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Civil Rules Interpretive Theory

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Article

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INTRODUCTION

We contend that the Federal Rules of Civil Procedure (Rules) should be interpreted in a distinctive fashion, despite the federal courts' proclivity to interpret the Rules as if they were statutes. The Supreme Court itself promulgates the Rules. Congress does not enact them as statutes through the traditional path of bicameralism and presentment. As a result, the principle of legislative supremacy and the related notion that the federal courts should serve as a faithful agent of Congress, which undergird every traditional theory of statutory interpretation, do not apply in the Rules context. Unlike statutory interpretation, Rules interpretation is not an *inter*branch endeavor, but rather an *intra*branch one. The Rules, therefore, require an interpretive theory that is descriptively and normatively grounded within this non-legislative framework. That said, rule-of-law norms demonstrate that the Rules are authoritative and that they are generally interpretable from a perspective that we call "jurisprudential purposivism." From these insights, we draw several conclusions: namely, the Rules should not be interpreted as if they are statutes; the nascent non-statutory theories of civil rules interpretation are inadequate; and an administrative law approach presents the best interpretive vision for the Rules. While our proposed model may not be the last word on the subject—indeed, we hope it is not—we intend it to be the beginning of sustained judicial and scholarly inquiry in the distinctive field of civil rules interpretive theory.

While statutory interpretation was once considered an overlooked or underappreciated area of scholarly inquiry,[1] this has dramatically changed over the past several decades. Partly as a result of Justice Scalia's intellectual interest in the subject, his intense preferences on the matter, and his advocacy of a distinctive approach,[2] there has been a revival of interest in

1. *See* Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983).

2. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL

statutory interpretation theory.[3] This has resulted in what some scholars have dubbed "the interpretation wars,"[4] which generally pit different variations of "the new textualism" against approaches falling somewhere within the "purposivism" camp.[5] Because mainstream judges and scholars seem to have assimilated key lessons from both of these perspectives (and the theories may therefore be converging in practice),[6] the most recent literature seeks to assess the current views and practices of the courts,[7] identify existing similarities and remaining differences between textualist and purposivist theories,[8] and recognize the differences that exist within each of the broad umbrellas of textualism and purposivism.[9]

Unfortunately, the lavish attention devoted to statutory interpretation has not been replicated for interpretation of the Federal Rules of Civil Procedure.[10] This is an important omis-

COURTS AND THE LAW (1997); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

3. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 244 (1992).

4. Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119 (2009) ("The latest move in the interpretation wars . . . is to declare something of a truce.").

5. *See, e.g.*, Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 881 (2015) ("The debate over how courts do and should interpret statutes has narrowed to two primary interpretive approaches: textualism and purposivism.").

6. *See generally* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) (arguing that it is "time for us to put the textualism-purposivism debate behind us").

7. *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (analyzing state courts' approaches to modern statutory interpretation); John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (analyzing the Supreme Court's recent interpretive approach); Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407 (2015) (analyzing Supreme Court cases using text, pragmatism, and purpose in interpretation). For examples of recent empirical work, see FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 119 (2009); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221 (2010).

8. *Compare* Molot, *supra* note 6, at 29–59, *with* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

9. *See, e.g.*, Manning, *supra* note 7 (describing different views of purposivism espoused by Supreme Court Justices); Andrew Tutt, *Fifty Shades of Textualism*, 29 J.L. & POL. 309 (2014).

10. There are just a handful of important exceptions to this rule. *See* Joseph P. Bauer, *Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720 (1988) (arguing that courts should take an expansive view

sion because federal courts must interpret the Rules in literally every civil case, and the Rules also serve as a model for most of the states.[11]

And just as in contested statutory cases, interpretive approach matters in Rules cases—a lot. Take, for example, the case of *Pavelic & LeFlore v. Marvel Entertainment Group*.[12] Here, "the District Court imposed a Rule 11 sanction in the amount of $100,000 against [the law firm of] Pavelic & LeFlore on the ground that the [underlying copyright infringement] . . . claim had no basis in fact and had not been investigated sufficiently by counsel."[13] The issue for the Supreme Court was whether Rule 11, as then drafted, permitted the entry of sanctions only against the attorney who signed the relevant pleading or whether Rule 11 embraced discretion for the district court to enter sanctions against the entire firm to which the signing attorney belonged.[14] The majority approached Rule 11 as it would "with a statute" and applied a new-textualist methodology that focused on the "plain meaning" of the text.[15] The Court concluded that the district court could not, consistent

of Rules interpretation); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927 (advocating an institutional approach to Rules interpretation); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039 (1993) (proposing an activist approach to Rules interpretation by the Supreme Court); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123 (2015) (analyzing the methodologies of Rules interpretation by the Roberts Court); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099 (2002) (arguing for constrained judicial interpretation of the Rules); *see also* Lumen N. Mulligan & Glen Staszewski, *Institutional Competence and Civil Rules Interpretation*, 101 CORNELL L. REV. ONLINE 64 (2016) [hereinafter Mulligan & Staszewski, *Institutional Competence*]; 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, *Regulation of Civil Procedure*].

11. As a point of perspective, *Twombly* has already been cited over 250,000 times, which is more than ten times the citations for *Brown v. Board of Education*, a much older case. Porter, *supra* note 10, at 124 n.3; *see also* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 710 (2016) (discussing the large formal and informal influence of the Federal Rules on state practice).

12. 493 U.S. 120 (1989).

13. *Id.* at 122.

14. *Id.* at 121.

15. *Id.* at 123 ("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete.'" (citations omitted)).

with the text of Rule 11, hold law firms liable for sanctions.[16] Justice Marshall in dissent, along with the lower courts, took a purposive approach to interpreting Rule 11.[17] From this differing interpretive vantage point, these jurists readily concluded that firm-wide sanction was consistent with Rule 11 because "[o]ne of the fundamental purposes of Rule 11 is to strengthen the hand of the trial judge in his efforts to police abusive litigation practices and to provide him sufficient flexibility to craft penalties appropriate to each case."[18]

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.[19] also illustrates the import of Rules interpretive theory. Here, the defendant filed a Rule 50(a) sufficiency-of-the-evidence motion at the close of plaintiff's case in chief, yet failed to renew this motion after the verdict per Rule 50(b).[20] The question for the Court was whether the court of appeals had the power to review the district court's Rule 50(a) order on appeal.[21] Looking to the texts of Rules 50(a) and 50(b) as if they were statutory provisions, and giving especially strong weight to precedent as it typically does in statutory interpretation,[22] the Court held that the court of appeals lacked the power to consider an appeal of the Rule 50(a) motion in the absence of a Rule 50(b) motion.[23] Justice Stevens, dissenting, found that the court of appeals retained the power to consider such an appeal.[24] Justice Stevens broadly distinguished the Rules "as procedure in which we may have special expertise" from statutes where the Court has "an overriding duty to obey . . . commands that unambiguously express the intent of Congress."[25] To that end, he opined that the Court should take a "spirit of the Federal Rules of Civil Procedure [approach that] favors preservation of a court's power to

16. *Id.* at 125–26.

17. *Id.* at 126 (describing the lower court's heavy reliance on the policies underlying Rule 11); *id.* at 129 (Marshall, J., dissenting) (arguing that "[t]he purposes of the Rule support this construction of Rule 11," which would allow for firm-wide sanctions).

18. *Id.* at 127.

19. 546 U.S. 394 (2006).

20. *Id.* at 396.

21. *Id.* at 399.

22. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1364–68 (1988).

23. *Unitherm*, 546 U.S. at 400–01.

24. *Id.* at 407 (Stevens, J., dissenting).

25. *Id.*

avoid manifestly unjust results" rather than a narrow, text-driven approach.[26]

Alongside cases of this nature, there is an additional set of decisions in which, under the guise of interpretation, the Supreme Court has set a new policy course for the federal judicial system.[27] These change-in-policy cases—such as *Harris*,[28] *Wal-Mart*,[29] *Twombly*,[30] and *Iqbal*[31]—are now familiar to students of federal procedure for both the substantial changes in practice that have been wrought as well as the questions of interpretation that have been raised.[32] In each instance, the Court simply had a different policy preference than the position adopted by the Advisory Committee or what had been embodied in prior interpretations of the relevant Rule. In each case, the Court chose to exercise its power in adjudication to render an "interpretive" about face.

These examples show that interpretive stances—whether involving textualism, purposivism, adherence to policy set by the Advisory Committee, or a dynamic approach to setting procedural policy—drive outcomes in Rules cases and profoundly impact the conduct of federal litigation generally. Much rides on these interpretive-stance driven decisions: should courts be free to consider the credibility of video evidence in a summary judgment posture;[33] may workers form a nation-wide class to sue their employer;[34] may defendants be compelled to undergo medical examinations over their protest?[35] And we could go on and on. Simply ignoring interpretative approaches to Rules cases as an afterthought, which has been the predominant practice, is no longer a sustainable position.

In prior work, we took up this interpretive-approach question and argued that the Supreme Court acts as an administrator in the field of civil procedure, borrowing lessons from administrative law to articulate a distinctive approach to Rules

26. *Id.*
27. *See* Porter, *supra* note 10, at 136–42.
28. Scott v. Harris, 550 U.S. 372 (2007).
29. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).
30. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
31. Ashcroft v. Iqbal, 556 U.S. 662 (2009).
32. *See infra* notes 61–71 and accompanying text (discussing *Twombly*).
33. *Harris*, 550 U.S. at 378–81.
34. *Wal-Mart*, 564 U.S. at 345.
35. Schlagenhauf v. Holder, 379 U.S. 104, 109 (1964).

interpretation.[36] In developing this position, we took for granted Justice Frankfurter's insight that "[p]lainly the Rules are not acts of Congress and can not be treated as such,"[37] without providing a theoretical justification for this position. We return to defend this fundamental assumption in this piece.

Here, we turn to first principles and provide a comprehensive argument for the position that the Rules demand a distinctive theory of interpretation. We also claim that our proposed administrative model is the best available alternative. We therefore view this project as a "prequel" to our prior work on this subject, in the sense that it provides the theoretical background for our proposals, as well as the fundamental rationale for recognizing civil rules interpretive theory as a distinct field of inquiry that is worthy of greater attention. Thus, even if one rejects our specific administrative law interpretive approach, we think that the point that the Rules require a unique interpretive framework is unassailable and should significantly change the conventional understanding of civil rules interpretation.

We tackle this project in three broad steps. In Part I, the heart of our argument, we contend that the Rules should not be treated as if they are statutes for purposes of interpretive theory. Here, we first note that while the Court is not consistent, it most often interprets the Rules just as it would a statute. We turn next to rejecting the soundness of this "blackletter view" both on descriptive grounds and, more importantly, on normative grounds. On the normative point, we show that all theories of statutory interpretation begin with a key separation-of-powers principle that the courts must respect legislatively enacted law. This point, however, is inapplicable in the Rules context as the judiciary itself crafts the Rules—not Congress. This does not mean, however, that the Rules lack authority. Drawing upon legal process theory, we contend that rule-of-law norms and the principles of institutional settlement and institutional advantage cement the authoritative nature of the Rules.

In Part II, armed with this newly explicated normative foundation for the authoritative nature of the Rules, we turn to the two nascent, non-Rules-as-statutes interpretive approaches

36. Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1194–1205.

37. Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

in the scholarly literature. We look first to the inherent authority model, which contends that because the federal courts create the Rules they should be free to interpret them with little textual restraint. We reject this approach on both rule-of-law and institutional-settlement grounds. We turn next to the regime-specific purposive model, which contends that, unlike statutes, the Rules come with a regime-specific commitment to a purposive, as contrasted with a neo-textualist, approach to interpretation. While we find much to admire in this view, we ultimately reject it as it fails to account for the essential choice-of-policymaking-form question that the Supreme Court faces in Rules cases and fails to embrace the institutional advantages of court rulemaking in procedural policy setting.

In Part III, we present and defend a refined version of our administrative law model of Rules interpretation. Because the Court acts much like an agency in relation to the Rules, we argue that it should interpret the Rules in an agency-like manner. By this, we mean it should pay special attention to the institution that is making Rules decisions, i.e., the lower courts, the Advisory Committee, and the Court itself in adjudication.[38] Moreover, the Court should route Rules issues to the institution best suited to resolve the issues raised. To this end, we argue that individual exercises of discretion and equity should be resolved by the lower courts. Matters of broad policy change, we contend, should be resolved by the Advisory Committee. Finally, we assert that matters of purposive textual interpretation, which includes the setting of equitable standards as expressions of the Advisory Committee's textual commitments, should be set by the Supreme Court as an adjudicator. After addressing potential objections to our view, we conclude that our model best respects rule-of-law norms and the principle of institutional settlement and makes the fullest use of the various institutional advantages relevant in Rules cases.

I. CIVIL RULES INTERPRETATION AS A DISTINCTIVE FIELD OF INQUIRY

In this Part, we defend our primary thesis that interpretation of the Federal Rules of Civil Procedure is a distinct endeavor from statutory interpretation. We begin by explaining

38. *Cf.* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004) (providing an extensive analysis of the policymaking options available to agencies).

that, rather than formulating a coherent theory of Rules interpretation, the Supreme Court has either reflexively treated the Rules as if they were statutes or exercised free-wheeling policy discretion in Rules cases.[39] We turn next to argue that the familiar debates regarding statutory interpretation, which all rest upon separation-of-powers principles, cannot simply be transferred to the *intra*branch context of Rules interpretation. After briefly reviewing the process by which the civil rules are promulgated, we contend that legal process theory and rule-of-law norms support the authoritative nature of the Rules and supply a better normative foundation for any civil rules interpretive theory than do legislative-supremacy-linked theories of statutory interpretation.

A. THE COURT'S VACILLATING APPROACH TO INTERPRETING THE RULES

Traditionally, when the Supreme Court addresses the matter of Rules interpretation, it reflexively assumes that the Rules are for all practical purposes just like statutes and should be interpreted as such.[40] Following this approach, the Court has often espoused a neo-textualist approach to Rules interpretation. In this posture, the Court often holds that "[w]e give the Federal Rules of Civil Procedure their plain meaning. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous."[41] Similarly, the Court will often deploy semantic and syntactic rules of statutory con-

39. *See* Porter, *supra* note 10, at 131–42.

40. *See, e.g.*, Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1172 (2013) (interpreting Rule 54(d)(1) and explaining that as "in all statutory construction cases, we 'assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose'" (quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009))); *see also* Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (noting that the Federal Rules are as "binding as any statute").

41. *See* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 540–41 (1991) ("'We give the Federal Rules of Civil Procedure their plain meaning.' As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous." (quoting Pavelic 7 LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989))); *Pavelic*, *supra* at 123 ("We give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, 'when we find the terms unambiguous, judicial inquiry is complete.'" (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)) (citations omitted)); Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) (using similar language); *see also In re* Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 29 (1st Cir. 2009) (applying the Supreme Court's traditional interpretive approach).

struction, which tend to be heavily emphasized by neo-textualist approaches to statutory interpretation,[42] in Rules cases.[43] Further, following this Rules-as-statutes approach, the Court will eschew policy-driven arguments as proper means of interpreting the Rules, noting that such policy questions must be sent to the drafters of the Rules.[44] And the Court tends to apply a heightened stare decisis norm that is generally associated with statutory interpretation to Rules cases.[45]

Consider, for example, the plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, where the Justices took just such a Rules-as-statutes approach.[46] In *Shady Grove*, New York law allowed insureds to collect statutory interest from insurers for late benefits payments, but under state law such interest could not be collected as part of a class action.[47] The plaintiffs filed an action in federal court, seeking to certify a class action to collect this statutory interest under Federal Rule of Civil Procedure 23. The issue for the Court was whether, under the *Erie* doctrine,[48] Rule 23 directly conflicted with the New York law such that Rule 23

42. *See* SCALIA & GARNER, *supra* note 2, at 69–166 (identifying and describing numerous semantic and syntactic canons of statutory interpretation).

43. *See, e.g.*, Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 547–48 (2010) (employing textualist tools in a Rule 15 case); Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (applying *expressio unius est exclusio alterius* in a Rule 8 pleading case).

44. *See, e.g.*, Jones v. Bock, 549 U.S. 199, 216 (2007) (holding in a Rules case that "'[w]hatever temptations the statesmanship of policy-making might wisely suggest,' the judge's job is to construe the statute—not to make it better. The judge 'must not read in by way of creation,' but instead abide by the 'duty of restraint, th[e] humility of function as merely the translator of another's command.'" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947))); *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (similar); Amchem. Prods. v. Windsor, 521 U.S. 591 (1997) (similar).

45. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) (recognizing that the principle of stare decisis has "special force" in statutory interpretation because "Congress remains free to alter what we have done"). The Advisory Committee is similarly free to "correct" interpretive errors by the Supreme Court. *See, e.g.*, FED. R. CIV. P. 11, advisory committee notes to 1993 amendments ("This provision is designed to remove the restrictions of the former rule."). As such, the Court will often deploy stare decisis with special force in Rules cases. *See* Johnson v. Shelby, Miss., 135 S. Ct. 346, 347 (2014) (relying strictly upon older, even questionable post-*Twombly*, interpretations to reverse in Rule 8 pleading cases).

46. 559 U.S. 393 (2010).

47. *Id.* at 397.

48. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

would govern under *Hanna*[49] or whether Rule 23 could be interpreted so as to avoid conflict with the New York statute.[50] The plurality interpreted Rule 23 as if it were a statute.[51] In so doing, the plurality looked exclusively to the plain meaning of Rule 23's text, deploying semantic interpretive tools, to conclude that Rule 23 conflicted with New York law.[52] Further embracing this interpretive stance, the plurality specifically eschewed a purposive or otherwise contextualized analysis in favor of this neo-textualist approach.[53] Moreover, again in line with a Rules-as-statutes approach, the plurality concluded that judicial policy preferences—such as the *Erie* doctrine's policy to avoid creating incentives to forum shop as between the state and federal courts—must give way to the policy set in the Rules (which the plurality presented as congressionally set policy).[54] Here, each interpretive stance by the *Shady Grove* plurality took a Rules-as-statutes approach. Moreover, as discussed above, the Court took just such a Rules-as-statutes approach in *Pavelic & LeFlore*[55] and *Unitherm Food Systems* as well,[56] as it has in scores upon scores of other cases.

This statutory-centric view of Rules interpretation does not always carry the day, however.[57] Despite the Court's frequent odes celebrating a strict statutory approach to Rules interpretation, it often engages with Rules cases from a decidedly non-statutory-text perspective.[58] Indeed, this policy-driven approach to the Rules has grabbed headlines as demonstrated by cases

49. Hanna v. Plumer, 380 U.S. 460, 463–64 (1965).

50. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980).

51. *See Shady Grove*, 559 U.S. at 400 ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure."); Porter, *supra* note 10, at 136 (concluding that the plurality takes a statutory interpretive approach).

52. *Shady Grove*, 559 U.S. at 398–400.

53. *See id.* at 405 n.7 (rejecting the dissent's "suggest[ion] that we should read the Federal Rules 'with sensitivity to important state interests' and 'to avoid conflict with important state regulatory policies'").

54. *Id.* at 416 ("But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed in federal instead of state court.").

55. *See supra* notes 12–18 and accompanying text (discussing the case).

56. *See supra* notes 19–26 and accompanying text (discussing the case).

57. *See* Porter, *supra* note 10, at 131–42 (identifying and describing two distinct methodologies of Rules interpretation invoked by the Roberts Court).

58. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1195–97; Porter, *supra* note 10, at 136–42.

such as *Harris*, *Wal-Mart*, *Twombly*, and *Iqbal*.[59] In this family of cases, we see the Court divorce itself from text, often almost entirely, and look predominately to policy.[60]

Twombly presents a prime example. After decades of upholding the "no set of facts" standard for adjudicating motions to dismiss under *Conley v. Gibson*,[61] the Court changed course in *Twombly*, an antitrust class-action suit against several telecommunications providers.[62] The complaint asserted simply that the defendants had colluded in violation of the antitrust laws but failed to provide any specific factual allegations of an unlawful agreement in support of that claim.[63] While the plaintiffs' bare allegations would have survived a Rule 12(b)(6) challenge under the well-established *Conley* standard,[64] the *Twombly* Court charted a new course and overruled *Conley*.[65] In lieu of the *Conley* standard, the *Twombly* Court required a reviewing court to disregard all recitals in a complaint that are mere legal conclusions and assess whether the well-pleaded factual allegations state a claim for relief that is "plausible."[66] In effect, the opinion crafted a new and more demanding test for assessing the sufficiency of complaints. What is key for our discussion is that the Court explicitly predicated this more rigorous standard on its desire to avoid the high costs of discovery and related incentives to settle unmeritorious cases.[67]

Indeed, commentators almost universally recognized *Twombly* as a pronouncement regarding the policy underlying

59. *See supra* notes 28–31 (citing these cases).

60. *See* Porter, *supra* note 10, at 149–53 (recognizing and describing this phenomenon).

61. 355 U.S. 41, 45–46 (1957). The Court had regularly upheld this standard for the fifty years between *Conley* and *Twombly*. *See, e.g.*, Erickson v. Pardus, 551 U.S. 89, 93 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 507 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 149–50 n.3 (1984); Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506 (1959).

62. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549–50 (2007).

63. *Id.* at 565 n.10.

64. *Id.* at 561.

65. *Id.* at 563 (retiring the key passage from *Conley*).

66. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)).

67. *See Twombly*, 550 U.S. at 558–59; Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 826–27 (2010) (reviewing *Twombly*).

pleading requirements in federal court[68] and, by extension, state court[69]—not as an interpretation of Rule 8's text. Indeed, proponents of the opinion welcomed it, not because of its textual parsing, but rather because it limited discovery costs.[70] Critics also tended to focus their discontent on the policy implications of *Twombly* as opposed to interpretive difficulties.[71]

When the Court acts in this non-textualist mode, as in *Twombly*, it offers little commitment to stare decisis norms of the type one expects in the statutory interpretation arena.[72] In an entire series of cases, from the use of video evidence on summary judgment to certification of class actions, the Court's interaction with the Rules can hardly be described as the straightforward exercise of statutory interpretation—at least not with a straight face.[73] Importantly, the Court has not provided any principled explanation for deviating from its traditional statutory approach to Rules cases, or even acknowledged that it is adopting a fundamentally different interpretive methodology.[74]

68. *See Twombly*, 550 U.S. at 579 (Stevens, J., dissenting) (noting the same).

69. For examples of how state high courts have responded to *Twombly* and *Iqbal*, see Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1196 n.32.

70. *See, e.g.*, Mark Herrmann et al., Debate, *Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 142–47 (2009) (opening statement of Herrmann and Beck arguing that *Twombly* and *Iqbal* were properly decided in an adjudication, are correct interpretations of Rule 8, and set sound policy); Lynn C. Tyler, *Recent Supreme Court Decision Heightens Pleading Standards, Holds out Hope for Reducing Discovery Costs*, 78 PTCJ 169 (2009).

71. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431; *see also* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1197 & nn.35–39 (describing these critiques and collecting sources). There were some interpretation-based critiques as well. *See* RICHARD A. POSNER, HOW JUDGES THINK 53 (2008) (contending that the Court in *Twombly* could not possibly have based its decision on "legalist" principles); Marcus, *supra* note 10, at 974 ("Every relevant indicator suggests that the Court misinterpreted Rule 8 in *Twombly* and *Iqbal*."); Spencer, *supra*, at 448–50, 461–73 (2008) (detailing the many ways in which the *Twombly* rule deviates from past practice, the text, the intent, and the legislative history of Rule 8).

72. *Cf. supra* note 45 (describing the role of stare decisis in statutory interpretation).

73. *See* Porter, *supra* note 10, at 136–37.

74. *See* Marcus, *supra* note 10, at 928 (claiming that the Court's interpretive methodology in Rules cases varies "wildly and inexplicably"); Porter, *supra* note 10, at 142, 156 (describing "the Roberts Court's interpretive bipolari-

B. REJECTING THE STATUTORY INTERPRETATION MODEL

The Court's split personality when it engages with the Rules presents prima facie problems. In ordinary moments, the Court tends to adopt a Rules-as-statutes approach. Yet there is a substantial minority of cases where the Court disregards this Rules-as-statutes approach and exercises free-wheeling policy discretion. Adopting a Rules-as-statutes model, as we go on to discuss, as a foundational theory of interpretation faces two essential difficulties: one descriptive and one normative.

First, the Rules-as-statutes approach is burdened with the difficulty of a descriptive disconnect from a substantial minority of the Court's own practice. Of course, developing an interpretive theory for the Rules necessarily is a normative endeavor.[75] As such, a mismatch between normative theory and actual practice need not be a strike against the normative approach per se. Indeed, often the point of an interpretive theory is to steer away from past errors or misguided practices in interpretation. Nevertheless, a radical departure from practice, one which simply paints over major swathes of the Court's exercise of its policy-setting muscle, should be viewed as a strike against an interpretive theory of the Rules. Seeing value in this Aristotelian[76] approach to normative endeavors such as presenting an interpretive theory for the Rules,[77] we take the position that the Rules-as-statutes position's lack of a robust descriptive fit is a strike against adoption of this view.

As such, we turn now to an examination of first normative principles in regard to the application of statutory interpretive

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ty," and recognizing "the Court's lack of transparency and self-reflection about its" disparate approaches).

75. *See* RONALD DWORKIN, LAW'S EMPIRE 45–86 (1986) (characterizing "interpretive" theories as reflecting interacting considerations of "fit" and "justification"); Marcus, *supra* note 10, at 930 ("The dearth of interpretive theory for the Federal Rules means that the normative defense of a methodology must begin with the basic questions of the sort often lost in the surfeit of commentary on statutory interpretation.").

76. *See* ARISTOTLE, NICOMACHEAN ETHICS (H. Rackham ed. & trans., 1975).

77. The first task in these endeavors, Aristotle argues, is to review the prevailing thoughts of the wise on the subject. *Cf. id.* at 1095a–b. Then, from these many views one must establish a first principle in such a manner so that "all the facts harmonize with" a true account. *Id.* at 1098b10. Then after having harmonized the facts into a first principle, Aristotle instructs us to reapply it to the world. That is, Aristotle uses first principles to help shed new light upon current controversies, as well as to help explain why the previous attempts went wrong.

theory to Rules cases. The first principle of statutory interpretation is the concept of "legislative supremacy."[78] This principle recognizes that statutory interpretation involves "an interbranch encounter of sorts," which "represents the legal moment when a court confronts the product of the legislative branch and must assign meaning to a contested provision."[79] As such, "the court must adopt—at least implicitly—a theory about its own role by defining the goal and methodology of the interpretive enterprise and by taking an institutional stance in relation to the legislature."[80] For similar reasons, statutory interpretation necessarily implicates democratic theory and related understandings of the separation of powers that are enshrined in the Constitution.[81] Legislative supremacy, in turn, reflects "the idea that the legislature has legitimate authority to make laws, and that the judiciary must respect that authority in making its [interpretive] decisions."[82] This principle suggests that courts should serve as the "faithful agents" of the legislature when they interpret statutes, and that the judiciary is subordinate to the legislature in the making of public policy.[83] "Fidelity to the legislature is thought to satisfy the demands of democratic theory by allowing popularly elected officials, presumed to be accountable to their constituents, to make policy decisions."[84] Meanwhile, because federal judges are unelected and politically unaccountable, liberal democratic theory seeks to limit the policymaking discretion of courts by requiring

78. *See, e.g.*, William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989).

79. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593 (1995).

80. *Id.* at 593–94.

81. *See* Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law. It must at the very least assume a set of legitimate institutional roles and legitimate institutional procedures that inform interpretation.").

82. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 810 (1994) (quoting Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 769 (1991)).

83. *See* Farber, *supra* note 78, at 283; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 5 (2001); Redish & Chung, *supra* note 82, at 810–11.

84. Schacter, *supra* note 79, at 594.

them to justify their interpretive decisions as the product of the policy choices of elected officials.[85]

The intellectual development of statutory interpretive theory highlights this fundamental linkage of statutory interpretation to the notion of legislative supremacy. Traditionally, the principle of legislative supremacy was reflected by the "originalist imperative," the idea that the animating goal of statutory interpretation was to ascertain and implement the legislature's subjective intent.[86] In the years following World War II and the New Deal, a rough consensus emerged in favor of the purposive approach to statutory interpretation that was exemplified by the legal process theory advocated by Professors Hart and Sacks.[87] Instead of focusing on the legislature's subjective intent with respect to the precise question at issue, legal process theory sought to identify the objective purposes that a reasonable person would attribute to a statute and its operative provisions, and to determine the best way to carry out those purposes under the circumstances presented in each case. In the last quarter of the twentieth century, new textualism arose as a means to constrain the policymaking discretion of the judiciary inherent in a purposive approach so as to better respect a particular understanding of the constitutional structure and the workings of the legislative process. The advocates of this view typically maintain that courts should rely primarily on textual sources of meaning, including the ordinary understanding of the operative provisions, related parts of the same act or the whole code, and established canons of statutory interpretation, to ascertain the objective meaning of the statutory text to a reasonable user of English.[88] New textualists conclude that this approach should be adopted by a faithful agent of the legislature because "the precise lines drawn by any statute may reflect unrecorded compromises among interest groups, unknow-

85. *See* Eskridge, *supra* note 78, at 344–45.

86. *See* Schacter, *supra* note 79, at 594; *see also* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 221 (2d ed. 2006) ("Anglo-American theories of statutory interpretation have traditionally emphasized *legislative intent* as the object or goal of statutory interpretation.").

87. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter THE LEGAL PROCESS]; William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, *in* THE LEGAL PROCESS, *supra*, at li–cxxxvi.

88. *See* ESKRIDGE JR. ET AL., *supra* note 86, at 235–36 (describing sources of guidance consulted by textualists).

able strategic behavior, or even an implicit legislative decision to forgo costly bargaining over greater textual precision."[89] New textualists will only consider a statute's underlying purposes or its policy consequences in a particular case to resolve ambiguity, which exists only when a court is required to choose from among two or more linguistically permissible meanings that remain after a thorough examination of a statute's "semantic context."[90]

To be sure, these competing statutory interpretative theories are based on fundamentally different conceptions of democracy, the rule of law, the constitutional structure, and the role of federal courts.[91] Textualism gives the utmost priority to a statute's semantic context and the way in which a reasonable person who knows all of the rules of grammar and syntax would use words, whereas purposivism privileges a statute's policy context and how a reasonable person would address the mischief that a statute was designed to cure.[92] Thus, these leading foundational theories of statutory interpretation understand the principle of legislative supremacy in different ways and have different conceptions of the proper role of a faithful agent of Congress. Nevertheless, they all agree that federal courts are subordinate to Congress as a policy-maker and that the judiciary must be able to attribute the outcomes of statutory cases in a meaningful way to "legislative choice."[93]

This first principle of statutory interpretation—i.e., attributing outcomes in particular cases to the choices of a separate branch of government based upon separation-of-powers norms—does not apply to cases involving the Rules. If statutory interpretation is necessarily "an interbranch encounter of sorts" that raises separation of powers concerns,[94] this is not true of Rules interpretation. Rather, the Rules Enabling Act provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure" for cases in

89. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

90. *Id.* at 2408.

91. *See generally* Siegel, *supra* note 4 (describing the divergent theories); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209 (2015) (discussing fundamental differences between competing conceptions of statutory interpretation).

92. *See* Manning, *supra* note 8, at 76.

93. *See id.* at 96; *see also* Farber, *supra* note 78, at 284–92 (distinguishing between strong and weak conceptions of legislative supremacy).

94. Schacter, *supra* note 79, at 593–94.

the lower federal courts.[95] While much of the drafting and other work that goes into promulgating and amending the Rules is carried out by judiciary committees, the members of those judiciary committees are appointed by the Chief Justice, and their recommendations are reviewed and must be approved by the Supreme Court.[96]

Congress is, of course, also provided with an opportunity to review and potentially veto proposed rules before they go into effect, but we do not find that such a procedure imbues the Rules with the same separation-of-powers normative underpinnings as statutory law. In this regard, we are of the same mind as Justice Frankfurter. We agree with him that "little significance attaches to the fact that the Rules, in accordance with the statute, remained on the table of two Houses of Congress without evoking any objection . . . [before they] came into force."[97] As he explained, when one compares "the mechanics of legislation and the practical conditions surrounding the business of Congress" with the procedure surrounding the potential veto of a procedural rule, "to draw any inference of tacit approval from non-action by Congress is to appeal to unreality."[98] As he bluntly put it, "Plainly the Rules are not acts of Congress and can not be treated as such."[99] Agreeing with Justice Frankfurter in this regard as we do, we conclude that when federal courts interpret the Rules, they are presented with an *intra*branch encounter of sorts, and as such the principle of legislative supremacy is inapplicable.[100]

Moreover, because the Court was formally delegated authority to promulgate the Rules by Congress, it makes little sense to understand the Court as a subordinate policy-maker

95. 28 U.S.C. § 2072(a) (2012).

96. *See infra* Part I.C.

97. Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

98. *Id.*

99. *Id.*

100. We believe that the structural safeguards provided by the committee process, including the notice-and-comment rulemaking procedures described below, prevent this arrangement from establishing an unconstitutional delegation of both lawmaking and law-elaboration authority to the same actors. *Cf.* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 618 (1996) (claiming that "the core of the separation of powers doctrine includes the requirement of some minimum separation between lawmaking and law-exposition," which is allegedly violated when courts give strong deference to agency interpretations of their own regulations).

with respect to Rules issues or as a "faithful agent" of itself.[101] This is particularly true given the Court's influence over the personnel on the rulemaking committees, and its obligation to approve of the contents of proposed rules before they can become effective. Although we believe that the rule of law and a jurisprudential principle of institutional settlement obligate federal courts to follow the ascertainable decisions of the rulemakers,[102] there is otherwise little need for the judiciary to attribute the resolution of interpretive problems to "rulemakers' choice" or to follow "an originalist imperative" purely on democratic legitimacy grounds. Indeed, the Rules are widely understood to contain interstitial gaps, which are designed to be filled by common-law forms of decisionmaking or the application of discretionary judgment, and thereby effectively sub-delegate policymaking authority to federal courts. Procedural policymaking by federal courts should therefore not be anathema for the reasons that underlie the concept of legislative supremacy, and which have guided the development of the leading theories of statutory interpretation.[103]

We are not the first scholars to recognize that legislative supremacy is not the proper starting point for Rules interpretation. Joseph Bauer briefly discussed this same conclusion several decades ago.[104] Our aims here, then, are twofold. One, by reiterating and expanding upon this point we hope to collective-

101. *Cf.* Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 334 (Andrew S. Gold & Paul B. Miller eds., 2014) (claiming that the fiduciary duties that an agent owes to her principle is to follow "her understanding of her principal's present statement of intentions," even when the principal's "preferences have changed").

102. *See infra* Part I.D.

103. Some scholars have embraced judicial discretion in statutory interpretation and suggested that courts should be viewed as "cooperative partners" of the legislature. *See, e.g.*, DWORKIN, *supra* note 75; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987). While federal courts (and especially the Court) could plausibly think of themselves as "cooperative partners" of the rulemakers in the context of Rules interpretation, this idea would merely beg the question of how the judiciary should implement the Rules. Accordingly, we do not think that anything meaningful turns on adopting or rejecting this label in this context.

104. Bauer, *supra* note 10, at 720 ("In construing the Federal Rules, the courts are interpreting standards which the Supreme Court itself has promulgated. Therefore, some of the problems which occur during statutory interpretation, such as ferreting out legislative intent, deferring to another branch of the government, or avoiding violations of principles of federalism by deferring to state interests, are in large measure eliminated.").

ly draw renewed attention to this essential normative distinction at play in Rules cases. And two, we aim to add a normative foundation upon which to rest Rules interpretation in the absence of legislative supremacy that is currently lacking in the literature.

Accordingly, we do not think that any of the leading foundational theories of statutory interpretation, based as they are upon the separation-of-powers concept of legislative supremacy, can simply be transplanted unreflectively into the Rules interpretation context. Rather, civil rules interpretive theory should be understood as a distinctive field of inquiry, which turns on the particular nature of the court rulemaking process, broader jurisprudential principles, and related questions of institutional competence.

C. THE COURT RULEMAKING PROCESS

We therefore turn to a brief description of the court rulemaking process, which differs substantially from the traditional legislative process. Court rulemaking has evolved over time to become an elaborate affair that takes two to three years to complete.[105] Congress originally enacted the Rules Enabling Act, which empowered the Supreme Court to promulgate rules of practice and procedure for the lower federal courts, in 1934.[106] Although the Act did not establish a committee process, the Court appointed a fourteen-person Advisory Committee to conduct the research and drafting necessary to create the original Federal Rules of Civil Procedure.[107] Under the first incarnation of the rulemaking process, the Court directly reviewed the work of the Advisory Committee and, when satisfied, reported the promulgated Rules to Congress,[108] which could overrule any

105. *See* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1671–72 (1995).

106. Act of June 19, 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (current version at 28 U.S.C. §§ 2071–77 (2012)). For detailed histories of the Rules Enabling Act and recent amendments to the rulemaking process, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (providing a detailed history of the Rules Enabling Act); Struve, *supra* note 10, at 1103–18 (reviewing the then-most recent amendments to the rulemaking process).

107. *See* Order, Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935) (initially appointing the Civil Rules Advisory Committee); *see also* Order, 297 U.S. 731 (1936) (replacing a committee member and renewing the Advisory Committee's charge).

108. *See* Act of June 19, 1934, § 1.

of the proposed rules by exercising the "legislative veto" built into the 1934 Act during the specified "report-and-wait period."[109] While the Court routinely deferred to the Advisory Committee's proposals during this early period,[110] it did on occasion exercise its authority to revise Advisory Committee proposals prior to submission to Congress.[111]

Since the 1988 amendments to the Rules Enabling Act, the Rules drafting process is more open to public participation, while at the same time more reticulated.[112] The current version of the Rules Enabling Act mandates the use of an advisory committee.[113] Unlike past committees dominated by practitioners, the committee is now made up of seven federal district court judges, one federal appellate court judge, one state-court judge, four practitioners, one representative from the Department of Justice, and one academic.[114] The current act also requires the Judicial Conference to publish its procedures for amendment and adoption of Rules;[115] to conduct open and publicly noticed meetings, record the minutes, and make those minutes publicly available;[116] to submit proposed amendments for public comment;[117] and to attach official drafters' notes to Rule proposals.[118]

The current rulemaking process comprises seven steps,[119] which is now very much a bottom-up approach to rulemaking.[120]

109. *See id.* § 2.

110. *See* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 677 (1975).

111. *See* Struve, *supra* note 10, at 1106 n.11. At least once, the Court exercised its rulemaking authority directly in amending a Rule of Criminal Procedure, bypassing the Advisory Committee entirely. *See* Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC. 250, 257 (1963).

112. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (current version at 28 U.S.C. §§ 2071–2075).

113. 28 U.S.C. § 2073(b).

114. *See* Committees on Rules of Practice and Procedure Chairs and Reporters, (2016), http://www.uscourts.gov/sites/default/files/committee-roster.pdf.

115. 28 U.S.C. § 2073(a)(1).

116. *Id.* § 2073(c)(1)–(2).

117. *Id.*

118. *Id.* § 2073(d).

119. *See* Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 195 F.R.D. 386 (2000) [hereinafter Rulemaking Procedures].

120. *See generally* Richard L. Marcus, *Reform Through Rulemaking*?, 80 WASH. U. L.Q. 901, 913–17 (2002) (describing top down versus bottom up ap-

First, the Administrative Office of the United States Courts collects recommendations for new Rules or amendments from the public, practitioners, and judges.[121] These suggestions are forwarded to the appropriate Advisory Committee's reporter[122] (typically a law professor assigned to each advisory committee to set the agenda and do the initial drafting of Rule revisions and explanatory notes[123]), who makes an initial recommendation for action to the Advisory Committee. Second, to go forward with a Rules revision, the Advisory Committee must submit the proposed revision and explanatory note, and any dissenting views, to the Standing Committee in order to obtain permission to advance to the publication and comment period.[124] Third, the Advisory Committee publishes the proposed revision widely, receives public comment, and holds public hearings.[125] At the conclusion of the notice-and-comment period, the Advisory Committee's reporter summarizes the results of the public input and presents them to the Advisory Committee.[126] If the Advisory Committee finds that no substantial changes to the proposal are called for, it transmits the revision and accompanying notes and reports to the Standing Committee.[127] If the Advisory Committee makes substantial changes to the proposed revision, it must go through another round of public notice-and-comment.[128] If it makes substantial changes to the proposed revisions, the Standing Committee returns the proposed revision to the Advisory Committee.[129] If the Standing Committee does not make substantial changes, it sends the proposed revision to the Judicial Conference.[130] Fifth, the Judicial Conference considers proposed revisions each September, sending approved revisions to the Court or rejected proposals back to the Standing Committee.[131] Sixth, the Court takes the proposed revisions under advisement from September to May 1 of the following year, at which time it must transmit to Con-

proaches).

121. *See* McCabe, *supra* note 105, at 1672.
122. *Id.*
123. *Id.* at 1664–65.
124. *Id.* at 1672.
125. *Id.*
126. *Id.*
127. *Id.* at 1672–73.
128. *Id.* at 1673.
129. *Id.*
130. *Id.*
131. *Id.*

gress those Rules it seeks to promulgate.[132] Seventh, under the current law, Congress's report-and-wait period runs another seven months from May 1 to December 1, at which time unaltered revisions to the Rules become law.[133] The court rulemaking process therefore results in the mandatory creation of an extensive rulemaking record, which is available to participants in the rulemaking process, members of Congress, the President, and the general public.[134]

In practice, this approach to rulemaking has two key virtues that lead to effective rulemaking. First, it promotes the use of empirical data in decisionmaking. As past Advisory Committee chair Mark R. Kravitz has noted, the Advisory Committee is "committed to gathering empirical data about the operation of the rules and any proposed rule changes so that we better understand the likely effect of rule revisions."[135] Moreover, the Federal Judicial Center, the research arm of the judiciary, works with the Advisory Committee to supply empirical studies of Rules issues.[136] Second, the legal community engages actively with the Advisory Committee in notice-and-comment periods. For example, the December 2015 Rules amendments received more than 2300 comments, many of which claimed that the proposed amendments were biased in favor of defendants.[137] In part because it regularly uses sound empirical evidence and subjects its recommendations to vigorous notice and comment, many conclude that the Advisory Committee produc-

132. 28 U.S.C. § 2074(a) (2012).

133. *Id.* If Congress decides to reject or modify proposed changes during this period, it must promulgate a joint resolution that satisfies the constitutional requirements of bicameralism and presentment. *See* U.S. CONST. art. I, § 7; INS v. Chadha, 462 U.S. 919, 935 n.9 (1983).

134. *See* Rulemaking Procedures, *supra* note 119, at 387–93.

135. Mark R. Kravitz, *To Revise, or Not To Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 217 (2010).

136. *See* Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60, 70 (2013); Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31, 39–40 (1988).

137. *See* Tony Mauro, *Lawyers Spar over Discovery Rules; Litigation Costs at Center of Debate*, NAT'L L.J. (Feb. 24, 2014), http://www.nationallawjournal.com/id=1202644114459/Lawyers-Spar-Over-Discovery-Rules; Rebecca L. Shult, *2,000+ Public Comments Submitted Responding to Proposed Changes to FRCP*, LEXOLOGY (Apr. 21, 2014), http://www.lexology.com/library/detail.aspx?g=dd0982a2-7c5a-4001-8380-648939119c8a.

es strong, non-biased rules[138] that reflect principled deliberation worthy of deep respect.[139]

Of course, the rulemaking process is not without fault or critics. First, the current seven-step rulemaking process is by most assessments, including our own,[140] overly ossified, taking two and a half years to promulgate rules.[141] Indeed, we agree with Stephen Yeazell's view that the current rulemaking process has become overly cumbersome with little added benefit to the quality of the finished product.[142] Second, some have critiqued its bottom-up approach as overly empowering of the Advisory Committee in lieu of the Supreme Court or Congress.[143] Third, others conclude that rulemakers, at least of late, are overly defense biased and unduly focused on the needs of complex litigation to the detriment of the bulk of ordinary cases.[144] Fourth, still others conclude that, instead of following the empirical data for typical cases, the rulemakers often become wrongly focused on high-profile, atypical cases.[145] Fifth, still

138. *See* Daniel R. Coquillette, *A Self-Study of Federal Judicial Rulemaking: A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679, 685 (1995) (discussing a report prepared by Thomas E. Baker and Hon. Frank H. Easterbrook).

139. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999) (defending court-based rulemaking as central to developing and maintaining rules that reflect principled deliberation).

140. *See* Mulligan & Staszewski, *Institutional Competence*, *supra* note 10, at 89; Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1237–38.

141. *See* McCabe, *supra* note 105.

142. *See* Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 235 (1998).

143. *See, e.g.*, Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 72–73 (2010).

144. *See* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1595 (2015) (labeling the current members as a "rulemaking committee appointed by a Republican Chief Justice that is dominated by judges appointed by Republican [P]residents and lawyers who defend corporations/businesses"); 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, 1144–52 (2015) (arguing that the appointments to the Advisory Committee by Chief Justice Roberts are biased against plaintiffs); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 614–23 (2001) (similar).

145. *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1042–43 (2016); Suja A. Thomas & Dawson Price, *How Atypical Cases*

others note that because the Advisory Committee responds to the practicing bar, not voters generally, it has an unfortunate tendency toward denying access to the judicial system.[146] Sixth, some scholars find, akin to an agency capture argument, that the rulemaking process is dominated by corporate interests.[147]

Consider the drafting process leading up to the 2015 Rules amendments as evidence that there is truth to both the claims of virtues and vices in the rulemaking process. The 2015 Amendments deal predominantly with pre-trial case management, discovery, spoliation, and cooperation among attorneys.[148] The Advisory Committee had access to a lot of data in this endeavor. For years, the Federal Judicial Center had found that, at the median, discovery is not overly expensive. It concluded that, again at the median, discovery cost about 1.6% of the stakes for plaintiffs and 3.3% of the stakes for defendants in 2009 with the median stakes coming in at $160,000.[149] Indeed, "[n]early every effort to quantify litigation costs and to understand discovery practice over the last four decades has reached results similar to the 2009 FJC study."[150] Nevertheless, the Advisory Committee, focusing on the approximately five percent of cases that do have explosive discovery costs,[151] and perhaps driven by biases attributable to the defense-centered elite Advi-

Make Bad Rules: A Commentary on the Rulemaking Process, 15 NEV. L.J. 1141, 1142 (2015).

146. *See* Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 N.M. L. REV. 261, 263 (2009).

147. *See* Coleman, *supra* note 145, at 1015–19.

148. *See* Proposed Amendments to the Federal Rules of Civil Procedure, Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84 and the Appendix of Forms, Absent Contrary Congressional Action, 305 F.R.D. 457 (2015) [hereinafter Proposed Amendments].

149. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE 43 (2009); *see also* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 773–74 (2010) (finding that "[discovery] costs are generally proportionate" to client stakes in the litigation); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 525, 531 (1998) (finding similar results just ten years earlier); *see also* JAMES S. KAKALIK ET AL., INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA xxvii (1998), http://www.rand.org/pubs/monograph_reports/2009/MR941.pdf ("Discovery is not a pervasive litigation cost problem for the majority of cases.").

150. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1111 (2012).

151. Willging et al., *supra* note 149, at 531.

sory Committee membership,[152] offered an aggressive slate of discovery-limiting amendments in 2013.[153] For example, the proposed 2013 changes included amendments which would have lowered the presumptive limits on the use of discovery devices in Rules 30, 31, 33 and 36.[154] In reaction, the bar aggressively deployed the opportunity to participate provided by the notice-and-comment period. As noted above, nearly 2300 comments, many critical, were submitted after the amendments were proposed.[155] Indeed, these proposed changes were comprehensively addressed by pro-plaintiff groups such as the American Association for Justice, which opposed them in the court of public opinion[156] and formally with the Advisory Committee.[157] Substantial changes to the proposed rules were made as a result. Indeed, the Advisory Committee withdrew all the proposed presumptive limits on Rules 30, 31, 33 and 36, noting that "[s]uch widespread and forceful opposition deserves respect."[158] Moreover, many of the other controversial proposed

152. *See* Coleman, *supra* note 145, at 1016–19.

153. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE (2013), http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf [hereinafter 2013 PROPOSAL]; *see also* REPORT OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE app. B-5 (2014), http://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf (noting choice to move for proportionality amendments to discovery).

154. *See* 2013 PROPOSAL, *supra* note 153, at 300–05, 310–11.

155. *See supra* note 137 and accompanying text (noting numbers of comments submitted).

156. *See, e.g.*, Arthur Bryant, *Access to Justice at Stake with Federal Rules Changes*, AM. ASS'N FOR JUST.: FIGHTING FOR JUST. BLOG (June 5, 2014), https://www.justice.org/blog/access-justice-stake-federal-rules-changes; *Federal Courts Should Not Be Rigged in Favor of Corporations*, AM. ASS'N FOR JUST. (Nov. 7, 2013), https://www.justice.org/news/federal-courts-should-not-be-rigged-favor-corporations; *Proposed Changes to Federal Rules Would Eliminate Access to Justice*, AM. ASS'N FOR JUST. (Dec. 20, 2013), https://www.justice.org/news/proposed-changes-federal-rules-would-eliminate-access-justice.

157. *See* Comments on Proposed Rules from J. Burton LeBlanc, President, Am. Ass'n for Justice, to Committee on Rules of Practice and Procedure (Dec. 19, 2013), https://www.regulations.gov/document?D=USC-RULES-CV-2013-0002-0372 (download pdf).

158. *See* Minutes, Civil Rules Advisory Committee Meeting at lines 466–67 (Apr. 10–11, 2014), http://www.uscourts.gov/sites/default/files/fr_import/CV04-2014-min.pdf.

changes were not adopted.[159] Of course, other proposals were adopted, and the jury remains out as to their impact.[160]

Debating the wisdom of the 2015 amendments is not our goal here. Rather, our point in this brief review of the rulemaking structure, coupled with an overview of its alleged strengths and weaknesses in practice, is to show that Justice Frankfurter was correct. The Rules are not statutes. They are crafted differently. The drafters face different lobbying pressures and different procedural hurdles. They succeed, and fail, differently from statutes. As such, wholesale adoption of a Rules-as-statutes approach to interpretation, based upon a separation-of-powers foundation, poorly fits in the context of this particular lawmaking process.

D. A NORMATIVE FOUNDATION FOR CIVIL RULES INTERPRETATION

We turn now from critique to our positive vision for the normative foundations of a theory of civil rules interpretation. While we believe that Rules interpretation is fundamentally distinct from statutory interpretation for the reasons described above, that does not mean that federal courts should be allowed to ignore the text and the ascertainable intent of the rulemakers. Because the principles of legislative supremacy and faithful agency are inapplicable, however, we need to provide another theoretical justification for this principle. To this end, we point out that the Rules are legally authoritative, from a legal process theory and rule-of-law perspective, once they have been enacted through the foregoing process, which therefore requires federal courts to follow the identifiable policy choices of the rulemakers. We believe this more applicable normative foundation for civil rules interpretation has several pragmatic consequences as well, which we discuss in Parts II and III.

We turn first to a primer on legal process theory. This school of thought aims to promote democratic legitimacy and

159. *See* Proposed Amendments, *supra* note 148.

160. *Compare* Altom M. Maglio, *Adapting to Amended Federal Discovery Rules*, TRIAL, July 2015, at 37, 40 ("[T]he actual rule amendments do not support [the] perspective [of severe restrictions on discovery]."), *with* Andrew J. Kennedy, *Significant Changes to Discovery and Case Management Practices*, AM. ASS'N FOR JUST. (Oct. 14, 2015), https://www.justice.org/magazine/trial/2015-july%E2%80%94drugs-and-devices (claiming that the rule amendments will cause "a sea change in the scope of discovery").

respect for the rule of law by approaching legal regimes as structures for rational decisionmaking.[161] To this end, "[i]ts central principle was that each governmental institution possesses a distinctive area of competence such that specific tasks can be assigned to that institution without reference to the substantive policies involved."[162] As a fundamental matter, then, this approach looks to process as a way to promote rational decisionmaking, with a focus upon routing decisions to fora holding the appropriate institutional advantage in light of the issue facing the decisionmaker.

Turning to interpretation, Hart and Sacks began with the premise that all law is purposive in orientation, and that the role of the judiciary in statutory interpretation is therefore to ascertain the best means of carrying out the legislature's purposes. In doing so, however, courts were instructed to avoid results that could not be squared with the statutory text or other clearly established legal policies, and they should "assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[163] This purposive methodology essentially entailed the following basic steps: "(1) develop an understanding of the purposes or principles of the statute, (2) evaluate alternatives for action in relation to those purposes or principles, (3) act in ways, other things equal, that best furthers those purposes or principles, and (4) adopt only interpretations permitted by the statute's text."[164] However, when purposive judges were confronted with problems that were likely unanticipated by the legislature, and following the plain meaning of the text would lead to absurd or severely problematic results, they would traditionally be willing to consider following the "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[165]

161. Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996); *id.* at 1397 ("Legal process theorists accepted the prevailing notion that government institutions act rationally to achieve their goals.").

162. *Id.* at 1396.

163. HART & SACKS, *supra* note 87, at 1378.

164. Stack, *supra* note 5, at 876 (summarizing the purposive framework for interpretation that was articulated by Hart and Sacks); *see also* HART & SACKS, *supra* note 87, at 1374–80 (providing their "note on the rudiments of statutory interpretation").

165. Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

It is important to understand that while Hart and Sacks set forth a purposive approach to statutory interpretation that is consistent with legislative supremacy and the judiciary's traditional obligation to serve as a faithful agent of the legislature, *The Legal Process* was based on a broader jurisprudential theory of the nature of law and therefore has potentially wider application.[166] Kevin Stack has recently revisited the theoretical underpinnings of *The Legal Process*, and explained that its "distinctive conception of the rationality of law made [the] theory an attractive synthesis of formalist and realist thought."[167] Unlike formalists, Hart and Sacks "recognized legal decisionmaking as a creative process," and, unlike realists, they "understood law and legal decisionmaking as a rational enterprise" that is "informed by an organic relationship among legal rules, social policies, and ethical principles."[168] Hart and Sacks viewed the state as a mechanism to facilitate collective action that would improve social welfare and thereby promote the common good,[169] and they therefore understood law as "a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living . . . ."[170] Because people who live together in a community must have some understanding of how they are expected to behave, those substantive understandings "necessarily imply the existence of what may be called *constitutive or procedural* understandings or arrangements about how questions in connection with both types are to be settled."[171] In other words, law requires procedure, and any legal system must also establish processes for how those procedures are to be made.[172] Because procedures can be well made or poorly designed to serve their objectives, Hart and Sacks repeatedly emphasized the importance of institutional competence:

166. *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 383–91 (2012) (reconsidering the premises of legal process purposivism and arguing that this approach should be extended to judicial interpretation of agency regulations); *see also* Eskridge & Frickey, *supra* note 87, at lxii (describing the vision of law that animated THE LEGAL PROCESS).

167. Stack, *supra* note 166, at 383.

168. *Id.* at 383 n.139 (quoting Eskridge & Frickey, *supra* note 87, at lxiii).

169. *See* HART & SACKS, *supra* note 87, at 2–3.

170. *Id.* at 148.

171. *Id.* at 3.

172. This is perhaps an observation that only a civil procedure professor could love.

> In a government seeking to advance the public interest, each organ has a special competence or expertise, and the key to good government is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.[173]

At the end of the day, "[a]n organized society is one which has an interconnected system of procedures adequate, or claiming to be adequate, to deal with every kind of question affecting the group's internal relations, and every kind of question affecting its external relations which the group can establish competence to deal with."[174] In short, Hart and Sacks saw a focus upon routing legal questions to the forum that holds the relevant institutional advantages in relation to the issue presented as key to their philosophy.

Yet, as Stack points out, contemporary scholarship tends to equate legal process theory with Hart and Sacks's famous suggestion that when inferring the purposes of a statute, courts "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably,"[175] and to criticize the theory on the grounds that this presumption is unrealistic and shifts too much policymaking discretion to the judiciary.[176] Yet this caricature of legal process theory ignores the importance that Hart and Sacks attributed to positive sources for identifying the purposes of statutes, and fails to appreciate how attention to those sources fits within their broader theory of law.[177] For starters, Hart and Sacks emphasized that "[a] formally enacted statement of purpose in a statute should be accepted by the court if it appears to have been designed to serve as a guide to interpretation, is consistent with the words and context of the statute, and is relevant to the question of meaning at issue."[178] Indeed, the legal process school embraces six broad concepts, all of which offer insight: (1) a focus upon institutional settlement; (2) a purposive approach to judicial decisionmaking; (3) a commitment to rule of law; (4) a commitment to reasoned elaboration of enduring legal principles; (5) a special attention to the balancing of neutral principles that transcend

173. Eskridge & Frickey, *supra* note 87, at lx.

174. HART & SACKS, *supra* note 87, at 4.

175. *Id.* at 1378.

176. *See* Stack, *supra* note 166, at 383.

177. *See id.*

178. HART & SACKS, *supra* note 87, at 1377; *see also* Stack, *supra* note 166, at 384–88 (providing a careful description of "the purposive technique").

the immediate facts of any particular case; and (6) a focus on the structural features of the law—such as federalism and separation of powers in the constitutional context.[179]

This fuller understanding of the legal process school is especially relevant here in light of the significance of the principle of institutional settlement. Hart and Sacks characterized this notion as "the central idea of law" that underlies every system of constitutive procedures.[180] This principle "expresses the judgment that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed."[181] Hart and Sacks claimed that a clear understanding of the principle of institutional settlement eliminates many of the "mysteries" of jurisprudence, such as the relationship between law and morality.[182] When this principle applies, "we say that the law 'is' thus and so, and brush aside further discussion of what it 'ought' to be."[183] Significantly, however, "the 'is' is not really an 'is' but a special kind of 'ought'—a statement that, for the reasons just reviewed, a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind 'ought' to be accepted as binding upon the whole society unless and until it has been duly changed."[184]

The key point for present purposes is that legal process theory's commitments to seeking institutional advantage in resolving controversies, and according proper respect to duly promulgated texts and the clear decisions of lawmakers follow from the nature of law and the principle of institutional settlement, rather than the concept of legislative supremacy. These commitments, therefore, have potential application in the non-legislatively crafted Rules context.[185]

Moreover, the proposition that adhering to the duly promulgated decisions of authorized institutions performs an essential coordinating function in a legal system that seeks to "solve

179. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 963–70 (1994).

180. HART & SACKS, *supra* note 87, at 4; *see also* Stack, *supra* note 166, at 389–91 (describing the principle of institutional settlement and explaining its importance to Hart and Sack's jurisprudential theory).

181. HART & SACKS, *supra* note 87, at 4.

182. *See id.* at 4–5.

183. *Id.* at 5.

184. *Id.*

185. *See* Stack, *supra* note 166, at 390–91.

the basic problems of social living"[186] provides a remarkably apt justification for the judiciary's obligation to follow the clear mandates of the Federal Rules of Civil Procedure. Adjudication is, after all, a public institution that seeks to resolve disputes that arise within a community in a peaceful fashion, and authoritative rules of procedure are plainly necessary for this institution to perform this function. The litigants, judges, and other participants in adjudication must have adequate guidance regarding how to behave. While the Rules Enabling Act provides little guidance regarding their preferred content, the very first Rule provides that "[t]hey should be construed and administered . . . to secure the just, speedy, and inexpensive determination of every action and proceeding."[187] Accordingly, we contend that the first principle of any theory of Rules interpretation should be that the judiciary must follow the principle of institutional settlement, and that this aspect of the rule of law requires federal courts to follow the identifiable policy choices of the rulemakers.[188]

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The Federal Rules of Civil Procedure require an interpretive theory of their own. Although the federal courts, more often than not, default to a Rules-as-statutes approach, this position is unsound. Every traditional theory of statutory interpretation takes legislative supremacy as an axiom upon which the theory is premised as it aims to navigate an *inter*branch encounter. Interpretation of the Rules, which are judicially crafted by contrast, is an *intra*branch encounter. As such, wholesale imposition of statutory interpretive theory to the Rules lacks a strong normative fit. Following legal process theory insights, we contend that an interpretive theory for the Rules better rests upon a foundation of the principles of institutional settlement, institutional advantage, and rule-of-law norms.

Of course, the heated debates over statutory interpretation have demonstrated that a rough consensus on first principles need not preclude substantial methodological disagreement. A full-fledged theory of Rules interpretation also needs to address several trickier problems, including (1) how to identify and resolve ambiguities in the Rules; (2) the proper ways to facilitate

186. *Id.*

187. FED. R. CIV. P. 1.

188. We will have more to say about precisely how this should be done later in the Article. *See infra* Part III.B.

any necessary or desirable policy changes in the operation of the Rules; and (3) whether and how to differentiate the methods that should be followed by the Supreme Court and lower federal courts.[189] The next Part describes the theories of Rules interpretation that have been suggested in the small body of scholarly literature on this topic, and explains how they address the relevant problems.

II. SCHOLARLY THEORIES OF RULES INTERPRETATION

While interpretation of the Rules remains woefully underexplored, we are not the first scholars to question the Rules-as-statutes model. We turn to the two leading families of theories in this part, both of which we find unsatisfying. We begin with the inherent-authority model, which asserts that the Court's engagement with the Rules is more of a common-law-like, free-wheeling, policy-setting endeavor than a traditional interpretative task. We reject this position as incompatible with the principle of institutional settlement and rule-of-law norms, given that the Rules Enabling Act has definitively routed procedural-policy questions to the rulemaking process. Second, we address the regime-specific purposive model. Unlike the inherent-authority model, this view assumes that courts face a traditional interpretive chore in Rules cases, but contends that, unlike statutes, the Rules come with a regime-specific commitment to a purposive, as contrasted with a neo-textualist, approach to interpretation. While we find much to admire in this view, we ultimately reject it because it fails to account for the essential choice-of-policymaking-form question that the Supreme Court routinely faces in Rules cases, and it fails sufficiently to embrace the institutional advantages of court rulemaking in procedural policy setting.

A. INHERENT-AUTHORITY MODEL

Recognizing the descriptive and normative flaws of a Rules-as-statutes interpretive model, several scholars are drawn to an unrestrained approach to Rules interpretation. Judge Karen Nelson Moore gives us the first complete presentation of this inherent-authority view of Rules interpretation.

189. *Cf.* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How To Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (suggesting that it may be appropriate for higher and lower courts to follow different interpretive methods based on their different institutional characteristics).

She contends that the Rules Enabling Act vests the Supreme Court with "substantial . . . powers . . . in the promulgation process" for the Rules[190] which, when viewed in light of the Court's inherent authority to set procedure, counsels for a "greater power to interpret Rules" than federal courts are traditionally understood to have when interpreting statutes.[191] As a result, the plain meaning of a rule's text need not control; indeed, even the intentions of the drafters should not limit the Court.[192] She posits that the Court should feel free to "reform[] the Rules" through interpretation.[193] Accordingly, she asserts that the Court should look to a rule's broadly perceived purpose and consider how this purpose can best be achieved in light of changed conditions.[194]

A related group of scholars go farther still. These commentators contend that the Rules are not fully authoritative at all. Rather, these thinkers tend to assert that the Rules are mere "rules of thumb."[195] Further, these commentators often decry viewing rules as authoritative under the guise that this is but an empty formalism.[196] It is fair to view these scholars as going even a step further than Moore insofar as they reject the need to engage in an interpretive act at all, while at the same time placing them within the same interpretive family as Moore.[197]

Members of this school, then, champion the Supreme Court bringing substantial policy-setting change by way of atextual, non-stare decisis constrained, Court-determined policy. The basic idea is that the Court makes the rules, and the Court

190. Moore, *supra* note 10, at 1093; *see also* Bauer, *supra* note 10, at 729 ("Pursuant to the Rules Enabling Act, . . . Congress has vested all rulemaking authority in the Supreme Court, subject only to a limited form of potential legislative veto.").

191. Moore, *supra* note 10, at 1093.

192. *Id.* at 1092–94.

193. *Id.* at 1109.

194. *Id.* at 1096.

195. *See* Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1196–97 (1994) (discussing the differences between "serious rules" and "rules of thumb").

196. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 351 (discussing the shortcomings of cases that favor formalism over due process concerns in the context of class actions and Rule 23).

197. *See* Marcus, *supra* note 10, at 941–42 (describing and rejecting this view).

should therefore feel free to change the rules based on policy considerations in a common-law fashion when it decides cases. The so-called summary judgment trilogy—*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[198] *Anderson v. Liberty Lobby, Inc.*,[199] and *Celotex Corp. v. Catrett*[200]—provide a strong example of this type of interpretative approach. Prior to the trilogy, in *Adickes v. S.H. Kress & Co.*,[201] the Court interpreted what is now Rule 56(a)'s language in the context of a 42 U.S.C. § 1983 civil rights suit, alleging that the defendant department store refused to serve the white school-teacher plaintiff and her minor African-American students at its lunch counter, leading to an arrest for vagrancy. The lead plaintiff contended that there was state action, as required by § 1983, because the department store and the local police conspired to prevent service at the lunch counter.[202] The district court granted summary judgment, reasoning that the plaintiff had failed to show evidence of a conspiracy.[203] Reversing, the Court interpreted "facts showing" as placing a duty on the defendant, as the moving party, to show affirmatively that no conspiracy took place.[204] "If the existence of a conspiracy was '*X*,' the *Adickes* Court held that Kress was required to produce affirmative evidence showing '*not-X*' (that is, that '*X*' is false)."[205] Thus, for a moving defendant to prevail at summary judgment, the movant must "show" that it has undisputed evidence countering every possible avenue to a plaintiff victory at trial.

The trilogy cases completely reversed this burden on a moving defendant, without a substantive change to the relevant text of Rule 56. They did so by placing the burden on the plaintiff to produce evidence to counter a summary judgment motion. In the lead *Celotex* decision, the Court held that Rule 56(e) requires the plaintiff to "designate 'specific facts showing that there is a genuine issue for trial.'"[206] The Court, thus, reinterpreted "facts showing" from a burden on defendants to show

198. 475 U.S. 574 (1986).
199. 477 U.S. 242 (1986).
200. 477 U.S. 317 (1986).
201. 398 U.S. 144 (1970).
202. *Id.* at 148.
203. *Id.* at 153–55 & nn.8–12.
204. *Id.* at 158.
205. Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 94 (2006).
206. *Celotex*, 477 U.S. at 324 (quoting FED. R. CIV. P. 56(e)).

with undisputed facts that plaintiff has no path to victory, to a burden on plaintiffs to produce sufficient evidence to support their claim at the summary judgment stage.[207] "In other words, if '*X*' is a necessary element of the plaintiff's claim," under the trilogy, "the defendant is not required to produce affirmative evidence showing '*not-X*'; the defendant can also meet its burden by showing that the plaintiff lacks sufficient evidence to prove '*X*' at trial."[208]

Of special importance here, the *Celotex* decision is rooted in a Court-set policy preference of sparing defendants the cost of trial in weak cases.[209] While we believe that this is a legitimate policy,[210] we also believe that it was established by the wrong body. In this regard, the notion that the *Celotex* approach, which "impose[s] virtually no burden at all on the movant,"[211] squares with Rule 56(e)'s requirement that "the movant shows that there is no genuine dispute as to any material fact"[212] is strained—at best. As Adam Steinman has convincingly argued, even assuming the *Celotex*, Court-set goal is a good one, "it fails in terms of the [three] interpretive values"[213] of "(1) consistency with prior cases; (2) consistency with the text that the decision purports to interpret; and (3) internal coherence."[214] As such, the trilogy cases exemplify the "reform the Rules through interpretation" approach, which is the hallmark of the inherent-authority view.[215] As discussed above,[216] this same Court-

207. *See* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1345 (2005); *see also* EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 79–81 (2d ed. 2000).

208. Steinman, *supra* note 205, at 98.

209. *Celotex*, 477 U.S. at 327 ("Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.").

210. *See* Redish, *supra* note 207, at 1343 ("[T]here exists no justification for imposing any burden on a movant for summary judgment that would not parallel the burden that party would have at trial prior to moving for judgment as a matter of law."); *see also* BRUNET ET AL., *supra* note 207, at 85 (same).

211. Redish, *supra* note 207.

212. FED. R. CIV. P. 56(a).

213. Steinman, *supra* note 205, at 111.

214. *Id.* at 107.

215. *Id.* at 109.

216. *See supra* notes 61–71 and accompanying text (discussing *Twombly*).

derived-policy-over-promulgated-text approach forms the core of *Twombly*'s and *Iqbal*'s reconstruction of Rule 8.

One may instructively draw parallels, even if the fit is not one-to-one, between Eskridge and Frickey's dynamic approach to statutory interpretation and the inherent-authority model of Rules interpretation.[217] From this perspective, the interpreter is not engaged in a purely historical search for legislative intent as exemplified by the text nor is the interpreter limited only to a search for the original purposes of the statute.[218] Rather under this view "statutory interpretation involves the present-day interpreter's understanding and reconciliation of three different perspectives, no one of which will always control."[219] These three perspectives are: (1) the best understanding of the statutory text itself; (2) the original legislative expectations as to the operation of the statute; and (3) "the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time."[220] This inclusion of prong-three and the evolving nature of the legal regime and its present-day effects, which is the hallmark of the dynamic approach, is more akin to inherent-authority common-law case synthesis than "traditional" statutory interpretation theories.[221] As such, the inherent-authority view of Rules interpretation, with its focus on reform through interpretation, fits well as an expression of dynamic interpretation in the Rules context.

Just as Eskridge argues that the dynamic theory of statutory interpretation better describes the actual practice of the courts than does an intentionalist or purposive model,[222] one could well conclude that the inherent-authority model (which effectively takes an aggressively dynamic approach to Rules interpretation) is also a descriptively superior model—at least for a portion of the Court's Rules cases. As Elizabeth Porter, who

217. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990); Eskridge, *supra* note 78; Eskridge, *supra* note 103.

218. Eskridge, *supra* note 103, at 1482 ("Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances.").

219. *Id.* at 1483.

220. *Id.*

221. *Id.* at 1481 ("[E]xplor[ing] the thesis that statutes, like the Constitution and the common law, should be interpreted dynamically.").

222. *Id.* at 1481–82.

endorses the legitimacy of this approach,[223] recently demonstrated, the "Court's procedural rulings [often eschew traditional statutory construction and] evince a contradictory mode of interpretation, one that is rooted less in the Rules and more in the Court's inherent power of adjudication."[224] In fact, Porter specifically describes many of the Court's decisions as exemplifying (if not going even beyond) the dynamic-interpretative approach.[225] In the "headline" change-in-policy cases—such as *Harris*, *Wal-Mart*, *Twombly*, and *Iqbal*[226]—the Court simply has a different policy preference than the position adopted by the Advisory Committee or embodied in prior interpretations of the relevant rule.[227] At least when the Court "rules from its common-law hip," as it does often in Rules cases, this inherent-authority model that finds roots in dynamic interpretive theory has much descriptive power.[228]

Nevertheless, the inherent-authority model is significantly flawed as a generally applicable theory of Rules interpretation. To begin with the descriptive fit, a sole focus on the Court's inherent-authority moments in Rules cases provides a false impression of the Court's overall approach. Indeed, the Court regularly embraces the Rules-as-statutes paradigm, even in recent years.[229] As we outlined above, we conclude that the Rules-as-statutes approach remains the "blackletter" view from which other approaches deviate.[230] The inherent authority view, thus, runs contrary to the Aristotelian principle that normative judgments have a rich descriptive connectivity with the issues being analyzed.[231]

More tellingly, the inherent-authority model fails normatively on legal process-school grounds because the Rules Enabling Act trumps the Court's inherent authority to establish

223. *See* Porter, *supra* note 10, at 175; *see also id.* at 146–48 (explaining that the Court's limited control over the rulemaking process makes it logical to use adjudication as the mechanism for implementing its own policy views despite the text of a Rule).

224. *Id.* at 136.

225. *Id.* at 137.

226. *See supra* notes 28–31 (citing these cases).

227. *See* Porter, *supra* note 10, at 136–41.

228. *Id.* at 142.

229. *Id.* at 131–36.

230. *See supra* notes 40–56 and accompanying text (discussing the blackletter view).

231. *See supra* notes 76–77 and accompanying text (discussing the Aristotelian principle).

procedure. To be sure, absent congressional action, the Supreme Court has "certain implied powers [that] must necessarily result" to the federal courts "'from the nature of their institution,' powers 'which cannot be dispensed with . . . because they are necessary to the exercise of all others.'"[232] In the absence of congressional action, the setting of procedure would seem to fall within the scope of this inherent power. But as the Court has itself held, "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States."[233]

Because Congress has so strongly acted here, any attempt to blot out this clear delegation structure in favor of an unbounded inherent-authority approach to Rules interpretation runs afoul of institutional-settlement and rule-of-law norms. As Catherine Struve concludes, "[T]he prior existence of inherent judicial authority concerning a particular matter . . . [of procedure] should, in any event, be irrelevant to the Court's interpretation of a Rule governing the matter."[234] Indeed, all agree that the Rules Enabling Act is delegated rulemaking authority from Congress—not a codification of inherent court power.[235] The Rules Enabling Act, furthermore, contemplates that major policy changes to the rules should be accomplished pursuant to the rulemaking process.[236] 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.[237] Any suggestion that the Court is free to ignore the force of the

232. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. 21, 23, 7 Cranch 32, 34 (1812)).

233. Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941) (footnote omitted).

234. Struve, *supra* note 10, at 1131.

235. *Id.* at 1125; *see also* Porter, *supra* note 10, at 175.

236. *See* Struve, *supra* note 10, at 1130 ("Accordingly, since the Enabling Act conditions the delegation of rulemaking power on the Court's use of the prescribed procedures, it appears to require the Court to resort to those procedures when seeking to change a Rule."); *see also* Marcus, *supra* note 10, at 933–36 (agreeing that the terms of the Rules Enabling Act are best understood to counsel interpretive restraint, but recognizing the limitations of a formal approach and the need for institutional analysis in this context).

237. *See* Charles E. Clark & James W. Moore, *A New Federal Civil Procedure: The Background*, 44 YALE L.J. 387, 392 (1935).

Rules, absent referral to the Advisory Committee, simply fails to acknowledge the commands of the Rules Enabling Act.[238] A viable theory of Rules interpretation should therefore recognize that the Court's delegated authority to make novel procedural policy in areas covered by the Rules is contingent on following the congressionally mandated rulemaking procedures.[239]

Despite the clear statutory commitment to procedural rule creation via the Rules Enabling Act process, adherents of the inherent-authority model conclude that given the constraints that the Act imposes on the Court, "it is logical that the Court would use its most powerful tool—adjudication—to contribute its voice to the agenda and process."[240] To suggest that the dictates of the Rules Enabling Act do not constrain the Court in Rules interpretation, however, is to reject the principle of institutional settlement. Application of this principle—"that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding"[241]—in this context is clear. Congress has duly established a process for promulgating rules of procedure. A basic commitment to institutional settlement, then, requires the Court to follow it. The inherent-authority model rejects the notion outright.[242] For similar reasons, the wholesale rejection of the Rules Enabling Act process in lieu of an unconstrained power to enact procedural policy pursuant to adjudication fails on rule-of-law grounds.[243]

Given our primary thesis, it is important to emphasize that our claim is that dynamic statutory interpretation is unnecessary and inappropriate in this context, even if this approach is necessary or desirable in statutory interpretation.[244] Dynamic

238. *See supra* note 223 (citing to Porter's conclusion that it is both legitimate and logical for the Court to set policy as an adjudicator).

239. We are not claiming, however, that dynamic interpretations of the Rules are ultra vires. Rather, our claim is that the Rules Enabling Act structure should be incorporated into the prevailing theories of Rules interpretation as a normative matter, and that this approach can be operationalized. *Cf.* Mulligan & Staszewski, *Institutional Competence*, *supra* note 10, at 75 (explaining that our proposed model "is one premised on institutional competencies, not authority").

240. Porter, *supra* note 10, at 147.

241. HART & SACKS, *supra* note 87, at 4.

242. *See* Porter, *supra* note 10, at 170 (recognizing the legitimacy of the inherent-authority model).

243. *Cf.* Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1568–69 (1994) (arguing that the rule of law mandates some level of fidelity to authoritatively enacted statutory law).

244. *Cf.* Glen Staszewski, *Statutory Interpretation as Contestatory Democ-*

interpretation has a tendency to infuse statutes with equity when the most straightforward reading of the text could lead to injustice or results that are contrary to contemporary public norms. This approach is unnecessary in Rules interpretation because many rules incorporate equitable standards that specifically contemplate that lower courts will exercise their discretion to achieve the best results in each particular case.[245] Dynamic interpretation is also premised on recognition that Congress does not, and probably cannot realistically, keep many statutes up to date, and courts are relatively well-positioned to update statutory policy when necessary to reach normatively desirable results in the cases they confront during adjudication. This approach is inappropriate in the context of Rules interpretation because there is a dedicated and focused cadre of rulemakers who are specifically charged with continuously keeping the rules up to date, and this process can realistically be initiated by the Court with mechanisms that would allow rule changes to be applied to pending cases.[246]

Moreover, we believe that advocates of the inherent authority model have been led astray by their tendency to equate any attempt to take the text of the Rules seriously with a rigid form of neo-textualism.[247] This tendency is perfectly understandable, given that Moore and Bauer were both writing at the dawn of the new textualism, and they perceptively identified and criticized a discernible trend by the Court to apply this methodology of statutory interpretation to Rules interpretation.[248] Meanwhile, Porter is part of a new generation who has come of age in an era when the most important lessons of textualism have been assimilated into the thinking of mainstream judges and scholars, and where it is commonplace for even staunch critics of this theory to acknowledge that "we are all textualists now."[249] It is therefore not especially surprising

racy, 55 WM. & MARY L. REV. 221, 245–49 (2013) (advocating "practical reasoning" in statutory interpretation).

245. *See infra* notes 253–69 and accompanying text.

246. *See infra* notes 306–15 and accompanying text (describing our proposed "referencing" procedure).

247. *See, e.g.*, Porter, *supra* note 10, at 171 (linking a textual commitment in Rules interpretation with Scalia-like "brittle textualism").

248. Indeed, the Court continues to apply textualism at times in Rules cases, as illustrated by *Pavelic & LeFlore*, *Unitherm Food Systems*, *Shady Grove*, and scores of other cases. *See supra* notes 40–56 and accompanying text (discussing these cases).

249. *See* Molot, *supra* note 6, at 36 n.157 (quoting Jonathan R. Siegel,

when Porter contends that a text-based interpretive approach to the Rules is at odds with their "equitable roots," and that this approach tends "toward becoming hypertechnical and harsh" and thereby wrongly limits lower-court discretion.[250] By contrast, in her view, the inherent authority approach, or what she labels "managerial interpretations," are characteristically "imbued with a sense of flexibility and fairness."[251]

In reality, however, an interpretive approach to the Rules that looks to text as constraining often leads to a discretionary standard for lower courts.[252] When lower courts are plainly authorized to exercise equitable discretion in implementing the Rules, there is little need for the federal judiciary to engage in "dynamic statutory interpretation." The Court may, however, properly add flesh to the bones of those discretionary standards or provide guidance regarding their outer parameters in appropriate cases by employing traditional tools of construction, or what we are calling "jurisprudential purposivism."

It is crucial to recall that the Rules aim to meld together law and equity practice as well as to codify many older common law practices that emerged from these separate systems.[253] It should be no surprise, then, that as a matter of straightforward interpretation, many of the Rules themselves call for lower-court discretion. As we have previously argued,[254] our proposed model of civil rules interpretation embraces these lower-court-, equity-, and discretionary-focused Rules. Our view is therefore compatible with the use of intentionalist and purposive tools of construction that predominated shortly after the Rules were promulgated, and continue to form the core of statutory interpretation for many scholars and judges.[255]

Simply put, the respectful treatment of text in Rules interpretation does not inevitably lead to a neo-textualist approach for the Rules any more than it does for statutes. For example, it

Textualism and Contextualism in Administrative Law, 78 B.U. L. REV. 1023, 1057 (1998)).

250. *See* Porter, *supra* note 10, at 175.

251. *Id.*

252. *See* Mulligan & Staszewski, *Institutional Competence*, *supra* note 10, at 70–73.

253. *See* FED. R. CIV. P. 2; *see also* Clark & Moore, *supra* note 237, at 393.

254. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1227.

255. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY 85 (2005) (contrasting "a literal text-based approach with an approach that places more emphasis on statutory purpose").

is by no means radical to recall that in the Court's view, "[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."[256] Thus, the issue "in any problem of statutory construction . . . is the intention of the enacting body,"[257] not necessarily the plain meaning of the text unadorned by the drafters' purposes or the like.

Following this 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 proponents of the inherent authority approach suggest.[258] For example, the Court has explained that 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 calls for much lower-court discretion, is amenable to the "principles of statutory construction."[259] 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 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.[260]

We see these principles at play in the Rules as well. Thus, for example, Rule 23 properly grants district courts broad discretion, yet appellate review may delimit the boundaries of this discretion.[261] Moreover, as we illustrate below with the example

256. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring) (footnote and citations omitted).

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

258. *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.").

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

260. FCC v. RCA Commc'ns, 346 U.S. 86, 90 (1953).

261. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 100–01 (1981).

of Rule 15,[262] the Supreme Court's crafting of more precise standards for a Rules' term such as "as justice requires" is consistent with deploying traditional tools of construction when the Court's interpretation is furthering the purpose or intent of the drafters.

Furthermore, despite contrary assertions by proponents of the inherent-authority camp,[263] not all text-focused constructions of the Rules call for a rigid, non-flexible, "the rule of law as a law of rules" approach[264] that privileges appellate authority over lower-court discretion. A text-focused approach to Rule 11(c)(1), for example, clearly illustrates that sanctions are discretionary.[265] 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 text-focused interpretation whenever the drafters use the term "may."[266] Simply put, a textual commitment to Rules interpretation often leads to lower-court discretion.

It appears, then, that proponents of the inherent-authority model have thrown the baby out with the bath water. By erroneously conflating any commitment to text with "brittle textualism,"[267] they are drawn to an unconstrained theory of Rules interpretation as the only alternative. This unbounded approach, however, ignores the dictates of the Rules Enabling Act—full stop! Such a view cannot be squared with the concept of institutional settlement.

By rejecting this inherent-authority approach, however, we do not embrace a naïve faith in the Rule drafters' ability to craft perfect regimes. We entirely agree that there are characteristic problems with rules based on their imprecision and the limited foresight of lawmakers.[268] Rules are therefore frequent-

262. *See infra* notes 291–95 and accompanying text.

263. *See* Porter, *supra* note 10, at 175.

264. *Cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 54 U. CHI. L. REV. 1175 (1989).

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

266. FED. R. CIV. P. 1, 2007 Advisory Commitee 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.'").

267. *See* Porter, *supra* note 10, at 175.

268. *See* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

ly ambiguous as applied to the facts of a particular case, and even when they have a seemingly plain meaning, rules can lead to absurd results that were not contemplated or intended when they were adopted by drafters.[269]

As such, we do not advocate for a position that is against all adjudication-driven interpretation of the Rules. Such adjudication is frequently necessary to resolve the ambiguities of legal rules.[270] Moreover, the promulgation of procedural policy though adjudication could potentially avoid the problems with rules in the first place because case-by-case decisionmaking is more flexible, dynamic, and incremental than rulemaking, in addition to being cheaper and easier to utilize in some circumstances.[271] For these reasons, administrative law, among other areas, contains several doctrines that allow administrators to exercise equitable discretion and soften the hard edges of bright-line rules in particular cases.[272] It is also widely understood that even if administrative agencies use rulemaking to make most of their law and policy, they will inevitably need to conduct a certain amount of "residual adjudication."[273] None of these points, however, compel one to reject any and all textually constrained Rules interpretations. As explained below, however, they should counsel careful attention to the respective roles of lower and higher courts in Rules interpretation, as well as recognition of the preeminent position of the Advisory Committee in crafting novel procedural policy.

B. REGIME-SPECIFIC PURPOSIVE MODEL

The other leading scholarly approach resides with those who conclude that the Rules must be interpreted, systematically, in light of the drafters' intent. These scholars, while recognizing that the Court in interpreting the Rules does not face the same task as it does when interpreting a statute,[274] never-

269. *See* Manning, *supra* note 89, at 2388; Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001 (2006) (providing a theoretical defense of the absurdity doctrine in statutory interpretation based on civic republican theory).

270. *See* MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 195 (3d ed. 2009).

271. *See id.* at 194–95 (describing the advantages of adjudication).

272. *See, e.g.*, Alfred C. Aman, Jr., *Administrative Equity*: *An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277; Cass R. Sunstein, *Avoiding Absurdity? A New Canon in Regulatory Law*, 32 ENVTL. L. REP. 11126 (2002).

273. *See* ASIMOW & LEVIN, *supra* note 270.

274. *See* Marcus, *supra* note 10, at 929 (recognizing that the principal-

theless argue that taking a traditional statutory-construction-like approach to Rules interpretation is best.[275] These scholars, most notably Catherine Struve and David Marcus, argue that the structure of delegated authority under the Rules Enabling Act, as well as the normative considerations that flow from notice-and-comment rulemaking, necessarily constrain the Court. They follow the dictate that the "Rule must . . . be applied if it represents a valid exercise of Congress's rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act,"[276] leaving open the interpretive question of what precisely any individual rule commands. These scholars, thus, differ from the inherent-authority camp insofar as they insist that the Court faces bounded choices when engaging with the Rules, and the Rules thus serve as a meaningful constraint.

Recognizing that Rules cases present standard interpretive questions, both Struve and Marcus, contrary to the Court's tendency toward a strict textualist approach to Rules interpretation in its Rules-as-statutes cases, reject a neo-textualist perspective. This rejection follows from the unique normative starting point at play in Rules cases; namely, that the Court is not faced with an issue of legislative supremacy but is interpreting the work product of the judiciary itself.

As such, Struve argues that even if one is otherwise a textualist as to statutes, in the Rules context one should look to purpose and intent as lodged in the Advisory Committee's Official Notes in the interpretive analysis.[277] This position appears even stronger given that the Rules Enabling Act after the 1988

agent metaphor that grounds much of the statutory construction debate is not applicable in Rules cases).

275. *See id.* ("[A]s a functional matter, a court should pursue the same interpretive goal for the Federal Rules that the faithful agent concept recommends for courts as they interpret statutes."); Struve, *supra* note 10, at 1141 ("Both the structure of the Enabling Act and the actual rulemaking process, then, counsel restraint in the interpretation of the Rules: the Court should not reject authoritative sources of meaning in favor of its own policy conception of a desirable Rule.").

276. Burlington N.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

277. *See* Struve, *supra* note 10, at 1103 ("[T]he Court should accord the Notes authoritative effect."); *id.* at 1158 ("The fact that the Notes proceed through the approval process along with the text also helps to meet textualist objections to their use."); *cf.* Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81 (2015) (claiming that a textualist approach to interpreting administrative regulations should include consideration of the regulatory preamble and other mandatorily created materials that were part of the public record when elected officials reviewed and approved the proposal).

amendments mandates both the creation of these notes and that these notes be promulgated contemporaneously with the text of the Rules.[278] These mandates create a different interpretive setting than most federal statutes, given that federal statutes seldom come with interpretive instructions or extensive, official lawmaking records.[279] Marcus refines this position explicitly to adopt a traditional purposive or intentionalist[280] approach.[281]

Their proposed approach is not entirely unprecedented. Similar regime-specific, purposive-approach arguments have been made regarding interpretation of the Uniform Commercial Code (UCC), for example.[282] The UCC, like the Rules, lists its purposes[283] and instructs courts to follow a purposive method of interpretation.[284] Additionally, "the drafters provided a fuller

278. 28 U.S.C. § 2073(d) (2012). Specifically, this section requires that "[i]n making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views." *Id.*

279. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 570 (1985) ("Congress seldom provides explicit guidance, even in legislative history, on how it wishes courts to interpret statutory language."); *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 890 n.13 (2003) ("[P]ast history shows that it is most unlikely that Congress will enact rules of interpretation that will generally resolve the disputed issues of interpretive choice."). While some scholars have argued that mandatory interpretive rules pose substantial problems in statutory interpretation, *see* Staszewski, *supra* note 91, not all share this view. *See, e.g.*, Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (arguing that Congress has the constitutional power to mandate tools for interpreting federal statutes and that it would be wise to exercise that power). In any event, in this paper, we need not take a stand on this statutory question. Rather, our focus is on the unique setting of interpretation of the Rules which are promulgated, unlike statutes, with explanatory comments and statements of purpose.

280. We realize many distinguish these views, but in the Rules context they are often collapsed.

281. *See* Marcus, *supra* note 10, at 957.

282. *See* Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 797 (1978).

283. U.C.C. § 1-103 (AM. LAW INST. & UNIF. COMM'N 2001) ("[U]nderlying purposes and policies [of this Act] are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.").

284. *Id.* official cmt. ("The text of each section should be read in the light of the purpose and policy of the rule or principle in question, and also of [the Act] as a whole, and the application of the language should be construed narrowly

delineation of purpose in the Official Comments to individual [UCC] sections."[285] As a result "of the way in which the Code was constructed," scholars conclude, "[UCC] litigation is a special arena . . . [that requires] purposive interpretation of the Code."[286] In just the same way, the Rules, in Rule 1, lay out a purpose, "the just, speedy, and inexpensive determination of every action."[287] And, as with the UCC, the Rules state that "[t]hey should be construed and administered" to further this purpose.[288] Finally, as with the UCC, the Rules are accompanied with official comments that offer much in the way of disclosing the drafters' intent and purpose. Thus, the potential application of a regime-specific purposive approach in the context of a unique legal regime is not without precedent. Rather, it presents as a context-sensitive take upon the interpretive question.[289]

Further, as the name implies, the regime-specific purposive approach to the Rules shares much with statutory purposive approaches. Purposive approaches to statutory interpretation are often seen as flowing from the legal process movement, which we also find key to interpretation of the Rules.[290] Struve and Marcus's approach, which looks to similar goals of the Rules drafters and seeks to further those ends in similar ways, fits solidly in this family of thought.

As we have previously argued,[291] when not facing policy-change cases, we applaud the Court for taking a text-focused interpretive approach that embraces purposive reasoning. In *Foman v. Davis*,[292] for example, the Court addressed when a district court could decline a motion for leave to amend a pleading when the text of Rule 15 was not self-defining, although the intent of the drafters was sufficiently clear. The Court ap-

or broadly, as the case may be, in conformity with the purposes and policies involved.").

285. McDonnell, *supra* note 282, at 800.

286. *Id.* at 801.

287. FED. R. CIV. P. 1.

288. *Id.*

289. *Cf.* Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 817 (2002) (arguing that as a matter of statutory interpretation, courts should consider the legal context in which Congress enacts a statute).

290. *See supra* Part I.D.

291. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1227.

292. 371 U.S. 178 (1962).

proached the question of defining Rule 15's then-drafted language—"leave to amend 'shall be freely given when justice so requires'"[293]—by deploying a text-focused-interpretive strategy. The Court thus read Rule 15 as a part of the Rules as a whole.[294] 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 envisioned by *Conley*, and delineated several standards, such as futility or bad faith, for when an amendment should not be allowed.[295]

We admire much in the regime-specific purposive model and think that this approach would generally work in the lower federal courts. This view is not ultimately satisfying, however, as the primary approach to civil rules interpretation for the Supreme Court. Most importantly, this view fails to account for the unique choice-of-policymaking-form question the Court faces with Rules issues. While noting that the Rules lack a separation-of-powers component that drives much of statutory construction, which negates any prima facie attraction to a textualist approach, proponents of the regime-specific purposive view continue to perceive Rules cases basically the same as if they involved statutes.[296] Following this approach, proponents of the model contend that the Court has an obligation to interpret the Rules, as it would with a statute.[297]

The Court, however, just like an administrative agency, faces a choice of policymaking form that it does not face in statutory cases. Most statutes that delegate authority to agencies to promulgate orders and rules leave it up to the agency to decide whether to make policy pursuant to rulemaking or adjudication. Agencies can therefore routinely choose whether to make policy decisions pursuant to rulemaking or adjudication. This decision is known in administrative law as an agency's

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

294. *Id.*; *see also* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477–78 (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).

295. *Foman*, 371 U.S. at 182.

296. *See supra* note 275 and accompanying text.

297. *See* Marcus, *supra* note 10, at 942 ("Relationships among the various institutions involved in rule promulgation and interpretation—the Supreme Court, the lower federal courts, rulemaking committees, and Congress—and the values that these relationships create support an obligation to interpret.").

"choice of policymaking form."[298] Since it is widely recognized that administrative agencies can make policy decisions through rulemaking or adjudication, an agency's choice of policymaking form has received a great deal of attention in administrative law scholarship. This literature recognizes the "obvious point" that "the agency makes an important choice when it selects the policymaking form its actions will take."[299] An agency's choice of policymaking form is important because rulemaking and adjudication have distinctive advantages and drawbacks as policymaking vehicles.

The Court faces just such a choice in Rules cases,[300] which weighs against full-fledged adoption of the regime-specific purposive model. First, the certiorari question itself is best viewed as a question of policymaking form.[301] Cases involving the application of equitable standards are best resolved initially—and, for the most part exclusively—in the lower federal courts.[302] 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 Court does not function as an error-correction institution—a role better played by the courts of appeals.[303] As such, typically it is best if the Court, in an act of policymaking form choice, dispenses with such review altogether—excepting those cases where a circuit split (or other indicia of certworthiness) would require taking up the matter. Indeed, the

298. *See* Magill, *supra* note 38.

299. *Id.* at 1397.

300. Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1205.

301. The Court sets its own agenda when it grants or denies certiorari. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 221–22 (1991) ("Fundamentally, the definition of 'certworthy' is tautological: a case is certworthy because four justices say it is certworthy. . . . [C]ertworthiness is ultimately subjective, changing, and undefinable . . . ."); Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 736 (1993) (reviewing PERRY, JR., *supra*) ("[I]t seems difficult indeed to read the Court's own Rule 10 as anything other than an invitation to balancing, to the making of 'political choice(s)' about what is 'important' enough to demand the overt, highly visible intervention of the United States Supreme Court."); *see also* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1234.

302. *See* Mulligan & Staszewski, *Institutional Competence*, *supra* note 10, at 82.

303. *Cf.* SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS (1986).

percolation of such issues in the lower courts will often yield consensus, in which case Supreme Court intervention will typically be unnecessary.[304] There will, however, 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 an issue, in which case the Court may eventually want or need to intervene. This is especially so in cases where the party seeking certiorari is also seeking a procedural reform, as the denial of a grant for such a party constitutes a loss.[305] But what is key is that interpretation by the Court is not an obligation—it is a choice.

Of course the certiorari power is not unique to Rules cases. What is unique to Rules cases is the further choice-of-policymaking-form option of resolution of Rules issues by the Advisory Committee. We have discussed in prior work the process by which the Court can effectively refer matters to the Advisory Committee after granting certiorari,[306] and the streamlining of this process that could occur with the introduction of modest reforms.[307] Even without statutory amendments, the Court could refer questions to the Advisory Committee by amendment to its own Supreme Court Rules.[308] Thus, using the criteria the Justices might otherwise deploy for determining whether to grant certiorari,[309] the Court could determine whether a particular Rules case merits high court review. At this stage, assuming the issue is "certworthy," the Court could accomplish such a reference to the Advisory Committee by summarily granting the writ of certiorari, vacating the lower court opinion, remanding the case, and ordering a stay pending action by the Advisory Committee.[310] Such a move would, in ef-

304. *See* Ronald J. Krotozynski, Jr., *The Unitary Executive and the Plural 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).

305. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1234–35.

306. *See id.* at 1235–37.

307. *See id.* at 1237–40.

308. *See id.* at 1236.

309. *See generally* Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 7–16 (2008) (reviewing the papers of retired Justices to determine what criteria the Justices employ in case selection).

310. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 345–49 (9th ed. 2007) (discussing the Supreme Court's GVR practice).

fect, operate like a certification of a question from a court to an agency[311] or from a federal court to a state court,[312] insofar as the lower court is merely to await resolution of the question. Should a rule revision result from this process, the new rule would apply to the case in the court of appeals after the stay is lifted. Indeed, Rules revisions are regularly applicable to cases pending on appeal without retroactivity concerns.[313] Further, this referencing approach follows administrative practice that recognizes that agencies have the discretion to stay adjudications to await the resolution of a rulemaking,[314] as well as judicial practice recognizing that courts have the discretion to stay proceedings to await the resolution of a rulemaking.[315] Moreover, given that there is no constitutional right to an appeal in civil cases,[316] nor a statutory right (in most cases)[317] to Supreme Court review at all, the Court's choice of a notice-and-comment

311. *Cf.* Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 197 (2010) (advocating for the expansion of certified questions from federal agencies to state courts).

312. *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507 (3d ed. 2008) (discussing certification from federal to state courts).

313. *See* Order Amending the Federal Rules of Civil Procedure, 146 F.R.D. 401 (Apr. 22, 1993) (providing an effective date for newly adopted amendments and directing that they "shall govern . . . insofar as just and practicable, all proceedings in civil cases then pending"). As such, revised rules apply on appeal, even if the district court relied upon the pre-amended rule in its ruling. *See, e.g.*, MCI Telecomms. Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1098 (3d Cir. 1995) (applying revised Rule 4(m) on appeal when the district court relied upon the pre-amended rule); *see also* Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 50–52 (2007) (arguing that congressional modification of civil statutes upon certification of a question from the Supreme Court would not run contrary to retroactivity prohibitions).

314. *See, e.g.*, 10 C.F.R. § 2.802(d) (2015) (providing that a petitioner who has filed a petition for rulemaking "may request the Commission to suspend all or any part of any licensing proceeding to which the petitioner is a participant pending disposition of the petition for rulemaking"); *In re* Tenn. Valley Auth. (Bellefonte Nuclear Power Plant, Units 3 and 4), 68 N.R.C. 361, 430 (2008) (recognizing that the Nuclear Regulatory Commission had the discretion to stay an adjudication until the parties could complete a rulemaking but declining to exercise that discretion), *rev'd on other grounds*, 69 N.R.C. (2009).

315. *See* DAVID F. HERR ET AL., MOTION PRACTICE § 10.07[B] (5th ed. 2010).

316. *See* Nat'l Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37, 43 (1954).

317. The only mandatory appeal to the Court now comes from three-judge district court panels. 28 U.S.C. § 1253 (2015). All other appellate review is done by writ of certiorari. *See id.* §§ 1254, 1257.

venue as opposed to an adjudicatory one would not constitute a due-process injury to the parties. As such, every Rules case, in a rich sense, is best understood as a matter of choice by the Court—not obligation.

The Marcus and Struve model fails to account for this feature of Rules cases and, as a result, fails to account for the advantages that flow from notice-and-comment rulemaking in Rules cases.[318] Moreover, neglecting the issue of policymaking form runs contrary to the legal process theory's focus upon institutional advantage as a key to constructing a well-run legal system.[319] Having explored the advantages of civil rules rulemaking over Supreme Court adjudication in the past, we concluded that there are at least four broad institutional advantages to rulemaking over adjudication in policy-change cases.[320] First, rulemaking, as opposed to adjudication, is 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.[321] Second, anyone who is interested can participate in rulemaking,[322] while adjudication is generally limited to the parties in a case.[323] 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.[324]

318. *See infra* notes 322–26 and accompanying text.

319. *See supra* Part I.D (discussing legal process theory).

320. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1207–12.

321. *See* ASIMOW & LEVIN, *supra* note 270, at 193 ("[T]he procedures of rulemaking have been designed for the precise purpose of exploring issues of law, policy, and legislative fact."); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.8, at 369 (4th ed. 2002) (claiming that for this reason, the product of rulemaking "almost certainly will be instrumentally superior to any 'rule' produced by the process of adjudicating a specific dispute").

322. *See* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 940 (1965) (recognizing that rulemaking is generally more accessible than adjudication).

323. *See* ASIMOW & LEVIN, *supra* note 270, at 192–93; PIERCE, *supra* note 321, § 6.8, at 368–69.

324. ASIMOW & LEVIN, *supra* note 270, at 193–94; Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 394 (1986) (explaining that adjudication is generally understood to represent "a commitment to incremental resolution of problems," while rulemaking "entails the comprehensive disposition of a large number of related claims"); Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 12 (2004) (recognizing that "[a]lmost every law tackles multiple problems at once," and that in con-

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.[325]

We do not believe notice-and-comment rulemaking a panacea, however. Rather, our point is that the overwhelming consensus in administrative law is that rulemaking is generally superior to adjudication as the form for setting policy—warts and all.[326] Moreover, as we have detailed before, these advantages of rulemaking generally apply to the court rulemaking process.[327] Both the inherent-authority and regime-specific purposive models forego these advantages in policy-change cases, which comes at substantial loss.[328]

III. THE ADMINISTRATIVE MODEL OF CIVIL RULES INTERPRETATION

We have, thus far, rejected the Court's typical Rules-as-statutes approach, with its separation-of-powers starting point, as inapposite for judiciary-drafted rules. We have also discarded the inherent-authority approach as contrary to the principle of institutional settlement in light of the Rules Enabling Act. We also cast-off the regime-specific purposive model for failing to account for the essential choice-of-policymaking-form question faced by the Court in Rules cases. In this section, then, we aim to sketch a positive case for the administrative agency model we espouse as the best interpretive theory for Rules cases. In renewing and refining our prior position on this score, we

trast to adjudication, "agencies can and do make multi-dimensional decisions" when they promulgate rules).

325. *See, e.g.*, PIERCE, *supra* note 321, § 6.8, at 372–74 ("The primary purposes of rules are to effect [sic] future conduct."); Sunstein, *supra* note 268, at 974 (recognizing that rules have a tendency to reduce "bias, favoritism, or discrimination in the minds of people who decide particular cases").

326. *See* PIERCE, *supra* note 321, § 6.8, at 368 ("Over the years, commentators, judges, and Justices have shown near unanimity in extolling the virtues of the rulemaking process over the process of making 'rules' through case-by-case adjudication."); *see also* Magill, *supra* note 38, at 1403 n.69, 1415 n.112 (reviewing the formative literature on this topic and reporting that "the bottom line" was that "agencies should rely on rulemaking much more often" than adjudication).

327. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1206–15.

328. *Id.* at 1240–51 (discussing the benefits of the rulemaking approach, including benefits to "the democratic legitimacy of lawmaking").

first discuss our preference for rulemaking over adjudication in policy-change cases. Second, we address the proper role for the Court as an adjudicator when presented with Rules issues resolvable by traditional tools of purposive construction. Finally, we respond to some administrative law-inspired objections to our proposal, and explain why we believe that our model would result in a sound regulatory regime.

A. PREFERENCE FOR RULEMAKING IN POLICY MATTERS

We begin with our contention that in policy-setting matters, Rules issues should be resolved by the Advisory Committee. Key to this conclusion is that the Court acts as an administrative agency in relation to the Rules, as we have argued extensively in prior work:[329]

> While the analogy is not seamless,[330] four key features demonstrate the similarity between administrative agencies and the Court in the civil procedure context, [which we believe noteworthy in interpreting the Federal Rules]. First, both agencies and the Court [in Rules matters] have delegated authority to make policy in their respective fields through orders entered in adjudication.[331] Second, both agencies and the Court [in Rules matters] have delegated authority to make policy through notice-and-comment rulemaking.[332] Third, because the law does not typically compel these institutions to make policy through a particular procedural vehicle, both agencies and the Court [in Rules cases] routinely confront choice-of-policymaking-form decisions.[333] Fourth, the historical parallels, and accompanying ideas of legitimacy, between agency rulemaking and court rulemaking strengthen our thesis that the Court functions as an administrative agency in the field of civil procedure.[334]

Following this administrative agency analogy, our model argues that the Court should implement or interpret the Rules as an agency would if it were following the widely accepted best

329. *Id.* at 1194–1205. Even our critics tend to agree with us on this point. *See* Porter, *supra* note 10, at 129–30 (recognizing that "recently other scholars have also analogized the Court to an agency, in order to demonstrate that the Court is insufficiently deferential to the rulemaking process," and claiming that "the Rules much more closely resemble agency regulations" than statutes).

330. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1205, 1205 n.98 (discussing the relevant differences).

331. *See id.* at 1205.

332. *See* Burbank, *supra* note 106, at 1025 (describing the Rules Enabling Act as a "delegation" of legislative power).

333. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1205.

334. *Id.*

practices on this topic.[335] This administrative law analogy rests upon the Court's choice of policymaking form—not the Court's mere policy-setting function—as the core issue.[336] Following this model, the Court, just as an agency would, should direct policy-change issues to the Advisory Committee for resolution by way of notice-and-comment rulemaking.[337] Key to our view is our conclusion that the Court should avoid making civil-procedure policy through its adjudicatory power and that major policy choices in this field should be made by referring any cert-worthy, non-statutory-construction questions that emerge from the Court's management of federal litigation to the rulemaking process. This proposed model is one premised upon institutional competencies, which is in line with the key insight from legal process theory that seeking institutional advantage as to the entity that resolves legal disputes is paramount.[338] The position 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. Moreover, adherence to the process of referral to the Advisory Committee, as we discussed above, respects the important principle of institutional settlement as embodied in the Rules Enabling Act.[339]

Consider *Schlagenhauf v. Holder*[340] by way of example. Rule 35 allows district courts to order the physical or mental examination of a party over that party's protest, if the standards of "in controversy" and "good cause" are met.[341] Despite

335. While there may be a meaningful theoretical difference between "implementation" and "interpretation," *see generally, e.g.*, Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007) (discussing the potential distinction), we need not work out the nuances of this distinction here.

336. Administrative law scholars similarly find the choice of policymaking form a central question. For citations to this extensive literature, see Magill, *supra* note 38, at 1403 n.69; Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1206 n.100.

337. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1212–15.

338. *See supra* Part I.D.

339. *See supra* Part II.A (critiquing the inherent authority view).

340. 379 U.S. 104 (1964).

341. FED. R. CIV. P. 35(a).

policy concerns regarding the potential for abuse, the *Schlagenhauf* Court held that "Rule 35 on its face applies to all 'parties,' which under any normal reading would include a defendant."[342] Dissenting, Justice Douglas concluded that even though the text mandated an application of Rule 35 to defendants, such a rule was rife with risk for "blackmail."[343] Concluding that safeguards should be provided, he stated:

> This is a problem that we should refer to the Civil Rules Committee of the Judicial Conference so that if medical and psychiatric clinics are to be used in discovery against defendants—whether in negligence, libel, or contract cases—the standards and conditions will be discriminating and precise. . . . Lines must in time be drawn; and I think the new Civil Rules Committee is better equipped than we are to draw them initially.[344]

We contend that Justice Douglas got it right as to those instances where the Justices harbor policy concerns with a rule. If the Justices disagree with the policy position embedded in the Rules, or believe a policy outcome was not considered by the drafters, then the appropriate course is to refer the matter to the Advisory Committee. This conclusion follows because the Advisory Committee, in matters of policy, holds all the institutional advantages described above.[345] These are the exact advantages Justice Douglas sought in the Rule 35 context. Thus, as the Court explicitly held in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, if the Court believes that the clear text of a Rule will lead to poor policy outcomes, relief "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."[346]

We have seen a similar dynamic at play with Rule 11. Recall the *Pavelic & LeFlore* case we discussed above where the Court held, over a strong purposive dissent, that law firms could not be sanctioned under Rule 11.[347] In 1993, the Advisory Committee re-drafted Rule 11 so that "a law firm is to be held also responsible . . . as a result of a motion under" Rule 11.[348] The amended Rule made full use of the institutional advantages of the Advisory Committee. First, the Advisory Committee conducted an extensive empirical review and considered

342. 379 U.S. at 112.
343. *Id.* at 127 (Douglas, J., dissenting).
344. *Id.*
345. *See supra* notes 320–25 and accompanying text.
346. 507 U.S. 163, 168 (1993).
347. Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989).
348. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

multiple points of view.[349] Second, in crafting the new rule, the Advisory Committee coupled the law-firm-liability reform with a then-new so-called "safe harbor" provision, which prohibits sanctions unless "within 21 days after service of the motion" the offending motion is not withdrawn.[350] In an action that the Court as an adjudicator could never do, the Advisory Committee concluded that "it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency" if after notice and twenty-one days an offending motion has not been withdrawn.[351] Similarly, in the aftermath of *Twombly*, many concluded that the Court was right to be concerned with explosive discovery costs in anti-trust cases, but that it would have done better to refer the matter to the Advisory Committee to craft new rules more carefully tailored to that specific problem, such as a proposed early motion for summary judgment, rather than changing all of pleading law by adjudication.[352] All this is to say, nearly all agree that policy changes are better crafted by the Advisory Committee than by the Court sitting as an adjudicator.[353]

349. *Id.* (identifying the relevant studies that were considered).

350. *Id.*

351. *Id.*

352. *See, e.g.*, Bone, *supra* note 71, at 881–85 (discussing lower courts' limited discovery, early summary judgment approach as well as noting that there are "legitimate screening concerns addressed by *Twombly*" but that the "Supreme Court is not the optimal institution to design a strict pleading rule"); Bone, *supra* note 139, at 889 ("[A] centralized, court-based, and committee-centered process is well suited for making general constitutive rules that define the basic framework of a civil procedure system and more detailed rules that control particularly costly forms of strategic behavior."); Clermont & Yeazell, *supra* note 67, at 850 ("It is entirely arguable that pleading should provide additional, and more vigorous, gatekeeping. But before discarding the pleading system that has been in place for many years, we ought to discuss its virtues and failures soberly and with the relevant information before us. The rulemaking bodies should have hosted that discussion."); Spencer, *supra* note 71, at 454 ("[T]he rule amendment process is preferable because it is a much more democratic, transparent, and accountable method of making changes to the Federal Rules."); *The Supreme Court 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 305–15 (2007) [hereinafter *Leading Cases*] ("The majority, motivated by legitimate concern over the large costs that discovery places on defendants, had good intentions. But a judicial opinion is the wrong forum for enacting a major change to settled interpretations of the Federal Rules."); Nathan R. Sellers, Note, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 378–79 (2011) ("The Court is not well-suited to making these policy decisions in the procedural context, especially compared to the formal rulemaking bodies.").

353. We address this point exhaustively in prior work. *See* Mulligan &

B. RESOLUTION BY THE COURT AS AN ADJUDICATOR

This is not to say that resolution of Rules questions by the Court sitting as an adjudicator is never appropriate. Indeed, just as an agency will often resolve discrete problems by adjudication or issue guidance, the Court should continue to address non-policy-setting matters in Rules cases by way of adjudication. The Court should only decide such cases, however, when the issues are cert-worthy under the Court's normal standards for making such determinations, and the case is capable of being resolved pursuant to traditional tools of purposive construction, by which we specifically mean to include non-textualist tools of interpretation.[354] We find that such matters fall into two broad camps, which we address in turn: (1) textual exegesis questions; and (2) equity standard-setting issues.

1. Issues Explicitly Resolved by Rulemakers

As we explained in Part I.D, the first element of any theory of Rules interpretation should be that the judiciary must respect the principle of institutional settlement, which requires federal courts to follow the identifiable policy choices of the rulemakers. We recognize, however, that following this directive may be easier said than done, and we have therefore borrowed from administrative law to provide concrete guidance regarding how courts should perform this task.

Our approach, which calls for some cases to be routed to the Advisory Committee while others will be resolved by the Court as an adjudicator, demands a mechanism for making choices of policymaking form. In our prior work, we attempted to describe this mechanism for choosing between decisionmaking by the Advisory Committee or by the Court sitting as an adjudicative body by way of three administrative law analogies.[355] First, we argued that if a Rules case requires an interpretation that rests substantially upon legislative facts (i.e., "those [facts that] a tribunal seeks in order to assist itself in the legislative process of creating law or determining policy"[356]), as opposed to adjudicative facts (i.e., historical facts of a

Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1207–12.

354. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."); Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1193.

355. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1215–34.

356. Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537, 549 (1949).

dispute the determination of which traditionally falls within the province of the jury[357]), the matter should be referred to the Advisory Committee. We so concluded because of the consensus among administrative law scholars that notice-and-comment rulemaking is the superior forum for unearthing legislative facts,[358] especially in light of the courts' well-known inability efficiently to create robust records that rely upon legislative facts.[359] Similarly, we argued that the Court should refer Rules issues to the court rulemaking process when those issues would be resolved pursuant to the second step of a *Chevron*-like inquiry because they effectively involve policymaking, as opposed to those situations when the Court could resolve the interpretive problem as a matter of law under *Chevron* step one by "employing traditional tools of statutory construction,"[360] which specifically include purposive and intentionalist tools. Providing yet a third analogy, we looked to the distinction between legislative and interpretive rules in administrative law and ar-

357. FED. R. EVID. 201(a); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 244 n.52 (5th Cir. 1976) (Brown, J., concurring) (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–16 (1942)).

358. *See, e.g.*, Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 244–45 (5th Cir. 1976) (Brown, J., concurring) ("Though a court, with its adversary procedure, is not necessarily precluded from resolving issues of legislative fact, it is generally thought that their determination is particularly appropriate to the administrative process, where staffs of specialists and great storehouses of information are available." (citation omitted)); PIERCE, *supra* note 321, § 6.4.3, at 326; Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 941 (1980) ("A remand to an agency might often produce better results than a remand to a trial court, because the trial court's procedure is likely to be the same as it would be for finding adjudicative facts."); Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 10–11 (1986) ("The conclusion is overwhelming that the Supreme Court lacks the essential institutional arrangement for developing the legislative facts on which some of its lawmaking should rest.").

359. *See, e.g.*, Henry Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 37–38 (1978) (criticizing the Court's handling of issues of legislative fact in *Roe v. Wade*, 410 U.S. 113 (1973)); Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1233–45 (1975) (suggesting ways to improve the Court's means of legislative fact development); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113 (1988) (discussing various proposals to deal with the "haphazard way in which courts receive legislative facts").

360. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

gued that issues that could be decided as valid interpretive rules are appropriate for resolution pursuant to adjudication, whereas policy decisions that would effectively result in the creation of "legislative rules" should be referred to rulemaking. Our expectation was that these three analogies would work in concert to offer helpful advice in routing Rules questions either to the Court as an adjudicator or to the Advisory Committee.

For those matters retained by the Court as an adjudicator, we, in league with the regime-specific purposive model, favor a purposive approach to Rules interpretation. We anticipate that the Court would rely heavily on the plain meaning of the text of the Rules and their broader legal and historical context to identify their purposes and constrain the scope of their permissible meaning,[361] and we anticipate that the Advisory Committee notes would be a particularly fruitful resource for identifying the explicit policy choices of the rulemakers.[362] We believe that objections to the use of legislative history in statutory interpretation are obviated in this context by the fact that the Advisory Committee notes are required by the Rules Enabling Act, and they accompany a proposed rule throughout the course of the rulemaking process—and they are therefore readily available to other participants, elected officials, and the general public before a proposed rule can be finalized.[363] The rulemaking process also provides formal opportunities for participants to dissent from the contents of the notes, and they cannot easily be

361. *See supra* Part I.D (describing the dual role of the statutory text in legal process theory); *see also* Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001) (arguing that procedural statutes should be interpreted in light of background principles of law in the field of civil procedure which are discoverable to federal courts with expertise in this area).

362. *See* Marcus, *supra* note 10, at 965–67 (arguing that the textualist critique of legislative history does not undermine the validity of "an inclusive method that permits courts to use a broad range of sources extrinsic to the text of the Federal Rules as they try to apply a rule consistent with rulemaker intent and purpose," and recognizing that the advisory committee notes belong at the top of a hierarchy of rulemaking history); Struve, *supra* note 10, at 1152–69 (claiming that the role of the advisory committee notes in the court rulemaking process demonstrates that they "possess distinctive claims to authority, based both on the terms of the Enabling Act and on the practicalities of rulemaking").

363. For similar reasons, Jennifer Nou and Kevin Stack both argue that regulatory preambles should be given substantial weight in the interpretation of federal administrative regulations from the perspectives of textualism and purposivism, respectively. *See* Nou, *supra* note 277, at 116–18; Stack, *supra* note 166, at 391.

manipulated because they receive careful attention at each stage of the process from people who can be expected to understand and pay relatively close attention to the issues.[364] We are therefore confident that the court rulemaking process creates a formal record that provides a rich source of information that would allow the federal judiciary to identify and implement the deliberate policy choices of the rulemakers in civil procedure cases.

While our proposed model embraces some notable differences between the proper role of the Supreme Court and lower federal courts in Rules interpretation—namely only the Court has the certiorari power and the ability to reference issues to the Advisory Committee—the disparities should be minimal when the rulemakers have explicitly resolved an issue. We contend that lower federal courts, like the Supreme Court, should respect the text of the Rules and follow the ascertainable intent of the rulemakers. There will, however, be issues of first impression, which will require lower federal courts to exercise some discretion in reasonably elaborating upon or extending the purposes of the rulemakers. It is also possible that circumstances could change substantially enough to create the functional equivalent of unanticipated problems, and that lower federal courts, in matters where the Supreme Court has yet to act, may resolve those issues in a reasoned fashion that deviated from the original intent of the rulemakers.[365] Generally speaking, however, we believe that all federal courts should resolve the civil procedure issues that arise during adjudication consistent with the identifiable policy choices of the rulemakers. Accordingly, our proposed approach to Rules interpretation would respect the rule of law and the principle of institutional settlement.

The pre-*Twombly* case of *Swierkiewicz v. Sorema N.A.*[366] is illustrative. The issue here was whether, under Rule 8(a)(2), a

364. *See* 28 U.S.C. § 2073(d) (2015) ("In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, *including any minority or other separate views*." (emphasis added)).

365. Such rare instances of lower-court deviation from rule-maker intent, we believe tends to show the matter sufficiently ripe for the Supreme Court to grant certiorari and refer the issue to the Advisory Committee. When viewed in this context, we think such action a strength of our approach as lower-court deviation from rule-maker intent acts as a strong signalling device.

366. 534 U.S. 506 (2002).

complaint in an employment discrimination case must contain specific facts establishing a prima facie case of discrimination per *McDonnell Douglas Corp. v. Green*.[367] Engaging in a purposive analysis of the text, the Court held that such a heightened pleading requirement was not required. The *Sorema* Court turned first to the text of Rule 8(a)(2).[368] It then examined the purpose of the rule, which it concluded was to establish a notice-pleading regime.[369] It then considered how "[o]ther provisions of the Federal Rules of Civil Procedure are inextricably linked to" the drafter-created policy choice embedded within a notice-pleading regime.[370] Thus, in cert-worthy cases which raise issues that can be resolved in a purposive fashion akin to *Sorema*, we conclude (as further elaborated below) that the Supreme Court as an adjudicator holds the institutional advantages over the Advisory Committee and lower courts in regard to achieving legitimate, correct, and efficient dispositions.

2. Elaboration and Application of Discretionary Standards

There remains a distinct category of issues—the fine-tuning of standards for lower-court equitable discretion—that is also readily amenable to resolution by the Supreme Court as an adjudicator. As explained above, the Rules merged law and equity,[371] and numerous rules provide lower courts with equitable discretion to achieve just results in particular cases. This discretion is conveyed in some instances by explicit grants of discretionary authority.[372] Such discretion is also conveyed in many instances by the rulemakers' choice of text. For example, the rules frequently require courts to "answer questions of degree and relativity,"[373] such as whether a "class is so numerous that joinder of all members is impracticable,"[374] or whether a proposed "amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[375]

367. *Id.* at 508 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
368. *Id.* at 512 (quoting the Rule's text).
369. *Id.*
370. *Id.* at 513.
371. *See supra* note 252 and accompanying text.
372. *See supra* note 266 and accompanying text.
373. Porter, *supra* note 10, at 164.
374. FED. R. CIV. P. 23(a)(1).
375. FED. R. CIV. P. 15(c)(1)(B).

Our agency model fully embraces this equitable, fact-laden, and discretionary aspect of Rules interpretation and recognizes that the primary authority for making decisions in these areas properly rests with federal district courts. This distribution of authority comports with the underlying purposes and design of the Rules, and recognizes that district court judges are typically best situated to make such decisions based on their relevant experience and perspective. We think that the Supreme Court should rarely review such decisions, and that appellate review should ordinarily be limited to whether the district court abused its discretion.

We further contend that it is sometimes appropriate for the Court to use adjudication to clarify how equitable standards should be applied as a general matter by lower courts—and that this function is compatible with a purposive method of Rules interpretation.[376] The administrative law analogies that we initially proposed to distinguish policy-setting cases from cases that could be resolved pursuant to traditional tools of construction do not work particularly well in this context, however, because putting meat on the bones of these equitable standards could conceivably turn on legislative facts or require the resolution of *Chevron*-step-two-like ambiguity or even involve the functional equivalent of a legislative rule.[377] Our model therefore requires a different mechanism to distinguish efforts to provide guidance to lower courts regarding the proper application or boundaries of discretionary standards, which we think is an appropriate function of adjudication, and the creation of novel procedural policy, which should once again be referred to the court rulemaking process.

We think that the proper boundaries of the Court's use of adjudication to provide equitable guidance should be determined by focusing on the type of reasoning to be deployed, as opposed to the precise nature of the question presented, and we therefore draw on other administrative law analogies to make this distinction. In each of our analogies, we are fundamentally aiming to route questions to the body best constituted to address the matter. For example, our push to send legislative-fact matters to the Advisory Committee rests upon that institution's superior ability to engage in broad empirical investigations as

376. *See* Mulligan & Staszewski, *Institutional Competence*, *supra* note 10, at 70–73 (suggesting that such clarification is akin to an administrative agency's general statement of policy).

377. *See id.* at 76–77.

compared to the Court sitting as an adjudicatory body.[378] Such a focus upon institutional advantage, moreover, sits well within the legal process school as an expression of the philosophy's focus on the structural features of the law.[379] In crafting the mechanisms for effectuating choices of policymaking form, then, we continue to adhere to our main motivating principle: Rules matters should be resolved by the institution holding the most institutional competence vis-à-vis the precise decisional tasks presented.

To this end, we adopt Randy Kozel and Jeffrey Pojanowski's distinction between prescriptive and expository reasoning in administrative decisionmaking as helpful in the equitable-standard-setting context, even if not a perfect fit in every instance.[380] Kozel and Pojanowski describe decisions that call for the weighing of evidence, utilizing technical expertise, and making value judgments as prescriptive, while decisions that call for an analysis of the drafter's intent or the boundaries of judicial case law are defined as expository.[381] Applying this distinction, Kozel and Pojanowski conclude that prescriptive reasoning—or what we have labeled as policy-change decisions in the Rules setting—constitutes one of the "core competencies" of notice-and-comment agency decision-making.[382]

Seeking similar institutional advantages in the Rules setting, 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.[383] Conversely, as Kozel and Pojanowski

378. *See generally* Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121 (2002) (documenting efforts since the late 1980s by the Advisory Committee to solicit and otherwise encourage empirical studies regarding proposed rule changes); *see also* Clermont & Yeazell, *supra* note 67, at 859 ("The rulemakers should soon commence a study of exactly where . . . the optimal pleading standard lies."); Sellers, *supra* note 352, at 366 ("[T]he Advisory Committee can commission research into the costs and benefits of a proposed amendment."); Struve, *supra* note 10, at 1140 (similar); *Leading Cases*, *supra* note 352, at 313 (similar).

379. Fallon, *supra* note 179.

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

381. *Id.* at 141–42.

382. *Id.* at 141.

383. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note

demonstrate, the appellate courts hold the institutional advantage when it comes to expository reasoning—i.e., deploying the traditional tools of statutory construction broadly conceived to include purposive and intentionalist approaches.[384] Following this insight, we contend that 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.

Consistent with our central focus on institutional competencies and with a new complementary analogy to administrative law doctrine, we maintain that equity standard-setting cases should continue to be resolved by the Supreme Court in adjudication. Indeed, 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."[385] 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.[386] 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.[387] At the same time, however, the

10, at 1221–27 (describing this same choice in terms of an analogy to *Chevron*).

384. *See* Kozel & Pojanowski, *supra* note 380, at 149.

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

386. *See* 5 U.S.C. § 553(b) (2015).

387. 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 analogy is

adoption of the administrative agency model does not preclude deference to the lower federal courts in Rules cases. Rather, cases involving the application of equitable standards should be resolved initially—and, for the most part, exclusively—in the lower federal courts, as we have been emphasizing, and any high-Court review should be conducted under an abuse of discretion standard.[388]

The foregoing division of responsibilities best promotes the competencies of each of the relevant institutional actors in Rules cases. Thus, the administrative model recognizes that there is little need to use notice-and-comment rulemaking procedures to address problems that can be resolved using traditional tools of purposive 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 traditional tools of purposive construction 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, the Court wants to change the controlling understanding of the rules (i.e., the underlying policy choice embedded in a rule), the Court should refer the relevant questions to the Advisory Committee for resolution pursuant to the rulemaking process. Finally, allowing the lower courts to exercise predominant control over the equitable discretion that occurs in federal litigation provides a variety of institutional advantages as well.

Gulf Oil Co. v. Bernard[389] is illustrative of the approach we favor in equitable-standard-setting cases. The opinion interpreted Rule 23(d), which then stated that in "the conduct of [class] actions to which this rule applied, the court may make appropriate orders: . . . (3) imposing conditions on the representative parties or on intervenors . . . [and] (5) dealing with similar procedural matters."[390] In an employment discrimination suit, the district court, pursuant to Rule 23(d)(3), entered an order prohibiting the parties and their counsel from communicating with potential class members without court ap-

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

388. *See* Mulligan & Staszewski, *Institutional Competence*, *supra* note 10, at 82.

389. 452 U.S. 89 (1981).

390. *Id.* at 99.

proval.[391] The Court reversed as an abuse of discretion.[392] In so deciding, the Court first looked to "the general policies embodied in Rule 23, which governs class actions in federal court."[393] The Supreme Court also noted that because of the "potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties."[394] Concluding, however, that this discretion must be bounded and subject to abuse of discretion review, the Court held that such "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties."[395] That is to say, taking a purposive interpretive approach, that is a hallmark of expository reasoning, the Supreme Court crafted equitable standards that furthered the policy choices enacted by the Advisory Committee. The Court further held that

> [o]nly such a determination can ensure that the [district] court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.[396]

C. THE CIVIL RULES REGULATORY REGIME

We have already responded in print to a number of stated or potential objections to our proposed model of Rules interpretation,[397] and we do not want to reiterate all of those points here. There is an underlying theme to these objections, however, that is worthy of brief discussion. The central concern is that the court rulemaking process has certain flaws that inhibit effective rulemaking, and as a result the Court should be empowered to circumvent this process. This concern has its own administrative law analogues, and while we will readily con-

391. *Id.* at 93.
392. *Id.* at 102–03.
393. *Id.* at 99.
394. *Id.* at 100.
395. *Id.* at 101.
396. *Id.* at 101–02.
397. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1237–51; Mulligan & Staszewski, *Institutional Competence*, *supra* note 10, at 84–90.

cede that the court rulemaking process is imperfect, we are unmoved by these objections for several reasons.

We turn now to particular objections. The first counterargument is that the court rulemaking process is "ossified," which creates an incentive for the Court to make novel procedural policy through adjudication.[398] This objection tracks the ossification hypothesis in administrative law, which posits that because various analytic requirements and external review processes make notice-and-comment rulemaking too time-consuming and expensive, regulatory agencies have strong incentives to make policy through less formal and participatory mechanisms such as interpretive rules, guidance documents, and adjudication.[399] The parallel concern is that the promulgation of new or amended civil rules currently takes roughly thirty months,[400] and innovations or changes cannot be adopted without the express or tacit approval of five different decision-making bodies. Accordingly, if a majority of Justices think that major policy changes are warranted, it is far easier and more efficient for the Court to take the bull by the horns and adopt them pursuant to adjudication, particularly if those changes are likely to be controversial and generate potentially fatal objections during the rulemaking process.

A second related objection is that the Court has limited control over court rulemaking, and this strengthens the incentive for the Justices to make novel procedural policy pursuant to adjudication.[401] This objection correctly recognizes that the Court functions as an administrator in the field of civil procedure, but contends that this particular regulatory scheme is distinct from most administrative settings because the Justices have less control over final policy decisions than most agency heads. From an administrative law perspective, the regulatory regime in civil procedure could be viewed as one that is "bottom

398. *Cf.* Porter, *supra* note 10, at 182–83 (suggesting that our referencing proposal would overwhelm the Advisory Committee, and claiming that "even assuming the rulemakers could appropriately handle all of these questions, resource constraints, the lengthy rulemaking process, and a likely lack of consensus would be serious obstacles to responsive reform"); Yeazell, *supra* note 142 (noting that the contemporary rulemaking process has become more cumbersome with little added benefit).

399. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

400. *See* McCabe, *supra* note 105.

401. *See* Porter, *supra* note 10, at 147.

up," rather than one that is authoritatively controlled by agency heads (or their political principles) in a "top-down" fashion.[402] Justices who want to dictate policy outcomes in civil procedure will therefore naturally be prone toward making policy decisions pursuant to adjudication (the part of the process that is effectively under their control), rather than deferring to court rulemaking.

A third objection is that the court rulemaking process has become "politicized" in recent years and the resulting policy decisions may therefore be excessively influenced by interest-group pressure, rather than a result of "neutral expertise."[403] Similar concerns of undue politicization have, of course, been a prominent theme in the administrative law literature in recent years.[404] Whatever the proper cure for undue politicization in the administrative process (a tough issue, to be sure), one could argue that it is sensible for an independent Court to make procedural policy pursuant to adjudication, rather than deferring to the outcomes of a more overtly partisan political process.

In response, we welcome rulemaking reforms. We are on record as seeking to reduce the current overly cumbersome drafting process to streamline its operation and encourage greater involvement by the Justices.[405] In particular, we have advocated for the adoption of a three-step model that would include notice-and-comment rulemaking by the Advisory Committee, Court review, and Congressional report-and-wait. We have estimated that this process could be completed in a period of approximately eighteen months, and we have expressed hope

402. *See* Mulligan & Staszewski, *Regulation of Civil Procedure, supra* note 10, at 1205 n.98 ("[T]he current court rulemaking model is best described as a bottom-up process, whereas agency rulemaking is traditionally described as a top-down process."); Porter, *supra* note 10, at 147 ("Ironically, then, the Court's position at the top of the administrative hierarchy effectively cuts it out of the process of initial revisions of Rules.").

403. *See, e.g.*, Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1612 (2008) (claiming that "the court rulemaking process has become increasingly politicized" since the 1980s, and that this development "has made it very difficult to revise the FRCP in general . . . because conflicting interest group pressures tend to create Advisory Committee stalemate"); *see also supra* notes 143–47 and accompanying text (discussing these critiques).

404. *See, e.g.*, Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012).

405. *See* Mulligan & Staszewski, *Regulation of Civil Procedure*, *supra* note 10, at 1237–40.

that by eliminating the roles of the Judicial Conference and Standing Committee, and otherwise streamlining the court rulemaking process, the Court would be encouraged to revive its more active role in reviewing, evaluating, and contributing to potential changes to the Rules. We also agree with Brooke Coleman that membership on the Advisory Committee can, and should, be more representative of the bar and more attuned to typical cases as contrasted with high-stakes complex litigation.[406]

Nonetheless, we do not believe that the foregoing objections—even without making these worthy reforms—provide a compelling basis for rejecting our proposed model of Rules interpretation. First, criticisms of the court rulemaking process (whether valid or not) fundamentally miss the mark when not comparatively made. The relevant question is whether court rulemaking is a superior mechanism for making novel procedural policy than Supreme Court adjudication, not whether the existing court rulemaking process (or, for that matter, Court adjudication) is perfectly ideal. Our claim is that court rulemaking in policy-setting matters (warts and all) is generally superior to Court adjudication (warts and all) for a host of reasons. To our minds, a valid critique of our proposal would need to take the opposite position, not merely identify flaws with the existing rulemaking process. The choice of policymaking form in this context is a bounded one with only two alternatives—and referral to a utopian "perfect" rulemaking process is not an option that is currently on the table. Thus, we reiterate the many advantages, as discussed above,[407] that the notice-and-comment approach to setting procedural policy enjoys.

Second, those objections are, at bottom, merely a relatively sophisticated version of the argument for an inherent-authority model of Rules interpretation. The objections boil down to claims that court rulemaking takes too long and is inconvenient, and that it undermines the ability of the Justices to adopt their own preferred procedural policies. As Lonny Hoffman puts this family of critiques, the Court is saying "to rulemakers: out of my way. Can't you see that modern litigation is totally different from what it was in 1938? Why haven't you done something by now?"[408] Wouldn't it be less burdensome and more

406. S*ee* Coleman, *supra* note 145, at 1049–51.

407. *See supra* notes 321–25 and accompanying text (outlining these advantages).

408. Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46

efficacious for the Court to use adjudication to make novel procedural policy pursuant to common-law reasoning or a dynamic method of Rules interpretation?

Well, sure, and this might therefore be a good idea—if the goal of civil rules interpretation was quickly and surely to implement the procedural policy preferences of the Justices. As we have explained, however, the inherent-authority model is contrary to the scheme established by the Rules Enabling Act, inconsistent with rule-of-law norms, and incompatible with the principle of institutional settlement.[409] Moreover, the court rulemaking process has epistemic advantages, in addition to promoting democracy and treating litigants more fairly. Accordingly, we believe that the benefits of presumptively using court rulemaking to make novel procedural policy easily outweigh the costs of constraining the Justices' ability unilaterally to impose their own views of sound procedural policy pursuant to adjudication.

Finally, and relatedly, we think the existing regulatory scheme for civil procedure has significant advantages, even if it departs from standard administrative law models or falls short of a romanticized ideal. We agree, of course, that the regulatory regime for civil procedure departs from a pure top-down model in the sense that the Justices cannot impose their own policy preferences over the objections of other participants in the process. In particular, the Justices cannot amend the Rules without the positive efforts and endorsements of the Advisory Committee, Standing Committee, and Judicial Conference. Meanwhile, however, the regulatory regime for civil procedure departs from a pure bottom-up model in the sense that the Justices, or the Chief Justice in particular, do appoint the members of these relevant committees, have final adjudicatory authority, and the ability to reject proposed amendments they do not favor. Nonetheless, our proposed model of Rules interpretation anticipates that the bulk of policymaking discretion should be exercised by lower federal courts and the Advisory Committee in a bottom-up fashion. This would effectively result in a "hybrid" regulatory regime that contains both top-down and bottom-up elements and matches the actual competencies of each of the relevant institutional actors.

U.C. DAVIS L. REV. 1483, 1512 (2013).

409. *See supra* Part II.A (critiquing the inherent-authority model).

While we believe it inappropriate to reject our proposal merely because court rulemaking falls short of a romanticized ideal, we also think that our proposal is strengthened by comparing the court rulemaking process with notice-and-comment rulemaking by many other agencies. First, the implicit notion that the Court sitting as an adjudicator, while surely speedier than the Advisory Committee, is freer of bias or more prone to empirical rigor than the Advisory Committee is simply specious. Both the Justices[410] themselves and the Supreme Court bar[411] are archetypes of elites, which carries all the biases attendant therewith.[412] Furthermore, just as with charges against the Advisory Committee,[413] the Court often relies upon non-empirically based, politically charged factual assumptions in setting procedural policy,[414] yet it lacks the notice-and-comment check to counterbalance such errors. While we cannot provide a full-fledged comparison here, and further empirical work to evaluate our impressions would be helpful, we are confident that the court rulemaking process is a relatively vibrant one, and that "politicization" of this process, to the extent it has occurred,[415] is therefore less detrimental than it would be in many other contexts. As discussed above, the Advisory Committee's proposals tend to generate a tremendous amount of commentary from judges, attorneys, scholars, and the general public.[416] Moreover, this commentary tends to be relatively well-informed, and to reflect relatively balanced views from a varie-

410. *See, e.g.*, Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903 (2003); Patrick J. Glen, *Harvard and Yale Ascendant: The Legal Education of the Justices from Holmes to Kagan*, 58 UCLA L. REV. DISCOURSE 129 (2010); Timothy P. O'Neill, *"The Stepford Justices": The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701 (2007).

411. *See* Coleman, *supra* note 145, at 1015–19.

412. *See, e.g.*, Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 141 (2013); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821 (2011).

413. *See supra* note 144 and accompanying text.

414. *See, e.g.*, Clermont & Yeazell, *supra* note 67, at 848–49; Herrmann et al., *supra* note 70, at 150–52.

415. While there is a widespread perception that court rulemaking has become increasingly politicized in recent years, *see supra* notes 143–47 and accompanying text, we are skeptical that the "golden age of rulemaking" was apolitical or that the Advisory Committee's decisions were solely a function of "neutral expertise." Rather, this perception may be influenced in part by the fact that today's rulemaking process is significantly more openly participatory and transparent than in the past.

416. *See supra* note 137 and accompanying text.

ty of competing perspectives, including those of trial attorneys, the defense bar, and other interested parties. Finally, the Advisory Committee tends to be responsive to major comments or suggestions by providing reasoned explanations for its decisions and, in many cases, amending its proposals as a result. While administrative rulemaking plainly runs the gamut, agencies have been heavily criticized for deficiencies in each of these areas in recent years.[417] We think that court rulemaking fares relatively well in each of these areas, and that it is even a context where the requirements of "interest group representation" theory could conceivably be met.[418] In any event, even if court rulemaking falls short of being "one of the greatest inventions of modern government,"[419] we think that it is a relatively sound rulemaking process—and, more important for present purposes, that it is a superior mechanism for making civil procedure policy than Supreme Court adjudication.

CONCLUSION

In this Article, we argued that civil rules interpretive theory should be recognized as a distinctive field of scholarly inquiry and judicial practice. In this endeavor, we described the existing theories of Rules interpretation that are set forth in the nascent scholarly literature, and advocated an administrative model of Rules interpretation. More broadly, we conclude that our views on Rules interpretation illustrate that the best form of interpretation depends on legal context, the nature of the lawmaking process, and the competencies of the relevant institutional actors.[420] We hope, therefore, that this Article will help to stimulate other legal scholarship and more thoughtful

417. For a recent analysis of public participation in rulemaking and the level of responsiveness by agencies to various types of comments, see Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of Email*, 79 GEO. WASH. L. REV. 1343 (2011).

418. The interest group representation model of administrative law, which predominated in the 1960s and 1970s, sought to provide "a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision." Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670 (1975).

419. *Cf.* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (1st ed. Supp. 1970) (calling informal rulemaking by administrative agencies "one of the greatest inventions of modern government").

420. *See generally* Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

judicial engagement with the emerging field of Rules interpretive theory.

Indeed, we believe that recognizing civil rules interpretive theory as a distinctive field of inquiry raises a host of interesting, important, and previously unexplored questions. For example, it may be worthwhile to consider whether the oft-recognized distinction between "interpretation" and "construction" could perform a potentially useful role in this setting.[421] Moreover, it is also worth considering whether our proposed administrative model of Rules interpretation should be extended to the contexts of the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Because both sets of Rules are adopted by the federal judiciary pursuant to delegations of authority under the Rules Enabling Act, they should not be treated the same as statutes for purposes of interpretive theory. On the other hand, those rulemaking processes could involve special characteristics or norms that would suggest caution in simply adopting our administrative model without appropriate modifications. For example, criminal procedure is rife with constitutional concerns that would need to be considered when adopting an interpretive methodology for that particular legal context.[422]

Similarly, it is worth considering how our proposed method of civil rules interpretation should be synthesized with the federal judiciary's obligation to interpret federal procedural statutes. Federal statutes reference the Rules often[423] (including the codification of the Rules for bankruptcy practice).[424] Whether codifications of these rules change the separation-of-powers foundation that supports the interpretation of these rules in those contexts is a question worthy of consideration. Similarly,

421. *See generally* Evan J. Criddle, *The Constitution of Agency Statutory Interpretation*, 69 VAND. L. REV. EN BANC 325 (2016) (analyzing the distinction's potential role in agency statutory interpretation); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (describing the distinction and discussing its potential role in constitutional interpretation).

422. *See* Stephen F. Smith, *Activism As Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057 (2002) (arguing for increased constitutional law interpretive norms in criminal procedure cases because "American criminal procedure is constitutional law, and remains so even after thirty years of conservative revisionism").

423. *See, e.g.*, 7 U.S.C. § 6306 (2012); 15 U.S.C. § 6613 (2012); 28 U.S.C. §§ 1741, 2246, 2409 (2012); 39 U.S.C. § 3007 (2012). This list is by no means exhaustive.

424. FED. R. BANKR. P. 9001.

many federal statutes, such as transfer of venue statutes, work in conjunction with the Federal Rules, even though they lack explicit cross-references.[425] Again, these regimes raise interesting interpretive questions given the blending of the normative foundations upon which these competing rules rest.

Finally, it is worth considering how civil rules interpretive theory ought to work in the states, which have a variety of different approaches for enacting rules of civil procedure for their courts, and where the rules of civil procedure interact with procedural statutes in a host of different ways. To begin, "[m]ost states' rules now mirror the Federal Rules, and the rest have been pulled toward the Federal Rules in significant ways. In every state, federal rulemakers have exerted an extraordinary gravitational pull on state rulemakers."[426] Importantly for our study, while many states have adopted their rules by judicial rulemaking,[427] many other states adopted the Federal Rules by statute—not judicial rulemaking.[428] We believe that it could follow from our argument that statute-adopting states should approach their civil rules as statutes (contrary to our conclusions about the Federal Rules), while those states adopting the Federal Rules by court order should approach interpretation in a manner akin to the one advocated here. Further, we believe that the persuasive authority of federal precedent may be questioned when there are mismatches of enacting schemes between state and federal systems. While we do not venture any definitive views on these or other related topics here, we do believe that jurists and scholars should start to think about preparing for battle in a whole different set of possible interpretive wars.

425. *See, e.g.*, 28 U.S.C. §§ 1404, 1406 (2012).

426. Dodson, *supra* note 11.

427. *See, e.g.*, ALASKA CT. R., R. CIV. P. (adopted by Sup. Ct. Ordinance 5, October 9, 1959); *see also* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003) (conducting a fifty state survey of procedural rules).

428. *See, e.g.*, ARIZ. REV. STAT. ANN., R. CIV. P.; COLO. REV. STAT. ANN., R. CIV. P.; KAN. STAT. ANN. § 60-200 (2016); *see also* Oakley, *supra* note 427.