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AGAINST (MERE) RESTYLING

*Edward A. Hartnett**

The Federal Rules of Civil Procedure have been completely rewritten. A top to bottom revision of every single rule has been completed by the Advisory Committee on Civil Rules.¹ Both the Standing Committee on Rules of Practice and Procedure and the Judicial Conference of the United States have approved the result.² Unless the Supreme Court balks or the Congress intervenes, the bench and bar will be using the new restyled version of the Federal Rules of Civil Procedure in a little more than a year.

Opposition may be futile. So few seemed to care about the rewrite that two of the three hearings that the Advisory Committee scheduled for public comment were cancelled due to lack of interest.³ I have no illusion that an essay in a law review will awaken the bench and the bar from their slumber—law reviews are more likely to put

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* Richard J. Hughes Professor for Constitutional and Public Law and Service, Seton Hall University School of Law. The thoughts expressed in this Essay were shaped by my participation in a group project to evaluate the proposed restyled rules and I thank all of the participants: Janet Alexander, Kevin Clermont, Geoffrey Hazard, Arthur Miller, James Pfander, David Shapiro, Linda Silberman, Catherine Struve, Tobias Wolff, Gregory Joseph, Scott Atlaw, Allen Black, David Buchanan, Robert Byman, Robert Ellis, Francis Fox, William Hangle, Loren Kieve, and Patricia Refo. I owe special thanks to Stephen Burbank for inviting me to join the project and for his comments on an earlier draft. It bears emphasis that I do not speak for the group, but only for myself.

1 ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2006) [hereinafter 2006 RESTYLED RULES], available at http://www.uscourts.gov/rules/Appendix_D.pdf.

2 REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 25 (Sept. 2006), available at <http://www.uscourts.gov/rules/Reports/ST09-2006.pdf>; Judicial Conference Action: September 2006 Session, <http://www.uscourts.gov/rules/#judicial0906> (last visited Oct. 20, 2006).

3 REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, *supra* note 2, at 21.

readers to sleep. Nevertheless, this Essay argues that the restyled rules should not be approved.

My opposition does not stem from a preference for the word "averment" over the word "allegation." And I have no objection to sentences that begin with a conjunction. I do not extol the beauty of sentences that are long with many separate dependent clauses branching off in tangential directions requiring great skill to determine what refers to what rather than short, simple, crisp, direct sentences. I like short sentences.

As have other procedural reformers before them, the restylists seek to make procedural rules simpler, clearer, more accessible, and easier to understand. I certainly share these goals. My job includes trying to help students who were not yet born when the Rules Enabling Act celebrated its fiftieth birthday learn the Federal Rules of Civil Procedure. I'm not looking to make that job any harder.

Yet the restylists have set themselves a goal that is at once insufficiently ambitious and overly difficult. Unlike prior reformers, they do not seek to create a better procedure. Unlike those who brought us the original Federal Rules of Civil Procedure, they do not seek to supersede preexisting statutory procedures. To the contrary, the restylists attempt to completely rewrite the Federal Rules of Civil Procedure while leaving the law of procedure the same as it was before their reform.

Part I of this Essay illustrates the near-impossibility of this task with some examples drawn from the changes made to the proposed restyled rules in response to public comment. Part II argues that the goal of preserving existing meaning is at war with the goal of clarity and simplicity. Moreover, rather than confront this dilemma head on, the proposed restyled rules add an additional layer of ambiguity, and do so in a way that brings to the fore the interpretive battle that rages between those who follow the plain meaning of the text and those who seek the lawmakers' purpose in legislative history. Part III addresses the possible supersession problems raised by the proposed restyled rules, and observes that the solution to the supersession problems attempted by the proposed restyled rules rests on a view of supersession that is almost certainly wrong.

I. THE NEAR-IMPOSSIBILITY OF CHANGING TEXT WITHOUT CHANGING MEANING

Two years ago, Professor Edward Cooper, the reporter for the Advisory Committee, used the pages of this journal to urge "the bench and bar [to] make the effort to examine the restyled rules with punc-

tilious care.”⁴ He observed that it “may be too much to ask any one person to assume this responsibility for every rule,” but suggested that readers pick a “favorite rule or two,” plus another “rule or a few to examine out of idle curiosity.”⁵

Professor Stephen Burbank and Gregory Joseph heeded this call. Agreeing that the task was too great for a single person, but less trusting of serendipity than Professor Cooper, they organized a group of twenty-one and divided the proposed restyled rules (which had been released for public comment in February of 2005)⁶ among the members of the group. Each rule was examined by at least one academic and one practicing lawyer, working as a team. I was assigned, along with Allen Black, to Rules 64 through 71. (I don’t claim that these are my favorite rules; I was too slow to respond to the invitation to get first dibs.)

On my first few passes, making the “[s]ide-by-side reading and comparison”⁷ between the existing rule and the proposed restyled rule that Professor Cooper had encouraged, I was impressed. The restyled rules are clearer and easier to understand. Yet as I dug further, moving beyond comparison of two texts to an examination of judicial interpretations of the current rule and asking whether the restyled rule might change that interpretation, I became more and more concerned. The more I looked, the less sanguine I became. By the time I concluded my review, I decided that I could not support the adoption of the restyled rules.

A majority of the assembled group reached the same conclusion. The detailed report noted concerns of one sort or another with most rules. I will not attempt to reproduce that report here, but focus instead on the few rules on which I worked. Even as to those rules, I will not discuss all of the numerous instances where I believe that the restyled rules arguably deviate from the meaning of the current rules. Instead, I will discuss first only those instances (and not even all of those) in which the Advisory Committee found the critique of their February 2005 restyled rules sufficiently well taken to make changes in the restyled rules *before recommending them to the Standing Com-*

4 Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1785 (2004).

5 *Id.* at 1785–86.

6 COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE (2005) [hereinafter 2005 DRAFT RULES], available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf.

7 Cooper, *supra* note 4, at 1785.

mittee. The five areas discussed below, I believe, serve well to illustrate the difficulty of restyling a rule without changing its meaning.

A. *Five Examples*

I. Rule 65(a)

Consider Rule 65(a), which governs preliminary injunctions. The current rule states, “Before or after the commencement of *the* hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.”⁸ The February 2005 proposed restyled rule stated, “Before or after beginning *a* hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.”⁹

The proposed rule referred to “a hearing” rather than “the hearing.” Yet the reference in the current rule to “the hearing” is sometimes thought to imply that a hearing on an application for a preliminary injunction is required.¹⁰ The proposed change from “the hearing” to “a hearing” would have made the inference that a hearing is required somewhat less likely. And the Advisory Committee changed it back, so that the restyled rule approved by the Judicial Conference now reads, “Before or after beginning *the* hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.”¹¹

8 FED. R. CIV. P. 65(a) (emphasis added).

9 2005 DRAFT RULES, *supra* note 6, at 167 (emphasis added).

10 *See, e.g.*, *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994) (“In this circuit, the refusal to hear oral testimony . . . is not an abuse of discretion if the parties have a full opportunity to submit written testimony and to argue the matter.”); *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 893–94 (1st Cir. 1988) (noting that courts normally “look askance” at the lack of an evidentiary hearing or oral argument, but adopting a pragmatic approach); *Williams v. Curtiss-Wright Corp.*, 681 F.2d 161, 163 (3d Cir. 1982) (saying a hearing is “salutary or at least expedient,” but not required if submitted evidence does not present unresolved relevant factual issue); *see* 11A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2947, at 126 (2d ed. 1995) (“Some type of a hearing also implicitly is required by subdivision (a)(2)”); *id.* § 2951, at 253 (noting that a temporary restraining order “is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction”); *cf. id.* § 2949, at 225–31 (discussing the views of various courts as to when hearings are required).

11 2006 RESTYLED RULES, *supra* note 1, at D-172 (emphasis added).

2. Rule 65(b)

Current Rule 65(b) provides, “A temporary restraining order may be granted without *written or oral* notice to the adverse party or that party’s attorney only if”¹² The February 2005 proposed restyling stated, “The court may issue a temporary restraining order without notice to the adverse party or its attorney only if”¹³ A 1966 amendment had been designed to “make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.”¹⁴ By changing “without written or oral notice” to “without notice,” this point may have been obscured. In particular, some might have contended that the notice referred to in the proposed rule contemplates service pursuant to Rules 4, 4.1, or 5, rather than a telephone call to the attorney, who might be far more readily available than the party. The Advisory Committee restored the words “written or oral,” and they are in the proposed restyled rule as approved by the Judicial Conference.¹⁵

3. Rule 65(c)

Rule 65(c) was of particular concern. It currently provides, “No restraining order or preliminary injunction *shall* issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”¹⁶ Although the current rule can be read as mandating that security be given whenever a restraining order or preliminary injunction is issued, courts have frequently concluded that they have discretion to waive the posting of security.¹⁷ The word

¹² FED. R. CIV. P. 65(b) (emphasis added).

¹³ 2005 DRAFT RULES, *supra* note 6, at 167.

¹⁴ FED. R. CIV. P. 65 advisory committee’s note (1966); *see* 11A WRIGHT ET AL., *supra* note 10, § 2941, at 36–37 (noting that the amendment was prompted “because it was felt that the original wording of the rule could be misinterpreted to permit a party seeking a restraining order to refrain from giving informal notice when the circumstances did not allow formal notice and a hearing”); *id.* § 2951, at 263–64 (noting that the Advisory Committee was concerned about possible due process defects in *ex parte* proceedings); *id.* § 2952, at 273–74 (describing the “informal notice requirement” as “consistent with notions of fair play and the general spirit of the federal rules,” as well as the possibility of “constitutional dimension”).

¹⁵ 2006 RESTYLED RULES, *supra* note 1, at D-172.

¹⁶ FED. R. CIV. P. 65(c) (emphasis added).

¹⁷ *See, e.g.,* Coquina Oil Corp. v. Transwestern Pipeline Co., 825 F.2d 1461, 1462 (10th Cir. 1987) (noting that, in some circumstances, a trial court may “determine a bond is unnecessary,” but that the court must at least consider whether to require a

“shall,” as Professor Cooper has noted, “has imperative overtones, but often preserves some measure of discretion,” and that even where the original intent was otherwise, “[a]ctual practice may have added some measure of discretion.”¹⁸ Waiver of the bond requirement is common in public interest litigation and cases brought by indigents. The leading case states bluntly, “It is clear to us that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c).”¹⁹

The February 2005 proposed rule stated, “If the court issues a preliminary injunction or a temporary restraining order, the court *must* require the movant to give security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”²⁰ The change from “[n]o restraining order or preliminary injunction *shall* issue except upon the giving of security,” to “the court *must* require the movant to give security,” would appear to have removed the discretion that the word “shall,” at least in practice, left available. Such a change would have been quite significant in cases where the movant lacks the resources to post security.

The Advisory Committee again altered the proposed restyled rules in response. Rather than restore the word “shall”—a word the restylers treat with such abhorrence that perhaps it should be added

bond); see 11A WRIGHT ET AL., *supra* note 10, § 2954, at 292–93 (“[I]t has been held that the court may dispense with security altogether if the grant of an injunction carries no risk of monetary loss to the defendant.”); *cf.* Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir. 1961) (relying on phrase “as the court deems proper” to permit court to find that no bond is required).

18 Cooper, *supra* note 4, at 1777.

19 Bass v. Richardson, 338 F. Supp. 478, 490 (S.D.N.Y. 1971); see Wayne Chem., Inc., v. Columbus Agency Serv. Corp., 567 F.2d 692, 701 (7th Cir. 1977) (holding that the “bond may be excused, notwithstanding the literal language” of the rule, where the plaintiff is indigent); Brown v. Callahan, 979 F. Supp. 1357, 1363 (D. Kan. 1997) (following Bass); 11A WRIGHT ET AL., *supra* note 10, § 2954, at 298 (describing Bass as “correct” and “followed by other courts”). For other examples, see Pharm. Soc’y of N.Y. v. N.Y. State Dep’t of Soc. Servs., 50 F.3d 1168, 1169–70 (2d Cir. 1995) (holding that district court properly waived the bond requirement because litigation pursued “public interests”); Cal. *ex rel.* Van de Kamp v. Tahoe Reg’l Planning Agency, 766 F.2d 1319, 1325–26 (9th Cir. 1985) (finding discretion to dispense with the security requirement when plaintiff cannot afford bond, particularly where Congress has provided for private enforcement of a statute). For academic treatment, see 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 65.52, at 65-97 to 65-98 (3d ed. 2006) (noting circumstances in which court “may waive security”); 11A WRIGHT ET AL., *supra* note 10, § 2954, at 300–03 (discussing approvingly cases that relax the bond requirement in public interest litigation).

20 2005 DRAFT RULES, *supra* note 6, at 168 (emphasis added).

to Rule 7(c) as a banned word in federal civil procedure²¹—it restructured the sentence completely to avoid using either “shall” or “must.” The proposal is now, “The court may issue a preliminary injunction or a temporary restraining order *only if* the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”²²

4. Rule 65(d)

Rule 65(d) reveals not only the difficulty of restyling a rule without changing its meaning, but also how even very minor changes can have a significant impact. The current Rule 65(d) provides, “Every order granting an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.”²³ This text is ambiguous regarding whether the notice requirement modifies the entire list of persons who might be bound by an injunction or restraining order or modifies only “those persons in active concert or participation.” Most sensibly conclude that the notice requirement applies to all,²⁴ so that even a party is not bound by an

21 See 2006 RESTYLED RULES, *supra* note 1, at D-8 (“The restyled rules minimize the use of inherently ambiguous words. For example, the word ‘shall’ can mean ‘must,’ ‘may,’ or something else, depending on context. The potential for confusion is exacerbated by the fact that ‘shall’ is no longer generally used in spoken or clearly written English. The restyled rules replace ‘shall’ with ‘must,’ ‘may,’ or ‘should,’ depending on which one the context and established interpretation make correct in each rule.”); *cf.*, *e.g.*, *Exodus* 20:13 (New American Bible) (“You shall not kill.”).

Actually, given the restylers’ plan to delete the abolition of demurrers from Rule 7(c), perhaps “shall” should replace demurrers as an abolished term. Thus Rule 7(c) would read, “Shall Abolished. Shall shall not be used.” Or should that be “Shall Abolished. Shall must not be used.”?

22 2006 RESTYLED RULES, *supra* note 1, at D-173 (emphasis added).

23 FED. R. CIV. P. 65(d).

24 See MOORE ET AL., *supra* note 19, § 65.61[3], at 65-108 (“A party . . . or non-party . . . who has not received ‘actual notice’ of an injunction or restraining order will not be bound by its terms.”); 11A WRIGHT ET AL., *supra* note 10, § 2956, at 337 (“Another prerequisite for binding a person to an injunction is that the person must have notice of the order.”); *id.* at 351-52 (“Of course . . . an officer or agent must have notice of the injunction to be held in contempt for acting in concert with the corporation.”); *id.* § 2960, at 381 (stating that contempt requires finding that “party to be charged had notice of the order”).

injunction or restraining order until he receives notice, but not all courts agree.²⁵

The February 2005 proposed rule, however, created subdivisions in Rule 65(d)(2), and placed the notice requirement in subsection (d)(2)(C), thereby limiting its application to those described in subsection (d)(2)(C). It provided:

The order binds only the following:

- (A) the parties;
- (B) the parties' officers, agents, servants, employees, and attorneys;
- and
- (C) other persons who receive actual notice of the order by personal service or otherwise and who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).²⁶

By its terms, then, that proposed rule would have held parties, officers, agents, servants, employees, and attorneys bound to an injunction or restraining order—and thereby subject to punishment for contempt—even when they lacked notice of the injunction or restraining order.

In response to this concern, the Advisory Committee concluded that the current rule was based on former 28 U.S.C. § 363, but that the original rulemakers had omitted a comma contained in the statute.²⁷ Resolving to restore the meaning of the earlier statute, the Advisory Committee moved the phrase requiring notice so that it applies to all. As approved by the Judicial Conference, the proposed restyled rule now reads:

The order binds only the following who receive actual notice of it by personal service or otherwise:

- (A) the parties;
- (B) the parties' officers, agents, servants, employees, and attorneys;
- and
- (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).²⁸

²⁵ *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir. 1987) (noting the ambiguity and concluding that officers and agents, servants, employees and attorneys need not receive actual notice of the injunction, but vacating the contempt order on other grounds).

²⁶ 2005 DRAFT RULES, *supra* note 6, at 169.

²⁷ 2006 RESTYLED RULES, *supra* note 1, at D-174.

²⁸ *Id.*

5. Rule 68

Rule 68 currently provides, “At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment”²⁹ The February 2005 proposed restyled rule stated, “At least 10 days before the trial, a party defending against a claim may serve on an opposing party an offer to allow judgment”³⁰

The existing rule requires the offer to be made more than ten days before trial; the proposed rule would have required the offer to be made at least ten days before trial. The proposed rule, unlike the current rule, would have permitted an offer to be made exactly ten days before trial. In short, $x > 10$ is not the same as $x \geq 10$. Moreover, the existing rule measures the ten days explicitly from the day the trial “begins,” or, in the case of an offer after the determination of liability, from the “commencement” of the hearing. By deleting these terms, the proposed rule might have increased ambiguity.³¹

In response, the Advisory Committee revised the proposed rule to read, “More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment”³²

All five of these examples involved quite modest textual differences:

- (1) “the” as opposed to “a”
- (2) “written or oral” to modify “notice” as opposed to no such modifier
- (3) “shall” as opposed to “must” as opposed to “may . . . only if”
- (4) a comma as opposed to no comma
- (5) “more” as opposed to “at least”

Yet they carried with them the potential for rather significant changes:

- (1) whether there is a hearing on an application for a preliminary injunction
- (2) whether a party or counsel is notified before an application for a TRO
- (3) whether an injunction can realistically be obtained by an indigent

29 FED. R. CIV. P. 68.

30 2005 DRAFT RULES, *supra* note 6, at 173.

31 See *Greenwood v. Stevenson*, 88 F.R.D. 225, 229 (D.R.I. 1980) (concluding that a trial begins for the purpose of Rule 68 “when the trial judge calls the proceedings to order and actually commences to hear the case,” not with jury selection).

32 2006 RESTYLED RULES, *supra* note 1, at D-178.

- (4) whether someone needs notice of an injunction before being held in contempt
- (5) whether an offer of judgment is timely

That such modest textual changes carry such significant effect underscores the near-impossibility of making significant textual changes without changing meaning. Tellingly, the Advisory Committee's research undertaken in response to concerns with Rule 65(d) reveals that the *original* Advisory Committee inadvertently omitted a comma when adapting statutory language for inclusion in the Federal Rules. Thus even the original Advisory Committee, led by Dean Clark, stumbled when attempting to take an existing law and reproduce it in a different form. Moreover, this omission of a comma was of little significance in an ambiguous rule because most courts and commentators resolved the ambiguity in a sensible way. An attempt to make things clear, however, led to a proposal that people be subject to punishment for contempt for violating an injunction despite lack of notice of that injunction.

B. Beyond These Five Examples

Some might say that surely any significant changes that would have been made by the restyled rules have been found by now, given the painstaking processes of the Advisory Committee, including its careful response to public comment. There is no doubt that the Advisory Committee has worked with care and dedication. I certainly appreciate the care and dedication with which they responded to submitted comments.

Indeed, some may find it ungracious of me to continue opposition, considering the seriousness with which the Advisory Committee responded to my concerns. But the Advisory Committee has not cleared up all of the ways the proposed restyled rules might change the meaning of the existing rules. Consider the Rule 65(c) issue discussed above regarding the giving of security upon issuance of a preliminary injunction. The current rule uses the word "shall," while the February 2005 proposed rule stated that the court "must" require the movant to give security. The rule as approved by the Judicial Conference states that a court may issue a preliminary injunction "only if" the movant gives security. I'm not confident that "only if" gives the same measure of discretion as "shall," or that it removes discretion to the same extent as "must" would. Is anyone?

Moreover, I don't have the chutzpah to claim that I caught everything the Advisory Committee missed. If the Advisory Committee's distinguished members, advisors, consultants, and reporter missed

things that I caught, I have to believe that others will catch things that we all missed.

All of us involved in the process so far have been attempting to imagine possible problems in hypothetical cases. If the restyled rules go into effect, however, many other minds will be brought to bear, and those minds will include thousands of lawyers dealing with concrete problems presented in particular cases. Moreover, those lawyers will be working zealously to advocate for a client whose interests are affected. Surely they will be able to find other instances where the restyled rule departs from the meaning of the current rule. At the very least, they will be able to discover and make plausible arguments that the new rule does not mean the same thing as the old rule did.

Thus far, I have only discussed proposed restyled rules that the Advisory Committee changed in response to public comment. As I noted at the outset, I believe that these five examples serve well to illustrate the difficulty of restyling a rule without changing its meaning. But I don't want to give the impression that the only difficulties with the proposed restyled rules were relatively straightforward problems that, once identified, were relatively easy to fix. Therefore, I will discuss an example of less obvious concerns about aspects of a single restyled rule—*aspects that were not altered by the Advisory Committee in response to comments, presumably because they are less amenable to fixing.*

Current Rule 68 provides:

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment.³³

The proposed restyled version of Rule 68(a), as approved by the Judicial Conference, provides:

More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of

33 FED. R. CIV. P. 68.

acceptance, plus proof of service. The clerk must then enter judgment.³⁴

It is unclear under the current rule whether an offer can be conditioned on the acceptance of all plaintiffs.³⁵ The proposed change from “judgment . . . for the money or property or to the effect specified in the offer” to “judgment on specified terms” would make it more difficult to contend that an offer cannot be conditioned on acceptance by all plaintiffs.

There is also some question whether the existing rule applies to actions for equitable relief.³⁶ The proposed change from “judgment . . . for the money or property or to the effect specified in the offer” to “judgment on specified terms” would make it more difficult to contend that the rule does not apply to offers to accept a particular equitable decree. There is a similar dispute whether the existing rule applies to class actions.³⁷

If Rule 68 applies to equitable relief and class actions, the court under the current rule retains authority to reject an accepted offer.³⁸

34 2006 RESTYLED RULES, *supra* note 1, at D-178.

35 See *Amati v. City of Woodstock*, 176 F.3d 952, 958 (2d Cir. 1999) (finding it permissible for a defendant to impose such a condition, but leaving open the question whether it is effectual to shift costs to plaintiffs who signified their desire to accept the offer); MOORE ET AL., *supra* note 19, § 68.04[9], at 68-34 (describing this as the “most problematic multiple-party situation”).

36 See *Chathas v. Local 134 IBEW*, 233 F.3d 508, 511 (7th Cir. 2000) (“Rule 68 offers are much more common in money cases than in equity cases, but nothing in the rule forbids its use in the latter type of case.”); 12 WRIGHT ET AL., *supra* note 10, § 3001.1, at 79 (2d ed. 1997) (noting suggestions that the rule does not apply in actions for equitable relief, but rejecting those suggestions).

37 See *Weiss v. Regal Collections*, 385 F.3d 337, 344 n.12 (3d Cir. 2004) (Scirica, C.J.) (“Courts have wrestled with the application of Rule 68 in the class action context, noting Rule 68 offers to individual named plaintiffs undercut close court supervision of class action settlements, create conflicts of interests for named plaintiffs, and encourage premature class certification motions.”); *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108, 111 (S.D.N.Y. 2001) (“[I]t has long been recognized that Rule 68 Offers of Judgment have no applicability to matters legitimately brought as class actions pursuant to Rule 23.”); MOORE ET AL., *supra* note 19, § 68.03[3], at 68-15 (noting “conflict in the few decisions addressing whether Rule 68 should apply to class actions” and stating that it is “questionable whether the offer of judgment rule should apply to cases such as class or derivative actions that require judicial approval of a settlement”); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, reprinted in 98 F.R.D. 337, 363, 367 (1983) (proposing an amendment to make clear that the rule does not apply to class or derivative actions).

38 See 12 WRIGHT ET AL., *supra* note 10, § 3005, at 109-10 (asserting that while Rule 68 offers “may include provision for a specified injunctive regime,” the “court cannot be compelled to enter the agreed judgment even though it emerged from a

The proposed rule, however, by changing “the clerk shall enter judgment” to “[t]he clerk must then enter judgment,” makes it more difficult to interpret the rule to permit such discretion.

These concerns are related: one way in which the current rule can be accommodated to equitable relief and class actions is through the availability of discretion to decline to enter an agreed judgment or decree. The proposed rule, on the one hand, strengthens arguments that it applies to equitable relief, while weakening arguments for discretion to decline to enter agreed judgments. If Rule 68 applies to class actions, and the duty of the clerk to enter judgment is made mandatory, settling parties can use Rule 68 offers to evade the strictures of Rule 23.

This is one illustration of the kind of plausible arguments that conscientious lawyers can and should make if the restyled rules go into effect.

II. TEXT, PURPOSE, AND RESTYLING

An obvious response to the risk that the restyled rules might change the meaning of the existing rules is to emphasize that such change is not intended. The Advisory Committee Note to Rule 1 states, “The style changes to the rules are intended to make no changes in substantive meaning.”³⁹ Moreover, after each rule, the Advisory Committee Note intones, “The language of Rule ___ has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.”⁴⁰

There is, of course, no assurance that courts will heed this monotonous note rather than attend to the plain language of the restyled rules. If the Advisory Committee were more committed to avoiding the risk that the restyled rules will be interpreted to mean something different than the existing rules, it could have included a rule of construction in the text of the rules themselves.

Rules of construction are hardly unheard of in the Federal Rules. Rule 1 provides that the rules “shall be construed and administered to

Rule 68 offer and acceptance” and that “Rule 68 cannot remove th[e] authority and duty” of a court to determine whether the settlement of a class action is acceptable); *see also* Acceptance Indem. Ins. Co. v. Se. Forge, 209 F.R.D. 697, 698 n.2 (M.D. Ga. 2002) (concluding that, in light of Rule 54, an accepted Rule 68 offer of judgment that does not include all claims and all parties does not result in a final judgment).

39 2006 RESTYLED RULES, *supra* note 1, at D-8.

40 *See, e.g., id.* at 20 (Rule 4.1); *id.* at 54 (Rule 16); *id.* at 169 (Rule 62).

secure the just, speedy, and inexpensive determination of every action.”⁴¹ Rule 82 provides that the rules “shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.”⁴² The Advisory Committee could have included a proposed addition to Rule 1 that stated, “These rules must be construed to retain the same meaning after the amendments adopted on December 1, 2007, as they did before those amendments.” Alternatively, it could have proposed an addition to Rule 82 that stated, “The amendments adopted on December 1, 2007, must not be construed to change the meaning of the rules as they existed before that date.”

Such a mandatory rule of construction would provide solid ground on which to rely for the conclusion that the restyled rules would not change the meaning of the existing rules. But it would do so at the cost of making it impossible for anyone to rely on the text of any of the restyled rules. In every instance in which someone relied on the text of the restyled rule, it would be open for others to argue that the text of the rule should be ignored in favor of its prior meaning. Rather than remove ambiguities and divisions of authority, it would retain them. The seeming clarity of the restyled rules would never be achieved. Rather than being simpler, clearer, more accessible, and easier to understand, all of the difficulties of the existing rules would be carried forward.

Thus the Advisory Committee had a very good reason not to propose such a rule of construction: it would undermine the very goals of restyling itself.⁴³

Yet by omitting such a rule of construction while including an Advisory Committee Note that the amendments “are intended to be

41 FED. R. CIV. P. 1.

42 FED. R. CIV. P. 82; *see also, e.g.*, U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.”); 1 U.S.C. § 112 (2000) (providing that, unless the context indicates otherwise, singular includes the plural, masculine includes the feminine, and “person” includes corporations); 25 U.S.C. § 458aaa-11(f) (“Each provision of this part and each provision of a compact or funding agreement shall be liberally construed for the benefit of the Indian tribe participating in self-governance and any ambiguity shall be resolved in favor of the Indian tribe.”).

43 *Cf. Cooper, supra* note 4, at 1767 (“The Style Project would be a disaster if—against all odds—it actually should succeed in freezing the ‘present meaning’ of every rule.”).

stylistic only,”⁴⁴ the proposed restyling rules give ammunition to *both* those who rely on plain text *and* those who rely on the lawmakers’ purpose. Some lawyers in some cases will rely on the plain language of the restyled rule while their adversary relies on the purpose of maintaining the pre-existing meaning. Some courts will accept the former, others will accept the latter; still others will blend the two.⁴⁵

The more that courts rely on the purpose of maintaining prior meaning, the less the restyled rules will achieve their goal of making the rules clear and easily understood. The flip side is that the more that courts rely on the plain language of the restyled rule, the more the restyled rules will achieve their goal of making the rules clear and

44 See *supra* note 40 and accompanying text.

45 See, e.g., Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1076–85 (1993) (noting that while some cases suggest an affinity for plain meaning, the Supreme Court continues to use other canons of construction, such as legislative history and the other policies behind the rules); Adam N. Steinman, “Less” is “More”? *Textualism, Intentionalism, and a Better Solution to the Class Action Fairness Act’s Appellate Deadline Riddle*, 92 IOWA L. REV. (forthcoming 2007) (manuscript at 4), available at <http://www.ssrn.com/abstract=920692> (discussing the textualist and intentionalist divide among federal appellate judges regarding the requirement that an application for discretionary appellate review of removal under CAFA must be made “not less than 7 days after entry of the order” (quoting 28 U.S.C. § 1453(c)(1) (West Supp. 2005))). See generally JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 25–28 (1999); Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 865–68 (1992); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626–40 (1990) (discussing the role of congressional intent in statutory interpretation and how courts use various sources to identify that intent).

Some think that the textualists have sufficiently won the battle that there is not much difference these days between textualist judges and purposivist judges. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006) (“Conventional wisdom has it that the textualists emphasize statutory text and purposivists emphasize statutory purposes. But when one considers *how* modern textualists go about identifying textual meaning and *how* purposivists go about identifying statutory purposes, the differences between textualism and purposivism begin to fade.”); *id.* at 5 (claiming that the “battle is largely over”); see also *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2617–22 (2005) (applying a textualist analysis to conclude (basically) that the supplemental jurisdiction statute, 28 U.S.C. § 1367, permits supplemental jurisdiction over claims involving an insufficient amount in controversy, and a purposive analysis to conclude that it does not do so as to claims involving lack of diverse citizenship); cf. John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 75 (2006) (agreeing that there is “more conceptual common ground than textualists . . . have sometimes emphasized” but arguing that textualists are concerned with semantic context and purposivists are concerned with policy context).

easily understood.⁴⁶ Ironically, then, the best hope for the successful implementation of clear, easily understood restyled rules is if lawyers and judges ignore the Advisory Committee Note repeated after each restyled rule. Indeed, this is not all that different from the expressed hope that lawyers and judges may forget that there ever was a restyling project.⁴⁷

And what would be wrong with that? Isn't any attempt to cling to the meaning of the rules as they exist today like trying to command the tides to cease? No set of procedural rules is perfect, and no drafting exercise is either. Why not say that careful, knowledgeable, and diligent people have worked for years to produce the restyled rules, that the restyled rules are as good as humanly possible, and their plain language should be allowed to supplant the meaning of the current rules?

The problem is that the proposed restyled rules have only been generated and evaluated from the perspective of determining whether or not they reproduce current meaning. Neither the Advisory Committee, the Standing Committee, nor the Judicial Conference evaluated them from the perspective of determining whether or not they are good rules of civil procedure.

Rule 62(d) illustrates the point. In producing the February 2005 proposed restyled version of Rule 62(d)(2), the Advisory Committee took great care to produce what it took to be the meaning of existing Rule 62(d). It followed the punctuation of the existing rule precisely—perhaps too precisely—and limited the requirement of notice to those who are in active concert with the parties and their agents. If anyone involved in the restyling had looked at the rule they were producing and asked, not whether it replicated the existing rule, but whether it was a good rule, it is difficult to imagine that they would have produced a rule that called for people to be bound by injunctions they didn't know about. But that wasn't the question for the restyling project.

If there is any significant possibility that the meaning of the existing rules will be lost as lawyers and judges focus only on the text of

46 The tension bubbles to the surface in the Advisory Committee's Notes to proposed Rule 65(d). There, the Advisory Committee's Notes include not only the standard claim that the changes are merely stylistic, but also a statement that the changes restore the meaning of a statute that was imperfectly expressed in the original 1938 rules. See 2006 RESTYLED RULES, *supra* note 1, at D-174.

47 See *id.* at D-5 ("The best sign of our success may be that in a few years, the bench and bar will have forgotten that there ever was a Style Project.").

the restyled rules—and there is⁴⁸—then the time to ask that question is *before* the proposed restyled rules are put into effect.

III. TEXT, PURPOSE, AND SUPERSESION

The Rules Enabling Act not only empowers the Supreme Court to “prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals,”⁴⁹ it also provides that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”⁵⁰ Under the supersession clause of the Rules Enabling Act, then, a Federal Rule of Civil Procedure can displace a pre-existing Act of Congress. Of course, a subsequent Act of Congress can displace a pre-existing Federal Rule of Civil Procedure.

In other words, under the current statutory framework, Congress and the Supreme Court each have the power to displace the procedural rules established by the other for the federal courts.⁵¹

In some instances, notably the Private Securities Litigation Reform Act, Congress has rather clearly established procedural requirements at variance with the existing Federal Rules of Civil Procedure.⁵²

48 See Cooper, *supra* note 4, at 1783 (“As time passes, memory of the Style Project will fade. New meaning will be found without any awareness of the earlier language or meaning. In part that will be a good thing: substantive changes will be made because the new meaning is better than perpetuating the old. We cannot effectively prevent that process, and we may not wish to.”); cf. RICHARD H. FALLON, JR., DANIEL J. METZLER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 908 (5th ed. 2003) (describing how federal officer removal was expanded by the 1948 revision of the Judicial Code); Robert D. Goldstein, Blyew: *Variations on a Jurisdictional Scheme*, 41 STAN. L. REV. 469, 514 (1989) (criticizing the Commission on Revision and Consolidation of the Statutes of the United States for eliminating “the important provision for postjudgment removal”); Edward Hartnett, *A New Trick From an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1129–31 (1995) (describing the changes made to separable claim removal by the 1948 revision of the Judicial Code).

49 28 U.S.C. § 2072(a) (2000).

50 *Id.* § 2072(b).

51 Three caveats: 1) any Rule promulgated by the Supreme Court under the Rules Enabling Act must also comport with the substantive rights limitation of that Act, *see id.* (“Such rules shall not abridge, enlarge or modify any substantive right.”); 2) Congress retains the power to repeal the Rules Enabling Act, in whole or in part; and 3) both Federal Rules and Acts of Congress must comply with the Constitution.

52 See, e.g., 15 U.S.C. § 78u-4(b)(1) (2000) (requiring a complaint to “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made

In other instances, courts have interpreted Acts of Congress to either supersede the existing Federal Rules of Civil Procedure or to influence their interpretation. For example, some courts that have permitted injunctions without security under Rule 65(c) have done so in reliance on the particular statute being enforced.⁵³ Similarly, some courts have viewed the mandatory requirement of current Rule 68 that “the offeree must pay the costs” to be “overridden by a contrary statutory provision.”⁵⁴

on information and belief, [to] state with particularity all facts on which that belief is formed”); *id.* § 78u-4(b)(2) (requiring a complaint to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind”); *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 276 (4th Cir. 2006) (“[F]or private securities fraud suits Congress altered the consequences of a Rule 11(b) violation . . .”).

53 *See* Cal. *ex rel.* *Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985) (exercising discretion to dispense with the security requirement when plaintiff cannot afford bond, particularly where Congress has provided for private enforcement of a statute); *Bass v. Richardson*, 338 F. Supp. 478, 491 (S.D.N.Y. 1971) (“If any difference exists between the language of Rule 65(c) and Congressional intent clearly embodied in the remedial statutes at issue, the federal statutes control.”); 11A WRIGHT ET AL., *supra* note 10, § 2954, at 302 (using this quotation from the *Bass* case to summarize the “thrust of the argument for a court exercising its discretion under Rule 65(c) in a permissive fashion”); *see also id.* § 2954, at 300 (noting that waiving the security requirement for the indigent “is consistent with the purposes of actions permitted in forma pauperis”).

54 13 MOORE ET AL., *supra* note 19, § 68.08[1], at 68-54; *see* N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 666–69 (E.D.N.C. 2003); *R.N. v. Suffield Bd. of Educ.*, 194 F.R.D. 49, 52 (D. Conn. 2000) (relying on a statute that invokes Rule 68, but includes an exception).

There are conflicting decisions whether a Rule 68 offer to provide a plaintiff with the maximum he could recover individually moots a proposed class action. MOORE ET AL., *supra* note 19, § 68.03[3], at 68-15 to 68-98 ; 12 WRIGHT ET AL., *supra* note 10, § 3001.1, at 3 (Supp. 2006); *see* *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004) (“Absent undue delay in filing a motion for class certification . . . where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.”); *Schaake v. Risk Mgmt. Alternatives, Inc.*, 203 F.R.D. 108, 112 (S.D.N.Y. 2001) (noting that to permit such a tactic would “allow defendants to essentially opt-out of Rule 23”). One basis for concluding that such an offer does not moot the class action has been that the statute being enforced contemplated class actions. *Weiss*, 385 F.3d at 345 (stating that a “significant consideration” is that “Congress explicitly provided for class damages” and intended that the statute be enforced “by private attorney generals,” and concluding that “[r]epresentative actions . . . appear to be fundamental to the statutory structure”).

The February 2005 proposed restyled rules said nothing about supersession. There was a substantial risk that upon taking effect, the restyled rules would supersede “all laws in conflict with” them.

In analyzing the relationship between a statute and a rule promulgated pursuant to the Rules Enabling Act, the Court of Appeals for the Sixth Circuit has adopted a straightforward last-in-time rule: in 1997, it concluded that the 1996 amendments to the *in forma pauperis* statute superseded then-existing Federal Rule of Appellate Procedure 24(a).⁵⁵ In 1998, Federal Rule of Appellate Procedure 24(a) was amended, and in 1999, the court held that the amended Rule 24(a) rule superseded the *in forma pauperis* statute.⁵⁶ It did not matter to the Court of Appeals that Rule 24(a) had been amended in 1998 as part of the restyling of the Federal Rules of Appellate Procedure—or that the meaning of Rule 24(a) was the same after 1998 as it had been before the 1996 amendments to the *in forma pauperis* statute. The key issue was which of two conflicting rules was last in time.

Other courts adopt a different approach, looking to the purpose of the rule amendment in order to determine supersession. The Court of Appeals for the Tenth Circuit concluded that a 1979 amendment to the Federal Rules of Appellate Procedure did not supersede a 1978 statute, relying on an Advisory Committee Note to conclude that the purpose of the 1979 amendment was “‘clarity only.’”⁵⁷

The Advisory Committee not only favors the latter approach but evidently believes that the “supersession is determined by looking to the nature and purpose of the amendment and comparing the date of

55 *Floyd v. U.S. Postal Serv.*, 105 F.3d 274 (6th Cir. 1997). The court found a conflict that overcame the maxim that repeals by implication are not favored. *Id.* at 277–78; *cf.* *Baugh v. Taylor*, 117 F.3d 197, 201 & n.16 (1997). The court in *Baugh* concluded that the 1996 statute did not conflict with the relevant provision of Federal Rule of Appellate Procedure 24 because the 1996 statute “merely moved” the provision from one subsection to another. *Id.* at 201. Such relocation was not viewed as “evidence of congressional intent to abrogate procedures in Rule 24,” and there was “no hint of such intent in the legislative history.” *Id.* at 201 n.16. For a critique of the use of the canon against repeals by implication in the context of clashes between statutes and Federal Rules, see Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677 (2002).

56 *Callihan v. Schneider*, 178 F.3d 800, 803–04 (6th Cir. 1999). *Callihan* cannot be understood as simply an effort to undermine *Floyd*: both *Floyd* and *Callihan* were written by Chief Judge Martin.

57 *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1485 n.8 (10th Cir. 1993) (quoting FED. R. APP. P. 4(a)(1) advisory committee’s note (1979)); *see also* *Local Union No. 38, Sheet Metal Workers Int’l Ass’n v. Custom Air Sys., Inc.*, 333 F.3d 345, 348 n.2 (2d Cir. 2003) (following *Autoskill* and describing the 1979 amendment as involving “minor revisions”).

the statute with the date the particular substantive rule provision that is inconsistent with that statute first ‘took effect.’⁵⁸ Rather than relying solely on an Advisory Committee Note (as it did with the possibility that the restyled rules might change the meaning of the existing rules), the Advisory Committee added a proposed Rule 86(b) to deal with the risk of supersession:

If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.⁵⁹

It also added a Committee Note stating:

Any conflict that arises should be resolved by looking to the date the specific conflicting rule provision first became effective.⁶⁰

There are three problems here. First, it almost certainly cannot be the case that the central inquiry is when a provision “first” took effect. Second, the Advisory Committee ignores that the division in approach among the courts regarding supersession reflects the familiar division between those who focus on the plain language of the text and those who rely on the lawmakers’ purpose. Finally, the proposed solution to the supersession problem may not have much traction with a judge who emphasizes the plain language of a text.

The Advisory Committee believes that supersession issues should be resolved by looking to the date that the specific rule provision first took effect. But that can’t be right. Consider a simple example: Federal Rule of Civil Procedure 12(a) requires (subject to certain exceptions) that an answer be filed twenty days after the service of a summons and complaint. Suppose Congress were to enact legislation in 2006 setting the time to answer at ten days. And suppose the Advisory Committee were to conclude in 2008 that ten days is simply too short and recommend that Rule 12(a) be repromulgated to establish twenty days as the time to answer. If the Supreme Court were to repromulgate Rule 12(a) for the precise purpose of reinstating the twenty day period (and if Congress had not repealed the Supreme Court’s rulemaking authority in this regard), surely it should be understood to supersede the statute. Yet under the “first became effective” standard, the newly repromulgated rule would not supersede the statute because the twenty day period “first became effective” well before the 2006 statute. Indeed, under the “first became effective”

⁵⁸ Supersession and the Style Project (May 8, 2006), in 2006 RESTYLED RULES, *supra* note 1, at D-229, D-231 to D-232 [hereinafter Supersession].

⁵⁹ 2006 RESTYLED RULES, *supra* note 1, at D-208.

⁶⁰ *Id.* at D-209.

standard, it would be impossible for the Supreme Court to reinstate a prior rule.⁶¹ In this simple example, it could establish a nineteen day period or a twenty-one day period, but it could not reestablish a twenty day period.

Of course, it would frequently be unwise and disrespectful for the Supreme Court to attempt to reimpose a rule that Congress had superseded. However, slight modifications of the simple example can remove the risk of folly or disrespect. For example, imagine that the congressional act was avowedly experimental, or that the statutory provision involved was a minor aspect of a major bill and the drafters mistakenly thought that they were replicating what the Federal Rules already required. In any event, it is difficult to see why the Supreme Court, under the Rules Enabling Act, should lack the power to reinstate a rule, even if a given exercise of that power might be wrongheaded.⁶²

What the members of the Advisory Committee evidently have in mind are situations where the purpose of promulgating a rule was not to reinstate a prior rule, but instead something else, particularly to make stylistic improvements and clarify meaning. Once it is seen that the rulemakers might intend to reinstate a prior rule, or might intend only stylistic changes, it becomes clear that the “first became effective” standard is not itself an appropriate general principle for deciding issues of supersession. Instead it is merely an application of a broader interpretive principle, that “supersession is determined by looking to the nature and purpose of the amendment.”⁶³

At this point we can see the second difficulty with the Advisory Committee’s approach to supersession. By assuming that supersession turns on the “purpose” of the amendment, it misses that the conflict in the way cases approach supersession mirrors the conflict in approaches to interpretation generally. Some judges focus on the text, not caring what the lawmakers had in mind (if anything⁶⁴), while

61 One could even go a step further and inquire whether a given Federal Rule of Civil Procedure that took effect in 1938 actually “first” took effect much earlier, perhaps with the Equity Rules of 1912.

62 See *McConville v. United States*, 197 F.2d 680, 682 (2d Cir. 1952) (Clark, J.) (holding that a Federal Rule of Civil Procedure governed, both because the statute was designed to be in conformity with the Federal Rule and because the Federal Rule “was reenacted (with some changes not here pertinent)” with an effective date subsequent to the statute and, “in accordance with the terms of the governing statute, supersedes all inconsistent statutory enactments” (citation omitted)).

63 Supersession, *supra* note 58, at D-231.

64 See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 30 (1989) (Scalia, J., dissenting) (“It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—

others seek to determine the lawmakers' purpose. The Court of Appeals for the Sixth Circuit did not care about the purpose of the 1998 amendments to Federal Rule of Appellate Procedure 24(a). It found a textual conflict between an earlier text and a later text and chose the later text as stating the governing law.⁶⁵ The Courts of Appeals for the Second and Tenth Circuits, by contrast, looked to the purpose of the rule amendments and found no supersession because the purpose of those amendments was merely stylistic.⁶⁶ The Federal Rules of Civil Procedure will be construed and administered by judges with both approaches (and some mixture of each); rulemakers proceed at their peril if they assume that judges will operate from the rulemakers' preferred interpretive posture.

The Advisory Committee is, of course, aware of these interpretive disagreements. It has chosen not to rely simply on an Advisory Committee Note explaining that the purpose of the restyling is not to effect supersession. Instead, it has included a proposed rule addressing the issue. But its proposed rule does not explicitly provide a rule for the construction of the Federal Rules of Civil Procedure. Instead, it appears to provide a rule for the construction of the supersession clause of the Rules Enabling Act:

If any provision in Rules 1-5.1, 6-73, or 77-86 conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007.⁶⁷

A judge who shares the interpretive assumptions of the Advisory Committee will have little problem with this provision. While at first blush she may wonder what the rulemakers were thinking, she will consult the Advisory Committee Note and learn that "[n]one of these amendments is intended to affect resolution of any conflict that might arise between a rule and another law."⁶⁸ She will rely on this purpose and decide any supersession question that arises from the restyled rules in the same way she would have decided them before the restyled rules took effect.

Yet such a judge would not likely need to have a text such as the proposed Rule 86(b); she would likely be content to rely on Advisory Committee Notes explaining that the amendments are intended to be stylistic to conclude that supersession was not affected by the restyled

but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.").

65 See *supra* notes 55-56 and accompanying text.

66 See *supra* note 57 and accompanying text.

67 2006 RESTYLED RULES, *supra* note 1, at D-208.

68 *Id.* at 209.

rules. Proposed Rule 86(b) is far more importantly aimed at a textualist judge.

How might a textualist judge respond? Might he not say something along the following lines:

The statute tells me that all laws in conflict with a Federal Rule of Civil Procedure are “of no further force or effect” after the Rule has “taken effect.” The Rule that I am considering took effect on December 1, 2007. That’s the date set in the Supreme Court’s order, a date consistent with the statutory requirement set in 28 U.S.C. § 2074. So far, it looks like the Rule will trump prior law.

Now, Rule 86(b) tells me that “priority in time for the purpose” of § 2072(b) is “not affected by the amendments taking effect on December 1, 2007.” But how can that be? Either the text of the Rule that I am considering took effect on December 1, 2007, or it didn’t. If it took effect on December 1, 2007, the text of the statute tells me that it trumps prior law. Is Rule 86(b) telling me that the text of the Rule somehow did not take effect on December 1, 2007? Or took effect for some purposes but not for others?

Congress in § 2074 gave the Supreme Court a limited power to “fix the extent” to which a Rule “shall apply to proceedings then pending,” but it didn’t give the Supreme Court the power to “fix the extent” to which a Rule would “take effect” for purposes of § 2072(b). Nor did it give the Court the power to promulgate a Rule establishing “priority in time” for purposes of § 2072(b). A statute can tell us how to interpret a statute, and a Rule can tell us how to interpret a Rule, but a Rule can’t tell us how to interpret a statute—unless a statute so provides. If Rules could tell us how to interpret a statute, then the amendment to § 2072 permitting the promulgation of Rules to “define when a ruling of a district court is final for purposes of appeal under § 1291,” would have been completely unnecessary.

So I am back where I started. The Rule, which took effect on December 1, 2007, trumps prior law.

If the goal is to avoid the risk that a textualist judge will give superseding force to the restyled rules, it seems to me that it would be better to explicitly provide a rule for the construction of the Federal Rules of Civil Procedure. Such a rule might provide:

No provision in Rules 1-5.1, 6-73, or 77-86, as amended effective December 1, 2007, may be construed to conflict with another law in effect on November 30, 2007.

Or:

All provisions in Rules 1-5.1, 6-73, or 77-86, as amended effective December 1, 2007, must be construed to be consistent with all other laws in effect on November 30, 2007.

Such a provision would instruct a judge that even if his or her best interpretation of a restyled rule would otherwise be that the restyled rule conflicted with preexisting law, this is not the correct way to construe the rule. If the restyled rule is construed so as to produce no such conflict, there is nothing to trigger supersession. Such a rule would not attempt to alter or define the meaning of the supersession provision of 28 U.S.C. § 2072(b). Instead, it would establish the meaning of the rules themselves.

CONCLUSION

The effort to restyle the Federal Rules of Civil Procedure has involved so many talented and hardworking people over such a long period of time that it is probably impossible to stop it completely. Although I fear that adoption of the restyled rules may make it harder for more substantial reform to be made—and despair that the restyling may ultimately stand as the best that this generation accomplished in procedural reform—my respect for those involved in the process (and recognition of their well-deserved influence) leads me to refrain from suggesting that the proposed restyled rules simply be blocked in their tracks.

Yet if adopted as proposed by the Advisory Committee, there is a real risk that the restyled rules will be understood to mean something different than the current rules mean. There is also a real risk that the restyled rules will engender litigation over whether to adhere to the current meaning of the current rule in light of the Advisory Committee Notes or instead to follow the plain language of the restyled rule. Finally, there is some risk that textualist judges will treat the restyled rules as superseding prior statutes.

Some may say that these risks have not materialized with the restyling of the Federal Rules of Appellate Procedure or the Federal Rules of Criminal Procedure and therefore should be of no concern with the Federal Rules of Civil Procedure. Yet even assuming that those restyling projects have been as big a success as their advocates claim, there are substantial differences between those sets of rules and the Federal Rules of Civil Procedure.

The Federal Rules of Appellate Procedure only govern proceedings in the courts of appeals. There are far fewer cases in the courts of appeals than in the district courts.⁶⁹ Moreover, the Federal Rules of

⁶⁹ In 2005, there were 253,273 civil cases filed in United States District Courts, and 68,473 appeals filed in regional United States Courts of Appeals. See DEP'T OF JUSTICE, JUDICIAL FACTS AND FIGURES tbls.2.1 & 4.1, <http://www.uscourts.gov/judicialfactsfigures/contents.html> (last visited Oct. 20, 2006).

Civil Procedure are relevant not only in the district courts, but also in appellate courts reviewing district court decisions. In addition, an appeal generally involves but a single round of briefing, perhaps an oral argument, and a decision. In a district court, the process of briefing, argument, and decision is repeated many times in a single case as various motions, invoking various Federal Rules of Civil Procedure, are made, briefed, argued, and decided over a course of months and years. There are simply far more opportunities to apply (and therefore to dispute the meaning of) the Federal Rules of Civil Procedure than the Federal Rules of Appellate Procedure. This difference is reflected in the law school curriculum: far more time is devoted to the Federal Rules of Civil Procedure than the Federal Rules of Appellate Procedure. A required course is built around the former, while scant attention is paid to the latter.

The Federal Rules of Criminal Procedure are a closer analogy. But even so, there are far fewer federal criminal cases than federal civil cases.⁷⁰ A larger proportion of criminal procedure is controlled by constitutional requirements, as opposed to the Federal Rules, than is true of civil procedure. This difference, too, is reflected in the law school curriculum: a course in criminal procedure is largely devoted to constitutional law of the Fourth, Fifth, and Sixth Amendments, compared to a relatively small share devoted to the Federal Rules of Criminal Procedure. A course in civil procedure, by contrast, will typically spend more time on the Federal Rules of Civil Procedure than the constitutional requirements of due process and jury trial. Finally, for a given number of cases, federal criminal prosecutions will involve fewer individual lawyers than federal civil cases. One side of the case will virtually always involve a member of the United States Attorney's Office, while the other side will frequently involve a member of the Federal Defender's Office or an attorney on a Criminal Justice Act panel.⁷¹

Thus, there is substantial reason to hesitate before concluding that restyled Federal Rules of Civil Procedure will be as successful as restyled Federal Rules of Appellate Procedure and Federal Rules of Criminal Procedure.

⁷⁰ In 2005, there were 253,273 civil cases and 69,575 criminal cases filed in United States District Courts. *See id.* tbls.2.1 & 5.1.

⁷¹ *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (reporting that thirty percent of accused felons were represented by a Federal Defender Organization and thirty-six percent were represented by a panel attorney, leaving approximately one-third represented by private counsel).

In light of these risks, I suggest that the proposed restyled rules be remanded to the Advisory Committee. Now that the Advisory Committee has produced the clearest restatement of the current rules that it could, let us acknowledge frankly that these rules may, despite the Advisory Committee's best efforts, mean something different than the current rules and ask directly whether these proposed restyled rules are good rules. Having done the best it could to mirror the meaning of the existing rules in clearer language, I suggest that the Advisory Committee put that task behind it and look at the proposed restyled rules with fresh eyes and a fresh question: Should these rules be adopted on their own merit?

This is not a call for utopianism; I do not suggest that the Advisory Committee ask whether these are the best rules imaginable, but rather whether these are the best rules that can realistically be expected at this time and place. If the answer is no, the rules should not be adopted. If the answer is yes, they should clearly displace the current rules, rather than leave open for argument the contention that they must be construed to carry forward the meaning of existing rules. Indeed, if the answer is yes, the possibility of embracing supersession rather than awkwardly seeking to avoid it—with particular exceptions for particular statutes where appropriate—should be considered.

And until the question whether these rules should be adopted on their own merit is asked and answered, the proposed restyled rules should not go into effect.