. See Willy v. Coastal Corp., 112 S. Ct. 1076, 1081 (1992) ("Rule 11 is designed to punish a party who has already violated the court's rules.") (unanimous opinion) (Rehnquist, C.J.); see also Judith A. McMorrow, Rule 11 and Federalizing Lawyer Ethics, 1991 B.Y.U. L. REV. 959, 972 ("Rule 11 is a disciplinary tool."). Others have noted a compensatory function. See Willging, supra note 277, at 4, 23-33. See generally Burbank, Rule 11, supra note 277, at 10-13 (discussing purposes of Rule 11); Saul M. Kassin, An Empirical Study of Rule 11 Sanctions 29 (1985) (stating that purpose of Rule 11 was to punish the offender, compensate the injured, and deter future abuse); Melissa L. Nelken, Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313 (1986) (describing different theories of the purpose of Rule 11).

Cf. Johnson, supra note 286 (considering appropriate sanctions in light of experience, criticising proposed amendment of Rule 11, and urging restriction of award of attorney's fees as remedy for Rule 11 violations).

Suggesting the Court should take a more activist role when interpreting the Rules is not intended, however, to denigrate the advantages of the rulemaking process. Current efforts at rulemaking afford an alternative mechanism for reaching resolution on what sanctions are appropriate. Indeed, the rulemaking efforts currently being undertaken, which involve substantial segments of the bench, bar, and academics, may offer the best hope for a broadly based consensus resolving this and other controversial areas of Rule 11.

See, e.g., Willging, supra note 277, at 92-97 (discussing methods lower courts have developed to afford notice to attorneys that sanctions are being considered by the courts).

Despite the argument that the Court should have the power to frame notification requirements as part of its decision of a case, there are certainly advantages to using the rulemaking process, which provides an opportunity for thorough evaluation by all interested persons in advance. See Miner v. Atl. Assn., 363 U.S. 641, 650 (1960), quoted in Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2144 (1991) (Kennedy, J., dissenting) (stating that rulemaking procedures designed by Congress to assure that procedural innovations "shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords"). However, judicial decisionmaking has led the way as one of the primary mechanisms in promoting the adoption of new provisions for or amendments to the Rules. For example, Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940), set out the framework of the proper approach for judges in considering judgment n.o.v. and new trial motions. This approach was largely codified in Rule 50(c) and (d). See Notes of Advisory Committee on Rules-1963 Amendment, reprinted in 83 S.Ct. 50, 71 (1962). Another example is Fed. R. App. P. 4(a)(2),
especially because the question of appropriate notice raises due process concerns. 298

A more activist approach to interpreting the Federal Rules by considering the Rules' policy and purpose is also consistent with the Supreme Court's recent decision in Chambers v. NASCO, Inc. 299 upholding the inherent power of the federal courts to "fashion an appropriate sanction for conduct which abuses the judicial process." 300 The Court affirmed the imposition of attorney's fees, amounting to all fees paid by a party to its attorneys during the course of litigation, when the party being sanctioned evidenced bad faith throughout the entire litigation, had attempted to mislead, lie to, and defraud the trial court, and had tried to deprive the court of jurisdiction. The Court acknowledged that although much of the party's conduct could be sanctioned under particular rules such as Rule 11, some of the bad faith conduct was beyond the scope of such rules. The Court held:

In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the rules themselves. 301

According to Justice White, writing for a 5-4 majority, reliance upon the district court's inherent power would not circumvent the other precise sanction rules. 302

which codifies prevailing appellate decisions that give effect to premature notices of appeal. Firstier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269, 274 (1991). See also Hickman v. Taylor, 329 U.S. 495 (1947), in which the Court developed principles of attorney work product protection that were later incorporated into Rule 26(b)(3).

298. Cf. Jeffrey W. Stempel, Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-verdict Dismissal Devices, 60 FORDHAM L. REV. 257, 261 (1991) (proposing that a proper reading of the existing Rule 11 requires "that any claim that has survived the pre-verdict stages of litigation be immune from Rule 11 sanctions").

299. 111 S. Ct. at 2123.

300. Id. at 2133.

301. Id. at 2136.

302. Justice White often referred to particular standards and sanctions in Rule 11 and in 28 U.S.C. § 1927 that authorized a sanction of attorney's fees to be imposed on attorneys who "unreasonably and vexatiously multiply proceedings." He emphasized that these standards do not displace the inherent powers of a court to prevent the abuse of the judicial process and to fashion appropriate sanctions, including imposing "attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" 111 S. Ct. at 2133 (quoting Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975)). For example, Justice White wrote:

But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the stat-
It is ironic that around the same time the Court was deciding several Rule 11 cases in a literalist mode, it was willing to embrace a broad view of the inherent powers of the federal courts in *Chambers*. Arguably, there is substantial tension, even conflict, between these two lines of cases. Plain meaning devotees would be expected to apply the language of Rule 11 that makes sanctions mandatory to all papers filed in violation of the certification requirement, and then to consider whether there is any inherent power of the federal court to fill the interstices (e.g., fraudulent oral statements). Allowing the court to impose a sanction for a wrong that is only partly covered by Rule 11’s explicit provisions seems to recognize that federal courts have broader powers than a literalist approach normally would approve.

Arguably, even Justice Kennedy’s dissenting approach in *Chambers* went beyond the plain meaning enthusiasts’ limits. Because Rule 11’s mandate of sanctions for papers filed in violation of its certification requirements is a clearcut rule, a literalist might argue that by implication there is no power to impose sanctions for abuses not specified in the Rule. However, as the majority points out in *Chambers*, there are passages in the Advisory Committee Notes suggesting the courts retain inherent powers to police conduct that implicates their jurisdiction or the conduct of judicial proceedings.  

303. See, e.g., id. at 2134-35; supra notes 31, 32.
The recommended approach—that the Court engage actively in interpreting the Rules rather than rigidly applying a plain meaning analysis—would not necessarily produce a different result than plain meaning analysis would in a specific case. However, a more activist role in interpreting the Rules would assure implementation of the purposes and policies sought to be furthered by a particular Rule and by the Federal Rules as a whole. This purpose and policy approach to interpretation would not replace rulemaking, but would be an appropriate accompaniment to the Court's role in the modern rulemaking process.

Indeed, the whole experience with Rule 11, including both the Rule 11 interpretation cases discussed in Section A of Part II and the rulemaking changes to Rule 11 discussed in this Section, demonstrate the potential synergy between a more activist approach to rule interpretation and the rulemaking process. Several matters resolved in *Pavelic, Cooter & Gell*, and *Business Guides* under variants of the plain meaning analysis were modified in the proposals transmitted by the Court to Congress in 1993. Under a more activist approach to rule interpretation, the Court would have had the flexibility to develop these aspects through rule interpretation, rather than being rigidly restricted by plain meaning analysis and being permitted to consider policy and purpose only in its rulemaking role.

### III. Comparison of the Court's Proper Role in Interpretation of Rules With Its Role in Rulemaking

Part I of this Article explored a modern view of the Court's proper role in rulemaking. The current view of some scholars and the House Judiciary Committee suggests that restrictions on the scope of the Court's rulemaking powers have a different justification from that originally emphasized in the classic Supreme Court opinions in *Sibbach* and *Hanna*, and that legislation, rather than judicial rulemaking, is appropriate when proposed rules involve policy choices that have an impact on

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304. *Pavelic* will be overturned by the proposed amendment of Rule 11(c)(1)(A), discussed supra in note 278, allowing law firms as well as individual signers to be sanctioned. *Cooter & Gell* will be modified by proposed Rule 11(c)(2)(B), which provides, "Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned." *Business Guides* will be limited by proposed Rule 11(b), which imposes duties on attorneys or unrepresented parties, and by proposed Rule 11(c)(2)(A), which prohibits award of monetary sanctions against a represented party for violation of the requirement that legal contentions are warranted by existing law or a nonfrivolous argument for its modification. 61 U.S.L.W. 4365, 4369-70 (Apr. 27, 1993).

305. See supra text accompanying notes 10-16.
substantive rights. At a minimum, the recent history of Congress's involvement in the rulemaking process suggests a more limited sphere for judicial rulemaking (or at least a more expansive scope of congressional review). Part II of this Article analyzed the Court's use of the plain meaning doctrine in interpreting the Federal Rules and concluded that a literalist approach to the Rules is inappropriate. Based on this conclusion, Part II argued that the Court should take a more activist role in interpreting the Rules by considering the policy and purpose behind them. These two positions are not antithetical. Indeed, a more activist role in interpreting the Rules permits the Court to do what it can do best—develop federal common law interpreting Federal Rules in light of their underlying policy and purpose on a case by case basis.

The discomfort of several former Justices with their role in promulgating the Rules, given the lack of time and staff for undertaking the development or thorough review of proposals, highlights the difficulty of the Court becoming more actively involved in the rulemaking process. The trend in the recent past has been to develop a larger infrastructure of committees and to emphasize an opportunity for public notice, comment, and criticism, making the Supreme Court's rulemaking role even more limited.

Once Rules have been promulgated through the rulemaking process prescribed by the Rules Enabling Act, they will be applied in cases to which they pertain. At that point, two different questions of interpretation may arise. One, the question of the validity of a particular Rule, is frequently debated, but is not addressed here. The other key interpretative question, evaluated earlier in this Article, is how to apply a valid Rule to a particular case. In the latter, much more common situation, the Court should embrace the opportunity to interpret a Rule in light of the procedural policy choices embedded in the Rule. The Court should adopt a more activist approach toward interpretation, refraining from wooden application of a plain meaning analysis that was developed in the context of statutory interpretation.

This recommended approach recognizes the dual roles of the Court as rulemaker and rule interpreter. Once Rules have been promulgated and are being applied in particular cases, the determination of the proper

306. See, e.g., Burbank, Hold the Corks, supra note 10, at 1019-20.
307. Cf. Burbank, Hold the Corks, supra note 10, at 1021 (“When the Supreme Court makes law through supervisory court rules, it is engaged in an enterprise that, both practically and normatively, is different in important respects from the enterprise in which the Court, or any federal court, is engaged when it makes federal common law.”); Landers, supra note 27, at 854-55 n.43 (distinguishing Court's powers of establishing common law from rulemaking powers).
interpretation and application of a Rule should be informed by many considerations beyond the simple literal language of the Rule. Chief among these considerations are the purpose of the Rule, the policies advanced by the Rule, the relationship between the particular Rule and the Federal Rules framework, potential conflicts with other Federal Rules, and relationship to policies furthered in statutory and constitutional provisions.

A more activist approach to interpretation of the Rules does not conflict with, but rather enhances, the Court's role in formulating Rules. The recommended approach recognizes the frequently expressed reservation of the Court's members to an expanded role for the Court in the rulemaking process. Yet the suggested approach offers the Court an opportunity to consider the entire context when interpreting a Federal Rule and to determine how the Rule would best be applied and interpreted in the context of the policies and purposes of both the particular Rule and the structure of the Federal Rules as a whole. An opportunity to consider the entire context will ensure that the Court plays a significant role in the process of reforming the Rules so as to further the basic goal of just, speedy, and inexpensive determination of litigation. Although it is possible to reach the same ultimate position through a strict textualist approach to the Rules combined with more frequent rulemaking, the more activist approach to interpretation would achieve immediate results in concrete cases, and would not relegate litigants in actual cases to the ephemeral hope of a timely rulemaking change.

The rigidity and ultimate futility of the plain meaning analysis must be recognized. What is plain to one person, whether lawyer, judge or layperson, is not necessarily plain to another. It is misleading to pretend that language is plain. Moreover, what is plain in one context may not be plain in another. The Court's consideration of the purpose and policy of a Rule offers much more flexibility and a greater opportunity to achieve the goals of "just, speedy and inexpensive" determination than a rigid plain meaning approach. This recommended approach to Rule interpretation would complement the role of the Court in the modern rulemaking process.

308. Cf. Carl Tobias, Standing to Intervene, 1991 Wis. L. Rev. 415, 460-61 (suggesting that judges should go beyond the language of Rule 24(a)(2) and look to policies and concepts not explicitly stated in the Rule; noting, however, that given judicial reservations to such an approach, formal amendment of the Rule was desirable).

309. Cf. Burbank, Rules and Discretion, supra note 273, at 701-09 (discussing multiple plain meanings given to Rule 3 by the Court).