

INSTITUTIONAL COMPETENCE AND CIVIL RULES INTERPRETATION

Lumen N. Mulligan[†] & *Glen Staszewski*^{††}

INTRODUCTION	64
I. EVALUATING THE MANAGERIAL APPROACH.....	68
A. Critiquing Porter’s Lower-Court Deference Approach	69
B. The “Mulliszewski Model” and its Strengths	79
II. REFERRING TO THE ADVISORY COMMITTEE.....	86
CONCLUSION	90

INTRODUCTION

In *Pragmatism Rules*,¹ Professor Elizabeth Porter takes up the understudied topic of the proper methodology for interpreting the Federal Rules of Civil Procedure. Porter’s view of Rules interpretation in the Supreme Court calls for increased deference towards lower-court application of the Rules within the confines of varied and factually rich cases.² While we find much to laud in Porter’s article, we conclude that her view ultimately undervalues the institutional advantages inherent in the court rulemaking process when it comes to the crafting of new procedural policy.

Porter’s theory of Rules interpretation fundamentally is one based upon deference to the lower federal courts.³ In coming to this position, she argues that the Supreme Court engages in two distinct modes of Rules interpretation, which she in turn links to appropriate levels of deference.⁴ At times, she argues, the Court tackles Rules cases making use of the traditional tools of statutory construction by focusing

[†] Earl B. Shurtz Research Professor of Law; Director, Shook Hardy & Bacon Center for Excellency in Advocacy; University of Kansas School of Law.

^{††} Professor of Law & The A.J. Thomas Faculty Scholar, Michigan State University College of Law. We are grateful to Howard Wasserman for helpful commentary on a previous draft.

¹ Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123 (2015).

² *Id.* at 177.

³ *Id.*

⁴ *Id.* at 130.

closely upon the text of the Rules.⁵ This is a familiar approach to Rules interpretation.⁶ At other times, Porter contends, the Court engages with the Rules in a “managerial” mode.⁷ In these instances, the Court eschews a close alignment with text and drafters intent as the lodestar of Rules interpretation in favor of enacting its own policy choices or by crafting an equitable result in light of the unique facts of the case. These competing modes of reasoning, Porter argues, are both legitimate means of interpreting the Rules.⁸ Having found that both the statutory and managerial approaches are sound, Porter adopts a *Chevron*-inspired analogy whereby these different modes of interpretation are linked to different levels of deference to the lower courts.⁹ Thus, in what she labels as pure statutory interpretation cases, the Supreme Court should adopt de novo review of the decision below and deploy traditional tools of statutory construction.¹⁰ In managerial cases, however, she argues for an abuse-of-discretion review in the Supreme Court, and remand for the application of any newly fashioned standards by the lower courts.¹¹ By applying a deferential standard of review and remanding in these managerial cases for lower court application of standards, Porter asserts that the Supreme Court’s future procedural decisions would become “more genuinely minimalist,”¹² and her proposal would therefore limit the Court’s excessive activism in such cases.¹³

Porter’s article performs a valuable service by drawing attention to the remarkably overlooked significance of the entire topic of “rules interpretation.” The lack of attention to civil rules interpretation is all the more glaring given the revived scholarly interest in statutory interpretation and the links between interpretive theories and foundational normative commitments,¹⁴ and the Court’s increased

⁵ *Id.* at 131–36.

⁶ See *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 123 (1989) (suggesting that the Rules should be interpreted as if they were statutes).

⁷ Porter, *supra* note 1, at 136–42.

⁸ *Id.* at 175.

⁹ *Id.* at 176–78.

¹⁰ *Id.* at 177.

¹¹ *Id.* at 177–78.

¹² *Id.* at 184.

¹³ *Id.* at 184–85.

¹⁴ See, e.g., Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) (recognizing this revival in its early stages).

number of Rules cases over the past decade.¹⁵ Porter has also made important contributions to the literature by articulating these two competing paradigms of rules interpretation and by identifying the legitimate foundations for each of these approaches in the rulemaking process and other potentially relevant sources of guidance. Finally, she has provided an administrative-law-inspired proposal to synthesize these competing methods of rules interpretation, which could conceivably improve in some ways upon the current approach. As if that were not enough, Porter has accomplished all of this in a single article that is a pleasure to read and, unusually for this genre, could fairly be described as entertaining and even humorous. As two of the handful of scholars who have previously devoted attention to the problem of rules interpretation,¹⁶ we greatly appreciate the foregoing contributions.

Indeed, there is much in Porter's work with which we readily agree. We concur with her that it is useful to distinguish between differing modes of interpretation employed by the Court in Rules cases.¹⁷ We concur with Porter that much of the Rules regime involves grants of discretion to the lower courts for case-by-case application of equitable standards within the confines of the unique facts of particular cases. We also agree with Porter that the Court is entirely competent to use traditional tools of statutory construction to resolve interpretive problems involving the Federal Rules. We further subscribe to Porter's position that it can be helpful to use principles of administrative law to

¹⁵ See Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 316 (2012).

¹⁶ See Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons From Administrative Law*, 59 UCLA L. REV. 1188 (2012) [hereinafter Mulligan & Staszewski]; Lumen N. Mulligan & Glen Staszewski, *Scholarship highlight: Who should resolve issues relating to the Federal Rules of Civil Procedure?*, SCOTUSBLOG (Oct. 17, 2012, 10:41 AM), <http://www.scotusblog.com/2012/10/scholarship-highlight-who-should-resolve-issues-relating-to-the-federal-rules-of-civil-procedure/> [https://perma.cc/KZX7-3D54].

¹⁷ While Porter distinguishes managerial rules interpretation *from* statutory interpretation, we believe that managerial interpretation is compatible with certain relatively freewheeling approaches to statutory interpretation, and that it could therefore properly be understood as a *form of* statutory interpretation. Because as Porter points out, the Federal Rules are not statutes, this debate is largely academic. On the other hand, we also believe that the category of "managerial rules interpretation" contains at least two distinct components, which are very important to disentangle. The different components of managerial rules interpretation and their proper treatment are discussed below in Part 1.B.

evaluate the best approach for the Court to use in regulating the field of civil procedure, and we are pleased that Porter has picked up on our suggestion to do so.¹⁸

We part ways with Porter, however, on the best way to implement what she characterizes as “managerial Rules interpretation.”¹⁹ As explained below, we think that this particular category actually involves at least two distinct types of cases, each of which merits its own special treatment.²⁰ First, some “managerial cases” involve the creation of new policy or changes to the controlling understanding of the Rules. Based on an assessment of the competencies of the relevant institutional actors, we think that the Court should refer such cases to the Advisory Committee for resolution pursuant to the court rulemaking process. Second, other “managerial cases” involve interpretations of the Rules, often through a purposive lens, where the Court fine-tunes or clarifies the meaning or parameters of the equitable standards that must be applied by the lower courts. While such cases plainly depart from a narrow textualism and tend to exhibit reasoning more characteristic of the legal process school, we think it appropriate for the Court to provide such guidance pursuant to adjudication and for lower courts to implement the clarified standards on remand. It is our position, then, that these differing types of “managerial” cases should be treated differently, with the former being referred to the Advisory Committee and the latter (in line with Porter’s position) being remanded to the lower courts.

We contend in this essay that our model is better suited than Porter’s to match the actual competencies of each of the respective institutional actors—the Supreme Court, the Advisory Committee, and the lower courts—and that it would therefore result in the best available mix of statutory

¹⁸ See generally Mulligan & Staszewski, *supra* note 16 (arguing that the Supreme Court is analogous to administrative agencies when dealing with questions of civil procedure); Porter, *supra* note 1, at 130 (recognizing that our work “recently . . . analogized the Court to an agency, in order to demonstrate that the Court is insufficiently deferential to the rulemaking process”).

¹⁹ See Porter, *supra* note 1, at 137.

²⁰ As explained below, some “managerial cases” merely involve the application of equitable standards to the facts of a particular case. See *infra* Part I. While we agree with Porter that the Court should review any such cases for an abuse of discretion by the lower courts, we tend to think that the Court should not be reviewing those decisions in the first place. Porter, *supra* note 1, at 178. A managerial Court should ordinarily defer to the lower courts in routine cases of this nature by not reviewing their decisions at all.

and managerial rules interpretation.²¹ In particular, our proposed model would take full advantage of the benefits provided by using the court rulemaking process established by Congress for making policy changes to the Federal Rules. Our proposed model would also allow lower courts to continue exercising the equitable discretion that is contemplated by many rules (with some additional guidance, when necessary, from the Court) and to continue to experiment with different approaches to achieving the best practices on procedural matters. We recognize that our proposal would leave a great deal of policy discretion in the hands of lower courts and the Advisory Committee, but we claim that this is a feature rather than a bug of our model. Moreover, we believe that our proposed model is consistent with the scheme established by Congress under the Rules Enabling Act.²² That said, we have previously advocated changes to the court rulemaking process that would improve its efficiency and likely enhance the role of the justices. We therefore conclude by explaining how certain changes to the court rulemaking process could enhance the legitimacy and effectiveness of civil rules interpretation in the federal judicial system.

I

EVALUATING THE MANAGERIAL APPROACH

In this part, we turn to an examination of Porter's proposal. In sum, Porter argues that in "managerial" cases the Supreme Court should opt for a policy of deference toward lower-court application of standards as opposed to Supreme Court application, and that this approach will curb the Court's interpretive excesses. We argue that Porter's position does not adequately distinguish among the different types of cases that fall within her "managerial mode." Separating these distinct types of cases, we contend, illustrates where Porter's theory both hits a bull's eye and where it goes wide of the mark. In subpart B, we further elaborate our position and its advantages for promoting

²¹ Our proposed model is consistent with the increasingly prominent view that methods of legal interpretation should be informed by the actual competencies of the relevant institutional actors. *See, e.g.*, Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 91 (2009); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

²² *See* Act of June 19, 1934, ch. 652, § 1, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2006)).

institutional competence. In our view, taking an institutional-advantages, not an inherent-authority, point of view best directs when a matter should be left for lower-court discretion, Supreme Court adjudication, or Advisory Committee review.

A. Critiquing Porter's Lower-Court Deference Approach

While we agree with Porter that in questions of statutory construction the Supreme Court is best suited to resolve disputes through adjudication, we think that her category of managerial rules interpretation requires fine-tuning. For starters, in using the term “managerial rules interpretation,” Porter purposefully invokes²³ Professor Judith Resnik’s discussion of judges as litigation managers as opposed to traditional adjudicators.²⁴ This managerial label, however, seems to us problem-inducing. To begin, Resnik’s discussion focuses upon how district court judges handle discovery and explosive docket growth.²⁵ It is not an interpretive theory for statutes, or the Rules. As such, we fail to see a strong connection between Resnik’s insights and Porter’s theory of deference in interpretation.

More importantly, providing a unitary label—managerial—artificially conflates at least two disparate types of cases that Porter herself identifies. Indeed, Porter includes Supreme Court-initiated policymaking or changes to the controlling understanding of the Rules as one instantiation of the “managerial mode.”²⁶ She also identifies Supreme Court-exercised, equitable discretion as another instance of this mode.²⁷ To be sure, we equally erred in our own past work by focusing primarily upon policymaking cases, while giving relatively short shrift to equity-standard-setting cases.²⁸ Porter’s work has therefore helpfully pushed

²³ See Porter, *supra* note 1, at 126 n.13.

²⁴ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

²⁵ *Id.* at 378–80.

²⁶ Porter, *supra* note 1, at 136–39.

²⁷ *Id.* at 139–42; see also *id.* at 179 (explaining that the managerial mode includes “reviewing decisions that involve the lower courts’ application of a legal standard to the particular facts of an individual case”).

²⁸ Compare Mulligan & Staszewski, *supra* note 16, at 1215–34 (providing administrative-law analogies designed to identify policy-change issues or cases), with *id.* at 1226–27 (recognizing the propriety of the Court’s practice of deciding equitable-standards cases pursuant to adjudication). See also Porter, *supra* note 1, at 182 (“[I]t is unclear how courts could resolve any questions involving equitable discretion rather than statutory interpretation—questions that are endemic to Rules interpretation—under the division of labor proposed

us to refine and clarify our own views. As a result, we are now all the more confident that these are two very different types of cases—policymaking and equity-standard-setting—which call for differing treatment. We refer to these two distinct sets of managerial cases differently, therefore, as “policy-change” cases and as “equity” cases.²⁹

Porter contrasts these managerial cases with statutory-interpretation cases. Here she contends that a statutory-interpretation approach to the Rules is at odds with “the Rules’ equitable roots,” and that this statutory-interpretation approach tends “toward becoming hypertechnical and harsh.”³⁰ By contrast, in her view, managerial interpretations are “imbued with a sense of flexibility and fairness.”³¹ While we agree with Porter that “policy-change” interpretations differ greatly from statutory-interpretation cases,³² which is why we recommend that policy-change cases be referred to the Advisory Committee,³³ we do not think that “equitable-discretion” cases, which Porter also labels as managerial, are necessarily distinct from statutory-interpretation cases at the Supreme Court level. On the contrary, we believe that the Court can properly clarify how such standards should be applied as a general matter by the lower courts—and that this function is compatible with traditional tools of statutory construction, broadly construed.³⁴ This is the case when the Court uses a purposive approach to statutory interpretation to add flesh to the bones of Rules that were consciously designed to be applied in an equitable fashion.

Despite Porter’s assumption, a statutory-interpretation approach to the rules can often lead to a discretionary standard for lower courts. It is key to recall that the Rules

by Mulligan and Staszewski.”).

²⁹ As noted above, we also think that “equity” cases can be further divided between those that merely involve application of a discretionary standard to the facts of a particular case, and those that involve refining or clarifying the equitable standard for future cases. See *supra* note 20 and accompanying text. Although the Court should rarely grant certiorari in the former category of cases, the latter category of cases can be used to provide valuable guidance to the lower courts in some circumstances.

³⁰ Porter, *supra* note 1, at 175.

³¹ *Id.*

³² Mulligan & Staszewski, *supra* note 16, at 1215–34.

³³ *Id.* at 1190.

³⁴ In reality, the distinction between managerial rules interpretation and statutory rules interpretation is probably a continuum, rather than two distinct categories—which Porter also seems to acknowledge. See Porter, *supra* note 1, at 135–36.

aim to meld together law and equity practice as well as to codify many older common law practices that emerged from these separate systems.³⁵ It should be no surprise, then, that as a matter of statutory interpretation many of the Rules themselves call for lower-court discretion.³⁶ As we have previously argued, although not with the precision that Porter's work has properly demanded,³⁷ we embrace these lower-court-, equity-, and discretionary- focused interpretations. In *Foman v. Davis*,³⁸ for example, the Court addressed when a district court could decline a motion for leave to amend a pleading when the text of the Rule was not self-defining, although the intent of the drafters was clear. The Court approached the question of defining Rule 15's then-drafted language—"leave to amend shall be freely given when justice so requires"³⁹—by deploying a traditional statutory-interpretation strategy. The Court thus read the Rule 15 provision as a part of the statute (i.e., the Rules) as a whole.⁴⁰ The Court, in this manner, interpreted the leave-to-amend provision in Rule 15 vis-à-vis the general goals of Rule 1 and the pleading standards established by Rule 8(a)(2) as then interpreted by *Conley*,⁴¹ and delineated several standards, such as futility or bad faith, for when an amendment should not be allowed.⁴² Apart from those who equate statutory construction only with a strict brand of textualism, the methodology deployed in *Foman*, and in many other cases, involves the use of traditional tools of statutory construction that predominated shortly after the Federal Rules were promulgated and continue to form the core of statutory interpretation for many scholars and jurists.⁴³

³⁵ See FED. R. CIV. P. 2; see also Charles E. Clark & James W. Moore, *A New Federal Civil Procedure - I. The Background*, 44 YALE L.J. 387, 393 (1935) (discussing the substantial union of law and equity in federal courts, despite the formal divisions that existed at the time).

³⁶ See, e.g., FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend the pleadings] when justice so requires."); FED. R. CIV. P. 11(c)(1) ("[T]he court may impose an appropriate sanction . . .").

³⁷ Mulligan & Staszewski, *supra* note 16, at 1227.

³⁸ *Foman v. Davis*, Ex'x, 371 U.S. 178 (1962).

³⁹ *Id.* at 182 (quoting FED. R. CIV. P. 15(a)).

⁴⁰ *Id.*; see also *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (stating that the plainness or ambiguity of statutory language is determined by reference to, among other things, the broader context of the statute as a whole).

⁴¹ *Conley v. Gibson*, 355 U.S. 41 (1957).

⁴² *Foman*, 371 U.S. at 181–82.

⁴³ See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY* 85 (2005) ("[C]ontrast[ing] a

The only manner in which we differ from Porter here is in her apparent insistence upon calling such decisions non-statutory, or managerial, and failing to distinguish these equity-standard-setting cases from cases that involve major policy change. Despite Porter's insinuations, not all "statutory interpretations" of the Rules call for rigid, non-flexible, "the rule of law as a law of rules" approaches.⁴⁴ A statutory-interpretation approach to Rule 11(c)(1), for example, clearly illustrates that sanctions are to be discretionary.⁴⁵ And this is but one example. Indeed, the Committee Notes to the 2007 amendments clearly state that the drafters often intend lower-court discretion; moreover, this discretionary approach can be invoked by way of standard statutory construction when the drafters use the term "may."⁴⁶ Thus, by labeling the application or clarification of rules that grant lower-court discretion as non-statutory interpretations, Porter creates schisms between a so-called managerial approach and a statutory-construction approach that need not exist. Simply put, a statutory-construction approach often leads to lower-court discretion. These are often consistent, not competing, approaches. We agree with Porter, moreover, that if and when the Court reviews a lower court's application of one of these discretionary standards, it should do so solely for an abuse of discretion.⁴⁷ It is also a good idea, as she suggests, for the Court to remand cases of this nature for implementation by the lower courts when the Court clarifies the content or parameters of such equitable standards during adjudication.⁴⁸

Such action by Supreme Court adjudication, as opposed to Advisory Committee action, fits within our standard-tools-of-interpretation exception to our preference for rulemaking. This is to say, when the text or purpose of the rule calls for a

literal text-based approach with an approach that places more emphasis on statutory purpose . . .").

⁴⁴ Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (calling for an approach to interpretation that extends the mode of analysis of "the *Rule* of Law, the law of *rules*" as far as possible).

⁴⁵ FED. R. CIV. P. 11(c)(1) ("[T]he court may impose an appropriate sanction . . .").

⁴⁶ FED. R. CIV. P. 1, 2007 Comm. Notes ("The restyled rules replace 'shall' with 'must,' 'may,' or 'should,' depending on which one the context and established interpretation make correct in each rule. . . . 'The court in its discretion may' becomes 'the court may' . . .").

⁴⁷ Porter, *supra* note 1, at 178.

⁴⁸ *Id.*

discretionary, lower-court determination—which they often do—we fully endorse Porter’s approach.⁴⁹ As such, Porter’s critique of our view,⁵⁰ in which she claims that we would refer all cases of equitable discretion to the Advisory Committee as opposed to remanding to the lower courts (and to be fair, our past focus upon policy-change cases likely invited this reading), is not the one we intend. When the Rules themselves call for the exercise of equitable discretion, we believe that the lower courts should exercise that discretion.⁵¹ In such instances, the Rules drafters have set a policy of district court discretionary action, the Supreme Court has interpreted that rule so as to give effect to that policy, and the lower courts correctly exercise their Rules-given discretion against the Supreme Court setting of a more detailed standard. In such instances, each institution—the Advisory Committee, the Supreme Court, and the lower courts—is acting squarely within the realm of its institutional competencies. Moreover, it is difficult to believe that court rulemaking would ordinarily provide significant added value in these types of situations.

We more fully part company from Porter in those cases she also labels as managerial but we contend are more precisely labeled as change-in-policy cases—these are the headline cases such as *Daubert*,⁵² *Wal-Mart*,⁵³ *Twombly*,⁵⁴ and *Iqbal*,⁵⁵ which were the primary focus of our previous article. Here, Porter does not argue, as in the *Foman* example above, that the best interpretation of the Rule at issue is one granting lower-court discretion per se. Rather, these are cases, in her view, in which the Court simply has a different policy preference than the position embodied in prior interpretations of the relevant rule or of the Advisory Committee itself.⁵⁶ In such cases, Porter argues that the Court is fully empowered by its inherent authority and the Rules Enabling Act to make a change in Rules policy by way of adjudication as opposed to going through the rulemaking

⁴⁹ Motions to amend are just such an example. See, e.g., *Technical Resource Servs. v. Dornier Medical Sys.*, 134 F.3d 1458, 1464 (11th Cir. 1998) (reviewing motions to amend under an abuse-of-discretion standard).

⁵⁰ Porter, *supra* note 1, at 182.

⁵¹ Mulligan & Staszewski, *supra* note 16, at 1227.

⁵² *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

⁵³ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

⁵⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁵⁵ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁵⁶ Porter, *supra* note 1, at 154–56.

process.⁵⁷

Our objections here are two-fold. First, unlike equitable-discretion cases, we fail to see how the process of lower-court deference (i.e., the remanding to a lower court for application of the new standard to the facts) will in any way constrain the Supreme Court in such policy-change cases. But this is precisely what Porter predicts. She suggests that the largest error the Court made in cases such as *Wal-Mart* and *Twombly* was not in the crafting of a new standard for class-action certification or for pleading in the context of an adjudication.⁵⁸ The error, in her view, was in the Court's own application of the new standard to the facts of the case instead of remanding for the lower courts to so apply the new standard in the first instance.⁵⁹

To be sure, we tend to agree with Porter that remand is the more appropriate course as a matter of institutional capacities and resource allocation in such cases.⁶⁰ The Supreme Court in more thoughtful moments tends to agree as well—the High Court is not an error-correction tribunal, but a forum for the resolution of matters of broad public importance.⁶¹ Nevertheless, we cannot agree with her conclusion that such a remand practice will moderate the effects of Supreme Court Rules decisions in policy-change cases.⁶² We find it highly unlikely that in a hypothetical remand in, say, *Twombly*—after the complete re-tooling of the pleading standard in light of the “retirement” of *Conley*⁶³—the lower court would have felt free to provide an application of the plausibility standard that meaningfully deviated from the one provided by the Supreme Court in the actual case. Porter's *Daubert* example, where the Court remanded back to the lower courts for the application of the new expert-witness standard, does not prove the point

⁵⁷ *Id.* at 154.

⁵⁸ *See id.* at 184–85.

⁵⁹ *Id.*

⁶⁰ *Cf.* Mulligan & Staszewski, *supra* note 16, at 1236 (arguing that the Court, following Supreme Court Rule 10, should only hear Rules cases that arise out of circuit splits or otherwise present important issues of federal law).

⁶¹ *See, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 610–12 (2005) (discussing the division of labor between high courts and intermediate appellate courts in the context of a habeas case).

⁶² *Cf.* Porter, *supra* note 1, at 184 (arguing that adopting her “framework would return the Court to a tradition of narrower, more genuinely minimalist procedural decisions”).

⁶³ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

either.⁶⁴ By all accounts, *Daubert* completely revolutionized expert-witness certification; the act of remanding to the lower court in the first instance seems to have little restrained the impact of that ruling.⁶⁵ Thus, if the goal of Porter's approach is to "address these interpretive excesses,"⁶⁶ she offers no compelling reasons to believe this result would follow merely from remanding in policy-change cases.

Second, Porter's critique of our preference for sending such policy-change issues to the Advisory Committee misses the mark. She suggests that we think the Supreme Court lacks the authority to issue a policy change by adjudication.⁶⁷ This is not our position. As we have previously argued: "Although we propose the adoption of a presumption in favor of rulemaking on civil procedure issues, we do not challenge the Court's inherent power, even when not coupled with statutory authority, to control court procedure by court order or by adjudication."⁶⁸

Our proposed model is one premised upon institutional competencies, not authority. Thus, our view is that among the federal lower courts, the Supreme Court, and the Advisory Committee, when it comes to making major changes to the policies underlying the Rules, the Advisory Committee possesses institutional advantages such that there should be a presumption in favor of referral to that committee instead of setting policy by adjudication in the Supreme Court. Without re-arguing our position in full, we would note that there are at least four broad institutional advantages to rulemaking over adjudication in policy-change cases.⁶⁹ First, rulemaking, as opposed to adjudication, is

⁶⁴ Porter, *supra* note 1, at 184–85.

⁶⁵ See, e.g., MICHAEL H. GRAHAM, 5 HANDBOOK OF FEDERAL EVIDENCE § 702:5 (Westlaw 7th ed., Nov. 2015 Update) ("*Daubert* overall in practice actually created a more stringent test for expert evidence admissibility especially in civil cases."); David E. Bernstein, Frye, Frye, *Again: The Past, Present, and Future of The General Acceptance Test*, 41 JURIMETRICS 385, 386 (Spring 2001) ("[*Daubert* and its progeny] dramatically tighten the rules for the admissibility of expert evidence in federal courts and in states that have adopted [the *Daubert* test].").

⁶⁶ Porter, *supra* note 1, at 177.

⁶⁷ *Id.* at 56 ("Mulligan and Staszewski . . . have argued in favor of applying a deference framework to the Court in Rules cases. But they have sought to apply that framework to require the Court to defer to the rulemaking process, not to the lower courts; in other words, they view the problem as one of judicial authority, rather than a problem of interpretation.").

⁶⁸ Mulligan & Staszewski, *supra* note 16, at 1213.

⁶⁹ See *id.* at 1207–12.

widely viewed as a better procedure for making policy and exploring issues of legislative fact precisely because informal rulemaking procedures are specifically designed for this purpose.⁷⁰ Second, anyone who is interested can participate in rulemaking, while adjudication is generally limited to the parties in a case.⁷¹ Third, the rulemaking method of making policy gives agencies greater control over their own agendas, allowing them to set priorities more easily and to implement their programmatic responsibilities rationally and comprehensively.⁷² Fourth, rulemaking is also widely understood to be fairer than adjudication to groups who are adversely affected by agency action, because newly-established rules are prospective instead of retrospective and can be crafted to afford exceptions and the like.⁷³

Porter's proposal foregoes all of these advantages in policy-change cases. In our prior work, we noted that forgoing these advantages comes at substantial loss. To be sure, cert-worthy cases do not walk into the Supreme Court and self-identify as equity-standard-setting or change-in-policy ones; nor do they effortlessly link themselves to the fora holding the appropriate institutional capacities. This is the problem of selecting the best decision-making forum. Nevertheless, we contend that the benefits of routing matters to the forum with superior institutional advantages outweigh the costs of selecting the best decision-making forum.

This is not to say that developing a rubric for selecting the best forum for Rules cases is without its challenges. In our prior work, while looking to institutional capacities, we often couched the choice of decision-making forum in analogies to certain administrative-law doctrines that, Porter argues, may not always work in a seamless fashion. This is particularly so in equitable-discretion cases given that the primary focus of our earlier work was to distinguish policymaking from interpretation, so that "policy change cases" could be identified and referred to the court rulemaking process. Thus, even though we previously insisted that when courts provide guidance regarding the meaning of phrases like "when justice so requires" under Rule 15, such guidance could be delivered by adjudication; conceivably, such matters could turn on legislative facts and

⁷⁰ *Id.* at 1207.

⁷¹ *Id.* at 1207-09.

⁷² *Id.* at 1209-11.

⁷³ *Id.* at 1211-12.

would presumably require the resolution of a *Chevron*-step-two-like ambiguity, which under our schema would weigh in favor of referral to the Advisory Committee. Moreover, it is not clear that the provision of such guidance in equitable-discretion cases would necessarily be treated as an “interpretive rule” under existing administrative law doctrine, again weighing in favor of referral to the Advisory Committee under our past proposals.

The question raised by Porter’s article, then, is whether such equity standard-setting cases should be referred to the court rulemaking process, or whether they should continue to be resolved by the Court through the use of traditional tools of statutory construction in adjudication. Consistent with our increased focus on institutional competencies and with a new complementary analogy to administrative law doctrine, we continue to agree with Porter that equity standard-setting cases should be resolved by the Supreme Court in adjudication. Specifically, we think that when the Court provides guidance to lower courts regarding the proper application of the equitable standards set forth in the rules, the Court is providing the rough equivalent of “general statements of policy.”⁷⁴ This is partly the case because the Court is providing guidance to its subordinates regarding how it plans to interpret or apply the rules in the future, and such guidance has informational value that helps to facilitate the consistent and predictable application of the law in a context where the Court (or agency heads) could not feasibly review every decision. It makes sense to offer this guidance in adjudication, continuing the administrative law analogy, because agencies are similarly not required to use notice-and-comment rulemaking procedures when they provide such guidance.⁷⁵ Finally, while such guidance channels discretion and provides the lower courts with useful information about the relevant factors that should inform their decisions when they implement the rules, the guidance does not change the substance of the rules or ordinarily dictate the result in any particular case.⁷⁶

⁷⁴ See generally Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 339–44 (2011) (providing a helpful overview of the applicable law, and recommending deferential standards for judicial review of the validity of guidance documents).

⁷⁵ See 5 U.S.C. § 553(b) (2012).

⁷⁶ For these reasons, administrative guidance is not binding upon the public. Of course, the Court’s decision is *binding precedent* for lower courts as a matter of *stare decisis*. Again, we do not mean to suggest that this

In refining our view here, we also take Porter's lead and focus more heavily on the form of reasoning to be employed, not necessarily the questions presented, in developing a choice-of-decision-making-forum theory in Rules cases. To this end, we adopt Professors Kozel and Pojanowski's distinction between prescriptive and expository reasoning in administrative decision-making as helpful, even if not perfect in every instance.⁷⁷ They describe decisions that call for the weighing of evidence, utilizing technical expertise, and making value judgments as prescriptive; while defining decisions that call for an analysis of the drafter's intent or the boundaries of judicial case law as expository.⁷⁸ In accord with our model for Rules interpretation, Kozel and Pojanowski conclude that prescriptive reasoning—or what we have labeled policy-change decisions and what Porter identifies as one type of managerial reasoning—constitutes one of the “core competencies” of informal agency decision-making.⁷⁹ In our view then, if the resolution of a Rules dispute in a cert-worthy case would primarily hinge upon prescriptive reasoning (knowing full well that most cases will not solely involve one mode of reasoning or the other), then the dispute should go to the Advisory Committee because it has the stronger institutional capacities to take on such a task. Conversely, as Kozel and Pojanowski demonstrate, the appellate courts hold the institutional advantage when it comes to expository reasoning—or what we label as cases deploying the traditional tools of statutory construction broadly conceived.⁸⁰ In these cert-worthy cases, where the predominant mode of discourse will be expository—be it in implementing a relatively detailed rule-based regime or in fine-tuning equitable standards for lower-court application—the Court should retain the matter for its own disposition sitting as a judicial entity.

In sum, deploying a finer-toothed comb to distinctions among Rules cases illustrates where we would keep company with Porter and where we would forge a different

analogy is perfect, but it does provide further evidence of the value of using administrative law principles to inform the Court's regulation of the field of civil procedure.

⁷⁷ Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 143 (2011) (noting that the distinction between prescriptive and expository decision making is not always crystal clear).

⁷⁸ *Id.* at 141–43.

⁷⁹ *Id.* at 141.

⁸⁰ *Id.* at 148–49.

path. When it comes to what we label “equitable-discretion” cases, we largely concur with Porter’s approach, if not her nomenclature. The lower courts hold all the institutional advantages to the speedy and just exercise of discretion in individual cases, but the Supreme Court can properly channel such discretion by providing interpretive guidance by way of expository reasoning—to use administrative-law parlance—through adjudication and by reversing abuses of discretion in appropriate cases. We part company with Porter, however, in policy-change cases. In our view, just as Porter rightly insists that the lower courts possess institutional advantages over both the Supreme Court and the Advisory Committee in cases that call for the exercise of equitable discretion, we should recognize that in terms of broad pronouncements of innovative policy that rely primarily upon prescriptive reasoning, the Advisory Committee holds an institutional advantage. Our approach, as detailed in the next section, aims to make the fullest use of the Advisory Committee’s strengths as a policymaker.

B. The “Mulliszewski Model” and its Strengths

Our most fundamental difference with Porter lies with who should set Rules policy. We maintain that the Court should avoid making civil-procedure policy through its adjudicatory power and that major policy choices in this field should be made, in the first instance, by lower courts, and then by referring any cert-worthy, non-statutory-construction questions that emerge from their management of federal litigation to the rulemaking process. We agree with Porter that there is a legitimate place for “managerial Rules interpretation,” be it in exercising discretion or in altering policy, within the federal judicial system, but we think that this role should be carried out by lower courts and the congressionally-designated lawmakers in this area—namely, the Advisory Committee. In this Part, we briefly describe our proposed model, explain how each of its components matches or promotes the actual competencies of the relevant institutional actors, and then briefly respond to Professor Porter’s critique of our approach.

First, we agree with Porter that the Court should continue to use adjudication to resolve interpretive problems involving the rules by using traditional tools of statutory construction in appropriate cases. The Court should only decide such cases, however, when the issues are cert-worthy under the Court’s normal standards for making such

determinations,⁸¹ and the case is capable of being resolved pursuant to “statutory rules interpretation.”⁸² Unlike Porter, we would include within this category cases such as *Foman* where the Court could use a purposive or intentionalist approach to provide guidance regarding the proper application of a policy established by the Advisory Committee. Like Porter, however, we agree that the Court’s guidance on such issues should be implemented by the lower courts on remand.

Second, we contend that cases involving the application of equitable standards should be resolved initially—and, for the most part, exclusively—in the lower federal courts. This includes cases that require the lower courts to apply an equitable or discretionary standard to the facts of a particular case, which do not ordinarily require any high-court review as the Supreme Court does not function as an error-correction institution—a role better played by the courts of appeals.⁸³ While we agree with Porter that the Court should apply an abuse of discretion standard to any such cases, we think it would typically be better if the Court dispensed with such review altogether—excepting those cases where a circuit split (or other indicia of cert-worthiness) would require taking up the matter. If, as Porter suggests, more deference to the lower courts is appropriate in this context, this result can be achieved (even more effectively than she suggests) by the Court’s normal practice of denying certiorari in such cases. Lower-court predominance or exclusivity in the realm of managerial rules interpretation should, however, also extend to cases that involve policy choices regarding the best understanding of the rules in a particular context, including cases that turn heavily on prescriptive considerations. We anticipate that the percolation of such issues in the lower courts will often yield consensus, in which case Supreme Court intervention will typically be unnecessary.⁸⁴ There will, however,

⁸¹ See SUP. CT. R. 10 (setting forth “Considerations Governing Review on Certiorari”).

⁸² As noted above, we provided standards for making this determination, which were drawn from various analogies to administrative law doctrine, in our original proposal. See Mulligan & Staszewski, *supra* note 16, at 1215–34.

⁸³ Cf. SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT’S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 1–2 (1986) (statement of Chief Justice Vinson) (“The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions.”).

⁸⁴ See Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural*

undoubtedly be situations in which lower courts with a plurality of perspectives regarding the best manner of managing federal litigation will disagree about the proper resolution of a policy issue, in which case the Court may eventually want or need to intervene.

Third, we claim that in this latter situation, the Court should refer policy questions that cannot be decided with traditional tools of statutory construction, which under a well-ordered cert-granting system should account for most “headline-grabbing” cases—for resolution pursuant to the court rulemaking process. More specifically, we have suggested that “the Court could summarily grant the writ of certiorari, vacate the lower court opinion, remand the case, and order a stay pending action by the Advisory Committee.”⁸⁵ At this point, the Court could “forward the issue to the Advisory Committee for notice-and-comment rulemaking.”⁸⁶ Under our proposal, the Court as adjudicatory body should *not* decide the merits of the policy dispute at issue.

We believe that the foregoing division of responsibilities would best promote the competencies of the relevant institutional actors. Our proposal therefore recognizes that there is little need to use rulemaking procedures to address problems that can be resolved by using traditional tools of statutory construction. Rather, courts are well situated to ascertain how the rulemakers previously decided such questions or to flesh out the contours of equitable standards during the course of adjudication. Accordingly, if the Court can use the method of “statutory rules interpretation” to resolve an important dispute about the best understanding of the rules at issue, it should continue to use its adjudicatory authority to do so. If, however, a case presents an unanticipated problem that was not previously resolved by the rulemakers, or the Court wants to change the controlling understanding of the rules, the Court should refer the relevant questions to the Advisory Committee for resolution pursuant to the rulemaking process. As we previously explained in some detail, notice-and-comment

Judiciary: On the Potential Virtues of Decentralized Judicial Power, 89 NOTRE DAME L. REV. 1021, 1053 (2014) (describing the premium that the federal judicial system places “on disparate decision makers all reaching the same conclusion” in the lower courts).

⁸⁵ Mulligan & Staszewski, *supra* note 16, at 1236 (describing our proposed “referencing” procedure).

⁸⁶ *Id.*

rulemaking provides substantial advantages for making policy decisions of this nature.⁸⁷ Finally, we believe that allowing the lower courts to exercise predominant control over the equitable discretion and policymaking that occurs in federal litigation provides a variety of institutional advantages as well. As explained above, some rules are explicitly designed to give lower courts equitable discretion to apply broad standards based on a variety of factors and thereby achieve the best result based on the facts of a particular case. There is typically no reason for the Court to second-guess how lower courts exercise their equitable discretion by reviewing such cases. Moreover, lower-court judges tend to have substantially greater experience and expertise than do the justices when it comes to managing federal litigation,⁸⁸ and it would therefore stand to reason that lower-court judges would be significantly better at deciding procedural issues of first impression than the Court. When difficult or controversial issues emerge that ultimately result in differences of opinion among the lower courts, their competing perspectives—and the learning that results from their divergent approaches—should provide valuable information to the Advisory Committee when it eventually embarks upon the task of establishing a uniform solution to the problem through the notice-and-comment rulemaking process.⁸⁹

In contrast to our model, Porter's proposed solutions would forego the advantages of making major policy decisions through a democratic rulemaking process, and she simultaneously underestimates the value of allowing lower courts to maintain control over the more discretionary aspects of rules interpretation in federal litigation.

⁸⁷ See *supra* notes 70–73 and accompanying text (summarizing these advantages).

⁸⁸ See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 86–87 (2010) (“The Justices do not have the time, trial-court experience, or on-the-ground information to evaluate the consequences that procedural changes may have on private enforcement of substantive law or what alternative enforcement mechanisms should be established if litigation pathways are impaired.”).

⁸⁹ It bears noting that administrative agencies frequently experiment with different approaches to a policy problem pursuant to adjudication, before promulgating a legislative rule that codifies their preferred solution. See RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE § 6.9, at 376–77 (4th ed., 2002) (recognizing that an administrative agency sometimes has good reasons for acting pursuant to adjudication, including the “desire to defer an effort to issue a generally applicable rule until after it has educated itself by conducting a series of adjudications in varying contexts”).

Meanwhile, Porter's criticisms of our proposed model are largely misplaced. Perhaps most fundamentally, she suggests that in criticizing the Court's practice of policy change via adjudication, we have questioned the Court's power to reshape the Federal Rules through adjudication.⁹⁰ As explained above, however, we have explicitly emphasized that our proposal is based on a normative conclusion that major policy decisions in civil procedure should be made pursuant to the court rulemaking process essentially as a matter of good government.⁹¹ We acknowledge the Court's authority to make policy pursuant to adjudication.⁹² Indeed, the Court's authority to make policy pursuant to either rulemaking or adjudication was central to our proposed analogy between administrative agencies and the Court's regulation of civil procedure.⁹³

We also agree for many of the reasons that Porter has articulated that "[a]ny framework for Rules interpretation must . . . consider and accommodate both paradigms [of rules interpretation] rather than simply wishing one away."⁹⁴ Our proposed model would accommodate both paradigms by providing for statutory rules interpretation in adjudication by the Court, directing application of discretionary regimes to the lower courts, and sending policy changes to the rulemaking process. We thoroughly agree that many of the virtues that Porter ascribes to "managerial rules interpretation" are indeed virtues⁹⁵—when this mode of rules

⁹⁰ See, e.g., Porter, *supra* note 1, at 128 (citing our work, among others, for the proposition that it may "be tempting to argue that . . . the Court's managerial Rules decisions are an abuse of power"); *id.* at 154 ("[The Court-as-agency proponents] downplay the inherent adjudicative power of the Court as head of the judicial branch."); *id.* at 181–82 ("[Mulligan and Staszewski] view the problem as one of judicial authority, rather than a problem of interpretation.");

⁹¹ See Mulligan & Staszewski, *supra* note 16, at 1213.

⁹² See *id.*

⁹³ See *id.* at 1194–1205. Porter claims that the Court's managerial decisions are not always as path-breaking as we suggest, and that sometimes—such as in *Twombly* and *Iqbal*—the Court is following the lead of lower courts. See Porter, *supra* note 1, at 154–55. She also points out that the Court is in dialogue with a broader constituency than the parties to a case. See *id.* These strike us as further reasons for the Court to refer proposed policy changes to the Federal Rules to the court rulemaking process.

⁹⁴ Porter, *supra* note 1, at 129.

⁹⁵ See *id.* at 150 (describing Moore's arguments for a more activist approach to civil rules interpretation); *id.* at 165–68 (explaining that the Court is exercising equitable interpretive power that was "primarily intended to belong to the trial judge, who by virtue of her close relationship to the case is in a better position than appellate courts to grasp the facts and the

interpretation is utilized by lower courts.⁹⁶ We believe, however, that other changes to the controlling understanding of the rules should be referred to the rulemaking process.

Porter contends that the latter component of our proposal raises logistical difficulties,⁹⁷ unduly weakens the influence of the Court (which, in turn, creates an incentive for the Justices to make policy through adjudication),⁹⁸ and fits uncomfortably with the authority that Congress delegated to the Court through the Rules Enabling Act.⁹⁹ The Rules Enabling Act, however, contemplates that major policy changes to the rules should be accomplished pursuant to the rulemaking process.¹⁰⁰ Moreover, the committee process and notice-and-comment procedures that limit the Court's ability to dictate the precise content of the Rules have been required by Congress since 1988. The Court has not possessed a full-throated, non-statutorily constrained license to control civil procedure by way of inherent authority since at least 1872.¹⁰¹ Thus, we are hardly seeking "to drastically minimize the Court's role in the rulemaking process."¹⁰² Congress already has done so—repeatedly. We therefore believe that our proposed model comports more fully with the requirements of the Rules Enabling Act than Porter's suggested alternative. That said, we have never suggested that the current rulemaking process is perfect. On the contrary, we have proposed statutory changes to the court rulemaking process that would increase its efficiency and likely *enhance* the role of the justices.¹⁰³ We briefly describe and elaborate on these proposed reforms, which are responsive to Porter's

relationship between parties," and recognizing that the Court's use of those methods has a substantially greater policy impact); *id.* at 175 ("The Court's managerial approach to the Rules provides an important escape route from a system that might otherwise tend toward becoming hypertechnical and harsh.").

⁹⁶ This is particularly true of "discretionary, fact-laden questions [that] are not within the institutional competence of rulemakers." *Id.* at 182.

⁹⁷ *See id.* at 182–83.

⁹⁸ *See id.* at 154–56, 183–84; *see also id.* at 147 (explaining that the Court's limited control over the rulemaking process makes it logical to use adjudication as the mechanism for implementing its policy views).

⁹⁹ *See id.* at 154–56, 183–84.

¹⁰⁰ *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1125–29 (2002).

¹⁰¹ *See* Clark & Moore, *supra* note 35, at 392.

¹⁰² Porter, *supra* note 1, at 154.

¹⁰³ *See* Mulligan & Staszewski, *supra* note 16, at 1237–40.

remaining criticisms, in the final Part of this Essay.

Before moving on, however, we would like to address briefly a final concern raised by Porter that is admittedly a bit more difficult. Specifically, she claims that “it is unclear whether the Court would feel any degree of constraint from a suggestion that it must either use traditional statutory interpretation tools or route a Rules interpretation question through the rulemaking process.”¹⁰⁴ Alternatively, she suggests that “if the Court wished to interpret a Rule through adjudication, it could simply squeeze its policy views through the lens of statutory interpretation.”¹⁰⁵ In other words, Porter points out that our proposal cannot prevent willful justices from cheating. This is true, and we would go further and acknowledge that there is nothing to force the Court to adopt our proposed model in the first place, and there would be no outside enforcement mechanism to ensure that the model would be properly implemented if adopted. For these reasons, our proposal admittedly relies on the good faith efforts of the Court. We believe, however, this is to some extent inevitable, because interpretive methodology and other legal doctrines of this nature cannot prevent truly willful justices from achieving results that comport with their policymaking preferences.¹⁰⁶ The adoption of our proposed model would nonetheless be more constraining than the usual situation in administrative law, which typically leaves the choice of policymaking form to an agency’s sound discretion.¹⁰⁷ In any event, we believe that the Justices should be receptive to our good-government-based arguments for making policy decisions through the rulemaking form if they are being intellectually honest. Several of them were administrative law professors, after all, where the advantages of rulemaking over adjudication as a policymaking form are virtually uncontested.¹⁰⁸ Finally, if our proposed model were adopted,

¹⁰⁴ Porter, *supra* note 1, at 155.

¹⁰⁵ *Id.*

¹⁰⁶ See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1549 (1998) (book review) (“All interpretive methodologies . . . present the willful judge with discretionary choices [I]t is less productive to focus on the willful judge and more productive to focus on the cooperative judge, as the prototype: not only are most judges cooperative rather than willful, but the assumption of cooperativeness is more consistent with the philosophy underlying Article III and may itself contribute to a judicial culture where willfulness is stigmatized.”).

¹⁰⁷ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

¹⁰⁸ See Mulligan & Staszewski, *supra* note 16, at 1212–13.

the Court would be taking an official position on the appropriate roles of statutory and managerial rules interpretation in federal litigation, and establishing some official standards of conduct and a division of responsibilities that matches the actual competencies of the relevant institutional actors. If the Court continued to make major policy decisions pursuant to adjudication, few would be fooled.

II

REFERRING TO THE ADVISORY COMMITTEE

In this last section, we consider Porter's rejection of the referral of matters to the Advisory Committee as impractical. She suggests that our proposed model would be unwieldy and would unduly emasculate the Court, raising four specific objections to our preference in favor of referral to the Advisory Committee.¹⁰⁹ We consider these objections briefly in turn, contending that the proper solution is to revise the rulemaking process in certain ways that we have previously suggested, rather than embracing a form of policy-changing interpretation for which the Court is poorly suited as a matter of institutional competence.

First, Porter objects that the Advisory Committee lacks the wherewithal to "confront thorny fact-specific, substance-specific problems that" call for discretionary decisions.¹¹⁰ In short, we entirely agree. As we reiterated above,¹¹¹ when a Rules regime calls for the application of lower-court discretion, that is exactly what should occur. The lower court should exercise its sound discretion.

Our disagreement with Porter on this score stems from what matters we deem amenable to traditional tools of statutory construction. Porter seems to equate traditional tools of statutory construction with a strict textualism often espoused by Justice Scalia.¹¹² She further concludes that abuse-of-discretion regimes are not consistent with statutory-construction analysis.¹¹³ Because we do not

¹⁰⁹ Porter, *supra* note 1, at 182-84.

¹¹⁰ *Id.* at 182.

¹¹¹ See *supra* Part I.A.

¹¹² See Porter, *supra* note 1, at 132-33 and notes therein; see also *id.* at 129 ("Brittle textualism in the statutory mode could undermine the Rules' vision of an accessible, merits-focused civil justice system.").

¹¹³ *Id.* at 179-81 (distinguishing statutory from managerial cases, and explaining that the latter involves "reviewing decisions that involve the lower courts' application of a legal standard to the particular facts of an individual

equate traditional tools of statutory construction with a narrow form of textualism, our view of what may fall within the parameters of statutory construction is apparently broader than Porter's.

We think our understanding of the traditional approach to statutory construction is well founded in this context.¹¹⁴ For example, the Court has recognized that “[a]nalysis of legislative history is, of course, a traditional tool of statutory construction. There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.”¹¹⁵ Thus, the issue “in any problem of statutory construction[] is the intention of the enacting body,”¹¹⁶ not necessarily the plain meaning of the text unadorned by the drafters’ purposes or the like. In our view, then, a drafting body, be it Congress or the Advisory Committee, may use equitable or discretionary terms without rendering an assessment of the parameters of those terms beyond the scope of traditional tools of statutory construction as Porter seems to suggest.¹¹⁷ For example, even though “Congress included no explicit criteria for equitable subordination when it enacted § 510(c)(1) [of the Bankruptcy Code], the reference in § 510(c) to ‘principles of equitable subordination’ clearly indicates congressional intent at least to start with existing doctrine,” and interpretation of equitable subordination under § 510(c), which call for much lower-court discretion, is amenable to the “principles of statutory construction.”¹¹⁸ Indeed, the fact that a drafting body uses language such as “public interest, convenience, or necessity” to “express[] a policy . . . [to be applied within a

case”).

¹¹⁴ We do not take a normative position regarding the best approach to *statutory interpretation* in our work on this topic. For discussion on one author’s position on statutory interpretation, see Glen Staszewski, *Statutory Interpretation As Contestatory Democracy*, 55 WM. & MARY L. REV. 221 (2013).

¹¹⁵ *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 106 (2007) (Stevens, J., concurring) (note omitted) (citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610, n.4 (1991)); *see also* *Steelworkers v. Weber*, 443 U.S. 193, 230–253 (1979) (Rehnquist, J., dissenting) (reviewing the legislative history of Title VII to discern Congress’ intent).

¹¹⁶ *United States v. N. E. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942).

¹¹⁷ *See, e.g.*, *United States v. Turley*, 352 U.S. 407, 411 (1957) (“[W]here a . . . statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.”).

¹¹⁸ *United States v. Noland*, 517 U.S. 535, 539–40 (1996).

set of] complicated factors for judgment” does not necessarily render the provision beyond the scope of statutory construction, at least with respect to the outer parameters of those terms.¹¹⁹

We see this principle at play in the Rules as well. Thus, in the Rule 23 context, district courts are properly granted broad discretion, but the boundaries of this discretion are not unlimited and are subject to appellate review.¹²⁰ As we illustrated with our Rule 15 example above,¹²¹ we do not see the Supreme Court’s crafting of more precise standards for a Rules term such as “when justice so requires” inconsistent with deploying standard tools of statutory construction when the Court’s interpretation is furthering the purpose or intent of the drafters. To be sure, Porter’s challenge to our view demonstrates the shortcomings of some of our administrative-law analogies with respect to equitable-discretion cases, and where we may want to branch out in future work. But we do not equate narrow textualism with traditional tools of statutory construction; and we think that it is a mistake to do so.

Second, Porter argues that the many questions that would be facing the Advisory Committee if they were all referred to the court rulemaking process would be overwhelming, even though many of these issues are “trans-substantive and thus appropriate for rulemaking.”¹²² We are not moved by this allegation. Of course, the Advisory Committee drafted the entirety of the rules without being overwhelmed. Moreover, the Advisory Committee regularly engages in wholesale, massive, substantive revisions—such as the recently enacted changes to discovery, electronically stored information, and case management—without becoming overwhelmed.¹²³ We are not claiming the Advisory Committee is a super-human institution free from all fault.¹²⁴ But as to the charge that the Advisory Committee

¹¹⁹ *F.C.C. v. RCA Commc’ns*, 346 U.S. 86, 90 (1953) (internal citations omitted).

¹²⁰ *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99–101 (1981).

¹²¹ *See supra* part I.A.

¹²² Porter, *supra* note 1, at 183.

¹²³ Supreme Court Order Transmitting Federal Rules of Civil Procedure Amendments to Congress (April 29, 2015), [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf) [<https://perma.cc/7GTC-6PD9>].

¹²⁴ *See, e.g.*, Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083,

lacks the resources to take on big projects, Porter's allegation lacks foundation in our view, particularly since the excessive burden that would allegedly have resulted from our proposal would merely have required the rule makers to have addressed four major policy issues over the course of approximately five years by Porter's own calculations.¹²⁵

Third, Porter argues that the Advisory Committee process as currently constructed is too time consuming and overly alienates the Supreme Court itself from actively participating in the promulgation of the Rules. Again, we entirely agree. As we have argued previously, the court rulemaking process, like conventional depictions of agency rulemaking, has become ossified, often taking up to two and half years to promulgate rules.¹²⁶ Key to the workability of our approach, then, may be the enactment of amendments to the current version of the Rules Enabling Act that would "return[] the rulemaking process to a three-step model that include[s] Advisory Committee rulemaking, Court review, and congressional report-and-wait," which we estimated could reduce the time for rulemaking to 18 months.¹²⁷ This would constitute a temporal period that is within the norm for appellate adjudication, even if it is not swift in comparison to an idealized standard.¹²⁸ More significantly, it is our view that with a return to a three-step, Rules promulgation approach, "the Court would be encouraged to revive its more active role in reviewing, evaluating, and contributing to potential changes to the Rules."¹²⁹ Thus, to the degree that Porter wishes to see a swifter rulemaking process with more direction from the Supreme Court itself, we fully concur and believe our approach more likely to achieve that end than her remand-based method.

Fourth, Porter contends that our referral to the Advisory Committee model incorrectly focuses upon a Supreme Court versus Advisory Committee tug-of-war, when the proper issue is one of deference to the lower courts.¹³⁰ This critique, we believe, again arises out of a fundamental

1144-52 (2015) (arguing that the appointments to the Advisory Committee by Chief Justice Roberts are biased against plaintiffs).

¹²⁵ See Porter, *supra* note 1, at 182-83 (setting forth a logistical parade of horrors that would allegedly result from our proposal).

¹²⁶ Mulligan & Staszewski, *supra* note 16, at 1237.

¹²⁷ *Id.* at 1238.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1239.

¹³⁰ Porter, *supra* note 1, at 184.

misunderstanding of our view. Porter believes our approach is premised upon which institution has power or authority to craft procedural policy,¹³¹ a position we have specifically disclaimed.¹³² Ours is an approach based upon who holds institutional advantages, which we explored in detail in part I.B. Hence, we reject a tug-of-war metaphor with its implicit “who has more power” connotation.

CONCLUSION

Porter’s article is an impressive and important one, which we believe is a must-read in the nascent field of civil rules interpretive theory. We further applaud her application of an administrative-law paradigm to this topic. While our disagreements over aspects of her proposed approach are real, and we think substantial, we are heartened that Porter has renewed the scholarly focus upon civil rules interpretation. Her critique of our position has sharpened our own presentation of our institutional-competencies approach, and we are confident that her views will positively contribute to reform of the Court’s approach to future Rules cases, as well as to scholarly engagement with this increasingly significant topic.

¹³¹ See *supra* note 67.

¹³² See *supra* note 68 and accompanying text.