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The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law

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ABSTRACT

In this Article, we argue that the U.S. Supreme Court should route most Federal Rules of Civil Procedure issues through the notice-and-comment rulemaking process of the Civil Rules Advisory Committee instead of issuing judgments in adjudications, unless the Court can resolve the case solely through the deployment of traditional tools of statutory interpretation. While we are not the first to express a preference for rulemaking on civil procedure issues, we advance the position in four significant ways. First, we argue that the Supreme Court in the civil procedure arena is vested with powers analogous to most administrative agencies. Second, building upon this insight, we present a justification for favoring rulemakings over adjudications by analogy to administrative law. Third, we couple this preference for rulemaking over adjudication with three criteria detailing when this presumption should apply. Namely, we conclude that civil procedure issues are better resolved by reference to the Advisory Committee if the issue (a) requires an interpretation of a rule that rests substantially upon legislative facts, (b) calls for the resolution of a *Chevron* step-two-like ambiguity, or (c) seeks a resolution that approximates a legislative rule. Only when traditional tools of statutory interpretation—text, history, and purpose—will resolve a case should the Court retain its disposition in the adjudicatory form. Fourth, we offer the mechanisms for pragmatically achieving this preference for rulemaking both under existing law as well as through a new "referencing" procedure, without unduly constraining the flexibility needed by lower courts to implement the civil rules effectively. In so doing, we contend that expanding the Court's use of rulemaking not only should result in better rules but should also bolster the democratic legitimacy of the Court's civil-rules decisionmaking.

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INTRODUCTION

Like administrative agencies, "[t]he Supreme Court is a regulator."[1] Nowhere is this more true than in the civil procedure context. Like an administrative agency, the Court's role in civil procedure is to set policy—not simply to resolve particular disputes.[2] And just like most administrative agencies—or regulators if you will—the Court may set civil procedure policy through case-by-case adjudication, as it did in *Bell Atlantic Corp. v. Twombly*[3] and *Ashcroft v. Iqbal*[4] when it reinterpreted Federal Rule of Civil Procedure 8(a)(2),[5] or by promulgating generally applicable rules through a notice-and-comment rulemaking procedure. As Justice Stevens wrote in his *Twombly* dissent: "I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order."[6] Although the Court faces this same choice between proceeding by rulemaking or adjudication every time it addresses a civil procedure issue—whether it is setting pleading standards, determining the advisability of sanctioning entire law firms for the misconduct of counsel,[7] or refashioning the law of summary judgment[8]—it has yet to devise a coherent framework for making this decision. Drawing lessons from administrative law, we aim in this Article to resolve this question by proposing that the Court create a presumption in favor of rulemaking over adjudication when deciding civil procedure issues.

1. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 4 (1984).
2. *See id.* at 4–5 (noting that the U.S. Supreme Court's role is uniquely one of policy setting, not dispute resolution).
3. 550 U.S. 544 (2007).
4. 129 S. Ct. 1937 (2009).
5. *See, e.g.*, Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1294–1313 (2010) (discussing the radical changes wrought by the Court's new approach to pleading).
6. *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting); *see also* Marek v. Chesny, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) (facing a similar problem regarding Rule 68's effect upon the availability of attorney fees and concluding that because the rule's effect upon the availability of attorney fees was at least ambiguous, "the Court should have stayed its hand" and allowed legislation or court rulemaking to amend Rule 68).
7. *See* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120 (1989).
8. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp , 475 U.S. 574 (1986); *see also* Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645 (2011) (drawing comparisons between *Twombly* and *Iqbal* and the summary judgment trilogy).

Administrative agencies regularly face the same adjudication-versus-rulemaking decision confronted by the Court in the civil procedure context.[9] Since the New Deal, Congress has routinely delegated broad lawmaking authority to administrative agencies charged with implementing a range of federal programs, just as it has delegated procedural rulemaking authority to the Supreme Court. In the course of implementing their delegated statutory authority, administrative agencies are tasked with numerous policy choices. For example, the Federal Trade Commission (FTC) must decide whether to consider certain business practices "unfair or deceptive."[10] In making these determinations, the FTC, like most other administrative agencies, has the discretion to choose between case-by-case adjudications, which create precedent, or by notice-and-comment rulemakings. Although statutes occasionally specify that an agency must use rulemaking or adjudication to make certain policy decisions, most statutes delegate authority to agencies both to promulgate orders and rules and to leave it up to the agency to decide whether to make policy pursuant to adjudication or rulemaking. This decision is known in administrative law as an agency's "choice of policymaking form."[11]

In *SEC v. Chenery Corp.*,[12] the Supreme Court held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[13] Federal courts thus rarely second-guess an administrative agency's decision regarding whether to use rulemaking or adjudication to make a particular policy decision. Given the ubiquity of these determinations, jurists and scholars have recognized that an agency's choice of policymaking form is a momentous decision and have developed a rich body of knowledge as to which form is superior for addressing particular types of questions.[14]

We believe administrative law has much to offer the Court when it is deciding which policymaking form it should choose in making civil procedure decisions. We contend that because the Court, like an agency, may set procedural policy via either form, it is apt to analogize the Court to an administrative agency

9. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–1403 (2004) (reviewing the multitude of policymaking forms available to agencies and the consequences of these varying forms).
10. 15 U.S.C. § 45 (2006).
11. Magill, *supra* note 9, at 1383–84.
12. (*Chenery II*), 332 U.S. 194 (1947).
13. *Id.* at 203.
14. *See infra* Part II (discussing the consensus in administrative law on the superiority of rulemaking to adjudication for setting policy in most contexts).

in this area.[15] Given this congruity, we argue that the Court should conform to the longstanding consensus in administrative law that policy changes ought to be the product of rulemaking rather than adjudication. While many have similarly expressed a preference that significant procedural policy changes be made by way of rulemaking, not adjudication,[16] to date, jurists and scholars have not offered a

15. This analogy between the Court in the civil procedure context and administrative agencies is understudied. Laurens Walker provides the most wide-ranging use of this analogy in his call for the Civil Rules Advisory Committee to conduct a cost-benefit analysis of newly proposed rules similar to that done by the Office of Management and Budget (OMB). *See* Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993) (arguing that the Rules Advisory Committee should be treated as a "true" administrative agency and thus be subject to an OMB-like review of all new rules akin to that mandated by Executive Order No. 12,291). Others have offered more glancing treatment of the analogy. *See, e.g.*, Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 309 n.107 (1982) (noting that civil rulemaking is analogous to administrative law in their disregard for matters of broader jurisprudential coherence); Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 880 (1993) ("[T]he 1988 amendments to the Rules Enabling Act, intended to open the process up, relied on a very weak administrative law model of notice and comment."); *infra* notes 86–90 & 352 (providing additional sources that briefly compare and contrast administrative rulemaking and court rulemaking). Finally, several commentators have suggested that the Court's use of the certiorari power across all issues is perhaps best viewed as administrative power, although they do not discuss civil procedure directly. *See infra* note 20.

16. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 883–85 (2010) [hereinafter: Bone, *Plausibility Pleading Revisited*] (concluding, in a brief discussion, that the issues reached in *Twombly* and *Iqbal* would be better resolved in a rulemaking); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 889 (1999) [hereinafter Bone, *The Process of Making Process*] ("[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."); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 282 (arguing that the technical nature of the promulgation of judicial rules cannot sustain interest through typical political channels and should be left to the formal advisory committee process); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850 (2010); Matthew A. Josephson, *Some Things Are Better Left Said: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 42 GA. L. REV. 867, 872–81 (2008); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 454 (2008) (arguing that *Twombly*-style changes should have been made by the Advisory Committee and briefly sketching the institutional advantages of the committee); *The Supreme Court—Leading Cases*, 121 HARV. L. REV. 185, 305, 315 (2007); 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) (asserting, with a shorter treatment that civil procedure policy is better made in the Rules Committee, after providing a detailed account of the *Twombly* and *Iqbal* decisions). Similarly, many have called for greater involvement by the political branches in rulemaking. *See, e.g.*, Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303 (2006) (arguing that the separation of substance and procedure in the Rules Enabling Act requires

fully developed justification for this preference, presented a set of criteria for choosing between policymaking forms, nor outlined a mechanism for achieving this preference.

Thus, in Part I, we further develop the understudied analogy between the legal authority of administrative agencies and the Court in the field of civil procedure. In so doing, we review the power of the Court, like an agency, to set policy through case-by-case adjudication and the Court's agency-like rulemaking power to draft and revise the Federal Rules of Civil Procedure. We also strengthen this analogy by expounding on the striking similarities between the evolution of rulemaking experienced by both the Court and agencies.

In Part II, we consider the superiority of the rulemaking form for making policy decisions. Here, we begin by noting that it is the nearly uncontested truth in administrative law circles that for setting policy, a well-functioning, notice-and-comment rulemaking procedure has extensive institutional advantages over adjudication. We proceed to review these many advantages of rulemaking over adjudication, noting that the singular exception relevant to court rulemaking lies with the resolution of questions of law pursuant to traditional tools of statutory interpretation (i.e., text, history, and purpose). As such, we argue for a presumption in favor of rulemaking over adjudication for all civil rules issues that do not rest upon a question of statutory interpretation.

In Part III, we address the question of when our preference for rulemaking may be overcome. Dipping again into lessons learned from administrative law, we offer three criteria as guides for determining when an issue is better suited for determination in a rulemaking, as opposed to an adjudicative, form. Namely, we assert that the Court should route to a rulemaking form those cases presenting issues of legislative fact, as contrasted with adjudicative facts; questions akin to *Chevron*-step-two issues, as opposed to *Chevron*-step-one issues; and policy pronouncements similar to legislative rules, rather than interpretive rules.

In Part IV, we articulate how our preference for rulemaking on civil rules issues should be implemented and respond to some potential objections to our position. We begin by offering a mechanism for referring cases to the Civil Rules Advisory Committee under the current statutory regime. Recognizing that the current rulemaking regime—like rulemaking by administrative agencies more

that the political branches take part in the formation of rules that are, by nature, partly substantive). Of course, some prefer vigorous judicial interpretation over rulemaking. *See infra* note 220 (citing scholars who advocate for a more liberal brand of interpretation in relation to the rules of procedure).

generally—faces potential problems of ossification,[17] we also argue for statutory reforms that would render the referencing of questions to the Advisory Committee more workable. We then respond to the contention that a scheme that routes cases away from adjudication could unduly constrain the equitable flexibility needed by lower federal courts to implement the civil rules effectively. We end this section with a few comments regarding deliberative democracy and theories of political legitimacy, contending that our approach would be a legitimacy-enhancing one. While we recognize that notice-and-comment rulemaking is not a panacea, we conclude the Article with a call for greater use of the Court's rulemaking authority in the field of civil procedure, excepting those cases amenable to resolution by traditional tools of statutory interpretation.

I. THE SUPREME COURT AS AN AGENCY IN THE ADMINISTRATION OF CIVIL PROCEDURE

Our primary claim in this Part is that the Supreme Court functions much like an administrative agency when it makes law in the field of civil procedure. We first review the Court's role, like that played by agencies, as the adjudicator of Rules[18] cases and its agency-like power to promulgate Rules. We conclude this Part by arguing that the Court's history as a rulemaker mimics closely that of agencies more generally, which bolsters our agency-analogy thesis.

A. The Court as Adjudicator of the Civil Rules

We begin, then, with a brief review of the options the Court has when deciding which policymaking form to use when resolving civil procedure issues—namely, adjudication or rulemaking. First, the Court can make policy decisions regarding the application of the Rules by adjudicating cases and controversies that implicate civil procedure and fall within its subject matter jurisdiction. This is true because the Court's decisions establish new precedent that is binding on the

17. The "ossification" hypothesis in administrative law posits that informal rulemaking has become "so heavily laden with additional procedures, analytical requirements, and external review mechanisms that its superiority to case-by-case adjudication is not as apparent now as it was before [informal rulemaking] came into heavy use," and that "agencies are beginning to seek out alternative, less participatory regulatory vehicles to circumvent the increasingly stiff and formalized structures of the informal rulemaking process." Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992).

18. We use "Rules" as a shorthand for the Federal Rules of Civil Procedure. The term "rule" may denote another regime.

lower federal courts when they interpret or apply the Rules.[19] By enacting the Judges' Bill of 1925, Congress provided the Court with almost complete discretionary authority over its adjudicatory docket, a characteristic shared by most agencies.[20] As a result, the Court may, and often does, set civil procedure policy by way of issuing opinions as the result of adjudication.

The *Twombly* and *Iqbal* cases illustrate the Court's authority to exercise its adjudicatory power to set civil procedure policy—although one could just as easily point to the Court's summary judgment, discovery, or sanctioning jurisprudence. After decades of upholding the "no set of facts" standard of *Conley v. Gibson*,[21] the Court changed course in *Twombly*, an antitrust class action suit against several telecommunications providers.[22] The complaint asserted simply that the defendants had colluded in violation of the antitrust laws, but it failed to provide any specific factual allegations of an unlawful agreement in support of that claim.[23] While the plaintiffs' bare allegation would have survived a Rule 12(b)(6) challenge under the well-established *Conley* standard,[24] the *Twombly* Court decided to chart a new course and overruled *Conley*.[25] 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

19. *See* Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 976 (2009) (recognizing that "[a]s a functional matter, judicial opinions themselves have the force of law" because "[t]he reasons that a court gives for its decision—the broader principles under which the court situates the facts and outcome of the case—are controlling on future courts").

20. *See* SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 12 (1986); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1 (2011).

21. 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). 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, 512 U.S. 163, 168 (1993); Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 14, 150 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).

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

23. *Id.* at 565 n.10.

24. *Id.* at 561.

25. *Id.* at 563 ("But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement.").

state a claim for relief that is "plausible."[26] In effect, the opinion crafted a new and more demanding test for assessing the sufficiency of complaints. 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.[27] Two years later, the *Iqbal* Court added two glosses on *Twombly*'s plausibility standard. First, it held that the plausibility standard applies in all cases—not just those, such as antitrust cases, where discovery costs are expected to be high.[28] Second, the *Iqbal* Court provided a more detailed presentation of the plausibility standard, holding that it is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense"[29] with the goal of determining whether the complaint's allegations create a "reasonable inference that the defendant is liable."[30]

Importantly for our discussion, commentators almost universally recognized *Twombly* and *Iqbal* as statements regarding the policy underlying pleading requirements in federal court[31] and, by extension, state court[32]—not the legalistic interpretation of Rule 8. Proponents of the opinions thus welcomed them, not because of their statutory parsing, but rather because they limited discovery costs.[33]

26. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (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)); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.").

27. *See Twombly*, 550 U.S. at 558–59 (basing the holding, in part, on the notion that surviving a 12(b)(6) motion will lead to astronomical discovery costs for the defendants that, in turn, will have the *in terrorem* effect of inducing them to settle even when they have strong bases for a defense); Clermont & Yeazell, *supra* note 16, at 826–27 (reviewing *Twombly*).

28. *See Iqbal*, 129 S. Ct. at 1953.

29. *Id.* at 1950.

30. *Id.* at 1949.

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

32. Several state high courts have adopted *Twombly* and/or *Iqbal* as the proper interpretation of their respective jurisdiction's version of Rule 8(a)(2). *See* Mazza v. Housecraft LLC, 18 A.3d 786, 791 (D.C.), *vacated*, 22 A.3d 820 (D.C. 2011); Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008); Doe v. Bd. of Regents of the Univ. of Neb, 788 N.W.2d 264, 278 (Neb. 2010); Sisney v. Best Inc., 754 N.W.2d 804, 808–09 (S.D. 2008). Other state high courts have specifically rejected adoption of *Twombly* and *Iqbal*. *See* Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 345 (Ariz. 2008); McKinnon v. W. Sugar Co-Op Corp., 225 P.3d 1221, 1223 (Mont. 2010); Colby v. Umbrella, Inc., 955 A.2d 1082, 1087 n.1 (Vt. 2008); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863–64 (Wash. 2010); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 189 n.4 (W.Va. 2010); *see also* Charles H. Wesley Educ. Found., Inc. v. State Election Bd., 654 S.E.2d 127, 132 (Ga. 2007) (citing both *Conley* and *Twombly* as good law in the same paragraph).

33. *See, e.g.*, Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J L. & POL'Y 61, 62 (2007) (contending that *Twombly* reached the right result but for the wrong reasons); Lynn C. Tyler, *Recent Supreme Court Decision Heightens Pleading Standards, Holds Out Hope for Reducing Discovery Costs*, 77 U.S.L.W. 2755 (2009); Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress*

Critics also tended to focus their discontent on the policy implications of *Twombly* and *Iqbal*.[34] These critiques run the gamut: (1) the opinions wrongly apply the plausibility rule to suits that are not likely to trigger expensive discovery;[35] (2) the opinions inaptly solve a discovery-abuse problem (that may not have needed solving) with a pleading-law solution;[36] (3) the opinions unfairly discriminate against claims in which plaintiffs must allege facts that are uniquely in defendants' possession and, as such, are only available to plaintiffs via discovery (e.g., intentional employment discrimination claims);[37] (4) the opinions are based upon faulty factual assumptions;[38] and (5) the opinions unduly deny plaintiffs with limited resources their day in court.[39] The empirical results of the impact of these cases, however, remain mixed.[40]

Overrule Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 142–47 (2009), http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf (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).

34. There are 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); David Marcus, *When Rules Are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretation*, 2011 UTAH L. REV. (forthcoming) (manuscript at 60–72), *available at* http://ssrn.com/abstract=1852856 (claiming that "[e]very relevant indicator suggests that the Court misinterpreted Rule 8 in *Twombly* and *Iqbal*"); Spencer, *supra* note 16, at 448–50, 461–73 (detailing the many ways in which the *Twombly* rule deviates from past practice, the text, the intent, and the legislative history of Rule 8).

35. *See* Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6):* Twombly, Iqbal*, and the Paradox of Pleading*, 62 STAN. L. REV. 905 (2010) (arguing that heightened pleading might make sense for antitrust cases but not for all civil cases).

36. *See* Spencer, *supra* note 16, at 452–54 (arguing that if the Court wishes to address discovery abuses it should do so directly).

37. *See* Bone, *Plausibility Pleading Revisited*, *supra* note 16, at 878–79; Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 84–92 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (claiming that *Twombly* and *Iqbal* have resulted in the disproportionate dismissal of civil rights cases); Howard M. Wasserman, Iqbal*, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

38. *See, e.g.*, Clermont & Yeazell, *supra* note 16, at 848–49; Herrmann, Beck & Burbank, *supra* note 33, at 150–52 (Rebuttal Statement of Stephen Burbank).

39. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

40. *See, e.g.*, JOE S. CECIL ET AL , MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf (concluding that from 2006 to 2010 there was an increase in the amount of motions to dismiss filed but not a general increase in their success); Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010) ("[A]fter *Iqbal*, [district courts] appear to be granting 12(b)(6) motions at a significantly higher rate than they did under

B. The Court as Drafter of the Civil Rules

Although the Court did not initiate rulemaking to address the policy issues that it sought to resolve in *Twombly* and *Iqbal*, it has often relied upon that form, just as an agency would, in crafting significant Rules innovations.[41] The court rulemaking process has evolved greatly over time into a complex affair that averages two to three years to complete.[42] The rulemaking era began when Congress empowered the Court to promulgate the Rules of Civil Procedure in 1934 with the passage of the Rules Enabling Act.[43] Although the 1934 Act did not specify the use of committees, in 1935 the Court appointed a fourteen-person Advisory Committee—which did not adhere to the notice-and-comment procedures currently required of the Advisory Committee[44]—to do the research and drafting work for the creation of the original Federal Rules of Civil Procedure.[45] Under this first incarnation of the rulemaking process, the Court directly reviewed the work of the Advisory Committee and, if satisfied, reported the promulgated Rules to Congress,[46] which could overrule any of the rules by exercising the legislative veto built into the 1934 Act during the specified "report-and-wait period."[47] Although the Court often deferred to the Advisory Committee's proposals during this early

Conley—which was already a sizeable 49% in the Database in the two-year period before *Twombly*."); William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 644 n.400 (2011) (stating that the data show motions to dismiss increasing for the four months after *Iqbal* and then leveling out to normal numbers); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss* (Univ. of Hous. Law Ctr., No. 1904134, 2011), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=1904134.

41. *See, e.g.*, Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 314–15 (2008) (pointing out that "[t]he federal rulemaking process has taken the lead in dealing with E-Discovery," which "was the most prominent new issue in American litigation in the last decade").

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

43. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (current version at 28 U.S.C. §§ 2071–2077 (2006)); *see also* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–18 (2002) (reviewing the most recent amendments to the rulemaking process). For a detailed history of the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

44. The innovation of notice-and-comment rulemaking was not a part of federal law until the passage of the Administrative Procedure Act in 1946. See *infra* notes 176–180 and accompanying text.

45. *See* Order, Appointment of the 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).

46. *See* Act of June 19, 1934 § 1, 48 Stat. at 1064 ("[T]he Supreme Court of the United States shall have the power to prescribe . . . for the district courts of the United States . . . the forms of . . . practice and procedure in civil actions . . . .").

47. *See id.* § 2, 48 Stat. at 1064.

period,[48] it did on occasion exercise its authority to revise Advisory Committee proposals prior to submission to Congress.[49] At least once, the Court exercised its rulemaking authority directly in amending a Rule of Criminal Procedure, bypassing the Advisory Committee entirely.[50]

The rulemaking process become more reticulated in 1958 when Congress created the Judicial Conference of the United States, which took over the direct supervision of the Advisory Committee from the Court.[51] This new structure resulted in decreased input into the rulemaking process by the Justices.[52] Indeed, during this period, the Court unfailingly promulgated Rules recommended to it by the Judicial Conference, leading Justices and commentators to describe the Court's role in rulemaking as one of being a "'mere conduit' for the work of others."[53]

By the late 1970s, observers of the rulemaking process, including Chief Justice Burger,[54] leveled charges at every step in the process. They argued that Congress's review of the Rules was flawed.[55] They similarly argued that the Court was not

48. *See* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 677 (1975) ("Although the Justices generally deferred to the Committee's expertise during [this time], they at least read and, when appropriate, rejected proposed alterations.").

49. *See* Struve, *supra* note 43, at 1106 n.11 (listing Court-imposed revisions to rules promulgated by the Advisory Committee during this initial twenty-year period).

50. *See* Charles E. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC. 250, 257 (1963). Congress merged the Court's civil and criminal rulemaking authority under one statute in 1988. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 404(a)(1), 102 Stat. 4642, 4651 (1988). Nevertheless, the relevant criminal procedural rules enabling act then in force, Act of June 29, 1940, ch. 445, 54 Stat. 688, was sufficiently similar to the civil Rules Enabling Act to render the Court's action relevant here. *See* Struve, *supra* note 43, at 1106 n.12.

51. *See* Struve, *supra* note 43, at 1107.

52. *See* Friedenthal, *supra* note 48, at 677 ("The removal of the direct connection between the advisory committees and the Court appears to have caused deterioration . . . in the level of supervision exercised by the Court.").

53. *Id.* at 685; *see also* Order of Apr. 29, 1980, 446 U.S. 997, 998 n.1 (1980) (Powell, J., dissenting) (advising Congress to "bear in mind that our approval of proposed Rules is more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves"); Order of Apr. 28, 1975, 421 U.S. 1022, 1022 (1975) (Douglas, J., dissenting); Order of Jan. 27, 1971, 400 U.S. 1031, 1036 (1971) (Black, J., dissenting) (dissenting from promulgation of Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates because "[w]ith our heavy caseload and the most crowded docket in history there is no use pretending that such rules can or do receive the careful, thoughtful attention of this Court"); 383 U.S. 1089, 1090 (1966) (Douglas, J , dissenting in part). At other times, however, Justice Douglas took a more involved approach to rule promulgation. *See, e.g.*, 409 U.S. 1132 (1972) (Douglas, J., dissenting).

54. *See* Warren E. Burger, *The State of the Federal Judiciary*, 65 A.B.A. J. 358, 360 (1979).

55. *See* Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 930 (1976).

an appropriate entity to promulgate Rules.[56] Commentators chastised the committee structure as acting beyond the bounds of the Rules Enabling Act[57] and for being unrepresentative and closed to public input.[58] The judiciary sought to correct many of these faults without new legislation by commissioning a Federal Judicial Center study, which, upon completion, suggested several amendments to the rulemaking process.[59]

These changes, however, did not satisfy Congress, which passed significant rulemaking reforms in 1988.[60] While retaining the Judicial Conference's role in the rulemaking process, the 1988 Act codified the role of the rulemaking committees for the first time. It mandated the existence of the Standing Committee on Rules of Practice and Procedure, which the Judicial Conference had previously established at its discretion, and charged the Standing Committee with reviewing the proposals of other duly appointed committees and making recommendations to the Judicial Conference.[61] The 1988 Act also formalized the Judicial Conference's practice of deploying area-specific advisory committees.[62] Hence, the Court can only promulgate Rules that have been vetted by the area-specific advisory committees, the Standing Committee, and the Judicial Conference.

The 1988 Act also increased representation and public participation in the rulemaking process. The Act mandates that the various advisory committees include practitioners, trial judges, and appellate judges.[63] Congress also mandated greater transparency and public input. The Act thus requires the Judicial Conference to publish its procedures for amendment and adoption of rules.[64] It further re-

56. *See id.* at 962 (contending that the Court does not possess the expertise and time required to engage effectively in rulemaking).
57. *See* Struve, *supra* note 43, at 1108.
58. *See* H.R. REP. NO. 99-422, at 16 (1987); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975).
59. *See* McCabe, *supra* note 42, at 1661–62. This study, published in 1983, resulted in several reforms, including increased public notice and the publication of decisions at various stages of the rulemaking process—changes that increased the transparency of the rulemaking process. *See* Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337 (1983).
60. *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). With the exceptions of amendments relating to the ability of rules to define finality for purposes of appellate jurisdiction, *see* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, 5115, and the addition of circumstances subject to interlocutory appeals, *see* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506, Congress has not tinkered with the rulemaking process since 1988.
61. 28 U.S.C. § 2073(b) (2006).
62. *Id.* § 2073(a)(2).
63. *Id.*
64. *Id.* § 2073(a)(1).

quires that the Advisory and Standing Committees conduct open and publicly noticed meetings, record the minutes, and make those minutes publicly available.[65] Additionally, the 1988 Act codified the longstanding practice of the Advisory Committee to attach official drafters' notes to Rule proposals.[66] Finally, the 1988 Act increased the length of the report-and-wait period to Congress. The period now stands at a minimum of seven months.[67]

Thus, the current rulemaking process comprises seven steps.[68] First, the Administrative Office of the United States Courts collects recommendations for new Rules or amendments from the public, practitioners, and judges.[69] These suggestions are forwarded to the appropriate Advisory Committee's reporter[70] (a law professor assigned to each advisory committee to set the agenda and do the initial drafting of rule revisions and explanatory notes[71]), 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.[72] Third, the Advisory Committee publishes the proposed revision widely, receives public comment, and holds public hearings.[73] 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.[74] If the Advisory Committee finds that no substantial changes to the revision are called for, it transmits the revision and accompanying notes and reports to the Standing Committee.[75] If the Advisory Committee makes substantial changes to the

65. *Id.* § 2073(c)(1)–(2).
66. *Id.* § 2073(d).
67. *Id.* § 2074(a). Since the 1988 amendments, Congress has only rarely exercised its power to halt or revise Rules. *See* Struve, *supra* note 43, at 1115. For example, Congress enacted the provisions of what is now Federal Rule of Evidence 412 after the Court rejected proposed amendments to the rape shield evidentiary rule that the Judicial Conference approved (in one of the few instances where the Court did not rubberstamp the Judicial Conference's work product). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918 (codified in scattered sections of 42 U.S.C.); McCabe, *supra* note 42, at 1661 n.36.
68. *See* Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 195 F.R.D. 386 (2000).
69. *See* McCabe, *supra* note 42, at 1672.
70. *Id.*
71. *Id.* at 1664–65.
72. *Id.* at 1672.
73. *Id.*
74. *Id.*
75. *Id.* at 1672–73.

proposed revision, it must go through another public notice-and-comment period.[76] Fourth, the Standing Committee reviews the proposed revision.[77] If it makes substantial changes to the proposed revision, the Standing Committee returns the proposed revision to the Advisory Committee.[78] If the Standing Committee does not make substantial changes, it sends the proposed revision to the Judicial Conference.[79] Fifth, the Judicial Conference considers proposed revisions each September, sending approved revisions to the Court or rejected proposals back to the Standing Committee.[80] 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 Congress those Rules it seeks to promulgate.[81] 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.[82]

C. Analogous Experiences of Agencies and the Court in Rulemaking

Like most agencies, then, the Court in the civil procedure arena is an institution that sets policy. It engages in this task, much as an agency would, with a discretionary docket and the choice of setting policy by way of adjudication or rulemaking. Moreover, the history of the court rulemaking process and the prevailing views of its legitimacy are remarkably similar to that of administrative law, further bolstering the analogy between the Court in the civil procedure context and an administrative agency.

While the campaign for a federal court rulemaking model was initiated by a famous speech from Roscoe Pound to the American Bar Association in 1906,[83] the Rules Enabling Act was not enacted until 1934 during the heart of the New Deal.[84] The proponents of the court rulemaking model thought that the judiciary,

76. *Id.* at 1673.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. 28 U.S.C. § 2074(a) (2006).
82. *Id.* If Congress decides to reject or modify proposed changes to the Rules 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) ("The [Rules Enabling Act] did *not* provide that Congress could unilaterally veto the Federal Rules. Rather, it gave Congress the opportunity to review the Rules before they became effective and to pass legislation barring their effectiveness if the Rules were found objectionable.").
83. *See* Bone, *The Process of Making Process*, *supra* note 16, at 893–94; Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513 (2006).
84. *See* Burbank, *supra* note 43 (providing a comprehensive historical treatment).

rather than the legislature, should promulgate the Rules because they believed in a sharp dichotomy between substance and procedure and trusted that courts would devise sound procedural rules through the application of "neutral expertise."[85] This view largely prevailed during the 1950s and 1960s, which corresponded with a period of significant consensus in favor of legal process theory in American public law and resulted in "the golden age of court rulemaking."[86] When the prevailing societal consensus collapsed, and law (including procedural law) became viewed as inherently political, Congress revised the court rulemaking process[87] in an effort to ensure the representation of all affected interests in the legislative process of promulgating Rules.[88] Despite those reforms, the legitimacy of the court rulemaking process has been repeatedly challenged since the 1980s on the grounds that the relevant decisionmakers are unelected and therefore politically unaccountable and because the policy choices of the rulemakers are not subject to sufficient political control.[89] Meanwhile, proponents of court rulemaking worry that increased participation rights and multiple levels of review have made the process unduly burdensome and inefficient, resulting in increased use of adjudication to set policy.[90] In other words, critics of court rulemaking complain that unaccountable public

85. As Robert Bone has explained, judges were viewed as neutral experts immune from political pressures and thus assumed to render more rational and fair systemic rules. *See* Bone, *The Process of Making Process*, *supra* note 16, at 896; *see also* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1708 (2004) ("[I]t cannot have hurt that the delegation and the rhetoric used to support [the Rules Enabling Act] were consistent with the ethos of the emerging administrative state."); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1272–80 (1997).

86. *See* Bone, *The Process of Making Process*, *supra* note 16, at 897–99.

87. *See supra* notes 54–67 and accompanying text.

88. *See* Bone, *The Process of Making Process*, *supra* note 16, at 902–07 (describing the decline of the court rulemaking model and explaining that "[t]he result is a shift away from a model based on expertise and toward one based on representation and accommodation of competing interest groups"); Burbank, *supra* note 85, at 1711; Walker, *supra* note 15, at 472; Walker, *supra* note 85, at 1285.

89. *See, e.g.*, Bone, *The Process of Making Process*, *supra* note 16, at 907–09 (describing the modern justificatory dilemma of court rulemaking, recognizing its similarity to the problems of legitimacy with the administrative state, and explaining that critics use concerns about legitimacy and efficacy "to demand changes in rulemaking procedures, to object to particular rules, and to call for greater congressional involvement"); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1191, 1211–14 (1996).

90. *See, e.g.*, Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 244–46 (1997) (recognizing the analogy between the ossification of informal rulemaking in administrative law and similar problems with court rulemaking and pointing out that "[t]he use of case-by-case adjudication to circumvent or preempt court rulemaking obstacles posed by the Enabling Act process is not unknown"); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 229 (1998) ("[W]e should reduce the encrustation of steps in the [court rulemaking] process, returning it to essentially two steps before presentation to Congress.").

officials are making discretionary policy choices, while proponents of court rulemaking worry that prior legislative reforms have resulted in the ossification of this desirable process.

The legitimacy of the administrative state has experienced a very similar historical development. The New Deal era was characterized by a progressive belief in the ability of administrators to solve social problems identified by the legislature through the application of neutral expertise.[91] The disciples of legal process theory were largely comfortable with broad delegations of lawmaking authority from Congress to agencies with limited political interference and deferential judicial review of agency policy decisions.[92] This belief in neutral expertise waned over the next several decades, reflecting a loss of faith in the objectivity of science, a recognition that agencies were necessarily making value judgments in the course of implementing their statutory authority, and a growing belief that democracy required such decisions to be resolved in a manner consistent with the will of the majority.[93] Moreover, there was an increased recognition of the importance of the influence of interest groups in a pluralistic democracy and a growing concern that agencies were vulnerable to being captured by the interests they were ostensibly charged with regulating.[94] Accordingly, administrative law shifted during the late 1960s and 1970s toward the interest group representation model, which 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."[95] During the past quarter century, this model has been criticized, in part, for its failure to ensure that agency policy decisions are subject to sufficient political control and also for imposing unduly burdensome procedural requirements on agencies, which many argue resulted in the ossification of the rulemaking process[96] and created the same ossification concerns raised by the court rulemaking process. While the interest group representation model still has a place in

91. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1677–78 (1975).
92. *See* Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 576–83 (1992).
93. *See* Stewart, *supra* note 91, at 1681–87; *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 475–85 (2003) (describing the majoritarian underpinnings of the interest group representation model).
94. *See* Stewart, *supra* note 91, at 1711–13.
95. *Id.* at 1670.
96. *See* Bressman, *supra* note 93, at 485–91 (describing the shortcomings of the interest representation model and the transition to presidential control); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2269–2319 (2001).

administrative law, those criticisms have ensured that its place is not at the center of the modern regulatory state's legitimacy.[97]

While the analogy is not seamless,[98] four key features demonstrate the similarity between administrative agencies and the Court in the civil procedure context. First, both agencies and the Court have been delegated authority to make policy in their respective fields through orders entered in adjudication. Second, both agencies and the Court have been delegated authority to make policy through notice-and-comment rulemaking. Third, because the law does not typically compel these institutions to make policy through a particular procedural vehicle, both agencies and the Court routinely confront choice-of-policymaking-form decisions. 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. As these four points illustrate, our administrative law analogy rests upon the Court's choice of policymaking form—not the Court's mere policy-setting function. That is, we fully recognize that the Court's opinions routinely set policy in other areas just as they do in Rules cases. Thus, it is this ability to deploy rulemaking in the civil procedure context that we contend is most salient for our analogy.[99]

97. *See* Bressman, *supra* note 93, at 485; *infra* Part IV.C (discussing contemporary theories of legitimacy).

98. For example, the current court rulemaking model is best described as a bottom-up process, whereas agency rulemaking is traditionally described as a top-down process. *See* William N. Eskridge, Jr., *Public Law From the Bottom Up*, 97 W. VA. L. REV. 141, 173–74 (1994). Additionally, the court rulemaking process lacks hard-look review. This was not always the case, however. Under the 1934 version of the Rules Enabling Act, Congress empowered the Court to exercise direct and exclusive control over the Advisory Committee that was accompanied with, if not hard-look review, at least a more rigorous oversight than is found today. *See supra* notes 43–50 and accompanying text. Moreover, we advocate for statutory reforms that would lead to greater involvement by the Justices both in initiating rulemakings and reviewing the final products of these rulemakings, thus strengthening our agency analogy, *see infra* Part IV, and resulting in a hybrid bottom-up and top-down model. *Cf.* Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669, 729–39 (2010) (proposing a "dynamic model of regulation" based upon the insight that "purely top-down regulatory solutions are ill fitted to risk management and unchanneled bottom-up solutions fall short of public goals"). We discuss other gaps in the analogy below. See *infra* notes 265–273 and accompanying text.

99. This is not to say that our position favoring rulemaking might not have implications for matters of statutory construction or review of administrative decisions. We reserve those discussions for the time being and do not intend, in this Article, to critique the Court's policymaking by adjudication in other areas.

II. THE LESSONS OF ADMINISTRATIVE LAW—THE SUPERIORITY OF RULEMAKING

Concluding, as we do, that the Court functions much like an agency in the Rules context, it is apt to consider administrative law best practices when discussing how the Court should handle its civil procedure regulatory task. Because it is widely recognized that 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.[100] This literature recognizes the "obvious point" that "the agency makes an important choice when it selects the policymaking form its actions will take."[101] An agency's choice of policymaking form is important because rulemaking and adjudication have distinct advantages and drawbacks as policymaking vehicles. The conventional wisdom in administrative law, however, is that rulemaking is the superior policymaking form in the vast majority of circumstances. Administrative law scholars have therefore advocated greater use of rulemaking by agencies and articulated criteria that should guide an agency's choice of policymaking form.[102] This Part begins by describing these lessons of administrative law and explaining how they are broadly applicable to the Supreme Court's choice of policymaking form in the civil procedure context. We then draw upon these lessons to suggest that the Court should adopt a presumption in favor of making policy decisions in the field of civil procedure though the rulemaking process, a presumption that should only be rebutted in cases that involve legal issues that can be resolved through traditional tools of statutory interpretation.

100. For a sampling of this literature, see Warren E. Baker, *Policy by Rule or Ad Hoc Approach—Which Should It Be?*, 22 LAW & CONTEMP. PROBS. 658 (1957); Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986); Arthur Earl Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990); Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363 (1986); Ralph F. Fuchs, *Development and Diversification in Administrative Rule Making*, 72 NW. U. L. REV. 83 (1977); William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103; Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529 (2005); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974); and Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, REGULATION, July/Aug. 1981, at 25. *See also* Magill, *supra* note 9, at 1403 n.69 (collecting sources).

101. Magill, *supra* note 9, at 1397.

102. *See, e.g.*, Baker, *supra* note 100.

A. The Superiority of Rulemaking in Administrative Law

We begin with a review of rulemaking in administrative law. When the regulatory state was expanded during the New Deal, it was generally expected that administrative agencies would continue the traditional practice of implementing their statutory mandates primarily through case-by-case adjudication.[103] The use of notice-and-comment rulemaking, however, eventually increased "with such speed that by the early 1970s commentators declared that the administrative state had entered the 'age of rulemaking.'"[104] Then-Professor Antonin Scalia wrote in 1978 that "perhaps the most notable development in federal government administration during the past two decades" has been "the constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking."[105] Part of the explanation for this development is that agencies, courts, and commentators recognized that, in many situations, "rulemaking has definite advantages over adjudication as a tool for agency lawmaking and policymaking"[106]—many of which apply to the Court as a rulemaker.

First, rulemaking is widely viewed as a better procedure than adjudication for making policy and exploring issues of legislative fact because the Administrative Procedure Act of 1946's (APA) informal rulemaking procedures are specifically designed for this purpose.[107] This advantage is directly applicable to the court rulemaking functions—as explained above, the latest version of the Rules Enabling Act largely mimics the APA.[108] We elaborate upon this point in the following Part, which discusses our proposed criteria for triggering court rulemaking.[109]

A second advantage of rulemaking over adjudication in administrative law is that anyone who is interested can participate in rulemaking, while adjudication

103. *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1145–46 (2001).
104. *Id.* at 1147 (quoting Wright, *supra* note 100, at 376).
105. Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376.
106. MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 192 (3d ed. 2009).
107. *See supra* notes 68–76 and accompanying text.
108. *See* ASIMOW & LEVIN, *supra* note 106, 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").
109. *See infra* Part III.

is generally limited to the parties in a case.[110] This advantage has both formal and functional dimensions. From a formal perspective, an order entered during adjudication can result in the creation of precedent that binds parties in subsequent cases, even though those parties had no opportunity to participate in the formulation of the law or policy at issue.[111] Conversely, everyone who receives notice of a proposed rulemaking is invited "to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[112] Moreover, hard-look judicial review ensures that agencies consider and respond to the significant comments in the administrative record and that they take competing interests and perspectives into account during the rulemaking process.[113] From a functional perspective, the rulemaking proceedings of administrative agencies are far more visible and attract substantially more public attention than the vast majority of individual cases.[114] This means that ordinary citizens, interest groups, and elected officials are more likely to know that an important legal or policy issue is on the agency's agenda during the rulemaking process.[115] They can therefore mobilize and seek to influence the agency's legal and policy decisions.[116] Indeed, the APA requires agencies to give advance notice of proposed rulemaking and thereby limits the extent to which they can resolve unanticipated issues in their final rules,[117] whereas the precise content of adjudicatory orders frequently depends upon the potentially idiosyncratic concerns of the parties and agency decisionmakers and is therefore relatively unpredictable.[118]

110. *See* ASIMOW & LEVIN, *supra* note 106, at 192–93; PIERCE, *supra* note 108, § 6.8, at 368–69.
111. *See* ASIMOW & LEVIN, *supra* note 106, at 192–93.
112. 5 U.S.C. § 553(c) (2006).
113. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61–64 (1985) (explaining how the hard-look doctrine promotes principles of deliberative democracy).
114. *See* PIERCE, *supra* note 108, § 6.8, at 369–70.
115. *See* Shapiro, *supra* note 100, at 940 (recognizing that rulemaking is generally more accessible than adjudication and claiming that "the enunciation of rules in adjudicatory proceedings frequently has the effect of 'hiding the ball' from those who are not initiated into the mysteries of a particular agency and its works").
116. *See* ASIMOW & LEVIN, *supra* note 106, at 193; PIERCE, *supra* note 108, § 6.8, at 369–70; *see also* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).
117. *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985) (invalidating a final rule that was not a "logical outgrowth" of the agency's proposed rule).
118. *See* PIERCE, *supra* note 108, § 6.8, at 368–69.

These participatory[119] and transparency[120] advantages apply to court rulemaking as well, although not as starkly as in the agency context. The high visibility of the Court's work and the potential to file amicus briefs[121] mitigate some of the participatory and transparency issues in agency policy setting. Nevertheless, there are likely to be fewer surprises and a much broader range of participation in court rulemaking than in adjudication, and rulemaking includes the opportunity for a legislative veto. *Twombly*, in particular, demonstrates how the Court can use adjudication to make dramatic changes to the Rules without providing advance notice or a meaningful opportunity to participate.[122]

A third advantage of rulemaking over adjudication is that the former 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.[123] In adjudication, by contrast, an agency's agenda may be dictated by the happenstance of whatever cases come before it. Even if the agency has discretion over which cases to pursue, the facts of any particular test case may not turn out as the agency had anticipated.[124] In addition, an agency's use of rulemaking to make law or policy provides the opportunity to adopt a far more comprehensive solution to any particular problem than is frequently available through adjudication.[125] This is particularly true when an agency's policy decisions

119. *See* Struve, *supra* note 43, at 1126 (explaining that "[a] court faced with an interpretive question in the context of litigation could not . . . provide [the] extensive opportunities for public input" that are offered by the court rulemaking process); Sellers, *supra* note 16, at 365; Spencer, *supra* note 16, at 454.

120. *See* 28 U.S.C. §§ 2073–2074 (2006); Spencer, *supra* note 16, at 454 (emphasizing that court rulemaking's notice-and-comment procedures shine "more light on the proposals, meaning that any politically difficult changes will receive scrutiny and that opponents will have the opportunity to voice their concerns to the Committee or ultimately to Congress").

121. *See* Rebecca Haw, *Amicus Briefs and the Sherman Act: Why Antitrust Needs a New Deal*, 89 TEX. L. REV. 1247 (2011) (claiming that extensive reliance on amicus briefs "makes Supreme Court antitrust adjudication analogous to administrative notice-and-comment rulemaking" and arguing that while this approach may improve upon the traditional judicial model, "it cannot realize the full benefits of APA rulemaking").

122. *See* Clermont & Yeazell, *supra* note 16, at 847 (claiming that "a thorough airing of the choices" did not accompany *Twombly* or *Iqbal* because "[t]he Court had given no forewarning adequate to generate public discussion" and "[t]he complicated issues were not sufficiently developed by lower-court percolation, by academic or empirical studies, or even by parties' position-taking").

123. *See* ASIMOW & LEVIN, *supra* note 106, at 193–94.

124. *See id.*

125. *See* Cass, *supra* note 100, at 394 (explaining that adjudication is generally understood to represent "a commitment to the incremental resolution of problems," while rulemaking "entails the comprehensive disposition of a large number of related claims").

involve structural reforms or tradeoffs between competing policy goals.[126] Agencies typically have fewer options or alternatives when they resolve issues pursuant to adjudication because this policymaking form, by definition, proceeds on a piecemeal, case-by-case basis. While rulemaking can be time consuming and expensive, agencies are able to use this policymaking vehicle to resolve issues in a comprehensive fashion in a single proceeding, instead of litigating similar issues in multiple cases that often lead to less coherent results.[127] Accordingly, rulemaking is often a more efficient policymaking form than adjudication.[128]

While the Court's discretionary docket already affords it control over its agenda,[129] the court rulemaking process, like agency rulemaking, provides the potential for more comprehensive solutions to policy disputes than the Court can adopt through adjudication.[130] Indeed, procedural issues routinely involve the types of structural reforms or tradeoffs between competing policy goals that are more coherently and effectively addressed through rulemaking.[131] For example, Catherine Struve has pointed out that the Court construed Rule 11 in an adjudication so as not to allow sanctions against the law firm of an attorney who committed misconduct, despite strong policy arguments for a contrary result.[132] Rule 11 was subsequently amended, however, *both* to allow sanctions against the law firm of an attorney who commits misconduct *and* to provide a twenty-one-day safe harbor within which corrective action can be taken and sanctions thereby avoided.[133] As Struve explains, the Court could not adopt this solution pursuant to adjudication.[134] Similarly, some scholars have suggested that the best solution to the concerns that animated the Court's decisions in *Twombly* and *Iqbal* would be the adoption of a heightened standard of pleading *and* the crea-

126. *See* 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 contrast to adjudication, "agencies can and do make multi-dimensional decisions" when they promulgate rules).

127. *See* ASIMOW & LEVIN, *supra* note 106, at 194.

128. *See* PIERCE, *supra* note 108, § 6.8, at 370–72.

129. *See supra* note 20 and accompanying text (discussing the discretionary nature of the Court's docket). Moreover, the role of other actors, including the Advisory Committee, Standing Committee, Judicial Conference, and Congress, in the court rulemaking process suggests that the Court has less control over its agenda and the decisions that it reaches in rulemaking than it does in adjudication.

130. *See* Sellers, *supra* note 16, at 368 ("[T]he Advisory Committee can make systematic changes to the Rules and, if necessary, amend several Rules at once."); Spencer, *supra* note 16, at 454; Struve, *supra* note 43, at 1140.

131. *See supra* notes 123–128 and accompanying text.

132. *See* Struve, *supra* note 43, at 1120–24.

133. *See* FED. R. CIV. P. 11.

134. *See* Struve, *supra* note 43, at 1123.

tion of a shorter and more focused discovery period prior to ruling on a defendant's motion to dismiss a complaint.[135] The merits of this specific proposal aside, our point is that the Court could not adopt a comprehensive solution of this nature pursuant to adjudication.

Fourth, rulemaking is also widely understood to be fairer than adjudication to groups who are adversely affected by agency action.[136] First, the orders entered by agencies pursuant to adjudication typically apply retroactively to conduct that occurred before the agency's decision, whereas regulations promulgated by agencies pursuant to rulemaking are typically prospective in nature.[137] Thus, rulemaking provides citizens with advance notice of their legal rights and obligations, which may be lacking when agencies enforce, for example, broad statutory prohibitions on unfair or deceptive business practices against particular conduct for the first time during adjudication.[138] Such notice facilitates planning by promoting predictability and stability within the legal system.[139] Moreover, generally applicable agency rules tend to apply uniformly to a defined class of conduct or relatively large group of regulated entities, while the orders entered pursuant to adjudication can only be enforced directly against adverse parties to the proceedings.[140] Accordingly, rulemaking tends to promote the similar treatment of similarly situated persons and reduce arbitrary discrimination, thereby promoting values underlying the Equal Protection and Due Process Clauses of the Constitution.[141] Of course, an agency's arbitrary exercise of its enforcement discretion might still undermine those values, but individual nonenforcement decisions are a form of agency adjudication.[142] In any event, agency regulations tend to be much more visible and easy to locate and understand than adjudicatory orders (even for nonlawyers!).[143]

135. *See, e.g.*, Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the* Conley-Iqbal *Dilemma*, 114 PENN. ST. L. REV 1191 (2010).
136. *See* PIERCE, *supra* note 108, § 6.8, at 372–74.
137. *See* ASIMOW & LEVIN, *supra* note 106, at 193.
138. *See supra* note 10 and accompanying text.
139. *See* Cass R. Sunstein, *Problems With Rules*, 83 CALIF. L. REV. 953, 976 (1995).
140. *See* ASIMOW & LEVIN, *supra* note 106, at 193.
141. *See* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1028–43 (2006) (describing the constitutional norms of fairness and equality); Sunstein, *supra* note 139, at 974 (recognizing that rules have a tendency to reduce "bias, favoritism, or discrimination in the minds of people who decide particular cases").
142. *See generally* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985).
143. *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2154 (2004) ("[T]he CFR, periodically revised by agencies under their broad delegated authority with an eye to making the law more accessible and improving voluntary compliance, is something that even nonlawyers can often follow.").

Rulemaking therefore facilitates political oversight of agency decisionmaking by elected officials and reinforces the advance notice that is provided to citizens of their legal rights and obligations.[144]

Again, many of these benefits apply to the Rules promulgated by the Court. Rules that the Court adopts pursuant to the rulemaking process are often prospective in nature, which means that litigants and nonparties have advance notice of their rights and obligations and the ability to plan accordingly.[145] In contrast, the orders entered by the Supreme Court during adjudication typically apply retroactively to the parties, which means that a mistaken understanding of the applicable Rules, or even a good-faith interpretation of existing precedent, could undermine the party's chances of prevailing in the litigation.[146] Such adverse consequences can be avoided in some circumstances, depending upon the Rule in question and the status of the case.[147] Thus, for example, the plaintiffs in *Twombly* and *Iqbal* could potentially move for leave to amend their complaints on remand in an effort to comply with the Court's new pleading standard.[148] Nonetheless, there are situations where a party will lose a case or become severely disadvantaged by the Court's decision—a problem that could have been avoided if the law had been clarified pursuant to the court rulemaking process in the first instance.[149]

B. A Presumption in Favor of Rulemaking

Thus, while rulemaking is by no means a magic cure-all, the key lesson to be learned for present purposes is that the overwhelming consensus in ad-

144. *See supra* notes 113–115, 136–138 and accompanying text.

145. *See* 28 U.S.C. § 2074(a) (2006) (setting forth an effective date for amendments to the rules).

146. *See supra* notes 136–142 and accompanying text (discussing the retroactive nature of adjudication); *cf. supra* notes 21–40 and accompanying text (describing the Court's dramatic change of course in *Twombly* and *Iqbal*).

147. In Part IV of this Article, we advocate that revisions to the Rules should apply retroactively. We do not believe our later stance undercuts the validity of the general proposition made here for several reasons. First, as we discuss in Part IV, we believe that in this context vesting Court adjudications with retroactive application, but not rulemakings, would lead to odd incentives. Second, as we note in this Part, retroactive application in the rulemaking setting is not overly damning given the opportunity to remand. Third, even when proposed changes to the Rules are applied retroactively, interested parties are given advance notice of this possibility during the course of the rulemaking process. The Court does not necessarily provide this type of notice when it revises the Rules pursuant to adjudication. *See, e.g.*, *supra* note 122 and accompanying text (explaining that many of the issues resolved in *Twombly* were not addressed by the parties or subject to public debate).

148. *See* FED. R. CIV. P. 15(a)(2).

149. *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (reversing a decision, which was based on earlier precedent, that summary judgment was inappropriate, and adopting a new standard for evaluating defendant's motion).

ministrative law is that rulemaking is generally the superior policymaking form.[150] Moreover, many of the advantages of rulemaking generally apply to the court rulemaking process. As such, we argue that the Court should adopt a presumption in favor of resolving the issues presented by Rules cases through notice-and-comment rulemaking.

Although we propose the adoption of a presumption in favor of rulemaking on civil procedure issues, we do not challenge the Court's inherent power, even when not coupled with statutory authority, to control court procedure by court order or by adjudication.[151] Rather, we argue that notice-and-comment rulemaking is normatively superior to adjudication in making civil procedure policy, just as the Court has recognized in the administrative law context. Tracking this analogy, we argue that the Court should not feel compelled to *mandate* notice-and-comment rulemaking on civil procedure issues, but the Court should explicitly adopt a strong preference for it. As the Court explained in the administrative law context:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.[152]

Similarly, one of the most common recommendations of leading administrative law scholars in the late 1950s and early 1960s was "to de-emphasize policy-making through case-by-case adjudications and instead shift to the definition of standards

150. *See* PIERCE, *supra* note 108, § 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 9, at 1403 n.69, 1415 n.112 (reviewing the formative literature on this topic and reporting that "the bottom line" is that "agencies should rely on rulemaking much more often" than adjudication). *But cf.* Robinson, *supra* note 100 (expressing indifference regarding the choice between rulemaking and adjudication).

151. *See, e.g.*, Rule, 2 U.S. (2 Dall.) 411, 413–14 (1792) (Jay, C.J.) (stating that while the "Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court," it retained the power, without statutory authorization, to "from time to time, make such alterations therein, as circumstances may render necessary"); *see also* Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) xiii (1822) (adopting formal rules of equity practice); 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1001, at 2 n.2 (3d ed. 2002) (listing authorities supporting the Court's inherent authority to craft procedural rules).

152. *Chenery II*, 332 U.S. 194, 202 (1946).

through policy statements and rulemakings."[153] Congress, agencies, and courts were largely receptive to this prescription for reform, which helped lead to the age of rulemaking in the late 1960s and 1970s.[154] During this period, leading commentators extolled the superiority of rulemaking over adjudication as a policymaking form.[155] The Administrative Conference of the United States subsequently endorsed the proposition that "[w]here the agency is, in effect, announcing a future policy, we believe it generally is best to use the rulemaking process."[156] In 1981, the Commissioners on Uniform State Laws went even further and recommended that states incorporate provisions into their APAs that would establish a general mandatory preference for agency lawmaking by rule and a general mandatory obligation for agencies to displace any lawmaking conducted through adjudication with subsequently enacted rules.[157] The contemporary literature on administrative law does not seriously debate rulemaking's superiority over adjudication as a lawmaking or policymaking form.[158]

Of course, there is no reason to expect the Rules to be perfect just because the Court routed them through the rulemaking process.[159] Moreover, Court adjudication is undoubtedly faster and less expensive than court rulemaking.[160] Finally, there are tasks, such as the interpretation of the Rules in straightforward cases, for which the Court (as an adjudicatory body) enjoys institutional advantages over the rulemaking process. Accordingly, there will be a legitimate need for

153. Schiller, *supra* note 103, at 1150; *see* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR A BETTER DEFINITION OF STANDARDS 143–47 (1962); Baker, *supra* note 100; Fuchs, *supra* note 100; Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Shapiro, *supra* note 100.

154. *See* Schiller, *supra* note 103, at 1147–52.

155. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 102, 219–21 (1969); Wright, *supra* note 100, at 376 ("[W]hen Congress has adopted a regulatory solution, and when the Delegation Doctrine does not bar that solution, the case for making administrative policy through rules, rather than adjudicatory decisions, is overwhelming." (emphasis omitted)).

156. ADMIN. CONFERENCE OF THE U.S., A GUIDE TO FEDERAL AGENCY RULEMAKING 83 (1983).

157. *See* MODEL STATE ADMIN. PROC. ACT § 2-104(3) to (4) (1981); *see also* Bonfield, *supra* note 100 (advocating these requirements).

158. Rather, there is widespread concern that stringent analytical requirements and external review mechanisms have ossified the rulemaking process, and commentators have therefore designed and proposed reforms to facilitate legislative rulemaking by agencies. *See, e.g.*, McGarity, *supra* note 17; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995).

159. See *infra* notes 313–322 and accompanying text (discussing problems with rules and advantages of adjudication).

160. *See* Yeazell, *supra* note 90, at 235 (describing the difficulty of amending the Rules under today's process and claiming that if one were to describe the process as "cumbersome," it would be "a quite measured comment"). We offer some reforms to ameliorate this concern in Part IV.

residual adjudication regarding the meaning and proper application of the Rules in particular cases.

III. CHOOSING A POLICYMAKING FORM

Having established the reasons for creating a presumption in favor of rulemaking on civil procedure issues, we now turn to the articulation of criteria detailing when this presumption should apply. To that end, we offer three formulations of what is likely but one notion: namely, that when the Court can decide a Rules case using traditional tools of statutory interpretation, efficiency and institutional advantages weigh in favor of resolution by adjudication. We couch this idea, however, in administrative law terms on the theory that these bodies of law are sufficiently well developed to provide a rich source of meaningful guidance for particular cases. First, we contend that the Court should resolve civil procedure issues through notice-and-comment procedures when an interpretation of a Federal Rule of Civil Procedure rests substantially on legislative facts. Next, we argue that the Court should refer issues that arise in civil procedure cases to the court rulemaking process when those issues would be resolved pursuant to the second step of a *Chevron*-like inquiry. Finally, we conclude that the Court should route to the Advisory Committee those civil procedure decisions that will produce policy pronouncements akin to legislative rules. The presence of any one of these criteria should favor deploying the preference for civil procedure rulemaking. Conversely, only when all three criteria are lacking should resolution by adjudication be the best course.

A. Legislative Facts v. Adjudicative Facts

First, we contend that the Court should deploy notice-and-comment rulemaking when the issue before the Court rests, at least in large part, on a question of legislative fact because this procedure is superior to the adjudicatory process for determining legislative facts.[161] Courts have long distinguished between legislative and adjudicative facts.[162] While the distinction between legislative and

161. *See, e.g.*, PIERCE, *supra* note 108, § 6.4.3, at 326 (explaining the distinction between adjudicative and legislative facts and how the adversary process enhances the accuracy of the former but not the latter); Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 941 (1980).

162. *See* Lewis v. Rucker, [1761] 97 Eng. Rep. 769 (K.B.) 772 (recognizing the distinction and noting that the court was free to obtain legislative facts off the record "by conversing with some gentlemen of experience in adjustments").

adjudicative facts may not be ironclad, generally speaking, adjudicative facts are those pertaining to the litigants, their activities, and their properties.[163] That is, adjudicative facts are the historical facts of a dispute the determination of which traditionally falls within the province of the jury.[164] Legislative facts, on the other hand, "are those [facts that] a tribunal seeks in order to assist itself in the legislative process of creating law or determining policy."[165] Such facts are "general [in nature] and do not concern merely the immediate parties."[166]

Given the Supreme Court's role as lawmaker, even in the adjudicatory form, it must often rely on legislative facts in rendering decisions.[167] Despite this imperative, the Court has consistently failed to adopt an effective means of obtaining reliable legislative facts on which to base its opinions.[168] This is the case because trial courts, which create the record on which the Court bases its rulings, are themselves poor venues for determining legislative facts.[169]

The reasons for this inadequacy parallel those given by administrative law scholars for the failure of formal rulemaking to acquire legislative facts.[170] Formal

163. *See* Kenneth Culp Davis, *Official Notice*, 62 HARV. L. REV. 537, 549 (1949) (providing the definitive modern treatment of the distinction between legislative and adjudicative facts); *see also* FED. R. EVID. 201(a) advisory committee's note (adopting Davis's distinction between adjudicative and legislative facts).

164. FED. R. EVID. 201(a); *see* Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 244 n.52 (5th Cir. 1976) (Brown, J., concurring).

165. Davis, *supra* note 163, at 549.

166. *Id.*

167. *See* Prentis v. Atl. Coast Line Co., 211 U.S. 210, 227 (1908) (Holmes, J.) ("As the judge is bound to declare the law he must know or discover the facts that establish the law."); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1921); Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108 & app. (1997) (documenting increased citation to nonlegal materials in Supreme Court cases over a number of terms).

168. *See* Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 9–11 (1986) (reviewing seven different approaches the Court has deployed to solve the difficulty of determining legislative facts and concluding: "[N]othing it can do is as satisfactory as what . . . an agency would normally do, for the Supreme Court has no properly qualified staff to make an appropriate study or investigation of legislative facts . . . . 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.").

169. *See, e.g.*, *Usery*, 531 F.2d at 244 (Brown, J., concurring) ("And it is the capacity of an administrative agency to marshal the abundant material from all aspects of a given industrial activity that gives to this important governmental machinery its acceptable expertise [over trial courts].").

170. Rulemaking under the Administrative Procedure Act (APA) may be "informal," *see* 5 U.S.C. § 553 (2006), or "formal," *see id.* §§ 556–557. Informal rulemaking proceeds by the publication of a proposed rule, receipt and consideration of comments from the public, and issuance of the rule with a statement of its basis and purpose. *Id.* § 553(c). Formal rulemaking follows the same format except that instead of receipt and consideration of comments, the agency must hold oral evidentiary hearings similar to a trial. *Id.* §§ 556–557.

rulemakings are attempts, via oral hearing and cross-examination, to determine legislative facts that will inform the substance of an administrative rule (that is, they are attempts to discern background facts against which to legislate).[171] Such attempts have been unmitigated disasters because this adversarial format, when not limited to the determination of the historical facts of a particular dispute, empowers opposing counsel near-unbounded leave to challenge every proposition. Agencies thus spend inordinate amounts of time and money establishing even the most rudimentary of legislative facts.[172] Accordingly, "the near-universal result of requiring an agency to issue rules only through formal rulemaking [is that] the agency abandons any effort to issue rules."[173] Similarly, the Court, in part as a consequence of the inability of trial courts to create records regarding legislative facts,[174] tends to perform poorly in this regard when it is left to backfill necessary legislative facts while the case is on appeal.[175]

Notice-and-comment rulemaking, on the other hand, is well suited to accurately determining legislative facts. Section 553 of the APA contains three basic requirements for legislative rulemaking. First, an agency must publish advance notice of proposed rulemaking in the Federal Register, setting forth the text of the agency's proposal or a description of the relevant issues.[176] Second, an agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments, with or without opportunity for oral presentation."[177] Third, the agency must publish its final rules with "a concise general statement of their basis and purpose,"[178] which essentially requires the agency to provide a reasoned explanation for its decision based on the administrative record to withstand hard-look judicial review.[179] Kenneth Culp Davis

171. *See* PIERCE, *supra* note 108, § 7.2, at 419.
172. *See id.* at 416–19; Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1278–1313 (1972) ("Another proceeding involving the standard of identity for peanut butter developed a transcript of over 7,700 pages, largely directed to the question whether the product peanut butter should consist of 90 percent peanuts or 87 ½ percent peanuts.").
173. PIERCE, *supra* note 108, § 7.2, at 417.
174. The Court will on rare occasion remand to a trial court for development of legislative facts. *See, e.g.*, Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194 (1934).
175. *See* Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 37–38 (1978); 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 (1975); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113 (1988).
176. *See* 5 U.S.C. § 553(b) (2006).
177. *Id.* § 553(c).
178. *Id.*
179. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

famously referred to this process as "one of the greatest inventions in modern government,"[180] partly because it allows an agency to gather and consider any information that is relevant to its policy decision.

The widespread admiration for notice-and-comment procedures in administrative law has led some scholars to lament their absence from the Court's process[181] of determining legislative facts in cases on its general docket and to offer a string of second-best proposals.[182] In suits dealing with the Rules, however, there is no need to settle for second best, given that the institutional advantages of rulemaking in collecting legislative facts apply with equal force to the court rulemaking process.[183] After a Rules case has proceeded through a court of appeals, it will normally be apparent in the lower court opinion and the briefing whether a suit is dependent upon a determination of legislative facts. In such instances, the Court should direct the Advisory Committee to initiate a notice-and-comment proceeding and thereby employ its institutional advantages in determining legislative facts.

The presence of questions of legislative facts as a factor for deploying a notice-and-comment procedure is likely to be of special importance in cases where the Court is asked to overturn a past interpretation of a Rule. This issue arises with some frequency, as the *Twombly* Court's decision explicitly to overrule *Conley* during the course of adjudication illustrates. As with its interpretation of statutes, the Court should be loath to overturn Rules precedents in an adjudicatory form[184]—especially where the basis for the overruling is a change in legislative facts—because notice-and-comment rulemaking provides a superior venue for making such a determination.[185] Even if the Court rejected a statute-like rule of

180. 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.1, at 448 (2d ed. 1978).

181. *See supra* note 168 (citing scholarship noting the lack of notice-and-comment procedures at the Court); *infra* notes 182, 351 (citing proposals that suggest that the Court could deploy notice-and-comment procedures even in the adjudicatory venue).

182. *See* Davis, *supra* note 161, at 940 ("Although the Court in some circumstances may judicially notice legislative facts without having solid information about them, still when the facts are crucial in the lawmaking and either complex or doubtful the Court should normally make a choice between asking for factual briefs and remanding for factual development."); *supra* note 175.

183. *See* Bone, *Plausibility Pleading Revisited*, *supra* note 16, at 884 ("[T]he Advisory Committee on Civil Rules can collect and process information, assess global effects, and compare different . . . options, [in addition to] invit[ing] public participation by holding hearings and soliciting written input.").

184. *See* Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) (holding that once the Court has construed a statute, stability is the rule, and the Court "will not depart from [it] without some compelling justification"); Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989) (holding that the Rules should be interpreted as if they were statutes).

185. *Cf.* Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of

stare decisis in this context,[186] and thereby treated its prior interpretations of the Rules as analogous to constitutional decisions, it should still refer issues that turn on legislative facts to the court rulemaking process. The Court's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[187] illustrates why this is so. In *Casey*, the Court outlined those criteria it uses to determine when the doctrine of stare decisis might be overcome in constitutional cases. The Court found four factors relevant: (1) the rule has proved to be unworkable, (2) the rule has created unique reliance interests, (3) the rule rests upon principles of law that have now been abandoned, and (4) the rule rests upon facts that have changed or come to be seen differently.[188] Tellingly, workability, general reliance interests, and changes to background facts are all inquiries into legislative facts (that is, general facts that affect everyone, not historical facts pertaining to a particular dispute).

Twombly presents a prime example of the role played by legislative facts in the civil procedure arena. The Court based its decision to overrule *Conley* in large part on a legislative fact: "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment.[189] Assuming this starting point, it would be worthwhile to know whether the costs and burdens of discovery are excessive, when this is true, if anything else could be done to address the problem, and the likely impact of a revised pleading standard on plaintiffs with valid causes of action.[190] Yet no brief, not even an *amicus* brief, set forth any data to support the Court's finding of this legislative fact.[191] Indeed, reliance on untested folk wisdom is, unfortunately, a common feature of debates about discovery. As "[t]wo Senior Researchers at the Federal Judicial Center

constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."); FED. R. CIV. P. 11(b)–(c) advisory committee's note (1993 amendments) (noting that the amended rule overturns *Pavelic & LeFlore*, which held that the 1983 version of Rule 11 did not permit sanctions against the law firm of an attorney signing a groundless complaint).

186. *See infra* note 220 (discussing Joseph Bauer's and Karen Moore's views that the Court should take a more expansive interpretive role in Rules cases).

187. 505 U.S. 833 (1992).

188. *Id.* at 854–59.

189. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

190. *See* Bone, *Plausibility Pleading Revisited*, *supra* note 16, at 883–84 (arguing that the Court "is not the optimal institution to design a strict pleading rule" because the requisite cost-benefit analysis "depends on empirical information about the frequency of meritless litigation, the difficulty of access to pre-filing information, the impact of litigation costs on government actors, and other factors," which "[t]he Court is not in a good position to gather and process," and because the Court is not well suited "to compare strict pleading to other methods for discouraging frivolous filings, such as penalties and fee shifting"); Clermont & Yeazell, *supra* note 16, at 853; Spencer, *supra* note 16, at 454.

191. *See* Clermont & Yeazell, *supra* note 16, at 848 (reviewing the briefs filed and critiquing the Court for relying on unverified "folk wisdom").

observed . . . 'the debate over discovery reform [in the 1990s] has proceeded largely, but not entirely, with reference to salient personal experiences and not with benefit of empirical evidence.'"[192]

There are reasons, moreover, to believe that the Court relied upon an inaccurate set of legislative facts in *Twombly*.[193] In fact, reputable studies paint a far different picture of discovery costs. For example, the Willging Study—one that the *Twombly* Court tangentially cited[194]—"found that the median total cost of litigation reported by attorneys in our sample was about $13,000 per client. . . . About half of this cost was due to discovery."[195] That is, median discovery costs in federal court in 1999 were around $6,500 per client. Further, the study found that, in the vast majority of cases, discovery expenses were quite low relative to the amount at stake in the litigation. The median cost of discovery was 3 percent of the stakes, although 5 percent of attorneys surveyed estimated discovery expenses at 32 percent or more of the amount at stake.[196] Only 15 percent of attorneys reported that they believed the costs of discovery are too high.[197] The 1998 RAND study came to similar conclusions.[198] Prior to *Twombly*, the Advisory Committee, which had reviewed these and other studies, did not see the need to render wholesale revisions to the discovery or pleading Rules.[199]

192. Glenn S. Koppel, *Reflections on the "Chimera" of a Uniform Code of State Civil Procedure: The Virtue of Vision in Procedural Reform*, 58 DEPAUL L. REV. 971, 1002 (2009) (quoting Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 787 (1998)).

193. *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002) (surveying empirical knowledge of civil procedure and demonstrating a significant disconnect between folk wisdom regarding procedure and the empirical data).

194. The Court cited the Advisory Committee Report. *See Twombly*, 550 U.S. at 559 (citing Memorandum From Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) [hereinafter Advisory Committee Report]). The Federal Judicial Center conducted the Willging study and reported to the Advisory Committee. *See* 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 n.* (1998).

195. Willging et al., *supra* note 194, at 531.

196. *Id.*

197. *Id.*

198. JAMES S. KAKALIK ET AL., RAND CORP., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA, at xxvii (1998), *available at* http://www.rand.org/pubs/monograph_reports/2009/MR941.pdf ("Discovery is not a pervasive litigation cost problem for the majority of cases.").

199. *See* Advisory Committee Report, *supra* note 194, at 357–61, 382–88 (predominantly proposing amendments to disclosure rules).

We are not necessarily defending the veracity of, or the methodologies employed by, the Willging and RAND studies. Nor do we contend that improved empirical data alone will improve rulemaking.[200] Rather, we assert that the Advisory Committee's institutional capacity, like the capacity of agencies that engage in rulemaking generally, to generate and analyze the studies needed to produce such legislative facts as were relied upon by the *Twombly* Court far exceeds that of the Court sitting as an adjudicative body.[201] The Court should avail itself of this institutional competence and route such cases to the Advisory Committee because findings by the Advisory Committee are more likely to be accurate across the broad spectrum of cases than are findings by the Court.

B. *Chevron* Step One v. *Chevron* Step Two

The Court should also refer issues that arise in civil procedure cases to the court rulemaking process when those issues would be resolved pursuant to the second step of a *Chevron*-like inquiry. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[202] the Court adopted a two-step framework for reviewing the validity of an agency's interpretation of its statutory authority.[203] The first step of this inquiry focuses on "whether Congress has directly spoken to the precise question at issue."[204] The Court explained that "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[205] Moreover, the Court explicitly

200. *See, e.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 319 (2008) [hereinafter Bone, *Making Effective Rules*] (arguing that empirical data, without a normative framework in which to place it, will not alone produce better rules); Bone, *The Process of Making Process*, *supra* note 16, at 915–16; Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 103–13 (1997).

201. *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 16, at 859 ("The rulemakers should soon commence a study of exactly where . . . the optimal pleading standard lies."); Sellers, *supra* note 16, at 366 (recognizing that "the Advisory Committee can commission research into the costs and benefits of a proposed amendment" to the Rules); Struve, *supra* note 43, at 1140; *The Supreme Court—Leading Cases*, *supra* note 16, at 313.

202. 467 U.S. 837 (1984).

203. *Id.* at 842–44.

204. *Id.* at 842.

205. *Id.* at 842–43.

instructed that the requisite inquiry should be performed by "employing traditional tools of statutory construction."[206] As the Court explained:

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[207]

In other words, the second step of the *Chevron* inquiry focuses on whether an agency's interpretation of an ambiguous statutory provision is "reasonable."[208]

While "forests have been laid waste to publish the outpouring of legal commentary on [*Chevron*] and its progeny,"[209] we merely want to utilize the basic conceptual distinction that underlies the two steps of this familiar analytical framework. As Richard Pierce has explained, the first step of the *Chevron* inquiry focuses on ascertaining whether Congress has resolved a policy dispute in the course of enacting a statute.[210] If so, then Congress has made "law" on the relevant question, and agencies and the courts both must follow Congress's instructions.[211] However, because Congress has limited time and foresight, and a limited capacity to agree on the details of most socioeconomic legislation, it leaves open many policy questions.[212] In this situation, which is governed by the second step of the *Chevron* framework, the institution that authoritatively resolves the precise question at issue is not engaged in "statutory interpretation" but rather is necessarily engaged in *policymaking*.[213] In short, "*Chevron* is based on the Court's recognition that giving meaning to ambiguous statutory language is policymaking"[214] and that "policy disputes within the scope of authority Congress has delegated to an agency are to be resolved by agencies rather than by courts."[215]

Similarly, our proposed use of the *Chevron* framework is premised on the view that when resolving civil procedure issues that arise in adjudication, federal

206. *Id.* at 843 n.9.
207. *Id.* at 843 (citations omitted).
208. *Id.* at 844.
209. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501 (2005).
210. *See* PIERCE, *supra* note 108, § 3.3, at 142.
211. *See id.*
212. *See id.* at 142–43.
213. *See id.* at 143.
214. *Id.* at 147.
215. *Id.* at 143.

courts are legally obligated to implement policy decisions that were made during the court rulemaking process.[216] Thus, if the Court determines that an issue was directly addressed or unambiguously resolved during the court rulemaking process, "that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent" of the rulemakers.[217] As when it applies the first step of *Chevron*, the Court should make this determination by employing traditional tools of statutory interpretation. Thus, if the text of the Rule, its legislative history (including the relevant Advisory Committee Notes), and its underlying purpose clearly resolve an issue, then the issue is properly characterized as a question of "law," which the Court should resolve pursuant to adjudication. Put simply, if the Court would resolve a civil procedure issue under the first step of a *Chevron* analysis, then we believe that our presumption in favor of rulemaking would be overcome by both efficiency and institutional-advantage factors, and the Court would properly resolve the case pursuant to adjudication.

Our proposed use of the *Chevron* framework also recognizes, however, that, like Congress (and other lawmakers), the drafters of the Rules do not explicitly resolve every issue that might subsequently arise when they promulgate new rules of civil procedure.[218] Moreover, the resolution of these open issues cannot realistically be characterized as a question of interpretation but rather involves policymaking by the relevant decisionmakers. Thus, when the Court concludes that the rulemakers did not have an ascertainable intent with respect to the precise question at issue based on the application of traditional tools of statutory interpretation, then it has no choice but to make civil procedure policy in resolving that issue. The Court would defer to a reasonable resolution of a policy decision by an administrative agency under step two of *Chevron* in this situation, but that is not an available solution in this context. Nonetheless, we believe that the Court could secure the same advantages by referring the resolution of ambiguities in the Rules to the court rulemaking process; the Court's policy choices would thereby be made pursuant to a more democratic process with superior access to expertise.[219]

216. *Cf.* Struve, *supra* note 43, 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.").

217. *Cf.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984).

218. *See* Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 16–23 (2007) (discussing the limits of interpretation and explaining that "many academics and some judges have openly admitted [that] no technique of interpretation can resolve every question of statutory ambiguity").

219. *See supra* Part II (discussing the superiority of rulemaking); Note, *A* Chevron *for the House and Senate: Deferring to Post-Enactment Congressional Resolutions That Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507, 1509–10 (2011) ("Because interpreting an ambiguous statute often requires a policy

We therefore contend that if the Court determines that the rulemakers have not directly addressed the precise question at issue, and the issue is therefore properly understood as a question of policy under step two of the *Chevron* framework, then the Court should refer the issue for resolution pursuant to the court rulemaking process, rather than resolving the issue pursuant to adjudication.

To date, the Court has not adopted any consistent approach to interpreting the Rules.[220] Rather, the Court sometimes applies a traditional interpretative methodology that is consistent with the resolution of issues pursuant to an inquiry that resembles the first step in a *Chevron* analysis.[221] Other times, the Court adopts a policy-orientated approach to the interpretation of the Rules, which seems comparable to the manner in which agencies might resolve statutory ambiguities in cases that would be decided under step two of *Chevron*. In addition to *Twombly*, *Iqbal*, and *Marek v. Chesny*,[222] this latter approach is illustrated by the Court's decision in *Cooter & Gell v. Hartmarx Corp*.[223] There, the plaintiff voluntarily dismissed its antitrust complaint filed by counsel—Cooter & Gell.[224] Before the case was dismissed, however, the district court held a Rule 11 hearing on the defendant's motion that the complaint lacked sufficient basis in fact, but it did not grant the motion until three and a half years after the case was dismissed.[225] Although neither the text nor the legislative history of Rule 11 addressed such after-dismissal sanctions—that is, the Court faced a *Chevron*-step-two ambiguity—the

judgment, the rationale underlying *Chevron* is that agencies are better policymakers than courts are due to agencies' greater political accountability and technical expertise." (footnote omitted)).

220. *See* Marcus, *supra* note 34, (manuscript at 4) ("[T]he Supreme Court's interpretive methodologies for the Federal Rules vacillate wildly and inexplicably."). Some scholars, noting that the Court is empowered to promulgate the Rules, call for the Court to take a more assertive stance in liberally interpreting the Rules. *See, e.g.*, 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, 720 (1988); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993). Others assert that the more elaborate nature of the court rulemaking process counsels in favor of a more restrained interpretive stance in resolving ambiguities in the Rules. *See, e.g.*, Marcus, *supra* note 34; Struve, *supra* note 43, at 1169.

221. *See, e.g.*, Bus. Guides, Inc. v. Chromatic Commc'ns Enters, Inc., 498 U.S. 533, 540 (1991); Pavelic & LeFlore v. Marvel Entm't Grp , 493 U.S. 120, 123 (1989), *abrogated on other grounds by* FED. R. CIV. P. 11 (1993 amendments) ("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.'" (citation omitted) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981))).

222. 473 U.S. 1 (1984); *see supra* note 6 and accompanying text (discussing these examples).

223. 496 U.S. 384 (1990).

224. *Id.* at 389.

225. *See id.*

Court affirmed the sanction as permitted by Rule 11.[226] The Court's ruling was roundly criticized, however, and swiftly reversed by the 1993 amendments to Rule 11.[227] The Court's resolution of this rule ambiguity during the course of adjudication, then, resulted not only in a poorly interpreted rule[228] but in the embarrassment of a swift reversal that was accompanied by the Court's acquiescence.[229] Our proposal suggests that the Court should not have resolved the issues presented in the foregoing cases pursuant to adjudication in the first place, but should instead have referred the issues directly to the court rulemaking process.[230]

One potential objection to this aspect of our proposal would focus on the apparent difficulty of applying the *Chevron* framework in a clear and consistent fashion.[231] There are two related components of this difficulty relevant to our present purposes. First, federal courts do not always agree on precisely what the application of traditional tools of statutory interpretation entails;[232] nor do they always apply their preferred interpretive methodologies in a consistent fashion under

226. *See id.* at 395 ("The view more consistent with Rule 11's language and purposes, and the one supported by the weight of Circuit authority, is that district courts may enforce Rule 11 even after the plaintiff has filed a notice of dismissal under Rule 41(a)(1).").

227. *See* Struve, *supra* note 43, at 1135–36 (discussing *Cooter & Gell* and the 1993 amendments).

228. *See, e.g.*, Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*, 40 ARIZ. L. REV. 965, 994 (1998) ("[B]oth the 1983 Amendment and the 1993 Amendment represent increased procedural hurdles and risk for litigants, resulting in a net shrinkage of access to courts."); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1788 (1992); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991).

229. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 508 (1993) (Scalia, J., joined by Thomas, J., dissenting in part) (rejecting the amendments in part because they "contradict what this Court said only three years ago" in *Cooter & Gell*).

230. *Accord* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 571 (2007) (Stevens, J., dissenting); Marek v. Chesney, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting).

231. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1090–91 (2008) ("[T]he Court usually does not apply *Chevron* to cases that are, according to *Mead* and other opinions, *Chevron*-eligible. Moreover, in analyzing how *Chevron* is applied in the cases where it is invoked by the Court, [the authors] found little doctrinal consistency.").

232. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1209–12 (4th ed. 2007) (discussing the relationship between the new textualism and *Chevron* and identifying some disagreement among Justices regarding the use of legislative history under step one); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 64 (2008) (describing different judicial approaches to the role of substantive canons of statutory interpretation under the *Chevron* framework and claiming that "whether an agency policy comports with background norms should be considered as part of *Chevron*'s case-by-case, step-two inquiry into whether the policy is reasonable").

the first step of *Chevron*.[233] Second, statutory ambiguity is used as a signal under *Chevron* that an interpretive issue is a policy matter that should be resolved in an authoritative manner by an administrative agency, but ascertaining whether a statute is ambiguous can itself be a matter of great uncertainty.[234] We agree with these observations about the application of *Chevron*, but we do not think that they present overwhelming difficulties for our proposal for two reasons. The first is experience—the federal judiciary has applied the *Chevron* framework in countless cases for over a quarter century, and although there are undoubtedly difficult line-drawing problems in some situations, we suspect that the framework provides a useful analytical device when statutes are either quite detailed or patently ambiguous. Second and more importantly, the Court could avoid resolving close cases, where the degree of a Rule's ambiguity is itself ambiguous, because we are advocating a strong presumption in favor of court rulemaking except where a case could be decided based solely on traditional tools of statutory interpretation.[235] If the Court lacks confidence that it will be able to resolve a civil procedure issue under the first step of a *Chevron*-like inquiry, it should simply decline to hear the case and refer the issue for resolution pursuant to the court rulemaking process.[236]

Others might object that our proposal prohibits the intentional creation of civil procedure norms via a common law approach. That is, the drafters of the Rules may, at times, deploy terms that do not have well-developed meaning upon issuance but purposely do so with the thought that the courts will fill in the meaning of the relevant terms through case-by-case adjudication. Our response to such a critique is threefold. First, our preference for rulemaking is limited to the Supreme Court. As we discuss later,[237] we do not intend our proposal to affect the interpretive prerogatives of the lower federal courts. Thus, under our proposal, a common

233. *See, e.g.*, ASIMOW & LEVIN, *supra* note 106, at 534–35 (observing that "judicial invocations of the test can sound perfunctory" in some cases, whereas in other cases "the court's inquiry into 'clear intent' under step one of *Chevron* looks much more searching").

234. *See* Glen Staszewski, *Textualism and the Executive Branch*, 2009 MICH. ST. L. REV. 143, 174; *see also* Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1091 (1997) (recognizing that the line between clarity and ambiguity under *Chevron* "has a highly random aspect to it"); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 51 (2006).

235. *See supra* Part II.

236. The consequences of a perceived mistake are also probably lower in this context than they are in administrative law, where the legality of an agency's decision is at issue. Here, the only result of a mistaken decision would be to refer an issue for resolution pursuant to court rulemaking when the case could arguably have been resolved in a competent fashion pursuant to adjudication. Given the small number of civil procedure issues that the Court resolves, and the significant advantages of court rulemaking, this would only be a relatively minor problem.

237. *See infra* Part IV.B (discussing the retained flexibility for lower court Rules interpretation).

law approach to a Rules issue could percolate in the lower federal courts without immediate recourse to court rulemaking. Second, we embrace the Supreme Court's role of giving statutory terms meaning by adjudication, so long as the Court could do so by traditional rules of statutory interpretation. In *Foman v. Davis*,[238] for example, the Court was tasked to define when a district court could decline a motion for leave to amend a pleading when the text of the Rule was not self-defining. The Court approached the question of defining Rule 15's (as then drafted) language—"leave to amend shall be freely given when justice so requires"[239]—by deploying a traditional statutory interpretation strategy. The Court thus read the Rule 15 provision as a part of the statute (i.e., the Rules) as a whole.[240] 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 interpreted in *Conley* and delineated several grounds, such as futility or bad faith, when an amendment should not be allowed.[241] Such action by adjudication fits comfortably within our traditional-tools-of-interpretation exception to our preference for rulemaking. Finally, if traditional tools of statutory interpretation would not lead to a clear result, we continue to find that reference to the Rules Committee would be the better course as a matter of institutional competency, as explained in Part II.

C. Legislative Rules v. Interpretive Rules

A third way to conceptualize the distinction between issues that are appropriate for adjudication and those that should be resolved pursuant to court rulemaking is to draw upon an analogy to the distinction between legislative and interpretive rules in administrative law. The *Attorney General's Manual on the APA* defines a substantive rule, or a legislative rule, as a rule that has "the force and effect of law."[242] In the absence of an applicable exemption, Section 553 of the APA requires such rules to be promulgated pursuant to notice-and-comment rulemaking.[243] A properly enacted and legally valid legislative rule has the same

238. 371 U.S. 178 (1962).
239. *Id.* at 182 (quoting FED. R. CIV. P. 15(a)) (internal quotation marks omitted).
240. *Id.*; *see also* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992) (stating that the plainness or ambiguity of statutory language is determined by reference to, among other things, the broader context of the statute as a whole).
241. *Foman*, 371 U.S. at 182.
242. TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947).
243. *See* 5 U.S.C. § 553 (2006).

force and effect as a statute enacted by Congress.[244] In contrast, the *Attorney General's Manual* defines interpretative rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[245] Because interpretive rules merely set forth an agency's views on what existing law already requires, they are exempt from the requirements of notice-and-comment rulemaking under the APA.[246] As the Sixth Circuit has explained, "[t]he interpretative rule exemption reflects the idea that public input will not help an agency make the legal determination of what the law already is."[247] Moreover, Judge Posner has aptly described the rationale for this exemption: "There are no formalities attendant upon the promulgation of an interpretive rule, but this is tolerable because such a rule is 'only' an interpretation."[248]

In our view, if the Court is resolving a civil procedure issue based on its interpretation of what the Rules already require, then it is issuing the functional equivalent of an interpretive rule, and the issue may appropriately be resolved pursuant to the less cumbersome process of adjudication. Conversely, if the Court is, in effect, promulgating a new substantive Rule, then it is adopting the functional equivalent of a legislative rule, and it should refer the underlying issues for resolution pursuant to the court rulemaking process.[249] As in the administrative law context, when the Court is effectively legislating, it should follow "notice and comment rulemaking, a procedure that is analogous to the procedure employed by legislatures in making statutes."[250]

One problem, of course, is that federal courts have had great difficulty distinguishing between legislative and interpretive rules in some cases.[251] Nevertheless,

244. *See, e.g.*, Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett, 300 U.S. 471, 474 (1937).
245. CLARK, *supra* note 242, at 30 n.3.
246. *See* 5 U.S.C. § 553(b)(A).
247. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005) (Rogers, J.).
248. Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 167 (7th Cir. 1996).
249. Although not deploying administrative law terminology, the Court has often espoused this position. *See, e.g.*, Becker v. Montgomery, 532 U.S. 757, 764 (2001) (holding that the Court is not empowered to extend the meaning of a Rule outside of the rulemaking process); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 548–49 (1991); Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989) ("Our task is to apply the text [of the Rule], not to improve upon it."); Harris v. Nelson, 394 U.S. 286, 298 (1969) ("We have no power to rewrite the Rules by judicial interpretations."). Given the interconnectivity of the Rules, this policy strikes most commentators as a sound one. *See, e.g.*, Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-authors*, 78 GEO. WASH. L. REV. 9, 28 (2009).
250. *Hoctor*, 82 F.3d at 171.
251. *See* Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1108–09 (D.C. Cir. 1993); Richard J. Pierce, Jr., *Distinguishing Legislative Rules From Interpretative Rules*, 52 ADMIN.

federal courts have provided some meaningful guidance that is useful for present purposes. For example, in *Hoctor v. United States Department of Agriculture*,[252] the Seventh Circuit held that a requirement that "all dangerous animals must be inside a perimeter fence at least eight feet high" was not a valid interpretation of a legislative rule that required a facility housing animals to be "structurally sound" and "maintained in good repair to protect the animals from injury and to contain the animals."[253] Judge Posner explained that the purpose of the APA's distinction between legislative and interpretive rules was to separate rules that require public notice and comment from those that do not.[254] Accordingly, he suggested that valid interpretive rules would ordinarily be developed "by the methods of reasoning used by courts," whereas legislative rules typically involve "the making of reasonable but arbitrary (not in the 'arbitrary or capricious' sense) rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation."[255]

The Court should use a similar analysis to distinguish civil procedure issues that are appropriate for resolution by adjudication from those that should be resolved pursuant to court rulemaking. In other words, if a case can be decided pursuant to "the methods of reasoning used by courts,"—or by what we have styled traditional tools of interpretation—then it presents the type of normal or routine interpretive issue that may properly be decided by the Court pursuant to adjudication. On the other hand, if a case would require the Court to make "arbitrary value judgments" regarding the appropriate rules of civil procedure, then the Court should refer the issues for resolution pursuant to the rulemaking process. We think that it is clear, for example, that the changes in the standards of pleading announced by the Court in *Twombly* and *Iqbal* involved just the sort of arbitrary value judgments that should have been made pursuant to a legislative process.[256] Indeed, the Court could not plausibly have developed the precise content of its newly established standard through traditional tools of interpretation, given that the new interpretations (even if laudatory) are contrary to the original meaning of

L. REV. 547, 547–48 (2000) (describing the federal judiciary's characterization of its difficulties in drawing the requisite distinctions).

252. 82 F.3d 165.

253. 9 C.F.R. § 3.125(a) (1991).

254. *See Hoctor*, 82 F.3d at 170.

255. *Id.*

256. *See supra* Part I A (discussing the change in pleading policy resulting from *Twombly* and *Iqbal*).

the text and all the relevant legislative history.[257] Following standard administrative law, such a change should have been adopted pursuant to notice-and-comment rulemaking.

Continuing with our analogy to administrative law, the requirements for using notice-and-comment rulemaking to overturn prior interpretations of legislative rules offer helpful guidance on the role of stare decisis with regard to prior civil procedure decisions. This is an issue that, as we noted previously, is particularly ripe for handling by the adoption of a presumption in favor of rulemaking.[258] Turning first to administrative practice, the D.C. Circuit has held that a rule should be designated as a legislative rule if it has "legal effect,"[259] which would be the case when "the rule effectively amends a prior legislative rule."[260] That court also

257. *See supra* notes 5, 34 (citing scholars discussing the divergence from the original meaning of Rule 8). As with the *Chevron* step-one and step-two distinction, the distinction between legislative and interpretive rules is not always crisp. But, as with our *Chevron* analogy, the stakes of the distinction between interpretive and legislative rules are lower for court rulemaking than for agencies. For instance, we are not advocating the invalidation of the Court's decisions on the grounds that the Court has made law through the wrong policymaking vehicle, as occurs with agencies. *See* 5 U.S.C. §§ 553(b)–(c), 706(2)(D) (2006); *Hoctor*, 82 F.3d at 167. Further, our presumption in favor of rulemaking means that in a close case the Court should opt for rulemaking over adjudication.

258. One could conceivably argue that the Court's decision in *Conley* was not a valid interpretive rule and that the issues presented in that case should have been resolved pursuant to the court rulemaking process. The validity of this claim would depend, in part, upon one's theory of interpretation. While we cannot do justice to those perennial jurisprudential debates here, we believe that the Court's decision in *Conley* comports with traditional methods of interpretation, as broadly understood from within the legal process tradition. *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). In particular, we believe that *Conley* is distinguishable in this regard from *Twombly*, partly because *Conley* purported to apply the settled understanding of Rule 8 when the case was decided, whereas *Twombly* explicitly overruled decades of well-established precedent. This distinction suggests two important observations about the distinction between "legislation" and "interpretation" that are only latent in much of the literature. First, a decision is more plausibly characterized as "interpretive" when it is made shortly after a legislative rule was adopted in an effort to clarify, apply, or fill in the interstices of the recently enacted rule. This is especially true when the decisionmaker was responsible for promulgating the rule at issue in the first place, as is frequently true of agencies and also of the Court in the field of civil procedure. *Cf.* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 549 (1940) (recognizing that an agency's interpretations "are entitled to great weight," particularly "where the interpretations involve contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new," and where the agency "suggested the provisions' enactment to Congress" (internal quotation marks omitted)). Second, the application of well-established precedent to a dispute should ordinarily count as a traditional element of interpretation. *Cf.* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 378 (1990); Richard W. Murphy, Hunters *for Administrative Common Law*, 58 ADMIN. L. REV. 917, 932 (2006).

259. *See* Am. Mining Cong.v. Mine Safety Health Admin., 995 F.2d 1106, 1108–09 (D.C. Cir. 1993).

260. *Id.* at 1112. The D.C. Circuit also set forth other criteria, which are not applicable in this context. *See id.*

suggested that agencies cannot use interpretive rules to provide precise content to extremely vague or open-ended legislative rules because this practice would allow agencies to circumvent the obligation to use notice-and-comment rulemaking for making legislative decisions.[261] Most pertinent for the role of stare decisis, the courts of appeals take a similar position regarding the reformation of certain interpretive rules, prohibiting their reversal without the use of notice-and-comment procedures.[262] That is to say, agencies may not overturn a prior interpretation of a rule when such a change would be substantial, unless it does so using the notice-and-comment form.

Returning to the civil procedure context, if the Court's decision would effectively amend an existing rule of civil procedure—that is, craft a rule that is functionally legislative as opposed to interpretive—the Court should refer the issue for resolution pursuant to the court rulemaking process. Similarly, the Court should also refer a Rules issue for resolution pursuant to the court rulemaking process if the Rule the Court is purporting to interpret is too vague or open ended to produce precise content through traditional tools of interpretation. A contrary practice would, as with administrative practice, allow the Court to promulgate (or amend) legally binding rules of civil procedure without using the legislative rulemaking process Congress established for that purpose.[263]

Following standard administrative law doctrine, we also contend that replacing one interpretation of a Rule with another interpretation of the same Rule should proceed by way of rulemaking. Although this blackletter rule has aroused much sound criticism in the agency context,[264] we find that the current doctrine

261. *See id.* at 1110; *see also* Pierce, *supra* note 251, at 558–61 (discussing and endorsing this aspect of the court's decision).

262. *See* Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1033–34 (D.C. Cir. 1999) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." (quoting Paralyzed Veterans of Am. v. D.C. Arena L P., 117 F.3d 579, 586 (D.C. Cir. 1997)) (internal quotation marks omitted)). This requirement does not apply to interpretive rules that overrule an agency's prior interpretation of its statutory authority. *See* Murphy, *supra* note 258, at 928–30 (describing and criticizing the rationale for this distinction). Under our analysis, however, the Federal Rules of Civil Procedure are analogous to legislative rules promulgated by the Court rather than a statute enacted by Congress.

263. *Cf.* Struve, *supra* note 43, at 1129 ("Should the Court wish to alter a Rule already in force, the Enabling Act does not contemplate that the Court could do so outside the rulemaking structure.").

264. *See, e.g.*, Murphy, *supra* note 258, at 918, 926–28 (describing the "scathing" academic critique of these decisions); Pierce, *supra* note 251, at 566–73 (arguing that the requirement is not supported by the APA and that it creates unwarranted difficulties for agencies that want to change their interpretations in response to new information or changed circumstances); Peter L. Strauss, *Publication*

has much to offer in the court rulemaking context for several reasons. First, in contrast to agencies, the Court does not necessarily have the institutional capacity to ascertain whether new information or changed circumstances warrant overruling a prior interpretation of the Rules during the course of adjudication.[265] Second, unlike agencies, the Court cannot actually promulgate interpretive rules outside of the court rulemaking or formal adjudication processes,[266] and the Court therefore lacks a third alternative for interpreting law that is self-consciously designed to take advantage of agency expertise, especially on issues of legislative fact.[267] Third, while agencies have the primary responsibility for interpreting the meaning of their own regulations (and cannot subdelegate this authority to others), the Court can rely on the lower federal courts to issue authoritative interpretations of the Rules of civil procedure in adjudication, and it should therefore only decide cases that present interpretive problems regarding the Rules when circuit splits develop or in other exceptional circumstances.[268] Fourth, while some agencies issue thousands of interpretive rules on an annual basis,[269] the Court decides fewer than one hundred cases per year, only a fraction of which are Rules cases.[270] Accordingly, the burden associated with using notice-and-comment rulemaking procedures to

Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 ADMIN. L. REV. 803, 846–47 (2001).

265. *See supra* notes 167–182 and accompanying text (discussing the difficulties faced by the judiciary in assessing legislative facts).

266. The Advisory Committee Notes are arguably analogous to interpretive rules promulgated by administrative agencies, but we believe that they are better viewed as an unusually authoritative form of legislative history because they are officially promulgated during the court rulemaking process pursuant to a statutory directive. *See* 28 U.S.C. § 2073(d) (2006); Struve, *supra* note 43, at 1152 ("[T]he Advisory Committee Notes possess distinctive claims to authority, based both on the terms of the Enabling Act and on the practicalities of rulemaking.").

267. Our proposal will therefore not create a perverse incentive for the Court to refrain from issuing interpretive rules. It may, however, create a worthwhile incentive for the Court to think twice before granting certiorari in civil procedure cases.

268. *See* ESTREICHER & SEXTON, *supra* note 20, at 4–5 ("[T]he Court's principal objectives in selecting cases for plenary consideration should be to establish clearly and definitively the contours of national legal doctrine once the issues have fully 'percolated' in the lower courts, to settle fundamental interbranch and state-federal conflicts, and to encourage the state and federal appellate courts to engage in thoughtful decisionmaking, mindful of their own responsibility in the national lawmaking process."); *id.* at 41–70.

269. *See, e.g.*, Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 699 (D.C. Cir. 1971) (reporting that the U.S. Department of Labor's Wage and Hour Administration responded to 750,000 requests for advice about the interpretation and application of the Fair Labor Standards Act per year and that approximately 10,000 of these requests were signed by the administrator of the agency).

270. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 75 tbl.2-8, 80 tbl.2-11 (3d ed. 2003) (providing data on the number of signed opinions issued by the Court per year and the number of formally decided cases per term by issue area).

revise prior interpretations of legislative rules would be far less onerous in the latter context. Fifth, there is a widely recognized need for greater interpretive flexibility by agencies that are charged with solving complex social problems at the forefront of science within a highly political environment,[271] which is significantly less compelling in the context of the Court's interpretation of the rules of civil procedure. Sixth, while an agency's decision to overrule a prior interpretation of its existing legal authority is typically subject to judicial review to ensure that the agency has engaged in reasoned decisionmaking,[272] the Court's decisions regarding the meaning or proper application of the existing Rules are not subject to any form of external review.[273] For all these reasons, more would be achieved by funneling to the court rulemaking process potential decisions to overrule prior interpretations of the Rules than is gained from requiring agencies to use notice-and-comment rulemaking to overrule prior interpretations of their regulations. We believe, therefore, that the Court should give precedents on the meaning of the Rules the same strong stare decisis effect that it has traditionally accorded to its interpretations of federal statutes.[274] In both contexts, changes should generally be made through a legislative process.

* * *

In sum, we present a two-step approach. First, the Court should adopt a presumption favoring the resolution of issues involving the Federal Rules of Civil Procedure pursuant to court rulemaking. Thus, if the factors that favor an adjudicatory resolution present a tough case, the Court should err in favor of routing issues to the Advisory Committee. Second, we offer three triggering criteria that reinforce this preference. Thus, if a case requires an interpretation of a Rule

271. *See* Edward Rubin, *Dynamic Statutory Interpretation in the Administrative State*, ISSUES LEGAL SCHOLARSHIP, NOV. 2002, http://www.bepress.com/ils/iss3/art2 (claiming that the theory of dynamic statutory interpretation "is even more convincing with respect to the interpretive function of administrative agencies"); Staszewski, *supra* note 234, at 146, 156–58 (claiming that textualists have a tendency to become advocates of dynamic statutory interpretation when they examine the proper role of the executive branch in this enterprise); Strauss, *supra* note 264, at 828 ("[C]onsiderations of protecting justified reliance interests aside, we generally expect and indeed approve fluidity of policy development in the agency context. Thus, one could expect agencies to assert considerably greater freedom of revision than courts think proper in their own practice.").

272. *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810–11 (2009) (setting forth the standard of review for changes in agency policy).

273. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

274. *See supra* notes 183–186 and accompanying text.

that rests substantially upon legislative facts, calls for the resolution of a *Chevron*-step-two ambiguity, or seeks a legislative-rule-like resolution, then the Court should route it to the Rules Committee. The Court should resolve by adjudication only those cases amenable to resolution by way of traditional tools of statutory interpretation.

IV. RULEMAKING PREFERENCE IN PRACTICE

Our preference for notice-and-comment rulemaking on civil procedure issues raises several questions of implementation. First, our conclusion begs the question of how the Court can effectuate such a form preference. These pragmatic considerations touch on constitutional concerns as well. Second, the referencing of the majority of the Court's Rules cases to the Advisory Committee may strike some as unduly limiting the judiciary's need for flexibility in administering the civil rules. Third, our scheme raises the issue of the democratic legitimacy of the Court as a rule promulgator. We address these issues in turn.

A. Referring Questions to the Advisory Committee

The Court has two means currently at its statutory disposal for implementing a preference for resolving civil procedure issues pursuant to rulemaking. First, the Court could simply deny certiorari to cases that raise Rules issues that are better suited to a rulemaking resolution and, after denying certiorari, recommend that the Advisory Committee take up the issue raised. Indeed, the Court selects nearly all of its cases by way of writ of certiorari.[275] Although Supreme Court Rule 10 presents criteria likely to influence the Court's exercise of its certiorari power, the Court's ability to grant the writ is unfettered.[276] Thus, as part of its certiorari-stage review the Court could identify—or require counsel by court rule to so identify—whether the present case requires a construction of a Rule that rests substantially on legislative facts, calls for the resolution of a *Chevron*-step-two ambiguity, or seeks a legislative-rule-like resolution. Having so identified these cases, the Court need only deny certiorari and notify the Advisory Committee.

We do not, however, endorse this approach. The most pressing concern we see with such an approach is that it renders the choice of policymaking form

275. *See* 28 U.S.C. §§ 1254, 1257 (2006).

276. *See* Sanford Levinson, *Strategy, Jurisprudence, and Certiorari*, 79 VA. L. REV. 717, 736 (1993) (reviewing H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991)).

outcome determinative for the parties that originally raise the issue. That is to say, under this first approach, the party seeking the procedural reform, or reinterpretation of the rule at issue, necessarily loses—even if in the end the Rule in question is reformed. This follows from the denial of certiorari. We contend that this approach would produce an unnecessary disincentive for parties (and, in particular, the losing party below) to welcome the initiation of a rulemaking proceeding in Rules cases, which could put pressure on the Court to eschew the rulemaking form. As such, we prefer a second scheme available under current law that is akin to the certification of, or more accurately the referring of, a question of law from a federal court to a state supreme court or an Article I adjunct tribunal.

We turn quickly, then, to a primer on certified questions. The certification of a question of law is the process by which a court that lacks definitive authority to declare the substance of a particular rule of law seeks an authoritative declaration of the rule from the relevant authoritative institution.[277] This may be done within the hierarchical structure of a court system, as when a lower federal court stays current proceedings and awaits the result of a question certified to a higher federal court.[278] Questions may also be certified inter-jurisdictionally between court systems, such as when a federal court stays proceedings in a diversity case and awaits the result of questions certified to a state supreme court.[279] Additionally, in some states a federal agency may certify a question to a state supreme court, such as Delaware's practice of enabling the Securities Exchange Commission to certify questions of Delaware law to the state supreme court.[280] A similar process allows courts to route questions to an alternative forum even when they are authorized to resolve the issue at hand. For example, the district courts hold exclusive subject matter jurisdiction over bankruptcy cases.[281] Thus, they are fully capable of entering authoritative judgments in bankruptcy cases. Nevertheless,

277. *See* Allan D. Vestal, *The Certified Question of Law*, 36 IOWA L. REV. 629, 629–30 (1951) ("[C]ertification of questions of law is a procedure by which an inferior court is able to obtain from a defining court a conclusive answer to a material question of law." (footnotes omitted)).

278. *See* 28 U.S.C. § 1292(b) (2006) (allowing for the certification of interlocutory questions from district courts to courts of appeals); *id.* § 1254(b) (allowing for the certification of questions from courts of appeals to the Supreme Court).

279. *See* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 159 & n.13 (2003) (citing statutes that enable federal-to-state certification and reviewing the practice).

280. DEL. CONST. art. IV, § 11(8); *see also* Verity Winship, *Cooperative Interbranch Federalism: Certification of State-Law Questions by Federal Agencies*, 63 VAND. L. REV. 181, 195–98 (2010) (reviewing the Delaware law).

281. 28 U.S.C. § 1334(a).

district courts are empowered to refer the resolution of these cases to non–Article III bankruptcy courts[282] and to withdraw those references (i.e., order the case back to the district court from the bankruptcy court).[283]

While retaining the Advisory Committee's current ability to receive suggestions from any member of the public, we suggest that the Court operationalize the preference for a resolution of Rules issues in the rulemaking form by drawing from these practices of certification and referencing. (We will term our scheme one of "referencing" questions to the Advisory Committee as this terminology more properly connotes the Supreme Court's retention of declaratory power in Rules cases.) The Court can accomplish this referencing practice by amendment to the Supreme Court Rules. Thus, using the criteria that the Justices might otherwise deploy for determining whether to grant certiorari,[284] the Court would determine whether a particular Rules case merits high court review. At this stage, assuming the issue is cert-worthy, the Court could summarily grant the writ of certiorari, vacate the lower court opinion, remand the case, and order a stay pending action by the Advisory Committee.[285] Such a move would, in effect, operate like a certification of a question from a court to an agency, insofar as the lower court is merely to await resolution of the question. In a sense, this is the mirror image of the Delaware-SEC certification scheme. The Court could then forward the issue to the Advisory Committee for notice-and-comment rulemaking. Of course, this process ultimately requires the Court to approve of the newly proposed rule. Thus, our scheme—which augments rather than displaces the general public's current ability to offer suggestions to the Advisory Committee—is also similar to the bankruptcy referencing procedure insofar as the Court is referring the resolution of an issue to a non–Article III actor yet retaining ultimate authority over the issue.[286]

The main advantage to this approach is that the choice of policymaking form here would not constitute a default loss for the party seeking the rule revision. In fact, should a rule revision result from this process, the new rule would

282. *Id.* § 157(a).
283. *Id.* § 157(d).
284. *See* 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).
285. *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 345–49 (9th ed. 2007) (discussing the Supreme Court's grant, vacate, and remand (GVR) practice).
286. *Cf.* Frost, *supra* note 218, at 6–9 (presenting a similar scheme whereby statutory ambiguities may be resolved by staying a case, certifying the question to Congress, and applying the newly amended statute to the case retroactively).

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.[287] Further, this referencing approach, consistent with our analogy between the Court and agencies, follows the administrative practice that recognizes that agencies have the discretion to stay adjudications to await the resolution of a rulemaking,[288] as well as the judicial practice that recognizes that courts have the discretion to stay proceedings to await the resolution of a rulemaking.[289] Moreover, given that there is no constitutional right to an appeal in civil cases,[290] nor a statutory right (in most cases[291]) to Supreme Court review at all, the Court's choice of a notice-and-comment venue as opposed to an adjudicatory one would not impose a due process injury on the parties.

Our approach to rulemaking by reference, while achievable under current law coupled with Supreme Court Rules amendments, would also benefit from statutory reform. One drawback to our proposal is the ossification of the current rulemaking process and the two-and-a-half-year period required to promulgate Rules under the current process.[292] Indeed, we agree with Stephen Yeazell's assessment that the current rulemaking process has become overly cumbersome with little added benefit to the quality of the finished product.[293] Following Yeazell,

287. Rule revisions are promulgated by the Court with the following provision: "[T]he foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern . . . , insofar as just and practicable, all proceedings in civil cases then pending." Order Amending the Federal Rules of Civil Procedure, 507 U.S. 1091, 1091 (1993). As such, revised rules apply on appeal, even if the district court relied upon the preamended 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 preamended rule); *see also* Frost, *supra* note 218, at 50–52 (arguing that congressional modification of civil statutes upon certification of a question from the Supreme Court would not run contrary to retroactivity prohibitions).

288. *See, e.g.*, 10 C.F.R. § 2.802(d) (2012) (stating 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 party pending disposition of the petition for rulemaking"); Massachusetts v. United States, 522 F.3d 115, 125 (1st Cir. 2008) (applying 10 C.F.R. § 2.802(d)); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380–81 (Fed. Cir. 2001) (directing Veterans Affairs to complete an expedited rulemaking within 120 days, unless extended by the court, and to stay all adjudications under the rule until its validity was established); *In re* Tenn. Valley Auth. (Bellefonte Nuclear Power Plant, Units 3 & 4), 68 N.R.C. 361, 383 (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).

289. *See* DAVID F. HERR ET AL., MOTION PRACTICE § 10.07(B) (5th ed. 2009).

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

291. The only mandatory appeal to the Court now comes from three-judge district court panels. 28 U.S.C. § 1253 (2006). All other appellate review is done by writ of certiorari. *Id.* §§ 1254, 1257.

292. *See* McCabe, *supra* note 42, at 1671–72.

293. *See* Yeazell, *supra* note 90, at 235.

we find that our proposal would work more efficiently if the Rules Enabling Act returned the rulemaking process to a three-step model that included Advisory Committee rulemaking, Court review, and congressional report-and-wait.[294] To be sure, we do not entirely advocate a return to the 1934 regime, in which the Advisory Committee worked without notice-and-comment procedures. But, like Yeazell, we see little added benefit resulting from multiple levels of committee review prior to promulgation of the Rules. As such, we support statutory reforms that (1) specifically endorse the Court's discretionary power to refer Rules questions to the Advisory Committee, (2) retain notice-and-comment rulemaking by the Advisory Committee, (3) specifically empower the Court to engage in a rigorous review of proposed rules (perhaps akin to a hard-look review),[295] and (4) eliminate the roles of the Standing Committee and the Judicial Conference in Rules drafting.

Reducing the rulemaking steps would lessen the time from the initiation of a rulemaking to the enactment of a revised Rule, rendering the entire rulemaking process not unacceptably longer than disposition on-the-merits by the Court. The average time between a grant of certiorari and a ruling on the merits by the Court is approximately nine months,[296] while the average time to promulgate a rule under the current system is approximately thirty months.[297] Elimination of review by the Judicial Conference alone would reduce the delay by seven months in every instance.[298] This reduced twenty-three-month timeline could be further reduced by several more months with the elimination of review by the Standing Committee—which occurs both before and after notice-and-comment procedures are deployed. Assuming another five months of savings, one could expect rulemakings to come to fruition on approximately an eighteen-month timeline, which is the average length of time for the Ninth Circuit to dispose of appeals.[299] Thus, with some reforms, a rulemaking approach could conform to the timeline norms of the Ninth Circuit. Admittedly, the Ninth Circuit is the least speedy court of appeals, but we find this a cost worth incurring for the procedural advantages of the rulemaking form.

294. *See id.* at 238–39.
295. *Cf.* Walker, *supra* note 15, at 479 (advocating reforms to court rulemaking analogous to White House review of agency rulemaking).
296. *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 745 (2009).
297. *See* McCabe, *supra* note 42, at 1671–72.
298. *See id.* at 1673.
299. *See* Carl Tobias, *The Federal Appeals Courts at Century's End*, 34 U.C. DAVIS L. REV. 549, 563 (2000) (relying on the 1998 Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals).

Such a statutory revision, moreover, likely would not lead to separation of powers difficulties. First, the APA has long vested agencies with discretion in making a choice of policymaking form without raising the specter of separation of powers difficulties within the executive branch.[300] Similarly here, such a statutory revision would merely vest the Court with the explicit discretion to choose a policymaking form,[301] not impermissibly direct the outcomes of particular cases under the guise of a revision of procedural rules.[302] Moreover, such a revision would rest upon the well-settled law holding that Congress is fully empowered to regulate the procedures of the lower federal courts and to set the means by which those procedures are established.[303]

Finally, we would hope that by eliminating the roles of the Judicial Conference and Standing Committee, and thereby 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.[304] As we noted, the Justices have become increasingly removed from active involvement with the court rulemaking process since the Judicial Conference was established in 1958, which precluded the Advisory Committee from answering directly to the Court and led the Justices to serve as a mere conduit for the work of the rulemaking committees.[305] We do not believe that this situation significantly undermines our claim that the Court functions as an administrative agency in the field of civil procedure. After all, agency heads (like the Justices) frequently subdelegate their statutory authority to "inferior officers" with greater expertise on a

300. *See supra* note 152 and accompanying text (quoting *Chenery II*, 332 U.S. 194, 202 (1946)).

301. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76–77 (1982) (plurality opinion) (upholding the constitutionality of using administrative agencies, subject to review, as adjuncts to Article III courts).

302. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (holding that Congress's power to control court procedure does not allow it to reopen cases fully disposed of by the judicial department under the guise of a mere procedural change).

303. *See, e.g.*, Willy v. Coastal Corp., 503 U.S. 131, 136 (1992) ("Congress, acting pursuant to its authority to make all laws 'necessary and proper' to [the] establishment [of the lower federal courts], also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced." (footnotes omitted)); Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Alaska Packers Ass'n v. Pillsbury, 301 U.S. 174 (1937); Livingston v. Story, 34 U.S. (9 Pet.) 632 (1835); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

304. *Cf.* Burbank, *supra* note 90, at 249 (claiming that the Court's current role in the court rulemaking process may be counterproductive).

305. *See supra* notes 52–53 and accompanying text.

topic,[306] and agency heads are certainly not personally involved in all of the policy decisions that are made by their institutions.[307] Moreover, there is nothing to prevent the Justices from playing a more active role in reviewing and evaluating (or even initiating) proposed changes to the Rules under the existing statutory scheme.[308]

On the other hand, the Justices have chosen not to play an active role in court rulemaking for many years, and the Court cannot promulgate changes to the Rules without an affirmative recommendation by the respective committees.[309] We suspect that if the court rulemaking process was streamlined, the Court's role as the administrator of the Rules was explicitly recognized, and a presumption in favor of court rulemaking was established, the Court would have meaningful incentives to take greater ownership of the policy decisions that are made pursuant to this process.[310] It may also be worthwhile to consider a statutory amendment that would allow the Court to modify the Rules on its own initiative, or over the objections of the Advisory Committee, as long as those changes were the product of notice-and-comment rulemaking and the Justices provided a reasoned explanation for their final decision. As explained below, however, we are somewhat reluctant to embrace this final reform in the absence of an external review mechanism (other than a potential legislative veto) to ensure that the Justices do not engage in arbitrary decisionmaking.[311] The end result, then, would be to return to the structure for court rulemaking that Congress established in 1934, supplemented by the procedures for public participation that were required by the Judicial Improvements and Access to Justice Act in 1988.[312]

B. Preserving Flexibility for Lower Courts

A potential objection to our proposal is that it would unduly limit the Court's interpretive creativity or flexibility and thereby undermine the advantages

306. *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 735 (2007) (recognizing that "statutes often permit an agency head to subdelegate some of her authority" to trusted subordinates).

307. *See* Note, *Subdelegation by Federal Administrative Agencies*, 12 STAN. L. REV. 808, 811 (1960) ("The policy favoring subdelegation in aid of efficient or competent operation is justified primarily because of the large volume and variety of tasks assigned to most agencies.").

308. *See* 28 U.S.C. §§ 2072, 2074 (2006); McCabe, *supra* note 42, at 1672–73.

309. *See* 28 U.S.C. § 2073(b); Struve, *supra* note 43, at 1129–30 ("Though the Court, like other entities, can suggest changes for the rulemakers' consideration, it cannot promulgate such changes against the wishes of the other participants in the rulemaking process." (footnotes omitted)).

310. *See supra* note 98.

311. *See infra* Part IV.C.

312. *See supra* Part I.A (discussing past and present rulemaking processes).

of adjudication in some situations. In this regard, there is no question that there are certain characteristic problems with rules.[313] First, virtually all rules are over- and under-inclusive with respect to their animating purposes because legislative classifications are typically imperfect proxies for the actual traits that are relevant for accomplishing regulatory goals.[314] Second, bright-line rules are apt to further their animating purposes in some places but not in others, particularly in an extensive and geographically diverse jurisdiction like the United States.[315] Third, the imprecision of legislative classifications is exacerbated as regulations age because changes in the world tend to render bright-line rules obsolete or, at least, less precise over time.[316] Finally, even without unforeseen technological developments, the imprecision of language and limitations on foresight prevent lawmakers from anticipating some of the circumstances to which their bright-line rules could subsequently apply.[317] Rules are therefore frequently 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 lawmakers adopted them.[318] Adjudication is therefore frequently necessary and appropriate to resolve the ambiguities of legal rules.[319] Moreover, the promulgation of law or 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.[320] For these reasons, administrative law contains several doctrines that allow administrators to exercise equitable discretion

313. *See generally* Sunstein, *supra* note 139.
314. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 360 (1949).
315. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 219–20 (1976).
316. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (describing the problem of "legal obsolescence" in an age of statutes); Sunstein, *supra* note 139, at 993 ("Rules are often shown to be perverse through new developments that make them anachronistic.").
317. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 647 (1996).
318. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) ("From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 29 (2001) ("The idea of equitable interpretation builds upon the Aristotelian premise that equity should mitigate the defects of generally worded laws.").
319. *See* ASIMOW & LEVIN, *supra* note 106, at 195.
320. *See id.* at 194–95 (describing the advantages of adjudication).

and that soften the hard edges of bright-line rules in particular cases.[321] 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."[322]

This objection to our proposal, then, would focus on the positive value of allowing adjudicators to exercise equitable discretion and reach sensible results in particular cases, even when the applicable rule is patently ambiguous or when the most straightforward application of a rule would lead to absurd or highly problematic results. For the most part, however, the exercise of equitable discretion and the resolution of patent ambiguity are aspects of statutory interpretation that would be employed during the second step of a *Chevron*-like inquiry or the crafting of a legislative rule.[323] Our proposal, therefore, effectively discourages the Court from exercising equitable discretion or resolving patent ambiguity in Rules interpretation cases and thereby precludes the Court from providing some of the most important benefits of adjudication. Indeed, if the Court were to follow our advice, it would nearly eliminate cases involving the Rules from its docket. That is so because under our proposal, the Court should only decide cases involving the Rules that (1) are deemed cert-worthy under its usual criteria and (2) present relatively straightforward issues of statutory interpretation. Most interesting civil procedure issues would, in contrast, be referred to the Advisory Committee for resolution pursuant to the court rulemaking process.

We agree that this could be a significant problem if the Court had exclusive jurisdiction over civil procedure issues. There are, however, federal district courts and circuit courts of appeals that decide issues involving the Rules on a regular basis—indeed, much more regularly than the Supreme Court. Moreover, unlike the Supreme Court, lower federal courts do not have delegated authority to revise the Rules of Civil Procedure, and they must therefore resolve the issues that are

321. *See* 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).

322. *See* ASIMOW & LEVIN, *supra* note 106, at 195.

323. *See, e.g.*, Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1269–71 (D.C. Cir. 1994) (upholding EPA's reasonable interpretation of the Safe Drinking Water Act under the second step of *Chevron*, despite an apparent conflict with the statutory text, and explaining that "where a literal reading of a statutory term would lead to absurd results, the term simply has no plain meaning . . . and is the proper subject of construction by the EPA and the courts" (internal quotation marks omitted)); Sunstein, *supra* note 321, at 11132 (describing the invocation of the absurdity doctrine in this fashion as "a modest means" of counteracting the pervasive existence of legislative misfit in the modern regulatory state, which is "an extremely serious problem for which it is important to find correctives").

presented to them during adjudication.[324] We are not proposing any particular method of Rules interpretation for the lower courts in this Article.[325] Nor are we suggesting that lower federal courts should be precluded from using equitable methods of interpretation in Rules cases. Rather, we believe that lower federal courts are in a good position to provide the foregoing advantages of adjudication in cases involving the Rules.[326] We also believe that by having a variety of lower courts resolve such issues pursuant to a variety of interpretative methods, the rulemakers will ultimately be able to take advantage of this experimentation as issues involving the Rules percolate their way up the federal judicial ladder.[327] Our claim is simply that by the time these issues reach the Supreme Court, they should presumptively be resolved pursuant to rulemaking rather than adjudication.

C. Deliberative Democracy as Political Legitimacy

While we are not overly concerned that our approach would raise constitutional concerns or interfere with the equitable discretion of the judiciary,[328] we do

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324. Our proposal anticipates that only the Supreme Court would be expressly authorized to stay pending cases and refer civil procedure issues to the Civil Rules Advisory Committee for resolution pursuant to court rulemaking. While we believe that it would be impractical to extend this authority to federal district courts and circuit courts of appeals, our proposal could potentially extend to cases in the circuit courts that have been certified for rehearing en banc. *Cf.* Frost, *supra* note 218, at 6 ("[T]he U.S. Supreme Court and the U.S. Courts of Appeals acting en banc should be given the authority to abstain from deciding cases before them and send questions about statutory meaning to Congress.").

325. Our claim that the Court should only decide civil procedure cases that can be resolved through traditional tools of interpretation would result in an interpretive approach similar to what is advocated by David Marcus, *see supra* note 34, and Catherine Struve, *see supra* note 43. We are not convinced, however, that this approach would necessarily be appropriate in every case that lower federal courts decide. Moreover, our approach differs from that of Struve because she grounds her proposal on a formal interpretation of the Rules Enabling Act, *see* Struve, *supra* note 43, at 1102, whereas our proposal is grounded on well-established principles of sound administrative practice. Our proposal also differs from that of Marcus because he claims that "judges should interpret rules such that significant changes to the procedural status quo come from the rulemaking process," Marcus, *supra* note 34, at 51–52, whereas we contend that the Court should not decide those cases pursuant to adjudication but should instead refer the issues for resolution pursuant to court rulemaking.

326. *Cf.* Easterbrook, *supra* note 1, at 6 ("Lower courts may adhere to the traditional model of dispute resolution with the assurance that their opinions are not a large source of rules. The Supreme Court has no such comfort.").

327. *See* Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 699 & n.68 (1984) ("By leaving courts of appeals free to decide independently issues already decided by other courts of appeals, the system encourages the 'percolation' of legal issues[, which has significant] benefits.").

328. *See supra* notes 290–291, 300–303 and accompanying text.

find questions concerning the political legitimacy of Supreme Court rulemaking ones worth more elaboration. Our claims that the Court's lawmaking role in the field of civil procedure is analogous to the lawmaking authority of administrative agencies and that the Court should make most of its policy decisions through notice-and-comment rulemaking raise fundamental questions about the legitimacy of the Court's role in this enterprise. After all, one line of conventional wisdom is that the Court comprises independent Justices with life tenure who are politically unaccountable and therefore have no business making policy decisions in a democracy in the first place.[329] Instead of proposing that the Court increase its legislative activity in this field, this view would suggest that we should criticize the Court's "activism" and call for the promulgation of rules of civil procedure by Congress or the President. In short, our call for increased court rulemaking faces a prima facie democratic legitimacy concern.

We do not believe, however, that the implementation of our proposals would undermine the legitimacy of the court rulemaking process. On the contrary, if the Court regularly referred to a notice-and-comment rulemaking procedure those policy questions that cannot be resolved pursuant to traditional tools of statutory interpretation, the democratic legitimacy of its decisionmaking would be significantly enhanced. It is widely recognized in administrative law that notice-and-comment rulemaking provides opportunities for public participation and obligations for decisionmakers to consider a range of different perspectives, which improve the legitimacy of the administrative process.[330] Because we are confident that the salutary functions of notice-and-comment procedures would be served by using the court rulemaking process to make policy decisions in the field of civil procedure, we believe that implementing our proposal would improve the democratic legitimacy of lawmaking in this area, in comparison to the status quo.

329. *See* Bressman, *supra* note 93, at 480 ("Post-Bickel, scholars began to distrust not only judicial use of individual rights to invalidate popularly enacted statutes, but *any* policy decision made by unelected officials."); Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 2 (2007).

330. *See* Abramowicz & Colby, *supra* note 19, at 1006 n.210 (quoting Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 289 (1998) ("Public participation is essential to sound agency decisionmaking because . . . it instills a sense of legitimacy in the public for the agency's decisions.")); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 187 (1997); *see also* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) (describing commentators' "[b]old claims" regarding the capacity of notice-and-comment rulemaking to promote democracy and legitimize agency policy decisions).

Nonetheless, our analysis undoubtedly highlights the broad discretionary authority that Congress has delegated to the Court to make policy in the field of civil procedure. In light of the unelected status of the federal judiciary, this broad delegation of lawmaking authority raises the same fundamental problems of legitimacy that have always posed challenges for the modern regulatory state.[331] Indeed, as we explained above, the intellectual histories of the legitimacy of court rulemaking and of the legitimacy of the modern administrative state have followed parallel trajectories.[332] Indeed, as we explained above, the intellectual histories of the legitimacy of court rulemaking and the legitimacy of the modern administrative state have followed parallel trajectories. It is worthwhile therefore to consider the current thinking about the modern administrative state's legitimacy, and to evaluate the legitimacy of the court rulemaking process pursuant to the prevailing standards.

In this regard, the leading model of legitimacy for the regulatory state at this time is the "political control model" of administrative law.[333] This model focuses on the ability of elected officials to supervise and control the discretionary policy choices of administrative agencies as the basis for democratic legitimacy.[334] The central idea is that if agencies are following the preferences of elected officials who are politically accountable to voters, then agency policy decisions will be democratically legitimate because they will presumably reflect the will of the people and achieve the consent of the governed.[335] The political control model is based on a majoritarian or pluralistic conception of democracy, which reflects "a belief in the hegemony of popular control of all governmental decisions."[336] The model also exemplifies an aggregative view of democracy, whereby the primary role of government is merely to ascertain and implement the pre-political

331. *See* Walker, *supra* note 15, at 462–63 (recognizing "[t]he vast discretion exercised by the Advisory Committee" and claiming that the court rulemaking process raises the same fundamental legitimacy concerns as broad delegations of lawmaking authority to administrative agencies).

332. *See supra* Part I.C.

333. *See, e.g.*, Bressman, *supra* note 93, at 485–92; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35 (2009).

334. *See* Watts, *supra* note 333, at 35; *see also* Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 856–57 (2012) (describing the political control model).

335. *See, e.g.*, McNollgast, *The Political Economy of Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1651, 1663 (A. Mitchell Polinsky & Steven Shavel eds., 2007); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 56–58 (2008).

336. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 538 (1998); *see also* Bressman, *supra* note 93, at 478.

preferences of its citizens.[337] It is widely recognized that the premises of the political control model "imply the need for presidential control over bureaucratic policymaking, because the president is the institutional actor most responsive to the preferences of a national majority."[338] The dominant theory of legitimacy in administrative law for the past quarter century has therefore been the "presidential control model," a version of the political control model.[339] From this perspective, Congress's delegation of broad policymaking authority to administrative agencies, which would otherwise be difficult to square with the American constitutional structure and principles of democracy, can be legitimized if agency decisions are subject to the control of the Chief Executive who is politically accountable to all of the nation's voters.

The court rulemaking process is a mixed bag from the perspective of the political control model. On the one hand, the court rulemaking process requires the Court to present proposed changes to the Rules to Congress and gives Congress the opportunity to veto any proposed changes that it finds undesirable.[340] While some civil procedure scholars have heavily criticized Congress's exercise (or threatened exercise) of its veto authority,[341] the meaningful use of this authority seems desirable and perhaps even necessary to ensure that the Court's decisions are consistent with the preferences of Congress (and theoretically, by extension, the people).[342] If anything, we should be concerned that the procedural hurdles of the legislative process and other transaction costs make it too difficult for members of Congress to veto proposed changes to the rules that a majority of elected representatives do not support.[343] Nonetheless, it is generally easier for Congress to veto a proposed change to the Rules than to override an

337. *See* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 13–15 (2004) (distinguishing between aggregative and deliberative conceptions of democracy).
338. Stephenson, *supra* note 335, at 59.
339. *See* Kagan, *supra* note 96, at 2246 ("We live today in an era of presidential administration.").
340. *See* 28 U.S.C. § 2074 (2006).
341. *See, e.g.*, Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).
342. *But see* Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1265–77 (2009) (claiming that the presumption that elected officials are politically accountable to the voters for their specific policy choices is generally implausible).
343. *See* Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 69 (2010) (providing a game-theoretic model, which reveals that participants in the court rulemaking process "are sometimes able to arbitrage congressional transaction costs to obtain results at odds with the results Congress would prefer in a world without transaction costs").

unpopular judicial decision, and our proposal to use rulemaking rather than adjudication to make policy decisions in the field of civil procedure would therefore increase the level of political control that is exercised over such decisions. The real problem with the court rulemaking process, from this perspective, is the absence of direct presidential influence or control over the contents of the Rules.[344] We suspect that the President could use the bully pulpit to make some headway in this regard, and there is nothing to prevent the White House from participating in the notice-and-comment rulemaking process. Moreover, the Justice Department is sometimes a very influential participant in court rulemaking.[345] We acknowledge, however, that the court rulemaking process is problematic from the perspective of presidential control theories of democratic legitimacy.

We are not particularly troubled, however, by the absence of presidential control over court rulemaking. Indeed, one of us has previously challenged the validity of this model of legitimacy on the grounds that policymaking in a constitutional democracy is not, and should not try to be, purely majoritarian and that even if we wanted policy decisions to reflect the pre-political preferences of the people, relying on elected officials to control the discretionary choices of agencies could not plausibly be expected to produce this outcome.[346] The leading alternatives to political control theories of administrative legitimacy tend to focus on the importance of reasoned deliberation to a legitimate and normatively attractive conception of democracy.[347] Deliberative models of legitimacy therefore focus on public officials' obligation to engage in reasoned deliberation on which courses of action will promote the public good.[348] Agency officials must engage in a

344. *See* Bone, *The Process of Making Process*, *supra* note 16, at 907–08 (recognizing that court rulemaking differs from agency rulemaking, in part, because "court rulemakers are not subject to executive control"); Struve, *supra* note 43, at 1124–25; Walker, *supra* note 15, at 462, 479–84; *see also* Geyh, *supra* note 89, at 1244–45 (acknowledging "certain obvious similarities" between court rulemaking and agency rulemaking but claiming that there are fundamental differences based on the greater political accountability of administrative agencies that results from the sitting President's ability to appoint and remove most agency officials).

345. *Cf.* Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking,"* 53 HASTINGS L.J. 843, 873–74 (2002).

346. *See* Staszewski, *supra* note 334, at 2.

347. *Id.* at 7–9; *see* HENRY S. RICHARDSON, DEMOCRATIC AUTONOMY (2002); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010).

348. *See, e.g.*, Jon Elster, *Deliberation and Constitution Making*, *in* DELIBERATIVE DEMOCRACY 97, 104 (Jon Elster ed., 1998); Dennis F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POL. SCI. 497, 498, 504 (2008); *see also* Staszewski, *supra* note 334, at 8.

decisionmaking process that considers all of the relevant interests and perspectives,[349] and they must provide reasoned explanations for their decisions that free and equal citizens with fundamentally competing perspectives could reasonably accept.[350] Agency decisions adopted pursuant to these criteria are democratically legitimate because each interest and perspective is treated with equal respect and arbitrary decisionmaking is prohibited.[351] A deliberative model of administrative legitimacy is based on broader theories of deliberative democracy, which seek to eliminate arbitrary governmental action and reach the best decisions on the merits in light of the available information and fundamental differences of opinion.[352]

We believe that the court rulemaking process fares relatively well from the perspective of deliberative theories of democratic legitimacy. Administrative law scholars have long recognized that notice-and-comment rulemaking contributes to the legitimacy of policymaking by administrative agencies, largely because it promotes the foregoing principles of deliberative democracy.[353] The notice-and-comment procedures followed by the Advisory Committee as part of the court rulemaking process provide fundamentally the same advantages. First, such procedures perform an informational function by allowing anyone who could be affected by a proposed rule to bring information and potential concerns

349. *See* RICHARDSON, *supra* note 347, at 213; Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 22–23 (Alan Hamlin & Philip Pettit eds., 1989); Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 359–60 (Elly Stein & Jane Mansbridge trans., 1987).

350. For influential discussions of this ideal, see AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 52–94 (1996); Joshua Cohen, *Democracy and Liberty*, *in* DELIBERATIVE DEMOCRACY, *supra* note 348, at 185, 193–98; John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 773 (1997).

351. *See* Staszewski, *supra* note 342, at 1282–84; Thompson, *supra* note 348, at 502 ("[L]egitimacy[] prescribes the process by which . . . collective decisions can be morally justified to those who are bound by them. It is the key defining element of deliberative democracy.").

352. *See, e.g.*, RICHARDSON, *supra* note 347, at 17 (seeking to develop a conception of public reasoning that would "reconcile administrative discretion with democratic control in such a way as to prevent bureaucratic power from being exercised arbitrarily"); *see also* GUTMANN & THOMPSON, *supra* note 350; PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 31–32 (1997); Cohen, *supra* note 350, at 185.

353. *See, e.g.*, Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1560 (1992) ("[T]he paradigmatic process for agency formulation of policy—informal rulemaking—is specifically geared to advance the requirements of civic republican theory."); Sunstein, *supra* note 113, at 59–64 (explaining that judicial innovations have transformed "notice-and-comment rulemaking into something very different from ordinary legislation" and claiming that "[r]eviewing courts are attempting to ensure that the agency has not merely responded to political pressure but that it is instead deliberating in order to identify and implement the public values that should control the controversy").

to the decisionmakers' attention.[354] Second, those procedures contribute to the legitimacy of policymaking on civil procedure issues by giving affected parties an adequate opportunity to participate in the process and by ensuring that rulemakers have the information necessary to engage in reasoned decisionmaking.[355] Third, this aspect of court rulemaking performs a constraining function by limiting the ability of decisionmakers to act arbitrarily or in a manner that is inconsistent with the law or the public interest.[356]

The primary concern about the legitimacy of court rulemaking from a deliberative perspective is undoubtedly the absence of an enforcement mechanism, such as hard-look judicial review, to prevent the rulemakers from making arbitrary decisions.[357] Although we believe that this is a serious concern, we do not think that it is fatal to the legitimacy of court rulemaking—or our proposal to expand its use—for several reasons. First, our proposed referencing procedure could perform a function analogous to hard-look judicial review in the sense that it would effectively remand ambiguities and other unanticipated problems with the Rules to the rulemaking process for further consideration.[358] Second, the court rulemaking process contains several safeguards that reduce the likelihood of arbitrary decisionmaking, even in the absence of an external enforcement mechanism. For starters, the Advisory Committee is obligated to consider seriously the comments that are submitted in response to proposed Rule changes and to engage in reasoned deliberation during the court rulemaking process.[359] Moreover, the Advisory Committee and the Court are likely to be sensitive to reputational considerations, and the manner in which the court rulemaking process was conducted in any particular case could easily be reviewed and evaluated by interested members of

354. *See* Abramowicz & Colby, *supra* note 19, at 1007–09.
355. *See id.* at 1009–11.
356. *See id.* at 1011–17.
357. *See id.* at 1023 ("Any analysis of the cost and efficacy of notice and comment in the judicial arena must consider whether the procedure would include a mechanism, analogous to the hard look doctrine in administrative law, designed to enforce the expectation that judges will consider and respond to illuminating comments."); *see also* Bone, *The Process of Making Process*, *supra* note 16, at 907–08 (recognizing that "court rulemaking differs from agency rulemaking," in part, because "judicial review does not offer the same kind of constraint as it does in the agency context, for successful challenges to federal rules are extremely rare and Supreme Court review relatively cursory"); Struve, *supra* note 43, at 1147–52; Walker, *supra* note 15, at 479.
358. *See supra* Part IV.
359. *See* Thomas F. Hogan, *The Federal Rules of Practice and Procedure*, U.S. COURTS (Oct. 2011), http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx (describing the use of public comments in the court rulemaking process).

the bench, bar, and legal academy.[360] Perhaps most important, a proposed change to the Rules can only be adopted (both under the existing court rulemaking process and under our proposal) pursuant to the agreement of the Advisory Committee and a majority of the Court.[361] While this requirement for consensus arguably distinguishes court rulemaking from other administrative rulemaking processes,[362] we think that the obligation for the Advisory Committee and the Court (as well as Congress) to agree on proposed changes to the Rules significantly reduces the risk of arbitrary decisionmaking in this context. The obligation therefore provides an important structural safeguard that improves the legitimacy of the court rulemaking process from the perspective of deliberative democracy, functioning in much the same way as the Constitution's bicameralism and presentment requirements.[363] Finally, it is noteworthy that leading scholars of the legitimacy of the court rulemaking process have embraced a deliberative model of legitimacy that is consistent with many of the principles described above.[364] Similarly, we believe that the Court's promulgation of rules of civil procedure through a notice-and-comment rulemaking process, which adequately considers and responds

360. *Cf.* Abramowicz & Colby, *supra* note 19, at 1023–27 (claiming that "the possibility of reputational rather than formal sanctions for ignoring comments suggests that a notice-and-comment system could have a significant benefit in the judicial context even absent any enforcement mechanism," and proposing a systematic means of evaluating the quality of the judiciary's response to the comments submitted in a random sample of cases).

361. *See* 28 U.S.C. § 2073(b) (2006).

362. *See supra* notes 309–312 and accompanying text.

363. *Cf.* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102, 109–11 (Robert A. Goldwin & William A. Schambra eds., 1980) (explaining that the American constitutional structure was designed to establish a deliberative democracy); Staszewski, *supra* note 141, at 1018–22 (claiming that a supermajoritarian requirement, such as bicameralism or presentment, can be understood "as a mechanism to facilitate deliberation in an effort to achieve consensus on ways of advancing the common good that take the views of political minorities into account").

364. *See* Bone, *The Process of Making Process*, *supra* note 16, at 890, 908 (claiming that "the legitimacy of the court rulemaking process does not derive from public participation or political accountability, but instead from a model of principled deliberation akin to common law reasoning," and recognizing the similarity between his argument and theories of deliberative administration); *see also* Struve, *supra* note 43, at 1140 (recognizing that "the structure of the rulemaking process facilitates informed and deliberative decision making," and that "[r]equiring that changes take place through the rulemaking process—rather than through adjudication—at least increases the chances that amendments will be subjected to a deliberative process and informed by practical knowledge"). Several leading commentators have also suggested that more public-spirited deliberation would improve the court rulemaking process. *See* Burbank, *supra* note 85, at 1742–43; Carrington, *supra* note 341, at 161; Jeffrey W. Stempel, *Halting Devolution or Bleak to the Future: Subrin's New-Old Procedure as a Possible Antidote to Dreyfuss's "Tolstoy Problem,"* 46 FLA. L. REV. 57, 60 (1994).

to a broad range of competing interests and perspectives, is a democratically legitimate method for making policy choices in this area. Indeed, there are good reasons to believe that this process is generally superior to rulemaking by a relatively uninformed and politically motivated Congress or President.[365] We are even more confident that this process is superior to policymaking by the Court pursuant to adjudication.

CONCLUSION

In this Article, we have advanced the notion that the Supreme Court ought to route most of its Rules decisions through the notice-and-comment rulemaking process instead of issuing judgments in adjudications. While we are not the first to have reached this conclusion, we believe our justification by analogy to administrative law, explicit preference for rulemaking, three triggering criteria, and novel referencing procedure represent a significant move from the mere expression of a preference to an actionable theory concerning the Supreme Court's choice of policymaking form. Even if we fail to convince some—or many—of the wisdom of our approach, it is our hope that jurists and scholars will give the Court's decisions regarding its choice of policymaking form more attention and care. For if proceduralists learn nothing else from administrative law, it is that the venue for making policy decisions matters. But, of course, this is a lesson we already knew.[366]

365. *See* Bone, *The Process of Making Process*, *supra* note 16, at 921–26 (claiming that "congressional rulemaking is likely to generate serious public choice inefficiencies, which could be reduced significantly by using a court-based committee-centered process"); Burbank, *supra* note 90, at 228; Carrington, *supra* note 341, at 165–66; Geyh, *supra* note 89, at 1222; Mullenix, *supra* note 341, at 801–02; Stancil, *supra* note 343, at 100; Walker, *supra* note 15, at 460.

366. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965) (holding that, in diversity cases, choice of forum will affect rules for service); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that choice of law should not affect decisions regarding the choice of federal forum).