

**25TH ANNIVERSARY OF THE SUMMARY JUDGMENT TRILOGY:  
REFLECTIONS ON SUMMARY JUDGMENT  
SEATTLE UNIVERSITY SCHOOL OF LAW**

**The Summary Judgment Changes that Weren't**

**Remarks of Lee H. Rosenthal\***

This Symposium has brought together scholars with a deep and thorough knowledge of civil procedure in general and the history and role of summary judgment in American state and federal courts in particular. This is an unparalleled gathering of experts on the history of the federal summary judgment rule and the jurisprudence that has developed under it. The timing of the Symposium is interesting. It is almost exactly two decades after the United States Judicial Conference, the policymaking arm of the federal court system, rejected the recommendation of its Advisory Committee on the Federal Rules of Civil Procedure and its Committee on the Rules of Practice and Procedure (generally referred to as the Standing Committee) to make significant changes to Rule 56 in the wake of the trilogy decided in 1986: *Anderson v. Liberty Lobby, Inc.*,<sup>1</sup> *Celotex Corp. v. Catrett*,<sup>2</sup> and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>3</sup> Such a rejection by the Judicial Conference of rule amendments recommended by the Advisory Committee and the Standing Committee through the

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\* United States District Judge, Southern District of Texas, Houston Division. In addition to her work as a district judge, Judge Rosenthal was a member of the Judicial Conference's Advisory Committee on the Federal Rules of Civil Procedure from 2001 to 2007, serving as its chair from 2003 to 2007. She served as the chair of the Committee on the Rules of Practice and Procedure, which oversees and coordinates the work of the Advisory Committees on the Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, Bankruptcy Procedure, and Evidence, from 2007 to 2011. Professor Daniel R. Coquillette, the J. Donald Monan, S.J., University Professor at Boston College and the Charles Warren Visiting Professor of American Legal History at Harvard Law School; Professor Steven S. Gensler, the Welcome D. and W. DeVier Pierson Professor of Law at the University of Oklahoma College of Law; Judge Mark R. Kravitz; and Professor Ed Brunet, the Henry J. Casey Professor of Law at Lewis & Clark Law School, commented on earlier versions of this Article, and Andrea Kuperman, Chief Counsel to the Rules Committees, commented and provided invaluable insight and assistance. The views and errors in this Article are Judge Rosenthal's.

1. 477 U.S. 242 (1986).
2. 477 U.S. 317 (1986).
3. 475 U.S. 574 (1986).

Rules Enabling Act<sup>4</sup> does not happen often.<sup>5</sup> The changes to Rule 56 that did not happen in 1992 were followed in 2007 by a change that did happen but was reversed three years later. It was not until 2010 that Rule 56 was substantially amended and the procedures for bringing and litigating summary judgment motions were changed significantly for the first time in forty years. And even then, what is perhaps most notable about the changes that were made are the ones that weren't. I want to explore, briefly, some of the changes that weren't made over the last decades and see what they tell us about both summary judgment and the rulemaking process.

I will not attempt to catalogue every idea that was raised and rejected throughout those decades. That would be very long and very dull. Instead, I will focus on the proposed amendments that almost became part of the summary judgment rule, proposals that did get through a significant part of the exacting Rules Enabling Act process but ultimately were rejected. I want to look at what is on the cutting-room floor to understand better what is in the text.

In 1987, the year after the trilogy was decided, the Civil Rules Advisory Committee took up Rule 56. According to the then-reporter

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4. 28 U.S.C. §§ 2072–2077. There are five Advisory Committees—for the Rules of Appellate Procedure, Rules of Bankruptcy Procedure, Rules of Civil Procedure, Rules of Criminal Procedure, and Rules of Evidence—and the Standing Committee, which provides coordination and oversight. Under the Enabling Act and related statutes and Judicial Conference procedures, the advisory committees recommend that the Standing Committee approve proposed amendments for a period of public comment. If the Standing Committee approves, a lengthy period of public comment follows. After that period, the advisory committee considers the comments, decides whether to proceed and, if so, whether to make revisions. If the advisory committee decides to make revisions, and if the revisions are not so substantial as to require republication, it decides whether to recommend that the Standing Committee approve the proposed revised amendments and transmit them to the Judicial Conference. If the Judicial Conference approves the proposals, they are transmitted to the Supreme Court. If the Court approves the changes, they are transmitted to Congress by May 1 of the year in which a proposed rule is to become effective. If Congress does not affirmatively act to defeat, change, or defer the proposals in what is usually a seven-month period for consideration, they become law on December 1 of that year.

5. See Griffin B. Bell, Chilton Davis Varner & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 23–24 (1992) (“Although the Judicial Conference may reject proposed rules or require further revision, the ‘general pattern in recent years’ has been for the Conference to approve the Standing Committee’s recommendations.”). One of the few examples of the Judicial Conference rejecting a recommendation of the Standing Committee was the 1996 rejection of the Standing Committee’s recommendation to return to a twelve-person jury in civil trials. See STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, MINUTES, JANUARY 9–10, at 2 (1997), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/jan1997.pdf> (“Judge Stotler reported that all rule recommendations submitted by the committee to the Judicial Conference at its September 1996 session had been approved by the Conference, except for the proposed amendments to FED. R. CIV. P. 48, relating to 12-person civil juries.”).

to the Committee, Professor Paul Carrington, the Advisory Committee viewed these Supreme Court decisions as revising Rule 56 to permit district judges to render summary judgment more freely than the Court's previous interpretations of the rule's text seemed to allow. To quote Professor Arthur Miller, an earlier reporter to the Advisory Committee, "*Celotex* has made it easier to make the motion, and *Anderson* and *Matsushita* have increased the chances that it will be granted."<sup>6</sup> The Reporter and others believed that the Court had expanded the standard more than the rule text seemed to permit.<sup>7</sup> As a result, members of the Advisory Committee believed the rule text was misleading.<sup>8</sup> Some of these same sentiments are echoed in the wave of critical reaction to the trilogy.<sup>9</sup> Much of the criticism sounded the theme that as expanded and widened, Rule 56 transformed district judges into pretrial factfinders.<sup>10</sup> As Professor Miller stated, the result was the "genial anarchy of trial court discretion."<sup>11</sup> The criticism also sounded the theme that the Supreme Court had bypassed the rulemaking process and changed Rule 56 by judicial decision rather than through the Rules Enabling Act.<sup>12</sup>

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6. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1041 (2003).

7. See Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 645 (2010) ("The Advisory Committee viewed those decisions [in the summary judgment trilogy] as revising the rule to permit district judges to render summary judgments more freely than the Court's previous interpretations of the rule's text seemed to allow—and, in many minds, including mine, more freely than the text of the rule could reasonably be said to intend." (footnote omitted)).

8. See *id.* at 646 ("The Advisory Committee believed that, among other effects, the trilogy's widening of the summary judgment procedure rendered Rule 56 misleading.").

9. See, e.g., Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 492 (1988) (arguing that the Court wrote an ambiguous opinion in *Matsushita Electric* that could be read to give judges varying standards to determine motions for summary judgment); see also Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 96 (2002) ("The most significant sources of the confusion [on the propriety of the use of discretion to deny summary judgment] stem from the text of Rule 56 itself and from language in two of the three opinions in the Court's summary judgment trilogy."); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 93 (1990) (arguing that the trilogy facilitates the process for defendants to make a summary judgment motion and increases their likelihood of success, while at the same time burdening plaintiffs with arguing the merits of their case at an earlier stage in the proceedings).

10. Miller, *supra* note 6, at 1045.

11. *Id.* at 1134.

12. See *id.* at 1029 ("[T]he Court's majority has even been criticized for effectively amending Rule 56 by judicial fiat [through the summary judgment trilogy] rather than through the procedure prescribed by the Rules Enabling Act . . ."); see also Carrington, *supra* note 7, at 648 ("The

The Advisory Committee continued its Rule 56 work over the next four years. This was not its only concern; there was other difficult work on the agenda as well.<sup>13</sup> The Committee meeting minutes for this period are both short and sketchy.<sup>14</sup> But the 1987 and 1989 minutes do show some of the major themes in the Rule 56 work: to link it with Rule 50, being recast from motion for directed verdict to motion for judgment as a matter of law; to clarify the use of summary disposition of an issue that did not resolve a claim in its entirety; and to refer to the burdens of production and persuasion as presented in *Anderson v. Liberty Lobby*.<sup>15</sup>

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premise of the Rules Enabling Act of 1934 that still governs the Judicial Conference is that courts of first instance should be bound to adhere to preexisting procedure rules crafted by the Conference and its committees but subject to Supreme Court approval and congressional acquiescence, just as they are bound to respect and enforce congressional legislation. The Supreme Court seems to have departed from that premise in the 1986 trilogy; it was seen by many to have rewritten Rule 56 in a moment of judicial activism.”); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988) (“These cases [in the trilogy], particularly *Liberty Lobby*, effectively rewrote Rule 56 without benefit of the procedures for amending the Federal Rules required by the Rules Enabling Act of 1934.”). Professor Miller noted, however, that this viewpoint “appropriately” had “few adherents.” Miller, *supra* note 6, at 1029.

13. Some of the issues and proposals the Civil Rules Committee considered during the same period were proposed amendments to Rule 51 to add flexibility to the timing of the court’s jury instruction, gender-neutralizing amendments to the Civil Rules, nearly complete rewriting of Rule 4 on service, proposed changes to Rule 45 on subpoenas, revising the rules on jury size, proposed amendments to address the reopening of the period to appeal if the appellant did not receive notice of entry of judgment, the timing of scheduling orders, and the proper method of claiming privilege.

14. The brevity reflects a considered choice. In the April 1989 meeting, the Committee discussed the problem of minute taking and agreed not to elaborate the minutes “beyond what has been the custom of the Committee, it being the sense of the Committee that it would be undesirable to create another level of legislative history to be explored by persons seeking to understand the text of the rule.” ADVISORY COMM. ON CIVIL RULES, MINUTES, APRIL 27–29, 1989, at 47 (1989), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1989-min.pdf>. The Committee has softened that approach, as evidenced by the detail of the minutes of more recent meetings, relying on thoughtful and precise descriptions to inform the reader’s understanding.

15. See ADVISORY COMM. ON CIVIL RULES, MINUTES, FEB. 12–13, 1987, at 3 (1987), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV02-1987-min.pdf> (“The Reporter was directed to include in the notes, at least, some reference to the problem of degrees of persuasion as presented in *Anderson v. Liberty Lobby*.”); *id.* at 4 (“The Committee expressed the inclination to see all the changes in Rule 56 in place, and also to consider the possible changes in Rule 50 in relation to those in Rule 56.”); ADVISORY COMM. ON CIVIL RULES, MINUTES, APR. 27–29, 1989, at 55 (1989), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1989-min.pdf> (“Burden of production of evidence or proof” was employed over the protest of those who thought the phrase redundant.”); *id.* (“The problem of the party not having the burden was addressed and the text clearly conformed to the Committee’s understanding that such a party should be able to point to the

A draft was published in 1989 that substantially rewrote Rule 56.<sup>16</sup> The purpose was to “enlarge the availability of the device of summary establishment of fact”; to “provide for the summary establishment of law to control further proceedings”; to “assure a party opposing summary action of reasonable opportunity for discovery”; to “integrate [Rule 56] with Rules 50 and 52”; and to provide guidance on “troublesome issues” under the current rule.<sup>17</sup> In September 1990, the proposed amendments were withdrawn because of the substantial number of comments received. There was particular concern over the device of “summary establishment” of fact and of law.<sup>18</sup>

In August 1991, the proposed amendments were republished. Again, there were many public comments received. The themes from the public comments are familiar because the Committees heard similar reactions after another proposal to revise Rule 56 was published in 2008. Some thought the changes were too radical. Some thought they were too inconsequential. There was concern over the lack of judicial control of excessive summary judgment motions. There was concern that judges were not ruling on summary judgment motions that were filed. And there was concern that judges were granting such motions by finding facts that should have been left for the jurors to determine. Many were unhappy with the existing rule—“The present rule is

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absence of probative material on the other side and thereby satisfy the requirements for a successful motion.”); COMM. ON RULES OF PRACTICE & PROCEDURE, MINUTES, JULY 17–18, 1989, at 13 (1989), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST\\_July\\_1989.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST_July_1989.pdf) (“Dean Carrington noted that one of the purposes of the proposed amendment to Rule 56 was to enable the court to confine discovery by deciding *certain issues* of fact and law at an early stage in the proceedings.” (emphasis added)).

16. See Memorandum from Judge John F. Grady, Chair, Advisory Comm. on Civil Rules, to Judge Joseph F. Weis, Jr., Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Comm., at i, vi–vii (June 12, 1989), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1989.pdf> (requesting approval for publication of a “substantial package of amendments,” and describing the proposed changes to Rule 56 and noting that “[t]his rule would be substantially re-written”).

17. *Id.* at vi–vii; cf. COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA BOOK FOR JAN. 14–15, 2008 MEETING 194 (2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/ST2008-01.pdf> (noting that in the proposal that led up to the 1992 proposed amendments, “[t]he initial effort . . . was to integrate Rule 56 more directly with judgment as a matter of law, emphasizing the identity of standards”).

18. See CIVIL RULES ADVISORY COMM., MINUTES, FEB. 21–23, 1991, at 6 (1991), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV02-1991-min.pdf> (noting that a new draft of the proposed amendments differed from the previously published draft “in the visibility of the device of summary resolution of issues by ‘establishment’ of law and fact,” and noting that “the establishment device had drawn the flack”).

unreadable except by one informed by substantial case law.”—but divided over what should take its place.<sup>19</sup>

At its spring 1992 meeting, the Civil Rules Advisory Committee approved a re-revised rule and recommended that the Standing Committee approve its transmission to the Judicial Conference.<sup>20</sup> A proposal to amend Rule 50 had been made for the purpose of linking it to the proposed text of Rule 56.<sup>21</sup> The Rule 50 proposal was approved and had become law earlier, but the Rule 56 proposal presented to the Standing Committee in 1992, then to the Judicial Conference, had a different result.

The Rule 56 proposal revised the summary judgment standard as it had been developed through the case law. As revised, it replaced the language of the existing rule—summary judgment “*shall* be rendered” upon a showing that no genuine dispute of material fact existed and that the moving party was entitled to judgment as a matter of law—with a statement that:

- (a) Of Claims, Defenses, and Issues. The court without a trial *may* enter summary judgment for or against a claimant with respect to a claim, counterclaim, cross-claim, or third-party claim, *may* summarily determine a defense, or *may* summarily determine an issue substantially affecting but not wholly dispositive of a claim or defense if summary adjudication as to the claim, defense, or issue is warranted as a matter of law because of facts not genuinely in dispute. . . .
- (b) Facts Not Genuinely In Dispute. A fact is not genuinely in dispute if . . . on the basis of the evidence shown to be available for use at a trial, or the demonstrated lack thereof, and the burden of

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19. See ADVISORY COMM. ON CIVIL RULES, MINUTES, MAY 11, 1992, at 14 (1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1992-min.pdf> (discussing the various issues that the judges on the Advisory Committee had with the proposed amendments).

20. Cf. Memorandum from Judge Sam C. Pointer, Jr., Chair, Advisory Comm. on Federal Rules of Civil Procedure, to Judge Robert E. Keeton, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Comm., app. A, at 119–29 (May 1, 1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1992.pdf> (presenting proposed revisions to Rule 56).

21. Cf. Memorandum from Hon. John F. Grady, Chair, Advisory Comm. on Civil Rules, to Hon. Joseph F. Weis, Chair, Standing Comm. on Rules of Practice and Procedure at 61 (June 19, 1990), reprinted in REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE, app. B, att., at 61 (1990), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1990.pdf> (draft committee note accompanying the proposed amendment to Rule 50, stating: “The term ‘judgment as a matter of law’ [being substituted for ‘direction of verdict’ in Rule 50] is an almost equally familiar term and appears in the text of Rule 56”; however, noting that Rule 50 and Rule 56 remain separate to show the difference between pre-trial and post-trial motions).

production or persuasion and standards applicable thereto, a party would be entitled at trial to a favorable judgment or determination with respect thereto as a matter of law under Rule 50.<sup>22</sup>

The Committee Note made clear that the revision was intended to “enhance the utility of the summary judgment procedure” and to establish a “single and consistent standard, as [it] has been developed through case law, for determining when summary adjudication is permitted.”<sup>23</sup> The revision attempted to incorporate and restate the trilogy and to codify the judicial discretion to deny summary judgment even if the standard for granting it is met.<sup>24</sup> The Standing Committee viewed this aspect of the proposed rule with concern that “may” sent a signal that the court has no duty to respond to summary judgment motions.<sup>25</sup> The Committee Note attempted to clarify the limited nature of the discretion to deny a motion:

When these standards are met, the court should ordinarily enter the appropriate summary disposition. However, the court is not always required to enter a summary adjudication that would be permissible under the rule. Despite the apparently mandatory language of the former rule, case law has recognized a measure of discretion in the trial court to deny summary judgments in a variety of circumstances . . . . The purpose of the revision is not to discourage summary judgment, but to bring the language of the rule into conformity with this practice.<sup>26</sup>

The Advisory Committee and the Standing Committee thought that the extent of this discretion to deny summary adjudication depended on whether the requested summary judgment was on a nondispositive

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22. See Memorandum from Sam C. Pointer, Jr., Chairman, Advisory Comm. on Civil Rules to Hon. Robert E. Keeton, Chairman, Standing Comm. on Rules of Practice & Procedure, att. A, at 170–71 (May 1, 1992), reprinted in REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE, app. E (Sept. 1992) [hereinafter SEPT. 1992 STANDING COMM. REPORT] (emphasis added), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1992.pdf> (regarding facts not genuinely in dispute).

23. See *id.* att. A, at 179 (describing the purpose of the revision).

24. See *id.* at 180 (Committee Note stating: “When these standards [set out in the proposed rule] are met, the court should ordinarily enter the appropriate summary disposition. However, the court is not always required to enter a summary adjudication that would be permissible under the rule. Despite the apparently mandatory language of the former rule, case law has recognized a measure of discretion in the trial court to deny summary judgment in a variety of circumstances.”); *id.* att. A, at 181 (“The standards stated in this subdivision for determining whether a fact is genuinely in dispute are essentially those developed over time, culminating in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).”).

25. Cf. *id.* att. B, at 12 (“Some object to the language affording the trial court with some discretion not to enter a summary adjudication . . . under the rule.”).

26. *Id.* att. A, at 180.

issue, or would resolve the entire case, and on the substantive law.<sup>27</sup> This same debate over whether a court has discretion to deny summary judgment when the showing to grant it has been made was renewed with respect to amendments proposed to be effective in 2007 and again with respect to amendments proposed to be effective in 2010, with a different result.

The amendments proposed in 1992 were also intended to establish “national procedures . . . with the purpose of eliminating the need for local rules on this subject.”<sup>28</sup> This goal, which was one of the reasons for beginning work on what became the 2010 amendments to Rule 56, was reflected in the 1992 proposal that summary judgment motions had to include separately numbered paragraphs reciting the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, with pinpoint citations to the record.<sup>29</sup> The response had to “indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute,” with pinpoint citations to the record, and to “recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing those facts.”<sup>30</sup> If a party failed to challenge an asserted fact, that could be treated as an admission of that fact.<sup>31</sup> The argument had to be made in a separate memorandum.<sup>32</sup>

The 1992 proposed amendments addressed partial dispositions as summary determinations, not judgments, and included the district judges’ single favorite rule. That is the anti-ferret rule, making clear that the district judge does not have to search through the record for evidence that might be buried deep within. Instead, it is the parties’ obligation to tell the district court what parts of the record merit consideration. The “court is required to consider only those evidentiary materials called to its attention” through the pinpoint citations.<sup>33</sup>

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27. *Id.* att. B, at 12 (“The revision, however, merely brings the language of the rule (currently worded as mandatory) into conformity with court decisions. These decisions recognize the need for some discretion, particularly with respect to issues that are not wholly dispositive of the claims made by or against a party.”).

28. *Id.* att. A, at 179 (proposed committee note).

29. *See id.* att. A, at 172 (proposed revisions to Rule 56(c)(1)).

30. *See id.* att. A, at 173 (proposed revisions to Rule 56(c)(2)).

31. *See id.* (proposed revisions to Rule 56(c)(2)).

32. *See id.* att. A, at 174 (proposed revisions to Rule 56(c)(4)).

33. *See id.* att. A, at 177 (proposed revisions to Rule 56(e)(2)). This rule is also known as the anti-truffle-pig rule. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”).

In sending the proposal to the Standing Committee with a recommendation for approval, the Reporter noted, with some understatement, that it was “moderately controversial.”<sup>34</sup> Some were “apprehensive that any change in the rule might diminish the utility of summary judgment procedures.”<sup>35</sup> Others opposed “the amendment because it incorporates into the rule the principles enunciated in Supreme Court decisions that they believe were wrongly decided.”<sup>36</sup> And some objected to the language affording the trial court some discretion not to enter a summary judgment that might be permitted under the rule.<sup>37</sup> That provision drew a dissent in the Advisory Rules Committee from a member who “would have preferred that the text of the rule indicate that summary judgment is mandatory when warranted.”<sup>38</sup> But even with this, the Advisory Committee unanimously recommended adoption of the proposed amendment of Rule 56.<sup>39</sup>

The proposal went up to the Judicial Conference and met defeat. It is useful to note that the package the Judicial Conference wrestled with during those years was large. It was an interesting time for proceduralists, as is the present.

The December 1992 minutes of the Standing Committee meeting described the Judicial Conference’s rejection of Rule 56. Some members of the Conference had argued that the summary judgment rule was working well in its present form and that judges had become familiar with the language of the rule and the current case law. But the suspicion was that the rejection had more to do with the trilogy and less to do with the proposed rule. “[S]ome members seemed not to like the case law on Rule 56 and might not have wanted to enshrine it in the rule.”<sup>40</sup> According to Professor Steven Gensler, who has written insightfully on this topic, legend has it that the proposal came under attack from both those who liked and disliked the trilogy.<sup>41</sup> Those who liked it did not want to make changes. Those who disliked it did not want to enshrine it.<sup>42</sup> And there was perhaps another problem as well.

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34. See SEPT. 1992 STANDING COMM. REPORT, *supra* note 22, att. B, at 12.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. COMM. ON RULES OF PRACTICE & PROCEDURE, MINUTES, DEC. 17–19, 1992, at 2 (1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST12-1992-min.pdf>.

41. Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1152 (2010).

42. *Id.*

Writing later about the Civil Rules Committee's work during the time in which he served as its reporter, Professor Carrington wrote: "In fairness, none of us were sure we had it right."<sup>43</sup> The entire proposed amended rule went down to defeat. This is the first major change that wasn't—a restated standard that codified the trilogy and granted clear discretion to judges to deny summary judgment.

The guidance the Civil Rules Committee took from the 1992 effort to amend Rule 56 can perhaps best be seen by looking to the next two sets of proposed amendments to the rule that also ended up on the cutting-room floor. Both sets occurred in 2010, but the run-up started in 2007 when the Civil Rules were thoroughly edited to be clearer, simpler, more consistent, modern in expression, and formatted for easier reading—without changing the substantive meaning of any rule. This was the extension of the so-called "style project" to the Civil Rules.<sup>44</sup> The Appellate Rules were "restyled" in 1997, and the Criminal Rules in 2002. The restyled Evidence Rules, the fourth set to be "restyled," became effective on December 1, 2011.

Professor Steven Gensler has written the definitive work on the Committee's decision in 2007 to change one word in the language defining the standard for granting summary judgment, and the decision three years later—which in rulemaking terms is a nanosecond—to reverse the change. In his 2010 article, "*Must, Should, Shall*," Professor Gensler describes the change in 2007 from the language that had existed for seventy years—that summary judgment "shall be rendered" on a showing that no genuine dispute of material fact existed and that the moving party was entitled to judgment as a matter of law.<sup>45</sup> In 2007, Rule 56 was amended to provide that summary judgment "should be rendered" on that showing. There were two parts to the decision to make this change. First, the decision to move away from "shall" was the result of the style project. The style conventions strongly disfavored

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43. Carrington, *supra* note 7, at 647.

44. As the Committee's reporter at the time of the "style project" explained, the goal was "to translate present text into clear language that does not change the meaning." Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1761 (2004); see also Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 SCRIBES J. OF LEGAL WRITING 25, 25–26 (2008–2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Style%20Resources/Lessons%20in%20Drafting.pdf> (discussing the "restyling" of the Federal Rules of Civil Procedure); Memorandum from Professor Joseph Kimble to All Readers, *Guiding Principles for Restyling the Civil Rules* (Feb. 21, 2005) [hereinafter *Style Guidelines Memo*], available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Style%20Resources/Guiding\\_Principles.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Style%20Resources/Guiding_Principles.pdf).

45. Gensler, *supra* note 41, at 1142–49.

“shall” for good reasons.<sup>46</sup> It is inherently ambiguous. Depending on the context, it can, and does, mean “must,” “should,” or “may.” And it is a word that is used in written legal documents, not in modern spoken or plainly written English. The style project’s goals of having the rules say what they mean and mean what they say, and shedding archaic expression, demanded that “shall” be consigned to the vocabulary scrap heap. And once that decision was made, it became self-fulfilling because the other major goal of the style project was consistency. Leaving “shall” in one or two places and nowhere else was inconsistent with that goal.

The style project engaged in a laborious, but fascinating, task. For every “shall” in the rules, teams of professors, reporters, and committee members pored over cases and treatises to divine from the use and context what the proper translation would be. Professor Joseph Kimble, the style consultant to the Standing Committee, recounts that there were almost five hundred “shalls” in the Civil Rules before December 1, 2007.<sup>47</sup> For most of these five hundred “shalls,” it was easy to decide, based on context and case law applying the particular rule, that the “shall” was meant in the sense of a command and to substitute “must.” That happened 375 times.<sup>48</sup> In other cases, again based on context and case law, it was easy to decide that “shall” was permissive and to substitute some form of “may.” And in yet other cases, a soft imperative “should” was clearly called for.<sup>49</sup>

Rule 56, however, defied easy translation. One reason was that two of the Supreme Court cases in the trilogy had inconsistent language on this very point. The opinion in *Anderson* stated: “Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course

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46. See Style Guidelines Memo, *supra* note 44, at xviii (“*Shall* is notorious for its misuse and slipperiness in legal documents.”). Professor Kimble explained that the style project “[b]anish[ed] *shall*.” *Id.* He explained:

The restyled civil rules, like the restyled appellate and criminal rules, use *must* instead of *shall*. *Shall* is notorious for its misuse and slipperiness in legal documents. No surprise, then, that the Committee changed *shall* to *may* in several instances, to *should* in several other instances, and to the simple present tense when the rule involves no obligation or permission . . . .

*Id.*

47. Kimble, *supra* note 44, at 79.

48. *Id.*

49. See *id.* at 81–83 (showing a comparative table of Federal Rules of Civil Procedure using “shall” versus “may”).

would be to proceed to a full trial.”<sup>50</sup> By contrast, the opinion in *Celotex* stated:

[T]he plain language . . . mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.<sup>51</sup>

In the failed 1992 proposal, the Civil Rules and Standing Rules Committees had changed “shall” to “may,” which is clearly a word conveying discretion. The proposed Committee Note, however, conveyed the standard of a soft imperative.

When these standards are met, the court should ordinarily enter the appropriate summary disposition. However, the court is not always required to enter a summary adjudication that would be permissible under the rule. Despite the apparently mandatory language of the former rule, case law has recognized a measure of discretion in the trial court to deny summary judgments in a variety of circumstances.<sup>52</sup>

To foreshadow a later term prominent in rulemaking debates, the meaning was “context-specific.” Context-specific variations in meaning do not make rule-writing easy.

The 1992 Rules Committees chose “may” as the controlling word, changing the standard. The lore is, of course, that the change in the standard defeated the proposal. This history of years of work without a rule change to show for it was well known to the Rules Committees when they faced the style choice in the years leading up to the 2007 style revision: if not “shall,” what? The case law was both inconsistent and varied.<sup>53</sup> The variation depended on the substantive area, on

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50. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

51. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

52. SEPT. 1992 STANDING COMM. REPORT, *supra* note 22, att. A, at 180.

53. *Compare Lacks Indus., Inc. v. McKechnie Vehicle Components USA, Inc.*, No. 2008-1167, 2008 WL 4962687, at \*2, \*5 (Fed. Cir. Nov. 21, 2008) (affirming a denial of the plaintiff’s motion for summary judgment on patent validity, noting that it would not “disturb a trial court’s denial of summary judgment unless [it found] that the court [had] indeed abused its discretion,” and that “the trial court has discretion to deny a motion for summary judgment” (quoting *Little Six, Inc. v. United States*, 280 F.3d 1371, 1373 (Fed. Cir. 2002))), with *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, 418 F.3d 1326, 1335 (Fed. Cir. 2005) (stating “[s]ummary judgment *must be granted*” if the Rule 56(c) standard is met (emphasis added)), and *Starns v. Health Prof’ls, Ltd.*, No. 04-1143, 2008 WL 268590, at \*1 (C.D. Ill. Jan. 29, 2008) (“Summary [judgment] is not a discretionary remedy. If the plaintiff lacks enough evidence, summary [judgment] must be granted.” (quoting *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam))). See also Memorandum from Andrea Kuperman to Judge Mark R. Kravitz, Discretion to Deny Summary Judgment (Feb. 19, 2008, as supplemented Jan. 25, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2056%20memo.pdf> (describing

whether the summary judgment sought was claim-dispositive or not, and on the circuit law that applied.<sup>54</sup> The Advisory Rules Committee pieced all this together and concluded that the 1992 version had been correct in its analysis but had picked the wrong word. “May,” which conveyed broad discretion, was not what the 1992 Committee Note described. Instead, the soft imperative “should” fit well. So the change from “shall” to “should” was made in 2007, as part of the style project. Although there was a great deal of comment on the revised proposed style rules from bench, bar, and academy, including from those who know this history well, there was only one comment directed to this change.<sup>55</sup> There was no significant argument that this changed substantive meaning, which was forbidden by the style project.

In 2008, the Advisory Committee published an extensive set of proposed amendments to Rule 56. This set of proposed amendments was the daughter of the style project, which painfully revealed the disconnect between the practice of bringing and litigating summary judgment motions on the one hand, and the rule text on the other. Such a disconnect was not surprising. Not only had the case law interpreting Rule 56 changed with and under the trilogy, making summary judgment motions both more frequent and more important, but civil litigation had changed in other ways that also affected summary judgment motions. To summarize a few of the many large changes in a few words, the number of trials continues to decline in both state and federal courts. More cases are resolved by means other than trial, including by motions

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varying case law on discretion to deny summary judgment).

54. See generally Memorandum from Andrea Kuperman to Judge Mark R. Kravitz, *supra* note 53 (describing varying case law throughout the circuits on discretion to deny summary judgment); *id.* at 2 (noting that the one appellate case that expressly disapproved of the exercise of discretion to deny summary judgment did so in the context of qualified immunity, and that “[b]ecause qualified immunity is a unique area of substantive law with an underlying policy favoring early resolution, the appellate case disapproving of discretionary denials in that context may not mean that district courts lack discretion to deny summary judgment in other contexts”). See also Friedenthal & Gardner, *supra* note 9, at 104 (noting that federal courts are split over whether judges are required to grant summary judgment if it is technically appropriate); *id.* at 104–06 (describing several circumstances in which courts have found it appropriate to exercise discretion to deny a properly supported motion for summary judgment, such as complex cases “just not ripe for summary relief,” including instances where “the issues presented in the motion were intertwined with issues not proper for summary adjudication”).

55. See Memorandum from Stephen B. Burbank & Gregory P. Joseph to the Comm. on Rules of Practice and Procedure, Restyled Fed. Rules of Civil Procedure 4 (Oct. 24, 2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202005/05-CV-022.pdf> (submitting comments on the proposed restyled rules on behalf of a group of eleven law professors and ten practitioners, and noting that there is bound to be disagreement as to the appropriate term used to replace “shall” in some of the rules (but not noting any specific concerns with the Rule 56 change)).

practice. Discovery has become more complicated, in part because of changes in information technology that turned it into e-discovery, and in part because discovery is in many cases focused on creating evidence to support or oppose summary judgment motions. By way of example of the disconnect, the rule text did not refer at all to motions for partial summary judgment, despite the importance and prevalence of such motions. The degree of the disconnect was revealed by the large number and variety of local rules that directed lawyers on how to move for, oppose, and litigate motions for summary judgment. Such a patchwork of local rules in an area that the national rules occupy may, and in this case did, indicate deficiencies in the national rule. This disconnect between rule text and practice could not be fixed in the style project because it would change substantive meaning. The 2007 summary judgment rule, clarified and simplified by the style project, was nonetheless, as one Committee member stated, a “wreck.”<sup>56</sup>

The 2008 proposal to revise the summary judgment rule that was published for comment retained the use of “should” and flagged for comment whether that was in fact the right word to state the standard for granting summary judgment when the criteria for doing so were met. The proposal was met with vigorous and numerous comments. The proponents of using “must”—that is, of requiring a judge to grant summary judgment whenever the requirements were met, with no discretion or flexibility—argued that the rule of law itself was threatened if judges could deny summary judgment to parties who had made the necessary showing to obtain it.<sup>57</sup> Many echoed the complaint

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56. See CIVIL RULES ADVISORY COMM., MINUTES, OCT. 27–28, 2005, at 27 (2005), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2005-min.pdf> (practitioner’s comments).

57. See, e.g., *Hearing Before the Advisory Comm. on Civil Rules* 89 (Feb. 2, 2009) (testimony of Mary Massaron Ross), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV02-2009-tr.pdf> (“When you try to explain to a client that there isn’t any genuine issue of material fact . . . but nevertheless the judge can deny it and then there’s no standard, that undermines respect for the rule of law.”); *Hearing Before the Advisory Comm. on Civil Rules* 93 (Nov. 17, 2009) (testimony of Thomas Gottschalk), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript\\_111708.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript_111708.pdf) (“[I]f a litigant is entitled to judgment as a matter of law, it must be granted. There is no justice in a system that doesn’t grant that.”); see also ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK FOR APR. 20–21, 2009, at 124 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2009-04.pdf> (summarizing the comments of Claudia D. McCarron, Esq.: “If ‘shall’ was ambiguous, it should be replaced by ‘must.’ ‘Should’ will mean an increase in the number of cases in which discretion is exercised to deny summary judgment; facing the cost of moving, ‘fewer meritorious motions will be filed.’”); *id.* at 125 (summarizing the comments of Debra Tedeschi Herron, Esq.: “When properly supported, summary judgment must be granted as it lessens the exorbitant costs of litigation and restores faith in the juridical system.”); *id.*

about earlier efforts to amend Rule 56, that the bigger problem was judges simply not ruling on summary judgment motions or denying valid motions, either out of reluctance to reach the result or out of hope that uncertainty would facilitate settlement.<sup>58</sup> The proponents of “should” as the standard—the soft imperative recognizing that judges ought to grant summary judgment when the criteria for doing are satisfied, but not when the support is thin or there is no inefficiency in developing a fuller record at trial—argued that access to courts and the interests of justice were threatened if judges were stripped of the discretion to deny summary judgment when it was technically justifiable but fairness supported a fuller presentation.<sup>59</sup> The

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(summarizing the comments of Stephen G. Morrison, Esq.: “The ‘unbounded discretion’ conferred by ‘should’ ‘could result in parts of the case, or the entire case, being tried to a jury when it never should have made it that far.’ ‘Must’ will promote the most efficient and inexpensive manner of providing justice.”); *id.* at 127 (summarizing the comments of Keith B. O’Connell, Esq.: “‘Must’ ought to replace ‘should.’ ‘Should’ has never meant ‘shall,’ and ‘will render the rule both under-utilized and ineffective.”); *cf.* *Hearing Before the Advisory Comm. on Civil Rules* 109 (Jan. 14, 2009) (testimony of G. Edward Pickle), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/FedCtHearing011409.pdf> (explaining the need for a mandatory standard because “uniformity is absolutely critical” so that the same standard is applied everywhere).

58. See ADVISORY COMM. ON CIVIL RULES, MINUTES, APR. 7–8, 2008, at 3 (2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2008-min.pdf> (summarizing the comments made by various participants); see also ADVISORY COMM., APR. 20–21, 2009, *supra* note 57, at 125 (summarizing the comments of Hon. Frank H. Easterbrook: “Some judges prefer to deny, despite the absence of genuine dispute as to any material fact, because at least one party will be satisfied by the jury’s verdict, both parties will appreciate being heard, and trial spares the need to decide the motion. But the party who shows there is no genuine dispute should not have to bear the costs of trial, nor should other parties in the trial queue have to wait longer.”); *id.* at 136 (summarizing the comments of Stephen Pate, Esq.: “[J]udges are reluctant to rule on summary judgment motions, even though it’s a situation involving a contract which involves matters of law.”. . . ‘Must’ will also protect against judges who use summary-judgment as a settlement tool.” (alteration in original)); *Hearing Before the Advisory Comm. on Civil Rules* 124 (Nov. 17, 2008) (testimony of Stephen G. Morrison), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript\\_111708.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript_111708.pdf) (“[I]t would be grossly unfair for the U.S. Judicial Conference Rules Committee to reach a conclusion that judges should punt [on a summary-judgment motion] when it’s too hard and too time-consuming.”); ADVISORY COMM. ON CIVIL RULES, MINUTES, APR. 13–14, 1992, at 14 (1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-1992-min.pdf> (“Mr. Linder argued that the revision was viewed as too radical, but did not reach the right problem, which is that motions are frequently not ruled on.”).

59. *Cf.* ADVISORY COMM., APR. 20–21, 2009, *supra* note 57, at 127–28 (summarizing the comments of Thomas J. Crane, Esq.: “I am strongly opposed to making the grant of summary judgment mandatory in certain cases.”); *id.* at 130 (summarizing the comments of Professor Suja A. Thomas: “‘Should’ is appropriate ‘because courts should be given discretion in tough cases. . . . Indeed, judges in the same case often disagree on what the evidence shows and thus whether summary judgment should be granted.”); *id.* at 131 (summarizing the comments of Professor Eric Schnapper: “‘Should’ is correct. ‘It is entirely common for the evidence and contentions of the parties to be somewhat different at trial than they were at summary judgment. . . . [T]hese

proponents of “should” echoed the complaints heard in earlier rulemaking efforts that judges were too willing to grant summary judgment to “disfavored” categories of litigants and that if judges were required to do so whenever the technical criteria were met, such litigants would be even more disadvantaged.<sup>60</sup> It was a wonderful debate. Dozens of witnesses weighed in and many written comments were submitted.<sup>61</sup> The upshot was to revert to “shall.”<sup>62</sup> That is, to undo the style change after only three years.

The Rule 56 text had gone from “shall,” to a proposal for “may,” to “should,” and back to “shall.” The reason for reverting to “shall” was the conclusion that the decision to change had itself violated a tenet of the style project. That tenet was to leave “sacred phrases,” which had become so laden with nuanced meaning from case law that to change the words would inevitably change the substantive meaning.<sup>63</sup> The

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differences would at times lead the district judge to conclude that the nature of the future trial record is insufficiently clear to warrant summary judgment. In addition, a judge considering a summary judgment motion may reasonably conclude that he or she does not understand the factual issues as well as he or she would at the end of a trial.”); *Hearing Before the Advisory Comm. on Civil Rules 24* (Nov. 17, 2008) (testimony of Richard T. Seymour), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript\\_111708.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript_111708.pdf) (“We all know from the trials we participated in that there is a world of difference in how an individual presents testimony, whether it’s a trial[] by affidavit[] does not give anyone the sense of a just result that a trial with live witnesses would produce.”).

60. See ADVISORY COMM., APR. 20–21, 2009, *supra* note 57, at 127–28 (summarizing the comments of Thomas J. Crane, Esq., who argued for “should” because summary judgment is already granted too frequently, particularly in ADA cases); *cf. id.* at 126 (summarizing the comments of Richard L. Seymour, Esq., who argued that “should” is the proper term and that “[d]ecisions in the First, Second, and Third Circuits ‘have criticized the tendency of district courts to use summary judgment as a device to clear their dockets rather than to identify and dispose of hopelessly unmeritorious cases,’” and that “[t]his tendency too will be exacerbated by ‘must’”); *id.* at 136 (summarizing the testimony of Tom Crane, Esq., who noted that “[s]ummary judgment is overused,” and that “[t]here is no need to increase its use by changing to ‘must’”).

61. See *id.* at 120–69 (summarizing written comments and testimony on proposed rules published for comment); *Hearing Before the Advisory Comm. on Civil Rules* (Feb. 2, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV02-2009-tr.pdf>; *Hearing Before the Advisory Comm. on Civil Rules* (Jan. 14, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/FedCtHearing011409.pdf>; *Hearing Before the Advisory Comm. on Civil Rules* (Nov. 17, 2008), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript\\_111708.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Transcript_111708.pdf).

62. See ADVISORY COMM. ON CIVIL RULES, MINUTES, APR. 20–21, 2009, at 3 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2009-min.pdf> (noting that “shall” was restored by a unanimous vote).

63. See ADVISORY COMM. ON CIVIL RULES, MINUTES, FEB. 2–3, 2009, at 6 (2009) [hereinafter ADVISORY COMM., FEB. 2–3, 2009], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV02-2009-min.pdf> (“‘Sacred phrases’ were carried forward without change, partly for the reassurance of familiarity but often because any change in expression might change meaning.”); see also Style Guidelines Memo, *supra* note 44, at xix–xx

Advisory Committee and the Standing Committee concluded that the statement of the standard—“summary judgment shall be rendered on a showing that no genuine dispute of material fact existed and the moving party was entitled to judgment as a matter of law”—was such a sacred phrase that it had been a mistake to change it as part of the style project in 2007.<sup>64</sup>

The 2010 proposal to amend Rule 56 was, of course, not subject to the don't-change-substantive-meaning limit of the style project. But the Advisory Committee decided from the outset of its work on what became the 2010 amendments to Rule 56 not to change the substantive standard for granting or denying summary judgment, and not to tilt the rule toward either plaintiffs or defendants. The Committee learned from the 1992 experience with a proposed amendment that would have both

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(noting that “sacred phrases” are different from terms of art such as “hearsay”).

64. The Advisory Committee recognized that “[b]y substituting ‘should’ for ‘shall,’ the Style Project may have inadvertently desecrated a sacred phrase.” ADVISORY COMM., FEB. 2–3, 2009, *supra* note 63, at 6. At its next meeting, the Advisory Committee recommended the restoration of “shall,” explaining that

[i]n February the Committee concluded that “shall” should be restored, despite the general style convention prohibiting any use of this word. Multiple comments on the published proposal, which carried forward with “should” from the Style Project, show unacceptable risks that either of the recognized alternatives, “must” or “should,” will cause a gradual shift of the summary-judgment standard. Brief discussion reconfirmed by unanimous vote the recommendation to restore “shall.”

ADVISORY COMM., APR. 20–21, 2009, *supra* note 62, at 3. Under Rule 56 as amended in 2010, “The court *shall* grant summary judgment . . . .” FED. R. CIV. P. 56(a). The Committee Notes accompanying the 2010 amendment explained:

“Shall” is restored to express the direction to grant summary judgment. The word “shall” in Rule 56 acquired significance over many decades of use. Rule 56 was amended in 2007 to replace “shall” with “should” as part of the Style Project, acting under a convention that prohibited any use of “shall.” Comments on proposals to amend Rule 56, as published in 2008, have shown that neither of the choices available under the Style Project conventions—“must” or “should”—is suitable in light of the case law on whether a district court has discretion to deny summary judgment when there appears to be no genuine dispute as to any material fact. Compare *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 \* \* \* (1948)),” with *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”). Eliminating “shall” created an unacceptable risk of changing the summary-judgment standard. Restoring “shall” avoids the unintended consequences of any other word.

FED. R. CIV. P. 56 advisory committee’s notes (2010).

restated and changed the standard for granting summary judgment and that frankly intended to promote the use of such motions.<sup>65</sup> With the proposals that were published in 2008, the Civil Rules Committee decided to allow the case law on the standard for granting or denying such motions to continue to develop around the existing rule statement. The result is the second major change that wasn't: the decision not to change "shall" to state the standard for granting summary judgment when the necessary showing had been made, and the decision not to change the iconic words that expressed the standard, despite the changes in case law and practice that had occurred.

While deciding not to change the substantive standard, and instead to make a change back to "shall" to ensure that no one thought the standard had been changed, the Civil Rules Committee pursued other proposals to clarify, simplify, and make consistent the procedures for bringing and litigating summary judgment motions. Some of them had been rehearsed in the 1992 proposed amendments. The goals were much the same as they had been in 1992. They included making the procedures more consistent across the country, reducing the role of local rules; recognizing partial summary judgments; and requiring movants and nonmovants to provide specific citations to the record, relieving judges of the obligation to behave like ferrets or truffle pigs.<sup>66</sup> The first goal was the most difficult. About half of the ninety-three districts had local rules requiring movants to set out the facts that they believed to be undisputed and that entitled them to summary judgment in separately numbered paragraphs. Of the fifty-six districts with such rules, twenty required the nonmovant to respond in kind. The rest of the districts did not have such a requirement.<sup>67</sup> To improve national consistency, the

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65. The stated purpose of the proposed 1992 amendment was "to enhance the utility of the summary judgment procedure." SEPT. 1992 STANDING COMM. REPORT, *supra* note 22, att. A, at 179 (1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1992.pdf>. See *id.* att. A, at 170–79, for the full text of the 1992 proposal to amend Rule 56.

66. See ADVISORY COMM. ON CIVIL RULES, MINUTES, APR. 19–20, 2007, at 3–4 (2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2007-min.pdf> (broadly discussing the reasons for amending Rule 56); Memorandum from Judge Sam C. Pointer, Jr., Chair of the Advisory Comm. on Civil Rules, to Judge Robert E. Keeton, Chair of the Standing Comm. on Rules of Practice and Procedure, Report of Advisory Comm. on Civil Rules att. A, at 124–29 (May 1, 1992), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-1992.pdf> (draft committee note to proposed Rule 56 revisions, explaining the proposed revisions); see also REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MAR. 2009 5–7 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST01-2009.pdf> (discussing the rationale behind the proposals to amend Rule 56 in 2008).

67. See Memorandum from Jeffrey Barr & James Ishida to Judge Michael Baylson, Survey of

2008 proposal included a so-called point-counterpoint provision. The proposed change would have required the party seeking summary judgment to file three items: a motion, a statement of the facts that are asserted to be beyond genuine dispute, and a brief. The response would have included a submission addressing each stated fact and could include a statement of additional facts asserted to preclude summary judgment, along with a brief. The movant could file a reply to any additional facts stated in the response, again with a brief.<sup>68</sup>

The 2008 point-counterpoint proposal was similar in some ways to that in the 1992 draft. It was unclear that the point-counterpoint part of the 1992 proposed rule revision played a role in the Judicial Conference decision to reject it. But in 2008, the proposal to make the point-counterpoint motion and response the default national standard, subject to a judge's ability to deviate from it by case-specific order but beyond the ability of a district or division to deviate from it by local rule or standing or general order, provoked another robust and deeply divided debate.

Having a default national procedure for filing and responding to summary judgment motions was important if the rule was to achieve national uniformity. National uniformity was one of the singular

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Dist. Court Local Summary Judgment Rules, in Memorandum from Judge Lee H. Rosenthal, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Comm. 110–12 (May 25, 2007) [hereinafter May 2007 Civil Rules Report], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2007.pdf> (discussing a review of ninety-two district courts regarding local summary judgment rules).

68. In relevant part, the proposed amendments to Rule 56(c) that were published in 2008 provided:

- (2) Motion. The motion must:
  - (A) describe each claim, defense, or issue as to which summary judgment is sought; and
  - (B) state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law.
- (3) Response. A response:
  - (A) must, by correspondingly numbered paragraphs, accept, qualify, or deny—either generally or for purposes of the motion only—each fact in the Rule 56(c)(2)(B) statement;
  - (B) may state that those facts do not support judgment as a matter of law; and
  - (C) may state additional facts that preclude summary judgment.
- (4) Reply. The movant may reply to any additional fact stated in the response in the form required for a response.

*Id.* at 66–67.

achievements of the Federal Rules in 1938.<sup>69</sup> But in the years since, local rules have proliferated. Of course, there are local variations in docket mix and conditions and in the culture of the bench and bar. These variations, often reflected in local rules, are important. And there is the individual discretion of judges to manage their own dockets in the way that works best for them. This individual discretion, often reflected in individual-judge rules, or “local-local” rules, is an important aspect of judicial independence and creativity. On the other hand, a national judicial system meant to have a nationally consistent set of procedural rules should not have radically different procedures from district to district in such an important area as summary judgment. Lawyers complain that they have to deal with very different practices among the courts.<sup>70</sup> Judges may not be fully aware of the problem that numerous and varying local rules present for out-of-district practitioners, or for local practitioners who are more familiar with state than federal courts. And many of the local-rule variations do not reflect, and are not caused by, differences in local practice or docket conditions. Instead, the variations may arise and persist from habit or from comfort with the familiar. But the Civil Rules Committee was unwilling to impose any particular approach as the national standard without confidence that it would be workable and fair on a national basis. The public comments on point-counterpoint undermined that confidence.

During the public-comment period on the proposed amendments to Rule 56 published in 2008, it became clear that imposing the point-counterpoint procedure as the default national standard would be

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69. See, e.g., Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1394 (1992) (describing how the Rules established uniformity); see also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 503–04 (1986) (discussing the desire of the drafters of the Federal Rules of Civil Procedure to create uniformity in federal practice); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002–06 (1989) (discussing arguments advanced in favor of uniformity during the creation of the Federal Rules of Civil Procedure, and the four “strands” of the “uniform federal rules’ theme”: interdistrict court uniformity, intrastate uniformity, transsubstantive uniformity, and uniformity of result).

70. Cf. Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1, 26–30 (1997) (using federal appellate practice as an example to show that complying with local rules impairs the quality and increases the cost of litigation, since lawyers must spend time discovering, understanding, and ensuring their compliance with local rules); Subrin, *supra* note 69, at 2020–26 (examining the wide-ranging differences among rules of court, highlighting rules regulating discovery and deposition practices). See generally Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213, 214–16 (1981) (discussing the promulgation of local rules in federal courts and the problems they create in practice).

viewed as favoring defendants at the expense of plaintiffs.<sup>71</sup> Lawyers representing plaintiffs, who are not always, but often, opposing summary judgment motions, argued that having to respond to individual paragraphs identifying facts asserted to be undisputed and entitling the movant to relief, in correspondingly numbered individual paragraphs, imposed yet another burden on the unrepresented and the underrepresented who were already at a disadvantage in summary judgment practice.<sup>72</sup> These lawyers also argued that the point-counterpoint procedure often prevented them from telling their client's story in a way that allowed the inferences as well as the facts to become clear. Instead, point-counterpoint disaggregated—sliced and diced—the evidence in a way that helped defendants and made summary judgment easier to grant. In other words, the lawyers argued, the point-counterpoint procedure could itself affect the substantive standard for

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71. See, e.g., ADVISORY COMM., APR. 20–21, 2009, *supra* note 57, at 120 (describing comments of Professor Elizabeth M. Schneider: “The detailed statement and response procedure may aggravate an already unsatisfactory situation” in civil rights and employment discrimination cases); *id.* at 121 (describing the comments of L. Stephen Platt, Esq.: “[I]n practice the courts are treating the plaintiff as still having the burden of proof in opposing summary judgment motions and the courts improperly take the inferences in favor of the moving party. . . . [T]he Committee should move in the direction of limiting the one-sidedness (i.e., favoring the moving party) of the current rule.” (alterations in original)); *id.* (describing the comments of Ellen J. Messing, Esq.: “[T]he Committee should move in a different direction [from point-counterpoint procedure]. It should take appropriate steps to limit the abuse of summary judgment motions in civil rights and other cases where the parties are disproportionate in resources.” (alterations in original)); *id.* at 122 (describing the comments of Cynthia L. Pollick, Esq.: “The comment urges that the present system is hard enough, the proposed amendments would make it harder for everyday citizens, leaving unfortunate long-lasting impressions about the federal justice system.”); *id.* at 123 (summarizing the testimony of Hon. Royal Furgeson: “Summary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the cost and risk to plaintiffs in the pretrial phases of litigation, while diminishing both for defendants. . . . [S]ummary judgment, as we have it today, has created an unlevel playing field.’ The procedure should not be further complicated by adding point-counterpoint.” (alterations in original)).

72. See, e.g., *id.* at 140 (summarizing the comments of Joseph D. Garrison, Esq.: “The problem with detailed statements is that some lawyers defending individual employment cases make abusive submissions detailing hundreds of facts, imposing inappropriate burdens on the small firms that often represent plaintiffs.”); *id.* at 143 (summarizing the comments of Professor Elizabeth M. Schneider: “Expresses concern that the proposed point-counterpoint procedure will have a particularly adverse impact on employment discrimination and other civil rights actions.”); *id.* at 145 (summarizing the comments of L. Steven Platt, Esq.: “The point-counterpoint system used in the Illinois district where Mr. Platt practices ‘doesn’t work and unfairly favors defendants.’ . . . ‘The point-counterpoint system is, for many reasons, ‘biased against plaintiffs and their lawyers in civil rights cases.’”); *id.* at 146 (summarizing the comments of Ellen J. Messing, Esq., which stated that “[f]rom our perspective as plaintiffs’ civil rights lawyers, this system is an unmitigated disaster”); *id.* at 157 (summarizing the testimony of John Vail, Esq., who noted that summary judgment is most often used by defendants, and that the proposed procedure would prevent plaintiffs, who carry the trial burden, from effectively creating a narrative).

granting summary judgment in a way that adversely affected plaintiffs.<sup>73</sup>

The benefit of having district and division local rules serve as laboratory experiments to test different approaches also became clear. Lawyers with experience in districts or divisions with point-counterpoint local rules gave mixed reviews of how well the procedure worked. Lawyers—on both sides of the “v.”—emphasized that without effective judicial control and management, the statements of undisputed facts could grow to mammoth proportions, defeating the intended efficiency.<sup>74</sup> Other lawyers praised the procedure and emphasized how well it had worked in their cases. And though it is not common to have judges speak out against rule proposals, that happened here. Judges in districts that had tried point-counterpoint and abandoned it came to ask the Civil Rules Committee not to recommend a change to Rule 56 that would impose the procedure on a national basis.<sup>75</sup> Judges with

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73. See, e.g., *id.* at 148 (summarizing the comments of Sharon J. Arkin, Esq.: “Point-counterpoint ‘is . . . very disturbing . . . because it encourages defendants to set forth excessive, unnecessary facts that must be addressed by the plaintiff in a painstaking piecemeal way.’”); *id.* at 148–49 (summarizing the comments of Stefano G. Moscato, Esq., for the National Employment Lawyers Association, who explained the problems with districts using the point-counterpoint procedure, including that “[t]he real merits get lost in the shuffle”); *id.* at 149 (summarizing the comments of March Buchanan, Esq.: “Experience in employment discrimination law shows that the point-counterpoint procedure ‘would be nothing more than abusive, in that it allows the defendant to select the theme of the motion, and prevents the plaintiff . . . from submitting reasonable inferences from the facts.’”); *id.* at 152 (summarizing the comments of Karen K. Fitzgerald, Esq.: “[T]he point-counterpoint system makes it even more difficult for the plaintiff to adequately correct some of the subtle misconceptions because the plaintiff is forced to respond within the confines of the defendant’s stated version of the story.’ The plaintiff should be allowed to tell the story in a persuasive way.” (alteration in original)).

74. See, e.g., *id.* at 150 (summarizing the comments of Jeffrey J. Greenbaum, Esq.: “[I]n many instances [point-counterpoint statements] are misunderstood or are misused ‘to overburden the other side with the need to respond to . . . far too numerous, detailed and complex fact statements.’”); *id.* at 151 (summarizing the comments of Margaret A. Harris, Esq.: “The proposed rule is unwieldy and would result in an inordinate increase in the amount of time spent by counsel . . . and, more importantly, result in the district court receiving, at minimum, four additional (and lengthy) documents that must be checked and cross-checked against one another.”); *id.* at 154 (summarizing the comments of Allen D. Black, Esq.: “Point-counterpoint ‘imposes an enormous amount of unproductive busywork on both the parties and the Court.’ In complex cases the statements ‘almost universally list hundreds of facts . . . , many of which have only tangential impact on the core dispute. The non-moving party is then compelled to contest or at least re-case hundreds of peripheral facts . . . .’”); *id.* at 157 (summarizing the testimony of Joseph Garrison, Esq., who explained that “there are motions that abuse the procedure by stating too many undisputed facts, including ‘supposed material facts which are not at issue’”).

75. See, e.g., *id.* at 140 (summarizing the comments of Hon. G. Patrick Murphy: “[T]his procedure was tried in our court by local rule and it proved to be a waste of time.’ . . . The amendment will be a disaster; ‘don’t do it.’”); *id.* at 144–45 (summarizing the comments of Hon. Claudia Wilken, who explained that since her district abandoned point-counterpoint procedures,

experience in both districts with it and without it made similar pleas. A judge who had extensive experience with summary judgment motions in districts with a point-counterpoint local rule and in districts with no such rule, from regularly serving in different courts, reported on the results of what turned out to be a nicely controlled experiment.<sup>76</sup> The direct comparison did not yield favorable reviews for the point-counterpoint procedure.<sup>77</sup> Yet other judges in districts with a local rule requiring point-counterpoint presentation of summary judgment motions and responses praised its benefits and emphasized that it made deciding summary judgment motions faster and better.<sup>78</sup> The Civil Rules Committee added to this information a study performed by the Federal Judicial Center on differences in the results and time to disposition between the districts that required point-counterpoint and those that did not.<sup>79</sup>

At the end of the day, the Civil Rules Committee decided not to pursue the published proposal for point-counterpoint. There were a number of changes to the summary judgment rule proposed that were enacted in 2010,<sup>80</sup> but they did not include a national system of a point-

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“we have found the summary judgment motion practice to be much improved”); *id.* at 146 (summarizing the comments of Hon. Robert L. Miller, Jr., who wrote for all the District and Magistrate Judges of the Northern District of Indiana, which abandoned its own point-counterpoint procedure because it “led to too much satellite briefing, such as motions to strike for non-compliance with the requirement”); *cf. id.* at 152 (summarizing the comments of Hon. Janice Stewart, who noted that the District of Oregon has a point-counterpoint procedure that she waives and that “has generated widespread dissatisfaction”).

76. *See id.* at 140–41 (summarizing the comments of Hon. John W. Sedwick, who had experience in both the District of Alaska, which did not use point-counterpoint, and the District of Arizona, which did use point-counterpoint); *see also id.* at 141 (summarizing the comments of Hon. H. Russel Holland).

77. *See id.* at 140–41 (summarizing the comments of Hon. John W. Sedwick, who described numerous problems with the point-counterpoint procedure); *see also id.* at 141 (summarizing the comments of Hon. H. Russel Holland, who joined Judge Sedwick’s comments and stated that “[a]s compared to Alaska, the Arizona local Rule 56 practice is ‘not compatible with’ the purposes of Rule 1”).

78. *See, e.g., id.* at 147 (summarizing the comments of Hon. Timothy J. Savage, who supported the proposed revisions); *id.* at 155 (summarizing the testimony of Hon. Robert E. Payne, noting that a local rule in his district that implemented a similar procedure was helpful to focus the briefing, provided that it was coupled with another rule limiting the length of briefs (which include the statements of undisputed facts, and the responses to those statements)); *cf. id.* at 147 (summarizing the comments of Hon. Barbara B. Crabb, who noted that she finds a similar procedure in the Western District of Wisconsin to be very helpful, but suggesting that it not be written into the national rule).

79. *See* Memorandum from Joe Cecil & George Cort to Judge Michael Baylson, Report on Summary Judgment Practice Across Districts with Variations in Local Rules (Aug. 13, 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/\\$file/sujulrs2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf).

80. The amendments that took effect in 2010 drew from many summary judgment provisions

counterpoint procedure. The local-rule variations could continue to operate in this area, at the expense of national consistency.

Part of this discussion was about national consistency as opposed to local-rule variations, a rulemaking theme that goes back to the mid-1930s. Since 1938, there has been a national rule stating the standard for when to grant or deny summary judgment. That is obviously critical; national uniformity is essential in stating the procedural rules that also define parties' rights. Briefing procedures are not in that category. One issue was whether this briefing procedure was in a second category, in which a consistent approach is more important than what the approach is, or in a third category, in which consistency is less important but the Committee has confidence it has picked the best rule and therefore can make it the national rule. Point-counterpoint did not fit into these categories or pass any of these criteria. It did not have to be a nationally uniform standard and the Committee was not confident that, to use Professor Carrington's words, what it proposed as the default national standard was "right." So the Committee opted not to make the change. This is the third change that wasn't. Like the first two changes that weren't, it exemplified, and resulted from, a robust, transparent, and highly effective process under the Rules Enabling Act.

In both 1992 and in 2010, when substantial revisions of Rule 56 were thoroughly studied, the Civil Rules Committee decided not to recommend changes that would alter the rule text describing the

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common in local rules. For example, the amendments adopted a provision that required a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record. Some of the other changes made by the 2010 amendments included: restoring "shall" to express the direction to grant summary judgment when the standard is met; indicating that the court should state on the record the reasons for granting or denying a motion for summary judgment; recognizing that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary judgment motion; providing courts with options when an assertion of fact has not been properly supported by the moving party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion; setting a time, subject to variation by local rule or court order in a case, for a party to file a summary judgment motion; explicitly recognizing that courts may enter partial summary judgments; and providing that after giving notice and a reasonable time to respond, a court may grant summary judgment for the nonmoving party, grant a motion on legal or factual grounds not raised by the parties, or consider summary judgment on its own. See REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE & PROCEDURE, TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, SEPT. 2009, at 14–15 (2009), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined\\_ST\\_Report\\_Sept\\_2009.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/Combined_ST_Report_Sept_2009.pdf) (emphasizing the importance of trial courts having some discretion in handling motions for partial summary judgment); FED. R. CIV. P. 56 advisory committee's notes (2010).

substantive standard. In 2010, the Committee decided not to make a change in briefing requirements—a change that on its face seemed only procedural—in part for fear that it could affect how the substantive standard worked by making it harder for certain categories of cases or litigants to litigate summary judgment motions. And in 2010, the Civil Rules and Standing Rules Committees decided to revert to a word that had been different for three years to avoid changing the substantive standard. The decision not to change the Rule 56 text setting out the standard for granting summary judgment was made in the face of significant criticism that the rule as drafted was indeterminate and unfair as a result of Supreme Court cases interpreting that text. The circumstances and nature of the criticism are similar to some of the reactions to *Bell Atlantic Corp. v. Twombly*<sup>81</sup> and *Ashcroft v. Iqbal*,<sup>82</sup> the 2007 and 2009 Supreme Court cases interpreting Rule 8 pleading requirements.<sup>83</sup> What do the decisions not to change the Rule 56 text describing the substantive standard for granting summary judgment motions, and the decisions to avoid other changes in the rule that could affect the standard, tell us first about summary judgment and, second, about the Rules Enabling Act?

The Rule 56 text, like the Rule 8 text, has proven enduring. Following Supreme Court decisions interpreting these rule texts, the Rules Committees looked hard at alternatives and concluded, after years of work, that they have not yet arrived at different formulations that are better and worth risking. The Rule 56 text has endured because its seemingly indeterminate standard is problematic only if the text is viewed apart from the common-law system in which it operates. The combination of the iconic rule text with the common law that has developed over time, emerging from many different cases, prevents the

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81. 550 U.S. 544 (2007).

82. 556 U.S. 662 (2009).

83. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 850 (2010) (“*Twombly*’s critics—and there are many—complain that the plausibility standard unfairly impedes court access for meritorious suits. . . . [*Iqbal*] . . . applies the plausibility standard to allegations that are less obviously deficient than those in *Twombly* and, in so doing, signals an even stricter approach to pleading requirements. Provoked by the *Iqbal* decision, many critics now believe that it is imperative to undo the effects of plausibility pleading.”); Kevin Clermont & Stephen Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 840–41 (2010) (arguing that *Twombly* and *Iqbal* created a de facto obligation on defense counsel to make a motion to dismiss and that plaintiffs are burdened with bearing the cost of defending these motions). See generally A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 27 (2009) (arguing that the Supreme Court’s interpretation of Rule 8 in *Twombly* and *Iqbal* will unfairly deny court access to certain types of plaintiffs).

unguided judicial discretion the critics decry and fear. It is that combination that makes Rule 56, and a variety of other rules, endure and function across a variety of subject matters and of factual patterns within the same subject matter. The Judicial Conference in 1992 rejected an effort to make the summary judgment standard more determinate because of nervousness about the effect of changing the words that had stood for so long. In 2010, the Rules Committees eschewed any change to the standard as stated in the text, and reversed the 2007 change, because the Committees concluded that the text has, and will, allow the common law to develop in a nuanced and context-specific fashion. That conclusion is the first lesson from the three changes that weren't. The first lesson is that the Rules Committees not only may, but should, and sometimes must, embrace the power and promise of the common law to add nuance and context to the rules in ways that adding or changing rule text simply cannot achieve.

And what do the changes that weren't tell us about the process of making or amending rules? The 1992 and the 2010 rule changes involved many of the difficult challenges of that process. The Committees grappled with the tension between national uniformity and local rules; between textual specificity to limit judicial discretion and reliance on common law to guide that discretion; and between the role of the judge and the role of the jury. And throughout the Rule 56 work, just as with the Rule 8 and Rule 12 work done after *Twombly* and *Iqbal*, the Rules Committees had to think hard about the right relationship of the four columns of the rules—pleading, discovery, early disposition, and trial.

In the work that led to the rule changes that weren't, the Rules Enabling Act process worked well. The Rules Committees gathered information in a disciplined and thorough way, through miniconferences in advance of formal rulemaking, through a robust public comment period, and through empirical study. The Committees took a hard and transparent look at what the information showed. Through three public hearings and many written comments on the 2008 proposal to amend Rule 56, the Rules Committees listened carefully to the views of people with very different ideas and made changes to the proposed rule as a result. There was no stubborn adherence to what was published or a determination to do something, simply because a great deal of time and effort had been invested. To the contrary, there was an honest assessment of the public comments and the flaws and warts they revealed in the published proposals. The public comment process is critical to rulemaking. The recognition of this is nowhere more

apparent than in the summary judgment changes that weren't. The changes to Rule 56—perhaps especially the changes that weren't—reveal reason to be very optimistic about the state of rulemaking for our federal courts. That is the second lesson from the three changes that were not.

The conversations about the right response to the trilogy, as with the right response to *Twombly* and *Iqbal*, are in part conversations about the Rules Enabling Act process. That process works well in part because the Rules Committees have carefully avoided being either political or politicized. The transparency of the last several decades, boosted by the internet, has helped. The commitment to empirical research also helps. And the Rules Committees have credibly made clear their commitment to continuing to monitor the rules to be sure that the decision not to amend remains the right choice. The Committees are vigilant and patient monitors of how the rules are operating in practice. The Committees will continue to watch how Rule 56 operates and if a problem emerges, the Committees will act with the tools the Rules Enabling Act provides.

The final and third lesson from the Rule 56 changes that weren't was best said by one of the most eloquent participants in the Rules Committees, Benjamin Kaplan.<sup>84</sup> He wrote:

No one, I suppose, expects of a Rule that it shall solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.<sup>85</sup>

This is a good way to describe what the Rules Committees understood was their task in working on Rule 56, in the early 1990s and

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84. Benjamin Kaplan was the Royall Professor of Law at Harvard Law School and a former justice of the Massachusetts Supreme Judicial Court. He also served on the Massachusetts Court of Appeals. He was a specialist in copyright law and civil procedure, and he served as the Reporter for the Civil Rules Advisory Committee from 1960 to 1966. Supreme Court Justice Ruth Bader Ginsburg wrote that "Benjamin Kaplan was [her] wise, witty, and most engaging teacher, [her] instructor through his lucid speech and writings to this very day, [her] model of what a great teacher and jurist should be." Justice Ruth Bader Ginsburg, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1349, 1349 (2011). Professor Arthur R. Miller, another participant in the Rules Committees' work, has stated: "Benjamin Kaplan was my mentor and role model, not simply in law school but for the better part of my professional life." Arthur R. Miller, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1354, 1354 (2011). In describing his work as assistant reporter to the Civil Rules Committee while Benjamin Kaplan was the reporter, Professor Miller stated: "As draft gave way to draft I felt like an apprentice to a craftsman. Ben could rotate the language of a potential rule provision as one would a diamond in the sunlight and see its flaws and imperfections. We polished endlessly." *Id.* at 1357.

85. Benjamin Kaplan, *A Preparatory Note*, 10 B.C. L. REV. 497, 500 (1969).

in 2008 to 2010. For the really tough problems—and when to grant summary judgment is that kind of problem—there are no final fixes. There is instead a problem that needs loving and constant effort. The decisions not to change Rule 56, but instead allow the common law to continue to evolve based on the familiar text, all the while studying how that evolution proceeds, is in this spirit. So, indeed, is this Symposium.