FEDERAL RULES OF PRIVATE ENFORCEMENT

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The Federal Rules of Civil Procedure were made for a different world. Fast approaching their hundredth anniversary, the Rules reflect the state of litigation in the first few decades of the twentieth century and the then-prevailing distinction between "substantive" rights and the "procedure" used to adjudicate them. The role of procedure, the rulemakers believed, was to resolve private disputes fairly and efficiently. Today, a substantial portion of litigation in federal court is brought under regulatory statutes that deploy private lawsuits to enforce public regulatory policy. This type of litigation, which scholars refer to as "private enforcement," is the engine for statutory regimes governing the workplace, the consumer economy, securities markets, the environment, civil rights, and more. Yet while the nature of federal court litigation has changed dramatically in the decades since the Rules were first promulgated, the Rules and the institutions through which they are made never adapted. The Rules thus perform a role—providing the infrastructure for a litigation landscape dominated by private enforcement—far different from the one they initially performed.

This Article unearths the history of how the Federal Rules of Civil Procedure became federal rules of private enforcement but were never adapted for their new task. It then explores how that transformation challenges foundational assumptions of federal civil procedure. In delegating authority "to prescribe general rules of practice and procedure," Congress does not only charge the judiciary with making rules to resolve disputes, but also with making rules that enable privately enforced regulatory regimes to function. The

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Rules and the court rulemaking process, however, continue to be driven by assumptions inherited from the founding era of federal court rulemaking. We posit that the disconnect between the Rules' original design and their modern function explains many of the most significant pathologies in federal court rulemaking today. We further argue that acknowledging this disconnect—and rethinking the Rules to support their private enforcement function—points the way to a reinvigorated rulemaking system for the modern litigation state. By recasting the relationship between the Rules and private enforcement, our account supplies fresh rationales for court rulemaking, sheds new light on the functions today's rulemakers perform, and justifies reforms that would align the rulemaking process and the Rules themselves with the laws they enforce. This Article thus seeks to update the Federal Rules of Civil Procedure in light of the function they have taken on in the near-century since they came into effect and, in doing so, seeks to make them a modern, enduring achievement.

INTRODUCTION

The period between World War II and the present day saw a sea change in how American law is enforced. From Title VII's prohibition of workplace discrimination,[1] to consumer,[2] environmental,[3] securities,[4] and antitrust regimes,[5] many of our most important laws are enforced through private, civil lawsuits. This mode of enforcement—what scholars term "private enforcement"[6]—is the product of a "legislative choice to rely upon private litigation in statutory implementation," rather than or alongside other mechanisms such as criminal sanctions, administrative enforcement, tax incentives, or civil litigation by government lawyers.[7] Private enforcement involves legislators both designing a private right of action in a statute and making a series of choices about how to structure, facilitate, or control such enforcement.[8] Its rise is no accident. State and federal legislatures, at times helped by courts, have deliberately encouraged private enforcement by creating private rights of action, modifying court procedures, and subsidizing litigation through attorney's fee-shifts, damages enhancements, and other measures that make it attractive for private parties and the attorneys who represent them to shoulder the work of enforcing the law.[9] Today, a substantial proportion—by some

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1 *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (private right of action).

2 *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681(n) (private right of action).

3 *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604 (citizen suit action).

4 *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964) (finding a private right of action under the Securities Exchange Act of 1934); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971) (finding a private right of action under section 10(b) of the Exchange Act).

5 *See, e.g.*, Sherman Antitrust Act of 1980, 15 U.S.C. § 15 (private right of action).

6 *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS & RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 65–125 (2017); THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S. (Lynda G. Dodd, ed., 2018); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1913 (2014); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1141 (2011).

7 FARHANG, *supra* note 6, at 3 (emphasis omitted).

8 *See id.* at 3–4.

9 For a larger history of how legislatures came to create incentives for private enforcement, see generally Sean Farhang, *Regulation, Litigation and Reform*, *in* THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA (Jeffrey A. Jenkins & Sidney M. Milkis eds., 2014).

measures, the majority—of civil cases that are actively litigated in the federal courts are private enforcement actions.[10]

Yet, despite private enforcement's prominence in the U.S. litigation system, our system of federal civil procedure is strangely inattentive to it. Private suits enforcing securities, antitrust, consumer, and civil rights laws, among others, depend on rules of civil procedure, and their success or failure is often linked to the shape and content of those rules. But look at the procedural rules for federal courts, where the highest dollar-value cases are heard, and private enforcement is nowhere to be found.[11] There is no mention of private enforcement in the Rules Enabling Act of 1934 ("Enabling Act"), where Congress empowered the Supreme Court and its advisory committees to make federal rules of civil procedure, or its subsequent amendments.[12] Private enforcement is not mentioned in the Federal Rules of Civil Procedure ("FRCP" or "Rules").[13] And it is scarcely attended to in the court rulemaking process through which the FRCP are updated and revised. The result is that laws that use private enforcement are *enforced* and *implemented* through procedures—the FRCP—that were not principally or deliberately *designed* to perform those functions.

How did the Federal Rules of Civil Procedure become federal rules of private enforcement without being adapted to their new task? And what does this history teach about the future of the Rules? As we'll show, the FRCP's design/function disconnect emerged from the parallel development of two complementary, but separate, legislative projects. The little-noticed disconnect between the FRCP and their enforcement function lies at the heart of many of the most serious pathologies in federal civil procedure today but is rarely—if ever—acknowledged by scholars and court rulemakers. And for good reason. Acknowledging the disconnect requires a basic reorientation in how scholars, lawmakers, and court rulemakers approach procedural design for the federal courts.

We begin in Part I by explaining how the FRCP inadvertently came to serve as supporting infrastructure for thousands of

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10 *See infra* note 113 and accompanying text.

11 Our focus in this Article is on the Federal Rules of Civil Procedure and the extent to which they facilitate or fail to facilitate private enforcement, but a similar analysis is also possible for state civil procedure codes. For a useful exploration of how state civil procedure is made, see generally Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1 (2018).

12 *See* 28 U.S.C. § 2072.

13 *See* FED. R. CIV. P.

statutory programs enforced through private litigation. While private enforcement causes of action were not unheard of when the FRCP came into shape, they did not dominate the landscape of litigation that formed the backdrop for the development of the Rules. Indeed, apart from prominent examples like the Sherman Antitrust Act, few federal statutes at the time relied on what we would now call private enforcement.[14] The FRCP, the product of an early twentieth century progressive reform movement, both arose from and reflected many of the premises of a world that pre-dated the modern regulatory state.[15] Indeed, while the rulemakers knew that the FRCP would to some extent be put to use in processes of statutory enforcement, they did not foresee the extent to which this would become their principal function. The Rules came to serve that function as lawmakers in the 1960s and early 1970s realized private enforcement's power as an engine for implementing statutory policy and, in doing so, shifting societal norms.[16] After Congress embraced private enforcement in the landmark Civil Rights Act of 1964, it soon migrated to other domains, as statutes relying on private enforcement multiplied and expanded.[17] Contemporaneous legal developments helped drive a surge in the number of laws deploying private enforcement, litigation under those laws, and the size of the U.S. plaintiff's bar. The Rules thus came to perform a role that, while not unknown to the people who drafted them, was not foreseen in their deliberations. Designed and built to resolve traditional legal disputes fairly and efficiently, the FRCP have become the infrastructure for private enforcement.[18]

Recognizing this disconnect and the history that gave rise to it profoundly alters our understanding of federal civil procedure. More than a simple set of procedures that facilitate

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14 *See infra* notes 87, 112 and accompanying text.

15 *See infra* Part I.A.

16 *See infra* Part I.B.

17 *See id.*

18 This is not the first article to suggest that the FRCP have come to perform functions beyond those that figured in debates over the Enabling Act. *See, e.g.*, J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. Rev. 101, 113–33 (2012) (exploring how the FRCP are poorly structured to facilitate accurate settlements); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 378–79 (1982) (exploring how the FRCP are used as part of an increasing managerial stance by federal judges). Nor is our title construct a particularly novel one. *See, e.g.*, Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. Chi. L. Rev. 829, 829 (2021); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2085 (2002).

"the just, speedy, and inexpensive determination of every action and proceeding,"[19] the FRCP are also the plumbing that enables thousands of private enforcement programs created by state legislatures and Congress to work. In administrative law terms, the FRCP "fill up the details" of statutory programs enforced through private enforcement.[20]

The rise of private enforcement could have been an occasion for civil procedure to adapt and evolve—for the FRCP to be remade for the modern regulatory state. But this is not what happened. As private enforcement revolutionized the federal courts, the Rules' basic structure and philosophy persisted even as a commentators saw private enforcement as triggering a crisis in rulemaking.[21] Private enforcement, by tying procedural rules to the implementation of substantive regulatory policy, challenged the substance/procedure distinction that lies at the heart of the rulemaking regime ushered in by the Enabling Act, as well as the notion that rulemakers could operate under a veil of neutrality. Rather than rethink the Rules for an era in which they form an integral part of regulatory enforcement, proceduralists largely circled the wagons, leaving the Enabling Act and its underlying commitments intact. Lacking a conceptual mooring—and facing a supposed "litigation crisis" caused in part by legislatures' increasing use of private enforcement—the rulemaking committee became gridlocked and the Rules ossified.[22] As rulemakers avoided making significant changes to the Rules for fear of intruding on Congress's domain, an increasingly assertive (and increasingly conservative) Supreme Court stepped into the void, interpreting the Rules, other federal statutes, and the Constitution to restrict private enforcement.[23]

This Article's initial contribution is to show how bringing these histories together helps us to understand this state of affairs—what one scholar terms "the collapse of the Federal Rules System."[24] But the Article offers more than a history of institutional stasis amidst changed circumstances. Recognizing the function that the Rules now perform points to a new

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19 *See* FED. R. CIV. P. 1.

20 Panama Refining Co. v. Ryan, 293 U.S. 388, 426 (1935) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825)).

21 *See infra* Part I.C.

22 *See infra* notes 125–140 and accompanying text.

23 *See infra* Part I.C.

24 *See* David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2489–90 (2021).

and more accurate understanding of their role in regulatory governance and the modern legal system—one that allows us to move past the dysfunction of the current rulemaking process but that also requires significant reforms. In Part II, we therefore turn to considering how reconceptualizing the Rules around their private enforcement function helps us to reconceptualize foundational issues in U.S. civil procedure about why Congress delegates rulemaking, what kind of neutrality the rulemakers should aspire to, the limits of the court rulemaking process, and about the very shape and structure of the Rules themselves.

Begin with the basic question of why Congress entrusts the FRCP's design to the judiciary. Where others see Congress's choice to rely on private enforcement as a *threat* to court rulemaking, we contend in Part II that this choice lends court rulemaking *legitimacy* by connecting it to Congress's first-order policy decisions. In so arguing, we depart from existing procedure scholarship and approach Congress's use of court rulemaking with the benefit of contemporary scholarship in administrative law and positive political theory.[25] While the rise of private enforcement has undermined the original rationales for the Enabling Act's delegation of procedure-making power to the Supreme Court, we argue that delegating procedure-making to the courts continues to be logical for Congress. Statutory programs that make use of private enforcement need procedure to function. Entrusting the FRCP to court rulemakers addresses Congress's need for the procedure that private enforcement programs depend upon without requiring Congress to do the work itself. This is so even though court rulemakers have different preferences and incentives than members of Congress, lack a background in many of the areas for which they devise rules of civil procedure, and may even be ideologically opposed to laws that are enforced through private, civil litigation. On our account, the procedures that courts create are part and parcel of a larger process where Congress uses courts, lawsuits, and lawyers to enforce and elaborate regulatory policy. Court rulemaking allows Congress to focus on designing and amending major legislative policies while leaving the crucial but arduous work of designing enforcement infrastructure to court rulemakers.

Our rethinking of the FRCP also challenges conventional wisdom concerning rulemaker neutrality and the trans-substantive

25 *See infra* Part II.B.

shape of the FRCP. The Rules regime has been characterized by a commitment to rulemaker "neutrality" and to "trans-substantivity"—to making rules that apply across a wide array of laws.[26] But in the modern regulatory state, the closeness of procedure-making to substantive regulatory outcomes has undermined the notion of the neutral rulemaker who labors on technical procedural matters divorced from substance and called into question the viability and wisdom of rationales for making rules that apply across cases. We seek to offer a modern understanding of those concepts and their appropriate scope, arguing that, today, neutrality and trans-substantivity have taken on particular new functions and are supported by new rationales. Rulemakers have been tasked by Congress with writing a single set of rules to support myriad private enforcement laws. The nature of this project informs the dividing line between questions of "practice and procedure" that are within the judiciary's authority to address and the "substantive right[s]" that are for Congress and other bodies with plenary lawmaking authority.[27] It necessarily requires rulemakers to abstract across myriad regulatory statutes, assuming a certain neutrality vis-à-vis questions of regulatory policy as they write cross-regime rules for many different kinds of cases. The scope and limits of court rulemakers' authority, the trans-substantive shape of the Rules, and the meaning of neutrality can thus be appreciated as part of the Rules' role supporting private enforcement. Importantly, these rationales for refined forms of neutral, trans-substantive rulemaking do not, as much scholarship assumes, require rulemakers to ignore the substantive regulatory implications of their work. To the contrary, they at times require rulemakers to depart from trans-substantivity to ensure the faithful implementation of private enforcement programs.

While Part II shows how rethinking the FRCP in light of their enforcement function aids in rethinking core principles undergirding the federal procedural system, Part III turns to its implications for how rulemaking should function. We explore various ways in which the rulemaking process is ill-designed for making federal rules of private enforcement. Court rulemakers operate under a statutory mandate that neglects the Rules' enforcement function. They lack the information needed to develop effective rules of private enforcement. And they operate under procedures that frustrate good rulemaking and

26 *See infra* Parts III.A & D.

27 *See* 28 U.S.C. §§ 2072(a)–(b).

encourage the Supreme Court to undermine private enforcement through decisions interpreting the Rules. In light of these structural defects, it is no surprise that rulemaking has ossified under private enforcement's weight. To remedy this state of affairs, we suggest reforms that would revive rulemaking and better equip it to fulfill its modern functions.

We thus come full circle. The FRCP's transformation into rules of private enforcement should prompt neither a crisis nor an opportunity to retrench them in order to curtail litigation's role in regulatory enforcement. It should, instead, prompt a rethinking of the Rules to embrace their new function *as* federal rules of private enforcement.

What would Federal Rules of Private Enforcement look like? Precisely because we've never had a rulemaking process that accounts for the Rules' enforcement function, this Article can only offer a speculative, and necessarily incomplete, picture of such rules. To illustrate the implications of our analysis, however, Part IV presents four case studies of areas where attention to the FRCP's role in private enforcement would impact their design.

The FRCP were authorized in the 1934 Enabling Act and came into effect four years later in 1938. Ultimately, our aim in this Article is to revisit their role in light of the function that they have come to perform in the near century since, with the benefit of scholarly literatures that similarly post-date the Rules' enactment and canonical writing on them. In doing so, we come not to bury the Rules, but to explain their continuing relevance. We aim to breathe new life into the court rulemaking process by reinterpreting the history of the past century, taking procedure's role in regulatory enforcement as a feature and not a bug, and reimagining procedure and rulemaking around that feature.

I
How Rules of Civil Procedure Became Rules of Private Enforcement

Walk into any federal district court today. If the court is not hearing a criminal case, the various judicial personnel will most likely be working on a matter arising under a law that makes use of private enforcement. Private enforcement actions, as we surveyed above, are those initiated and litigated by private parties seeking to enforce regulatory legislation.[28] Such private rights of

[28] *See* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 Lewis & Clark L. Rev. 637, 639 n.2 (2013) ("We use the phrase 'private enforcement' for both enforcement initiated by private parties but taken

action were rare when the FRCP came into their modern shape in 1938, but they have proliferated over the past sixty-odd years. Congress and state legislatures have vested members of the public with the power to enforce in court a bevy of laws governing social and economic life, making litigants and courts central actors in the interpretation and implementation of U.S. regulatory law. Today, private enforcement cases are one of the predominant forms of federal court litigation.[29]

But curiously, private enforcement is missing from the FRCP, which "govern the procedure in all civil actions and proceedings in the United States district courts."[30] Scan the Rules' text and you will find lots of things—provisions governing pleading, notice, joinder, counterclaims and crossclaims, disclosures, discovery, provisional and final remedies, and much more—but no mention of private enforcement or the statutory regimes implemented via the FRCP. Nor does private enforcement sit more subtly beneath the Rules, featuring prominently as a concept in the debates and discussions of the Civil Rules Advisory Committee ("Advisory Committee"), which is appointed by the Supreme Court and drafts new rules and rule amendments that ultimately are sent to the Court and Congress.[31] The result is that the FRCP have been transformed *in practice* without their structure or the assumptions that animate them ever having been rethought for the functions they now perform.

In this Part, we explain how this peculiar state of affairs came to be. To do so, we bring together the two histories of the FRCP and the rise of private enforcement, showing that while the two are deeply connected, the FRCP were never adapted for their private enforcement purpose. The parallel histories we set out will be familiar to scholars of civil procedure, the federal courts, and regulation. But although those histories have major implications for one another, they are not usually presented together. In doing so, we recover the history of how the Federal Rules of Civil Procedure came to be federal rules of private enforcement.

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over by public officials as well as enforcement initiated and prosecuted by private parties.").

29 *See infra* note 113 and accompanying text.

30 *See* FED. R. CIV. P. 1.

31 For an overview of the various stages and layers of the rulemaking process, see 1 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE - CIVIL § 1.04 (Daniel R. Coquillette et al., eds., 3d ed. 2022).

A. The Federal Rules of Civil Procedure: 1938-2022

The FRCP are the product of a legal revolution that culminated with the enactment of the Rules Enabling Act of 1934.[32] The law and the debates that led up to it put in place a structure and set of underlying premises about the purpose and functions of federal civil procedure that, to this day, continue to shape the FRCP and thinking about federal court rulemaking.

The Enabling Act resulted from a long debate over procedure among law reformers, Congress, and the courts that focused on moving away from technical and complicated rules toward flexible rules that aided in the efficient resolution of disputes. Before the Enabling Act and the 1938 FRCP, federal courts in actions at law generally followed the procedures of the state courts of their home state.[33] The reformers who advocated for the Enabling Act lamented how this system required parties at times to follow convoluted, labyrinthian state procedural codes that parties could draw on to prevent cases from being resolved "on the merits."[34] In a 1906 speech before the American Bar Association ("ABA"), Roscoe Pound lamented the proliferation of technical, mechanical procedures made

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32 *See* 28 U.S.C. §§ 2072–2077. *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043–98 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944–56 (1987).

33 *See* Conformity Act of 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197; *see also* Joseph A. Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEX. L. REV. 1, 6 (1934) (discussing the pre-Rules procedural regime). Before 1872, federal courts applied the state law procedures that were in effect at the time that the state had joined the union. *See* Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94. There had been Federal Equity Rules governing district courts in equity proceedings since 1822, but they were applied unevenly and, according to contemporary observers, not often followed by district court judges. *See* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 10–11 (7th ed. 1930) (discussing the history of the Equity Rules); ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 160 (1987) (discussing judicial resistance to the Equity Rules); Erwin N. Griswold & William Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 HARV. L. REV. 483, 494 (1929) (same). As one federal district court judge put it, "very little attention has been paid to [the Equity Rules], and I doubt if any case can be found in any of the courts where they have been scrupulously and exactly enforced, or where they have been even nearly followed." Electrolibration Co. v. Jackson, 52 F. 773, 773 (W.D. Tenn. 1892).

34 *See, e.g.*, EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *Erie*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 28 (2000). New York's Field Code, adopted in 1848, is a much-discussed example; when adopted in 1848, it had 341 provisions, yet by the turn of the century, it had swelled to 3,441. *See* Subrin, *supra* note 32, at 940. The Field Code was criticized by lawyers as being "unnecessarily rigid and elaborate." PURCELL, JR., *supra* note 34, at 28.

adjudication follow a "sporting theory of justice," where counsel used the rules in a competitive game of obfuscation and interference that frustrated courts' ability to do substantive justice.[35]

A host of early twentieth century procedural reformers—including Pound, William Howard Taft, and various leaders of the ABA—argued for the merger of law and equity under uniform federal rules, and, inspired by the flexibility of equity, for a simplified pleading system limited to giving parties notice of what was in dispute and broad joinder of claims and parties in streamlined proceedings.[36] Reflecting the Progressive Era's affinity for "scientific" policymaking, the reformers proposed that the new rules be developed by experts within the judiciary.[37] While the reformers did not use the term "transsubstantiv[ity]"—which Robert Cover appears to have coined in 1975[38]—they believed that all different kinds of cases should be heard using a single set of procedures, to give judges the discretion to do justice.[39]

The Enabling Act, enacted after the New Deal began to roar into action and a series of personnel changes broke a logjam in Congress,[40] responded to reformers' critiques and reflected their vision of simplified, non-technical procedure that operated independently of any specific area of the law. The Act gave the Supreme Court "the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, . . . the practice and procedure in civil

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35 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 399, 404 (1906).

36 Pound articulated his view in two identically titled articles. *See* Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 402–03 (1910); Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 491, 497 (1910). For an exploration of Pound's thinking on procedural design, see Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 526–28 (2006). For an exploration of Taft's views and the ABA's push for federal rules, see Burbank, *supra* note 32, at 1045–48. For an overview of equity's widespread influence on procedural reformers and the FRCP, see generally Subrin, *supra* note 32.

37 *See, e.g.*, Subrin, *supra* note 32, at 969 (exploring the origins of proposals to vest rulemaking power in the Court and committees of experts); *see also* Burbank, *supra* note 32, at 1046–48 (quoting President Taft's statement to the effect that "that the best method of improving judicial procedure at law is to empower the Supreme Court to do it through the medium of the rules of the court, as in equity").

38 *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).

39 *See* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 26–27 (1905).

40 *See* Burbank, *supra* note 32, at 1095–96.

actions at law."[41] It also endowed the Court with the power to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both."[42] Drawing a distinction between "substantive" rights (which were a matter for Congress) and "procedure" (the responsibility of the court rulemakers), the Act commanded that such rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[43] The Act's reference to "general rules" paved the way for rulemakers to fashion trans-substantive procedure.[44] The Enabling Act thus provided authority for court rulemakers to make flexible general rules governing actions at law and in equity, and it cemented a vision of procedural rulemaking as something distinct from controversial and value-laden substantive lawmaking.

The Enabling Act, however, merely authorized the Supreme Court to devise new procedures; it did not set out a procedural code for the federal district courts. The task of drafting new procedural rules fell to an Advisory Committee that the Court formed soon after the Act's passage.[45] At its helm was Charles E. Clark, the Dean of Yale Law School. Clark and his fellow committee members viewed procedure-making as "a sort of morality play in which the demon, procedural technicality, keeps trying to thwart a regal substantive law administered by regal judges."[46] Modern litigation realities required courts to resolve complex claims "for which procedural lines would be an outdated impediment," as well as cases that were "so simple they did not need procedural lines and steps."[47] The Committee's response was to sweep aside "definitional lines and procedural steps" and craft a set of "simple general rules" that would work "for all cases."[48]

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41 Rules Enabling Act, Pub. L. No. 73–415, ch. 651, § 1, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072–77).

42 *Id.* at § 2.

43 *Id.* at § 1.

44 *Id.* at § 2.

45 For an overview of the composition of the committee, which was then called the Supreme Court Advisory Committee, see Subrin, *supra* note 32, at 971–73.

46 *Id.* at 973.

47 *Id.* at 974.

48 *Id.* This is not to say there were not differences of opinion among committee members. Clark, for instance, had not initially included liberal discovery provisions, which were advocated by University of Michigan law professor Edson Sunderland and which Clark ultimately accepted. For an overview of the history, see *id.* at 967.

The Committee's lawyers had experience in complex litigation and their discussions ranged from relatively simple tort and contract cases to more complex railroad rate-setting cases, patent cases, and strike suits against corporate officers.[49] Although reformers like Clark saw the federal rules as part of the New Deal turn towards social legislation, at the time, private enforcement was nascent. Federal law contained fewer than twenty federal statutes containing either a fee-shifting provision, authority to award multiple or punitive damages, or both.[50] The Rules that Clark and his colleagues drafted were thus born of a largely common law world, and indeed, the core regulatory statutes of the New Deal were largely enforced through agency processes.[51]

The 1938 Rules conformed with the reformist vision that produced them. With the world in what FDR described as a state of "high tension and disorder,"[52] the Supreme Court submitted the Rules to Congress in January of 1938, and they came into effect on September 1, 1938 through congressional inaction. Borrowing from Pound's critique of the sporting theory of justice, Rule 1 decreed that the rules governed "the district courts of the United States in all suits of a civil nature" and should "be construed . . . to secure the just, speedy, and inexpensive determination of every action."[53] Rule 2 merged law and equity, declaring that henceforth there would be one type of action in federal district court, the civil action.[54] Borrowing from equity's focus on simplicity and flexibility, Rule 8 instituted a regime of notice pleading, requiring "a short and plain statement of the claim showing that the pleader is entitled to relief."[55] Clark, shortly after the adoption of Rule 8, explained that it created "a very simple, concise system of allegation and defense" that "call[ed] for very brief and direct allegations."[56]

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49 *See id.* at 972–73.

50 *See* Burbank, Farhang & Kritzer, *supra* note 28, at 644 (noting that "[t]here were three such statutes from 1887 through 1899, eight from 1900 through 1929, [and] seven from 1930 through 1939").

51 *See, e.g.*, Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299, 305–07 (1983).

52 7 FRANKLIN D. ROOSEVELT, *Annual Message to the Congress - January 3, 1938*, *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 1, 1 (Samuel I. Rosenman ed., 1941).

53 FED. R. CIV. P. 1 (1938) (amended 2007).

54 *See id.* 2.

55 *Id.* 8.

56 Charles E. Clark, *Fundamental Changes Effected by the New Rules I*, 15 TENN. L. REV. 551, 552 (1939).

To promote efficient dispute resolution among parties, liberal cross-claim, counter-claim, and joinder rules were instituted, as were liberal rules of discovery and admission of evidence at trial.[57] Similarly, the process for filing appeals was simplified and streamlined.[58] The Rules were also trans-substantive. With the exception of rules such as Rule 9(b), carving out separate pleading standards for allegations of fraud or mistake, the FRCP applied to cases under federal or state law, without regard to whether the cause of action derived from a statute or the common law.[59] As described by Professor James William Moore, the Advisory Committee's research assistant, the new rules "epitomize[ed] the new objective of all procedure . . . that litigation ought to be settled on the merits and not upon some procedural ground."[60]

Though the Rules' approach to procedure was in many ways revolutionary, it was also somewhat backward-looking. Judith Resnik observes that "one of the prototypical lawsuits for which the 1938 Federal Rules were designed was the relatively simple diversity case: a dispute between private individuals or businesses in which tortious injury or breach of contract was claimed, private attorneys were hired to represent the parties, and monetary damages were sought."[61] The rulemakers, to be sure, were also cognizant of other types of cases and forms of litigation. Stephen Subrin's magisterial history of the FRCP notes that "much of the discussion [among the rulemakers] was about rate-setting cases, equity litigation generally, admiralty and patent cases, and potential strike suits against corporations and their officers."[62] The rulemakers presumed that litigation would be party-, not lawyer-, driven, and that parties had access to, and the resources to pay for, counsel to conduct such litigation. They largely ignored questions of funding and access.[63] And while some quickly predicted that Rule 23's rudimentary class suit could offer "a way of redressing group

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57 *See* FED. R. CIV. P. 13–24 (dealing with counterclaims, crossclaims, joinder, interpleader, and third parties); *id.* 26–37 (dealing with discovery); *id.* 39–53 (dealing with trial).

58 *See id.* 62–68.

59 *See, e.g.*, *id.* 9(b) (1938) (amended 2007) (requiring that averments of "fraud or mistake . . . be stated with particularity").

60 James William Moore, *The New Federal Rules of Civil Procedure*, 6 I.C.C. PRAC. J. 41, 42 (1939).

61 Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508, 517–18 (1986).

62 Subrin, *supra* note 32, at 972–73.

63 *See id.* at 971–73.

wrongs" and operate as "a semi-public remedy administered by the lawyer in private practice," the larger role of the Rules in regulatory governance was not central.[64]

Almost immediately, the Rules were heralded as a success, transforming litigation in the federal courts and serving as a model for states that adopted them as their own.[65] And in the eighty-five years since the Rules took effect, their animating assumptions have shown remarkable staying power. The Enabling Act still delegates procedure-making for the federal courts to the Supreme Court (which now conducts rulemaking via a formalized advisory committee and the Judicial Conference).[66] The delegation continues to be structured around a division between "substantive" rights (which the Rules "shall not abridge, enlarge or modify") and "rules of practice and procedure" (which the Supreme Court "shall have the power to prescribe").[67] Rulemakers continue to follow the "foundational assumption" of trans-substantivity,[68] even as scholars have highlighted its shortcomings as a policy matter and shown that strict trans-substantivity is not required by the Enabling Act's reference to "general" rules.[69] Rule design continues to be animated by the view that the Rules have "have no independent goals of their own and instead exist to provide for the efficient resolution of cases on their substantive merits" and the aspiration that rulemakers, likewise, operate above the political fray.[70] Indeed, as we discuss further below, rulemakers and commentators have at times taken the position that lifting the veil of ignorance and paying *too much* attention to the laws that are implemented through the FRCP threatens the legitimacy of the court rulemaking enterprise.[71]

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64 *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941).

65 *See* Subrin, *supra* note 32, at 973–74.

66 *See* 28 U.S.C. §§ 2072(a), 2073.

67 *See id.* § 2072(a)–(b).

68 *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 536, 543–44.

69 Instead, scholars have shown that "general rules" were understood as referring principally to the same procedures being used in all federal district courts, in contrast to practice under the Conformity Act. *See, e.g.*, Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 383 (2010); Burbank, *supra* note 68, at 542.

70 *See* David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 381 (2010).

71 *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 895 (1999)

There have, to be sure, been departures from these assumptions.[72] David Marcus has shown that the 1966 revision of the class action rule aimed in part to bolster desegregation litigation in the wake of *Brown v. Board of Education*.[73] Benjamin Kaplan, the reporter to the Advisory Committee that promulgated the 1966 revisions, wrote three years after the revisions took effect that new Rule 23(b)(3) sought "to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[74] In the 1970s and 1980s, Chief Justice Warren Burger used his influence over the court rulemaking process to counter a supposed "litigation explosion" in the United States.[75] His efforts attracted the attention of liberals in Congress and ultimately resulted in the Judicial Improvements and Access to Justice Act of 1988,[76] which opened up the rulemaking process to outside participants and subjected it to certain procedural checks that Congress had previously imposed on administrative agencies.[77] As we discuss below, the Rules are in the process of being amended to include

(exploring the core assumption of rulemakers that "the values relevant to procedural rulemaking were not substantive in nature. They were practical values of administrative design, such as efficiency, . . . simplicity, and flexibility").

72 And as we explore below, there has been significant scholarly critique of these assumptions and their ongoing viability. *See infra* Parts III.A, C, & D, note 132, and accompanying text.

73 *See* David Marcus, *Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 660 (2011).

74 Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969); *see also* Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126 (1989) (noting that "one could foresee that [the new opt-out rule] would apply particularly in certain substantive fields such as securities fraud; and, with no great flight of imagination, one might predict that the working of the rule must bring about changes of substance—as it has in fact done in the very fraud field"). Whether Kaplan's views were shared by the committee, the Supreme Court, or the 89th Congress is uncertain. John Rabiej relates that Kaplan's assistant, Arthur Miller, "testified at one of the committee's public hearings in 1996 on Rule 23 that the 1966 committee had nothing specific on its mind regarding class actions. 'Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative . . . . And the rule was not thought of as having the kind of implication that it now has.'" John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 323 n.4 (2005) (omission in original).

75 BURBANK & FARHANG, *supra* note 6, at 65–125.

76 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702, §§ 401–407, 102 Stat. 4642, 4642–52 (1988) (codified as amended in scattered sections of 28 U.S.C.).

77 *See* BURBANK & FARHANG, *supra* note 6, at 108–10.

non-trans-substantive procedures for cases seeking judicial review of Social Security disability insurance determinations.[78]

Yet important as these developments are, they have not dislodged the Enabling Act's substance/procedure distinction, its delegation of procedure-making to the Supreme Court, the Rules' general commitment to trans-substantivity, or the view that rulemakers should be "neutral" on matters of substantive regulatory policy. Today's Rules continue to reflect the influence of the 1930s.

B. Private Enforcement: From Idiosyncrasy to Mainstay of Federal Litigation

The creation and institutionalization of the FRCP occurred alongside a second revolution, this one in the way that law in the United States is enforced. Scholars have long appreciated that private dispute resolution can have larger regulatory effects on individuals who are not parties to the litigation.[79] But for most of the nation's history, civil lawsuits between private parties were conceived of as a means of vindicating personal, individual rights.[80] Lawmakers did not consciously understand private litigation as a tool for pursuing policy goals such as eliminating employment discrimination, protecting consumers from unsafe products, or ensuring the integrity of financial markets. All of that changed in the "Rights Revolution" of the 1960s and early 1970s. Since then, "private enforcement" of the law through civil lawsuits has become a dominant—according

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78 *See infra* notes 222–229.

79 *See, e.g.*, Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 459 (2008) ("To our modern sensibilities, tort law wears (at least) two hats: victim-specific compensation and regulatory deterrence.").

80 *See generally* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012) (exploring the influence of this dispute resolution model to understandings of the federal courts' role and functions). This view persists in the Supreme Court's standing doctrine, which so adamantly opposes the idea that a public, regulatory interest should permit access to the courts that it denies such a claim presents a "case" or "controversy" under Article III. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) ("Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only 'the rights of individuals,' *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 2 L.Ed. 60 (1803), and that federal courts exercise 'their proper function in a limited and separated government,' Roberts, Article III Limits on Statutory Standing, 42 DUKE L.J. 1219, 1224 (1993).").

to some *the* dominant[81]—means of enforcing and elaborating regulatory policy in the United States.

Private enforcement has deep historical roots. At common law, "any of the king's subjects" could bring suit for certain statutory violations to recover awards specified by law.[82] Blackstone explained that "[s]ometimes one part [of the award] is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a *qui tam* action"—one brought on behalf of the plaintiff as well as the King.[83] American colonies used this mode of enforcement,[84] and in 1863, Congress enacted the federal False Claims Act,[85] which used the qui tam device "to combat rampant fraud in procurement during the Civil War."[86]

Despite private enforcement's deep historical roots, federal law contained less than twenty of what we would now call private enforcement statutes when the FRCP took effect in 1938.[87] They included the Sherman Act, which allows plaintiffs to recover treble damages and attorney's fees in suits to enforce the antitrust laws,[88] and the Fair Labor Standards Act ("FLSA"), enacted the same year as the FRCP, which allows employees to sue for unpaid wages, costs, and attorney's fees and contains

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81 *See* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 45 (2001) (arguing that private enforcement "became a primary mode of implementing national antisegregation policy"); *id.* at 193 (exploring the "unique extent to which" the American regulatory system "encourages private enforcement of public law" (emphasis omitted)).

82 3 WILLIAM BLACKSTONE, COMMENTARIES *160.

83 *Id.*

84 CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:1 (updated June 2022).

85 False Claims Act, ch. 67, 12 Stat. 696 (1863) (codified as amended at 31 U.S.C. §§ 3729–3733).

86 U.S. *ex rel.* LaValley v. First Nat. Bank of Boston, 707 F. Supp. 1351, 1354 (D. Mass. 1988). Private enforcement in the U.S. stretches at least back to 1793 and has troubling connections to slavery at its earliest foundations. *See* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1195 (2021) ("The Fugitive Slave Act of 1793, the first of a pair of slavery-reinforcing private subordination regimes, empowered slave owners, their agents, and attorneys 'to seize or arrest' alleged fugitives and obtain certificates authorizing their return to slavery.").

87 *See* FARHANG, *supra* note 6, at 66 tbl. 3.1; *see also* Burbank, Farhang & Kritzer, *supra* note 28, at 644 (collecting instances where various federal statutes contained either (1) a fee-shifting provision or (2) authority to award multiple or punitive damages, or both, and finding there "were three such statutes from 1887 through 1899, eight from 1900 through 1929, seven from 1930 through 1939").

88 Clayton Antitrust Act of 1914, ch. 323, § 4, 38 Stat. 730, 731 (codified as amended at 15 U.S.C. § 15(a)).

a rudimentary class action that allows employees to sue on behalf of similarly situated employees.[89]

The New Deal was a period of intense legislative activity, and Congress enacted many laws alongside the FLSA.[90] Few of them contained private rights of action, however, and when they did, they tended to authorize suits against the *government* for the denial of statutory benefits.[91] One explanation for this design choice is that policymakers believed that private, civil litigation was an ineffective way of protecting the public interest, especially as compared to administrative enforcement.[92] Another explanation involves a New Deal distrust of courts, especially after the experience of federal courts overreaching in labor disputes and the Supreme Court's interventions against New Deal programs.[93] As late as 1960, private enforcement in most statutory areas "was either virtually or entirely unknown."[94]

The turning point in lawmakers' attitude toward private enforcement occurred after the passage of Title VII of the Civil

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89 Fair Labor Standards Act of 1938, Pub. L. No. 75–718, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)).

90 For overviews of the legal transformations worked in the New Deal, see, e.g., IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013); PETER H. IRONS, THE NEW DEAL LAWYERS (1982).

91 *See, e.g.*, Amendment to Title II of the Social Security Act, Pub. L. No. 76–379, § 205(g), 53 Stat. 1360, 1370–71 (1939) (authorizing a civil action for review of final determinations of the Social Security Board) (codified as amended at 42 U.S.C. § 405(g)).

92 As former Harvard Law School Dean James Landis saw it, "the common law system left too much in the way of the enforcement of claims and interests to private initiative . . . . For [administrative] process to be successful in a particular field, it is imperative that controversies be decided as 'rightly' as possible." JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 34, 39 (1938). Scholars have argued that Congress's reliance on public rather than private enforcement also has origins in contemporary party politics and the enforcement preferences of key members of the New Deal coalition. *See* David Freeman Engstrom, *"Not Merely There to Help the Men": Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 STAN. L. REV. 1, 6–8 (2018); David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1074–75 (2011) [hereinafter *Lost Origins*].

93 For an overview of the struggles over courts and labor disputes, see generally WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991). On the legal battles over New Deal legislation, see, e.g., LAURA KALMAN, FDR'S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM (2022). *See also* Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 482–508 (2017) (exploring the New Deal battles over the labor injunction resulting in the enactment of the Norris-LaGuardia Act of 1932).

94 David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 627 (2013).

Rights Act of 1964.[95] For decades, liberal Democrats had introduced legislation backed by civil rights groups that prohibited racial discrimination in voting, public accommodations, education, and employment, only to see it blocked by southern segregationists in their own party.[96] These early civil rights bills would have been enforced by a new federal agency modeled on the National Labor Relations Board.[97] With Southerners in Congress opposed to any form of civil rights legislation, the Civil Rights Act needed support from pro-business northern Republicans.[98] While they accepted the need for a federal ban on employment discrimination, these Republicans staunchly opposed the creation of a new federal bureaucracy and demanded that Title VII be enforced through civil suits brought by victims of job discrimination.[99] In the key negotiation, "liberals insisted that if private enforcement was the best they could do, a fee shift [allowing prevailing plaintiffs to recover their attorney's fees] must be included, and thus Republicans incorporated one into their amendments to Title VII."[100]

Although liberals initially resisted the use of private enforcement in Title VII, experience changed their minds. The NAACP Legal Defense and Education Fund and allied groups proved to be adept users of Title VII's private right of action and wielded it to attack de jure discrimination at a range of employers across the nation.[101] The NAACP also cultivated a network of private attorneys who could support their practices financially while enforcing job discrimination laws and lobbied Congress to adopt fee-shifting provisions in other civil rights laws.[102] By 1972, civil rights groups' position on private enforcement was the near-opposite of their position only a decade earlier. During negotiations over the Equal Employment Opportunity Act of 1972, the Leadership Conference on Civil Rights refused

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95 Sean Farhang, *Regulation, Litigation, and Reform*, *in* THE POLITICS OF MAJOR POLICY REFORM IN POSTWAR AMERICA 48, 53–54 (Jeffrey A. Jenkins & Sidney M. Milkis eds., 2014).

96 *See* FARHANG, *supra* note 6, at 96.

97 *See* Engstrom, *Lost Origins*, *supra* note 92, at 1084.

98 *See* FARHANG, *supra* note 6, at 96.

99 *See id.*

100 Farhang, *supra* note 95, at 53. As enacted, Title VII provided that "the court, in its discretion, may allow the prevailing party, other than the [EEOC], a reasonable attorney's fee as part of the costs." Civil Rights Act of 1964, Pub. L. 88–352, § 706(k), 78 Stat. 241, 261 (codified as amended at 42 U.S.C. § 2000e-5(k)).

101 *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 51 (1998).

102 FARHANG, *supra* note 6, at 54.

to back a bill that traded strengthened administrative enforcement by the Equal Employment Opportunity Commission for weakened private enforcement.[103]

In the decades that followed, the number of laws that made use of private enforcement increased many times over, as Congress and state legislatures enacted more and more statutes with private rights of action, damages enhancements, and attorney's fee-shifting provisions.[104] As legislatures increasingly enacted private rights of action, a cluster of other legal developments intentionally or inadvertently catalyzed private enforcement even further.

In 1966, the Supreme Court put forward a revision of Rule 23 that allowed courts to certify an "opt out" class action in cases seeking money damages.[105] As courts began to certify damages classes, they held that funds recovered through such actions were covered by the "common fund" doctrine, an ancient equitable device through which a party who recovers a fund on behalf of a group of people may recover their costs—including attorney's fees.[106] Working in tandem, the amended Rule 23 and the extension of the common fund doctrine to class actions created a new form of "entrepreneurial litigation."[107] An

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103 *See id.* at 134–35.

104 *Id.* at 66 tbl. 3.1 (showing that, between 1964 and 2004, the number of private enforcement regimes in major federal laws increased from less than 50 to more than 300). We also recognize that private enforcement is one of the principal means of securing remedies for violations of the Constitution. Most prominently, 42 U.S.C. § 1983 provides a civil remedy for violations of federal rights by government officials and others acting "under color of" state law. While our focus in this Article is on how legislatures deploy civil litigation to enforce and implement statutory policy, scholars have developed a robust scholarly literature on the procedural and other hurdles that litigants asserting constitutional claims face. *See, e.g.*, JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023); JAMES E. PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR (2017). Because § 1983 and related causes of action reflect a statutory policy authorizing private enforcement of constitutional rights, this Article's call for civil rulemakers to take into account legislative enforcement policies would entail placing civil rights suits in the rulemaking calculus, either designing trans-substantive rules with Congress's civil rights enforcement priorities in mind or designing departures with those same priorities in mind.

105 *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 386–400 (1967).

106 For an elaboration of the history of common fund doctrine, see generally John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

107 *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 285 (1983) (coining the term).

attorney could aggregate "relatively paltry potential recoveries" into something that was worth pursuing, then claim a percentage of the recovery as a contingent attorney's fee if the suit succeeded.[108]

Private enforcement received another boost when, beginning in 1977, the Supreme Court limited state bars' authority to regulate attorney advertising, allowing attorneys to launch the now-ubiquitous (and increasingly specialized)[109] advertisements for clients seeking legal representation.[110] Someone who responded to such an advertisement would most likely find themself in a sophisticated referral network, where labor is divided among firms that recruit and screen clients, litigate and settle cases, and coordinate the distribution of settlements.[111]

Today, the number of laws that use private enforcement and the amount of litigation under them are orders of magnitude greater than they were in the 1960s. The number of fee and damage provisions in federal statutes, well less than fifty in the 1960s, had risen to over 300 by 2004.[112] Private enforcement suits followed course. As Stephen Burbank and Sean Farhang explain, "[f]rom a rate of 3 [private enforcement] lawsuits per 100,000 population in 1967—a rate that had been stable for a quarter century—it increased by about 1000% over the following three decades (reaching 13 by 1976, 21 by 1986, and 29 by 1996)."[113] These trends persisted at the state level. A 1984 study of state codes identified 1,974 fee-shifting statutes

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108 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); *see also* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 266 (2003) (describing the cost-spreading function of the class action).

109 *See* Seth Katsuya Endo, *Ad Tech & the Future of Legal Ethics*, 73 ALA. L. REV. 107, 113, 127–130 (2021).

110 Bates v. State Bar of Ariz., 433 U.S. 350, 379 (1977); *see also* Stephen C. Yeazell, Brown*, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1985–91 (2004) (describing the liberalization of the Court's doctrine on attorney marketing).

111 *See, e.g.*, Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 244 (2006); JOHN P. HEINZ, ROBERT L. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 53–54, 71–72 (2005).

112 FARHANG, *supra* note 6, at 66 tbl. 3.1.

113 Stephen B. Burbank & Sean Farhang, *Litigation Reform, An Institutional Approach*, U. PA. L. REV. 1542, 1547 (2014). By another measure, roughly 30 percent of the directives enacted by recent Congresses contain a private right of action and financial support for private litigation. Sean Farhang, *Legislative Capacity and Administrative Power Under Divided Polarization*, 150 DAEDALUS 49, 49, 59 (2021).

then in effect.[114] A more recent study examining the past forty years of state law has identified more than 3,000 private enforcement regimes at the state level.[115] Over the past five years, in any given year, between half and two-thirds of civil actions filed in U.S. federal district courts have asserted causes of action under regulatory statutes; consistently 95% or more of those actions have been brought by private parties.[116] The rise

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114 Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 323 (1984).

115 *See* Zachary D. Clopton & David L. Noll, The Litigation States 5 (2021) (unpublished manuscript) (preliminary data on file with authors); *see also* Diego A. Zambrano, Neel Guha, Austin Peters & Jeffrey Xia, *Private Enforcement in the States*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 66) (using computational-linguistics and machine learning techniques to examine the prevalence of private enforcement provisions in state legislation and finding 3,500 private rights of action by conservative estimates).

116 *See Table C-2—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2017), https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2017/12/31 [https://perma.cc/C4K9-3DH5]; *Table C-2—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2018), https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2018/12/31 [https://perma.cc/R2HK-DW5M]; *Table C-2—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2019), https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2019/12/31 [https://perma.cc/VP4Z-E8KB]; *Table C-2—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2020), https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2020/12/31 [https://perma.cc/P8P8-MDJ8]; *Table C-2—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2021) [hereinafter *Civil Statistical Tables 2021*], https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2021/12/31 [https://perma.cc/8BC9-Z6CZ]. In addition to private enforcement actions, two categories of cases make up a substantial share of the federal courts' docket. The first category, which is not exclusive of private enforcement cases, consists of mass tort personal injury actions that typically are transferred to a single district court for coordinated management under 28 U.S.C. § 1407 and resolved on an aggregate basis (without individual cases being worked up) via aggregate settlements, dispositive motions, voluntary dismissals, and defaults. *See, e.g.*, David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 418–20 (2019). The percentage of cases that are managed via multidistrict litigation "has risen since 1992, from a low of about 5% to a high of 21%" in 2019. *See* Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1272 (2019). Authors with ties to the corporate defense bar often assert that it is even higher. *See, e.g.*, Alan E. Rothman & Mallika Balachandran, *Early Vetting: A Simple Plan to Shed MDL Docket Bloat*, 89 UMKC L. REV. 881, 882 (2021). The second category of cases are those brought by individuals who are incarcerated. In 2021, prisoners filed 46,160 petitions or actions that the courts docketed under unique docket numbers. *See Civil Statistical Tables 2021*, *supra* note 116. These cases consist of mainly petitions for a writ of habeas corpus and actions seeking remedies for violations of prisoners' civil and constitutional rights. Though managing prisoner litigation is an important function of the federal courts, we do not consider such cases private enforcement actions. *Cf.* FARHANG, *supra* note 6, at 238 n.35 (similarly excluding prisoner cases).

of private enforcement is reflected in the growth of the U.S. legal profession. Between 1960 and 2022, the number of lawyers in the United States increased more than four-fold, with the largest increase in the 1970s, "a decade when the number of lawyers jumped 76%—from 326,000 in 1970 to 574,000 in 1980."[117]

Private enforcement, in short, has transformed the landscape of regulation in the United States, giving rise to what Farhang terms "the litigation state."[118] And in doing so, private enforcement has transformed the work of the federal courts.

C. New Litigation, Old Rules

The private enforcement revolution changed the nature of litigation in federal court. Courts today continue to hear cases that fall within the dispute resolution paradigm that informed so much of rulemakers' work on the FRCP in the late 1930s. But much of what the federal courts do is adjudicate private litigation that advances a public regulatory purpose, brought under state and federal statutes that deliberately authorize and incentivize civil litigation by private parties as a means of enforcing, implementing, and elaborating statutory policy.

The shift is more than theoretical. Indeed, the shift towards private enforcement has profound implications for courts and procedure-making. This is so in part because private enforcement actions differ significantly from their common law counterparts. The common law tradition that has shaped so much of the U.S. legal system involves judges either making or, as some see it, finding law in the absence of positive law or in the interstices—the "empty crevices"[119]—of enacted statutes.[120] Common law adjudication is therefore often viewed as involving judicial creativity, with judges improvising, balancing competing values and considerations, and devising legal rules

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117 AM. BAR. ASS'N, ABA PROFILE OF THE LEGAL PROFESSION: 2022, at 22. Of course, we do not claim that private enforcement is the only factor that has driven the increase in the number of lawyers.

118 *See generally* FARHANG, *supra* note 6.

119 *See* Linkletter v. Walker, 381 U.S. 618, 623–24 (1965) ("[J]udges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic . . . terms that alone are but the empty crevices of the law.").

120 *See generally* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV 527 (2019) (arguing that common law judging can involve judges "finding" rather than "making" law); *see id.* at 532–35 (collecting sources supporting the proposition that common law judges "make" law).

and standards through interpreting all aspects of the cause of action.[121]

This process of practical reasoning stands in marked contrast to the process of interpreting, applying, and enforcing a statute, where "[r]ules of written law trace their validity to an initial enactment, made by particular people in a particular way"[122] and where the statutory enactment "is both the only reason and a conclusive reason for saying that this is the law."[123] Private enforcement, that is, involves judicial implementation of democratically-enacted policies, where the adjudicator must train their eye to the statute itself and seek to faithfully apply it. In contrast to a judge sitting in equity—or one who unearths social or legal norms in the common law tradition—a judge who adjudicates a private enforcement case must seek to faithfully implement duly-enacted legislative policy, serving on the conventional account as an agent of the legislature in enforcing its policy. And rules of procedure matter to these processes of private enforcement. They plumb enforcement processes—creating gateways, pathways, and blockages—and ought to facilitate enforcement in line with legislative prerogatives and priorities.[124] And it is precisely because of private enforcement's consequences for judging and procedure that our procedure system's lack of emphasis on private enforcement is so puzzling.

We are not the first to note the significance of the rise of private enforcement and its major implications for what David Marcus calls the "Federal Rules System."[125] To date, two closely

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121 *See, e.g.*, Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 267 (1992) ("[T]he common law includes any rule articulated by a court that is not easily found on the face of an applicable statute. This definition is designed to include exercises of judicial creativity."); Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) ("[I]n most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.").

122 *See* Sachs, *supra* note 120, at 546–47.

123 *See* A.W.B. SIMPSON, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 359, 366–67 (1987).

124 For an account of how procedural rules create gateways and pathways, see generally Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652 (2013).

125 Marcus, *supra* note 24, at 2486 (understanding the federal rules system as the FRCP and procedural systems that share the FRCP's constituent components, including "a transsubstantive default architecture for civil litigation," "the assignment of a procedural regime's maintenance . . . to court-supervised experts working outside the political process and under judicial supervision," and "a set of cultural expectations about litigation, particularly its adversarial and party-driven nature").

related lines of scholarship have explored private enforcement's effects on federal court rulemaking and the downstream consequences for federal civil procedure.

The first body of scholarship traces how the rise of private enforcement triggered a "crisis" in civil rulemaking that has led to the ossification of the court rulemaking process and the FRCP. As we noted above, court rulemaking is structured around a distinction between "substance" and "procedure": while the Supreme Court may "prescribe general rules of practice and procedure," "[s]uch rules shall not abridge, enlarge or modify any substantive right."[126] Before private enforcement exploded onto the scene, rulemakers often safely assumed that matters such as pleading standards, class actions, and burdens of proof were procedural, and thus fell squarely within court rulemakers' authority under the Enabling Act.[127] Private enforcement, however, "highlighted the close connection between procedure and substantive policy,"[128] and showed that even quintessentially procedural matters could have major implications for the practical impact of statutory programs.

These changes, in turn, came to affect the prevailing view of neutrality in procedure-making as "[a]n expert driven process outside of politics."[129] As procedural rules came to be seen as "serv[ing] the substantive objectives" of regulatory policies—powerful arrows in the quivers of civil rights litigants, workers, consumers, and others—the notion that rulemakers could labor as neutral process guardians without attention to procedure's substantive effects was cast into doubt.[130] The role of interest groups in pushing for and against procedural reforms only deepened this view.[131] Today, as a result, it is not uncommon for procedure scholars to reflect that the rulemakers are, as Brooke Coleman puts it, "subject to the same biases and

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126 28 U.S.C. §§ 2072(a)–(b).

127 *See, e.g.*, Bone *supra* note 71, at 901–03 (exploring how older ideas about the separation between substance and procedure both flourished before and wilted with the rise of private enforcement suits).

128 Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 295 (2010).

129 Marcus, *supra* note 24, at 2490.

130 Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 325 (2008); *see also* Marcus, *supra* note 70, at 402–03 (exploring how the rise of the modern class action was seen as blurring the boundary between procedure and substance and undermining value-neutrality).

131 For an overview of the role of partisan interest groups in pushing for procedural reform, see BURBANK & FARHANG, *supra* note 6, at 19–20, 55–58, 106–112.

preferences to which we all succumb," including ideological and cognitive biases.[132]

These changes also made it clearer that procedural rules could undermine regulatory enforcement. In 1983, for example, the Supreme Court approved amendments to Rule 11 that required courts to impose sanctions when they determined that the Rule's certification requirements had been violated.[133] Despite the "procedural" nature of the change, civil rights groups complained "that Rule 11 had a markedly disproportionate impact on civil rights cases" and, when "combine[d] with other factors[,] inhibit[ed] access to the courts for litigants with marginal, even arguable, claims or defenses."[134]

As procedure's implications for statutory policy became too obvious to ignore, commentators increasingly questioned the coherence of the substance/procedure distinction,[135] and rulemakers became decidedly more cautious about the proposals they were willing to consider and move forward.[136] Congress, meanwhile, created new opportunities for interest groups to check the rulemakers. The Judicial Improvements and Access to Justice Act of 1988, mentioned briefly above, requires rulemakers to follow open meeting requirements and provides interested parties the opportunity to comment on rule amendments, giving them the ability to slow rulemakers' work and sound "fire alarms" to allies in Congress when rulemakers propose amendments that threaten statutory programs.[137]

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132 Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407, 424 (2018).

133 *See* 5A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1331 (4th ed. 2018).

134 Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 363 (1990) (quoting STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 7 (1989)). The 1983 amendments to Rule 11 were largely rolled back by 1993 amendments to the Rule. *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

135 *See, e.g.*, Bone *supra* note 71, at 901–03 (exploring the changes in commentary and thinking).

136 *See, e.g.*, Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 754–59 (1993).

137 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702, § 401, 102 Stat. 4642, 4648–50 (1988) (codified as amended 28 U.S.C. § 2073(c)). Some have welcomed these changes, arguing that because procedural rulemaking is ineluctably a political and value-laden endeavor, rulemaking should be a participatory process modeled off of legislative processes. *See, e.g.*, Stempel, *supra* note 136, at 754–59. Others have argued that, while the line between procedure and substance is less clear-cut than originally assumed, the distinction remains

As a result, major procedural reforms today are not pursued through the rulemaking process. Scholars describe court rulemaking as having broken down or being in a state of crisis.[138] Some argue that court rulemaking has collapsed[139] and may "go the way of the French aristocracy,"[140] while even its defenders go only so far as to say that the process is "not dead yet."[141] Behind all of this prognostication is the rise of private enforcement and its effects on civil rulemaking.

The second body of scholarship explores how, against the backdrop of a stultified rulemaking process, other institutions have acted strategically to retrench private enforcement litigation.[142] In a path-breaking monograph, Burbank and Farhang trace how conservative lawyers and politicians set out to weaken private enforcement through changes to federal civil procedure.[143] After largely failing to secure more restrictive procedures from Congress and court rulemakers, this "counterrevolution" against federal litigation turned to the judiciary, where lawyers asked the Supreme Court to interpret the FRCP, federal statutes, and Article III in ways that restricted private enforcement. The strategy was a resounding success. Burbank and Farhang find that "the counterrevolution against private enforcement of federal rights [has] achieved growing rates of support . . . from an increasingly conservative Supreme Court,"

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a useful construct. *See, e.g.*, Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795, 838–43 (1991). Other scholars have updated the case for court rulemaking by offering philosophically-informed arguments for continuing it. *See, e.g.*, Bone, *supra* note 71.

138 *See, e.g.*, Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 Stan. L. Rev. 673, 676 (1975); Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 Rev. Litig. 1, 9 (1994); Mullenix, *supra* note 137, at 802; Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 Iowa L. Rev. 1269, 1271 (1997); Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 Law & Contemp. Probs. 229, 231 (1998).

139 *See generally* Marcus, *supra* note 24.

140 Mullenix, *supra* note 137, at 802.

141 Richard L. Marcus, *Not Dead Yet*, 61 Okla. L. Rev. 299, 300 (2008). The interests, agenda, and ambitions of the current rulemaking process are reflected in the multi-year "restyling" project, which sought to make the Rules simpler, clearer, more accessible, and easier to understand, without making "changes in substantive meaning." Edward A. Hartnett, *Against (Mere) Restyling*, 82 Notre Dame L. Rev. 155, 167 (2006). Although the project literally rewrote many FRCP, the new rules emphasized: "[t]hese changes are intended to be stylistic only." *Id.*

142 *See, e.g.*, Burbank & Farhang, *supra* note 6, at 4–5; Sarah Staszak, No Day in Court: Access to Justice and the Politics of Judicial Retrenchment 79–117 (2015); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. Pa. L. Rev. 1839, 1859–61 (2014).

143 *See generally* Burbank & Farhang, *supra* note 6.

and that "plaintiffs' probability of success when litigating private enforcement issues before the Supreme Court has been in decline," with plaintiffs losing about 90% of the time in cases with at least one dissent by 2014.[144] In contrast to earlier scholarship which suggested that liberal and conservative Justices were equally likely to vote in ways that weakened civil litigation,[145] Burbank and Farhang find that Republican appointees to the Supreme Court were markedly more likely to rule in ways that restricted plaintiffs' ability to engage in private enforcement.[146]

We accept both that rulemaking has become ossified and that conservative Supreme Court Justices have exploited that ossification to retrench litigation in the federal courts. Yet, compared to the attention they have devoted to the breakdown in the rulemaking process and the Supreme Court's civil procedure cases, scholars have devoted comparably less attention to the *structural* features that made those developments possible.

Those features, however, are a crucial part of the story. The parallel evolution of the FRCP and private enforcement resulted in a disconnect between what the Rules and the rulemaking process were designed to do and the function that they currently perform. Today, the Rules perform a function miles removed from the function they initially performed. Litigation that consciously aims to use private lawsuits for public regulatory purposes is now the lion's share of the federal courts' work. And the fact that the Enabling Act, rulemaking infrastructure, and Rules themselves did not evolve to cure this structural disconnect helps to thicken and explain the story of rulemaking's ossification and gives us a richer and more complete picture of conditions that permitted the Supreme Court in recent decades to retrench private enforcement.

Yet appreciating the disconnect also requires us to revisit foundational questions about federal civil procedure that go

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144 *Id.* at 23–24; *see also id.* at 130–91. Burbank and Farhang focus on cases with at least one dissent because they "believe that the presence of one or more dissents suggests the possible influence of ideology on the justices' views about the meaning of law and how it should develop." *Id.* at 149.

145 *See, e.g.*, Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1116 (2006) (noting "[t]he frequent participation—and occasional leadership—of the Court's more liberal members in shaping a Court fundamentally hostile to litigation").

146 *See* BURBANK & FARHANG, *supra* note 6, at 150–52 (finding that Justices Scalia, Roberts, Thomas, and Alito voted "against private enforcement 87% of the time in cases with at least one dissent").

unaddressed in the literature. If the Federal Rules of Civil Procedure are also federal rules of private enforcement, why would Congress continue to entrust the courts with responsibility for ensuring that private enforcement programs function successfully? Is the court rulemaking process set up to produce effective rules of private enforcement, and if not, what would such a process look like? How would the FRCP differ if the Enabling Act and court rulemakers acknowledged the FRCP's enforcement function instead of focusing on the ostensibly neutral process values?

In the remainder of this Article, we take up those questions, showing how private enforcement affects Congress's reasons for delegating the design of the FRCP to court rulemakers, the assumptions that guide court rulemaking, the structure of the rulemaking process, and specific rules of civil procedure. In the Conclusion, we return to the literature on retrenchment and the ossification of court rulemaking and show how understanding the Rules' design/function disconnect sheds new light on those developments.

II
Rulemaking for the Litigation State

The prior Part traced how two central features of the modern litigation state that are not often considered together developed along parallels paths, with profound implications for the federal rules system. The Rules Enabling Act of 1934 put in place a system of court rulemaking premised on the assumptions that rules of civil procedure would be developed within and by the federal judiciary, limited to matters of "procedure," broadly applicable to all kinds of cases, and developed by experts who were neutral on first-order questions of regulatory policy. With the court rulemaking system in place, the rulemakers elaborated the Federal Rules of Civil Procedure, which have provided the basic framework for federal civil procedure ever since. Meanwhile, in the legislative sphere, lawmakers realized private, civil litigation's promise as a tool for implementing, enforcing, and elaborating statutory policy. Private enforcement was not unknown when Congress enacted the Civil Rights Act of 1964, but its use there highlighted its potential as a tool for enforcing and elaborating regulatory commitments. Congress's enactment of more and more private rights of action, buttressed by other innovations in the courts and the bar, transformed civil litigation into a dominant mode of implementing statutory policy in the United States, to the point

that, today, private enforcement actions make up a substantial portion of the federal courts' docket.

Bringing these two histories together sheds new light on the breakdown of the federal rules system. Once private civil litigation became a prominent mode of enforcing statutory policy, the Rules became crucial to the success, failure, and meaning of regimes like Title VII. The rulemaking process, however, never adapted to demands made of civil procedure in the modern litigation state. And rulemakers continued to adhere to the fiction that procedural design could be, and was, divorced from debates over first-order policy.

It also raises foundational questions about the rationales for court rulemaking and the assumptions that inform it. If civil procedure inevitably affects the meaning and effectiveness of statutory regimes implemented through civil litigation, why should Congress delegate the design of civil procedure to court rulemakers? Should rulemakers aspire to follow a thick conception of neutrality, in which the design of civil procedure is shaped exclusively by neutral process values like fairness and efficiency, without giving weight to the effect of procedural choices on statutory regimes? Does a single set of trans-substantive procedures make sense for the diverse set of private enforcement laws that have been enacted by Congress and state legislatures?

In this Part, we offer an updated account of Congress's delegation of procedure-making authority to court rulemakers that accounts for the central role private enforcement plays in contemporary governance. This updated and more accurate understanding of Congress's delegation of procedure-making authority unsettles foundational assumptions about the court rulemaking process and aids us in rethinking the purpose and functions of that process. In a world where the FRCP are also federal rules of private enforcement, court rulemakers cannot—and should not—be indifferent to congressional enforcement goals. In creating cross-cutting rules, they should be attentive to the choices that Congress has made in the laws the rules provide the enforcement architecture for, while being open to the possibility that specific statutes or types of claims warrant subject-specific deviations from cross-cutting, trans-substantive rules. And, in light of the many statutes that deploy private statutory enforcement, they should read the Enabling Act's distinction between "substance" and "procedure" as an instruction about the policy choices that Congress has reserved for itself and the ones that it has entrusted to court rulemakers.

By taking the Rules' private enforcement function seriously, this Part thus retheorizes Congress's delegation of procedure-making power to court rulemakers, and from that foundation, also rethinks rulemaker neutrality, the scope and limits of rulemaker authority, and the trans-substantive shape of the Rules.

A. Delegating for Private Enforcement

As Part I recounted, the rise of private statutory enforcement pushed the original rationales for the Enabling Act's delegation of procedure-making authority to the judiciary to the breaking point. Private enforcement showed that, contrary to the claims of the Enabling Act's backers, the design of court procedures is not a technocratic endeavor divorced from debates over substantive regulatory policy. It highlighted the extent to which the individuals charged with writing the rules are not immune from the influence of partisanship, ideology, and bias. And it highlighted the extent to which their choices (and the Supreme Court's interpretations of the Rules) can make or break statutory regimes. Thus the "crisis" in the federal rules system: While the federal judiciary still has legal authority to promulgate rules of civil procedure, the court rulemaking system is like a house on a shoreline ravaged by climate change, its foundations crumbling away beneath it.

Although civil procedure scholars have put forward new rationales for court rulemaking,[147] they have devoted surprisingly little attention to the body of scholarship that arguably has the most to teach about why Congress has continued to delegate the design of civil procedure to the courts even as the traditional rationales for court rulemaking have broken down. A substantial body of work in political science and administrative

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147 *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 895 (1999) (exploring rulemakers' core assumption that "the values relevant to procedural rulemaking were not substantive in nature. They were practical values of administrative design, such as efficiency . . . , simplicity, and flexibility."); Mullenix, *supra* note 137, at 838–43 (arguing that, while the line between procedure and substance is less clearcut than originally assumed, the distinction remains a useful construct); *see also* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188, 1188 (2012) (urging that procedural change occur through civil rulemaking rather than judicial interpretation because of rulemaking's informational advantages and superior democratic legitimacy); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 821 (2010) (similar).

law considers why Congress delegates authority to other institutions, the factors that influence Congress's choice to legislate or delegate and the form that delegations take, and the policy and political effects of statutory delegations.[148] Although this literature typically considers congressional delegations to administrative agencies and executive departments, not courts,[149] it has much to teach about why it remains logical for Congress to continue to delegate rulemaking to the courts in an era of private enforcement. Here, we briefly survey the literature then consider its implications for Congress's delegation of procedure-making authority to the judiciary.

The jumping off point in the contemporary delegation literature is an understanding of how delegation allows Congress to address information and collective action problems that prevent it from fully articulating legal standards itself. Passing legislation requires lawmakers to coordinate the actions of hundreds of members of Congress and secure the assent of key lawmakers who control various veto-gates in the two political parties and the legislative process.[150] The same collective action problems and veto-gates mean that, once legislation is enacted, repealing or amending it is difficult.[151] Scholars have long recognized that entrusting policy development to institutions outside of

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148 *See generally* Sean Gailmard & John W. Patty, *Formal Models of Bureaucracy*, 15 ANN. REV. POLI. SCI. 353–77 (2012); J. Bendor, A. Glazer & T. Hammond, *Theories of Delegation*, 4 ANN. REV. POLI. SCI. 235, 244–45, 246, 255, 261–64 (2001). Work on Congress's choice to delegate is separate from the literature on the "nondelegation" doctrine in constitutional law, which focuses on whether and how the judiciary should enforce Congress's obligation to exercise legislative powers by policing the breadth of statutory delegations. On the effects of a more robust, judicially enforced nondelegation doctrine, see Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication,"* 108 CORNELL L. REV. 401, 453–56 (2023).

149 There is, however, a line of scholarship focusing on Congress's choice *between* agencies and courts. *See, e.g.*, Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts*, 119 HARV. L. REV. 1035, 1037 (2006); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 363 (2010); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 405–06 (2008); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 33 (1982).

150 *See generally* BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING 143–84 (2006); GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 165–86 (2002).

151 For a simplified explanation of the dynamics that contribute to the stickiness of enacted legislation, see David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753, 778 (2022).

Congress allows lawmakers to take advantage of information and expertise that Congress cannot realistically make use of at when legislation is initially developed.[152] As Jed Stiglitz has explored, Congress also faces a crisis of trust when the success of a statutory program depends on the perception that it was not enacted to advance partisan interests.[153] Members of Congress are necessarily partisans, so why would voters believe that a program they put in place advances non-partisan policy goals?

Delegation provides a means of addressing all these problems. The development of statutory policy can be entrusted to experts who are directed to follow standards set out by law.[154] This both eliminates a point of contention in Congress and allows policy to be informed by outside institutions' expertise. By authorizing other institutions to make policy, Congress allows policy to be updated in response to changed circumstances, by institutions that are subject to fewer procedural constraints and collective action problems than Congress itself. And policy development can be insulated from "improper" influences, as the Federal Reserve Act seeks to accomplish by entrusting federal monetary policy to the Fed.[155]

Delegation, however, is not costless. Entrusting another institution with devising and implementing statutory policy creates a principal/agent relationship between the delegating Congress and the recipient of delegated authority.[156] For countless reasons, the recipients of delegated power are unlikely to implement policy exactly as the enacting Congress would have wished. Indeed, their policy choices may be substantially at odds with Congress's.[157] This results in "agency costs" created

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152 *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 48 (1999).

153 *See* EDWARD H. STIGLITZ, THE REASONING STATE 21–35 (2022).

154 *See* EPSTEIN & O'HALLORAN, *supra* note 152, at 48–49.

155 *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 158 (2016); STIGLITZ, *supra* note 153, at 47–48. More ominously, opponents of modern federal governance have also suggested that members of Congress delegate because they are unwilling to do their jobs and seek to manipulate political responsibility for decisions. *See, e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1463 (2015).

156 *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 243–44 (1987).

157 Indeed, recipients of delegated power may use it to advance policies that the enacting congressional coalition would have disagreed with and to attack the very programs that the delegate is charged with administering. *See* Noll, *supra* note 151, at 764.

by Congress's reliance on necessarily imperfect agents to carry out statutory policy.

The literature teaches that agency costs are inevitable when Congress chooses to delegate. But this does not make delegating irrational. A major strand of the delegation literature explores the mechanisms available to Congress to control agency costs and align agents' incentives with their congressional principals.[158] More fundamentally, the simple presence of agency costs does not prove that delegation's costs outweigh its benefits. Perhaps the most influential theoretical account of Congress's choice to legislate or delegate emphasizes that legislating in Congress and delegating to another institution both entail costs for members of Congress.[159] The question for a member of Congress is not whether there are *any* costs from delegating, but whether the costs of delegating are *lower* than those of legislating within Congress. Even when policy is formulated by institutions and actors that do not align perfectly with congressional preferences, delegation may be the optimal strategy because its costs are outweighed by its benefits.

These dynamics shed light on Congress's continued delegation of procedure-making authority to court rulemakers as the original rationales for delegation broke down. To be sure, the persistence of the Enabling Act is, to some degree, simply a product of the stickiness of enacted federal legislation. But delegating procedure also addresses the political, informational, and practical difficulties to making federal civil procedure in Congress itself. Designing court procedure is a technically challenging task, one that does not offer immediate political rewards to lawmakers.[160] Congress is a poor forum for developing cross-cutting procedural rules. Apart from members' political incentives to avoid such work, the fragmented, veto-gate-laden nature of the legislative process means that it would be difficult to maintain a set of court procedures or to update them over time.

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158 *See generally* Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

159 *See* EPSTEIN & O'HALLORAN, *supra* note 152, at 34–35; Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213, 216–17 (1990).

160 Indeed, in the judicial interpretation process, much procedural reform goes under the radar. *See, e.g.*, Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Retrenchment*, 65 DEPAUL L. REV. 293, 295 (2016) (exploring how procedural decisions by the Court have lower public visibility and are less constrained by public opinion).

Delegating procedure-making to the courts addresses all these problems. Procedure can be shaped by actors with deep knowledge of courts and litigation, who can be directed to operate under procedures designed to produce good rules. Court procedures can be updated in response to changed circumstances more easily than would be the case if the code were produced by Congress itself. To the extent that court rulemakers are perceived as less political than Congress[161] delegating procedural design is an example of what Stiglitz calls "[d]elegating for [t]rust."[162] Court procedures may be perceived as fair because they are ostensibly devised by non-partisan experts.

All this argues for delegating the design of procedure as a general matter. But the rise of private enforcement, and the Rules' role in supporting it, adds a further rationale. Every time Congress enacts a law that is enforced through private litigation, it has a need for civil procedure. An employment discrimination claim, for example, cannot be resolved without an array of rules governing how to assert a claim, party and claim joinder, discovery, the pre-trial process, trials, and the preclusive effects of judgments. Yet for all the reasons that Congress is poorly positioned to develop general rules of procedure, it is poorly positioned to specify the gap-filling procedural rules that private enforcement regimes depend upon to function. For these regimes, the FRCP are a form of supporting infrastructure or "subsidiary administrative policy"[163] that is essential to the regimes' functioning and which Congress realistically cannot supply. Court rulemakers supply the infrastructure—the plumbing—that privately enforced laws need to function.[164]

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161 *But see* Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/6CYD-GKBJ].

162 Stiglitz, *supra* note 153, at ix.

163 *See* Yakus v. United States, 321 U.S. 414, 425 (1944).

164 Though we emphasize the similarities between Congress's reasons for delegating procedure-making to courts and its reasons for delegating the development of statutory policy to administrative agencies, we of course recognize the institutional differences between courts, on the one hand, and agencies, on the other. Agencies are creatures of statute, whereas the Supreme Court is created by Article III. Agencies are conventionally viewed as having a kind of democratic legitimacy that results from their being answerable to the president and congressional oversight, whereas courts are not subject to presidential direction or control, and the rulemaking model "assumes that Congress will exercise its veto power under the Rules Enabling Act only rarely." Bone, *supra* note 71, at 908. There also are differences in the functions that Congress has tasked courts and agencies with performing. Whereas the Enabling Act bars court procedures from altering "substantive" rights, agency regulation such as the SEC Rule 10b-5 governs primary conduct and has the force and effect of law. *Compare* 28 U.S.C. § 2072(a)–(b), *with*

Importantly, nothing in this updated account of Congress's reasons for delegating procedure-making to the courts depends on a clean distinction between substance and procedure or on rulemakers being apolitical guardians of neutral process values. Members of Congress are well aware that court rulemakers are influenced by partisanship, ideology, and other aspects of their identities and backgrounds; and the past four decades of court rulemaking have made plain that procedure pervasively shapes substantive regulatory policy.[165] Yet neither the porousness of the substance/procedure divide, the reality that rulemakers' work is shaped by partisanship and ideology, nor the need for checks on agency costs created by delegation undermine the basic rationales for delegating procedure-making to the courts. Both the ordinary operation of the federal courts and the implementation of private enforcement regimes require civil procedure. Absent the FRCP, private enforcement regimes could not function, but Congress is poorly positioned to make FRCP or an equivalent itself. The agency costs inherent in delegating procedure-making to court rulemakers are a price that Congress

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17 C.F.R. § 240.10b-5 (2023). Based on such differences, some scholars question whether court rulemaking should be analogized to agency policymaking. *See, e.g.*, Bone, *supra* note 71, at 907–08; Mullenix, *supra* note 137.

For our purposes, however, the similarities between courts and agencies are more instructive than the institutional differences between them. We approach court rulemaking as, fundamentally, a question of congressional choice and seek to answer why Congress has continued to rely on court rulemaking as the original rationales for the delegation of procedure-making authority have broken down. We believe that viewing courts the way that the literature conventionally views agencies—as imperfect agents, which respond wholly or in part to preferences that diverge from Congress's and yet are charged with developing subsidiary policy necessary for the implementation of statutory regimes—has considerable explanatory power, for the reasons we offer in the text. In so arguing, we join other scholars who have found the analogy instructive to probe. *See, e.g.*, Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 476 (1993); 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); Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 880 (1993); Mulligan & Staszewski, *supra* note 147.

165 It is unsurprising, then, that Farhang finds Congress devotes relatively more attention during legislative hearings to sections of regulatory statutes that rely substantially on civil litigation and elaborates policy with greater specificity in those sections compared to sections that rely on other enforcement mechanisms. *See* Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1534–35 (2018). On the influence of ideology on judicial behavior, see, e.g., ADAM BONICA & MAYA SEN, THE JUDICIAL TUG OF WAR: HOW LAWYERS, POLITICIANS, AND IDEOLOGICAL INCENTIVES SHAPE THE AMERICAN JUDICIARY 5 (2020). For procedure's effects on statutory policy, see *supra* notes 130–134 and accompanying text.

rationally is willing to pay for a generally applicable body of civil procedure.[166] To be sure, the Enabling Act does not provide for judicial review of rule amendments in the same manner that administrative law provides for judicial review of final agency action.[167] To the extent that the courts review the FRCP's validity when a party challenges one, review is highly deferential to the rulemakers' view of their own authority.[168] Nevertheless, the Act's "laying before" process performs a function similar to judicial review of administrative action under certain political conditions, allowing Congress to check amendments that are not consistent with the Act's delegation to the judiciary.[169]

This account of Congress's delegation of procedure-making to the courts flips conventional scholarly accounts of rulemaking in decline on their head. Where others see Congress's choice to center private enforcement as a *threat* to the enterprise of court rulemaking, we believe those same choices create a continuing need for court procedure-making and lend it legitimacy by connecting it to Congress's first-order policymaking. When Congress chooses judicial enforcement for a regulatory regime and chooses not to specify holistic or regime-specific enforcement procedures, the FRCP provide off-the-rack procedures for enforcing the regime—default rules for processing civil cases and, in so doing, implementing statutes that make use of private enforcement.

The procedures that courts create are thus part and parcel of a larger regulatory ecosystem that uses courts, lawsuits,

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166 In so arguing, we offer an account of the institutional logic that explains Congress's continued delegation of procedure-making power to the courts. Individual legislators will agree with and act on that logic to varying degrees, and their subjective thinking will only rarely be apparent from the public record. We seek to illuminate the institutional and political incentives that make delegating procedure attractive to Congress, not to offer an account of individual lawmakers' subjective views.

167 *Compare* 5 U.S.C. § 702 (providing that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof"), *with* 28 U.S.C. § 2074(a) (providing that rule amendments are to be transmitted to Congress by May, and "take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law").

168 *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

169 *See* 28 U.S.C. § 2074(a). The dynamics of this check, however, differ importantly from the dynamics of judicial review. While any court of competent jurisdiction may set aside agency action, Congress may only negative a rule amendment "by law"—that is, by enacting a bill that satisfies the constitutional requirements of bicameralism, presentment, and presidential approval.

and lawyers to enforce and elaborate regulatory policy. Without court-made procedure, the ecosystem could not function.

B. From Neutrality to Principled Generality

If the Rules' role in facilitating private enforcement explains Congress's continued delegation of rulemaking power to the Supreme Court, it also unsettles foundational assumptions that have long informed the civil rules system. The first of these is a thick conception of rulemaker neutrality. This view follows from the separation of substance and procedure that the Enabling Act's backers used to justify delegating control of federal civil procedure to the Supreme Court. It holds that, because substance and procedure are separate, rulemaking should take place with a kind of studied indifference to its effects on specific laws. Rulemakers, then, are not responsible for the success or failure of particular laws. Their remit is instead to design a set of rules that advance neutral process values like fairness and efficiency.

Once we abandon the simplistic view of the substance/procedure divide that informs the Enabling Act and view the Rules as supporting infrastructure for laws enforced through private enforcement, there is no obvious rationale for continuing to adhere to this thick conception of rulemaker neutrality. Just as it would be illogical for the SEC to promulgate regulations implementing the Exchange Act without understanding the Act's history, objectives, and policies, it makes equally little sense for court rulemakers to devise procedures for private statutory enforcement schemes without at least an awareness of Congress's choices in enacting them and expectations for their implementation.

On this understanding, the Rules' enforcement function requires sensitivity to—indeed, *heightened attention* to—procedure's effects on statutory policy. If court rulemakers are charged with crafting the infrastructure supporting private enforcement regimes, it is not enough that they design rules with attention to what are often conceived of as procedural values of fairness and efficiency. They must also devise rules that ensure the *faithful implementation* of statutory regimes that are enforced through private civil litigation. Stated differently, court rulemakers should understand their authority to craft rules of practice and procedure in light of Congress's ongoing legislative practice and the role it creates for them to fashion gap-filling default rules to facilitate the enforcement of regulatory policies.

Rulemaking so understood is not neutral to substantive law in the thickest sense, in which rulemakers make procedure without considering or giving any weight to the effect of procedural choices on regimes like Title VII or the Sherman Act. The endeavor does, however, involve a thinner, more feasible type of neutrality that results from the nature of the task court rulemakers undertake. Once again, another literature is instructive and can help to illuminate the kind of neutrality to which rulemakers should aspire. Rule-of-law theorists have long noted the way in which legislative generality can check against arbitrary or discriminatory legislation.[170] This is, in part, so because general laws will affect lawmakers themselves, or at least constituencies that are important to them. When lawmakers enact general laws, they have skin in the game and thus are more likely to ensure that laws are well-considered.[171]

A similar logic acts on court rulemakers who craft default rules of private enforcement for a range of statutes. By necessity, court rulemakers make rules for hundreds if not thousands of regulatory regimes at once. As such, rulemakers must abstract from the details of particular regimes and design default rules to facilitate cross-regime private enforcement. Rulemakers should strive to be neutral about the ends of policies—the thickest values they embody—but be attentive to the enforcement means and priorities selected by legislators. On this account, rulemakers should not aspire to *neutrality* but to *principled generality*. The goal is a set of rules that faithfully implement Congress's and state legislatures' choice to make use of private statutory enforcement across a range of regulatory regimes.

There is some synergy between our view and that expressed by Robert Bone. For Bone, the proceduralist's task is not to engage in rulemaking behind a veil of ignorance, but instead to "infer[] general principles from existing practice and design[] an integrated system of rules based on those principles."[172] We

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170 For classic articulations of the point, see, e.g., LON L. FULLER, THE MORALITY OF LAW 46–48 (2d ed. 1969); H.L.A. HART, THE CONCEPT OF LAW ch. 2 (1961); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 22 (1689).

171 As provocatively expressed by John Finnis, "[a] tyranny devoted to pernicious ends has no self-sufficient *reason* to submit itself to the discipline of operating consistently through the demanding processes of law, granted that the rational point of such self-discipline is the very value of reciprocity, fairness, and respect for persons which the tyrant, *ex hypothesi*, holds in contempt." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 273 (1980).

172 Bone, *supra* note 71, at 890. Thus, Bone reads Robert Cover's famous essay against trans-substantivity—where he coined the term itself—as a deeper

agree that court rulemaking should take account of existing legal practice but stress that practice cannot be deduced simply from litigant behaviors. It must expand to include and center legislative design choices.

This does not mean that the task of designing such rules is easy. Indeed, it is enormously complicated. Consider two fronts. First, such rulemaking requires creating default rules for private enforcement *and* traditional dispute resolution suits.[173] Second, the Rules not only provide the infrastructure for claims under federal private enforcement schemes but those created by state legislatures as well, since federal courts adjudicate state law claims pursuant to diversity and supplemental jurisdiction.[174]

Adding states into the picture complicates our account of Congress's delegation of procedure-making power to the Supreme Court because state legislatures do not necessarily pursue the same policies through private enforcement as Congress, and state policy may even conflict with federal law. Why would Congress want to supply enforcement infrastructure for state law claims, especially when state policy is at odds with congressional preferences?

A full answer to that question would take us into the arcane history of federal diversity jurisdiction. Looking at Congress's activity over the twentieth and twenty-first centuries, however, we do not believe that Rules' role supporting state private enforcement is a major factor in Congress's continued choice to delegate procedural design to court rulemakers. When crafting the hundreds of federal statutes that are enforced via private, civil litigation, lawmakers in Congress could not have escaped noticing that their handiwork would be enforced by and through the FRCP. And so, they could not have helped appreciating the way in which the FRCP supplied necessary infrastructure for federal private enforcement regimes. In contrast, we doubt that lawmakers were significantly or deeply

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rumination on how procedural choices "necessarily had to take account of substantive policies." Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1157 (2006); *see also* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 734–35 (1975).

173 Even under federal question jurisdiction, for example, federal courts hear traditional common law claims and claims under regimes that use civil litigation for private enforcement. *See Civil Statistical Tables 2021*, *supra* note 116.

174 *See* 28 U.S.C. § 1332 (laying out the bases for diversity jurisdiction in federal court); *id.* § 1367 (laying out the bases for federal district courts to exercise supplemental jurisdiction).

interested in promoting the availability of the federal courts as a forum for state private enforcement claims. Litigants' ability to assert state private enforcement claims in federal court is an artifact of the diversity and supplemental jurisdiction statutes. Those statutes have been amended infrequently. The most significant recent amendment to the diversity statute, the Class Action Fairness Act of 2005, changed the contours of federal jurisdiction to disable and restrict state court litigation.[175]

We view the Rules' foremost role, then, as supplying the infrastructure for federal private enforcement. And yet, the Rules also supply infrastructure of thousands of private rights of action created by state legislatures in an effort to catalyze private statutory enforcement. Because the Rules govern federal and state claims, rulemaking requires calibration *between* federal causes of action and *among* federal and state ones.[176] We recognize that creating default rules that run across these causes of action requires acts of alignment, line drawing, and judgment. Those acts are both the tasks and challenges of rulemaking.

C. The Limits of Rulemakers' Authority

Our account of the Rules' private enforcement role also offers a new perspective on long-running debates over the limits of court rulemakers' authority under the Enabling Act. Under the Act, the Supreme Court is authorized to promulgate "general rules of practice and procedure . . . for cases in the United States district courts."[177] But those rules "shall not abridge, enlarge or modify any substantive right."[178]

Following this dichotomy, decades of caselaw and scholarship have approached the limits of rulemakers' authority as a question about the meaning of "substance" and "procedure." In

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175 *See, e.g.*, Zachary D. Clopton, *Catch and Kill Jurisdiction*, 121 MICH. L. REV. 171, 176 (2022); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353–54 (2006).

176 While the rulemakers' choices in the FRCP will inevitably impact state private enforcement, we note that state legislatures have considerable power to protect state private enforcement goals when cases are heard in federal court. For example, the state law limitation on the certification of class actions at issue in *Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 U.S. 393, 398 (2010), could easily be rewritten as a limitation on damages keyed to the number of claims asserted against a defendant. Because federal courts follow state law on remedies for statutory violations, such a damages provision would avoid the threat of crushing liability that motivated the New York legislature to restrict the availability of class actions in state court.

177 28 U.S.C. § 2072(a).

178 *Id.* § 2072(b).

Sibbach v. Wilson & Co., Inc., for example, the Supreme Court said that in considering whether a rule is within the scope of the Enabling Act, "[t]he test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[179] John Hart Ely posited that "a procedural rule is . . . one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes."[180] In *Hanna v. Plumer*, the Supreme Court put an institutional gloss on the analysis.[181] After observing that a "procedural" rule is one that "relates to the 'practice and procedure of the district courts,'" the Court reasoned that a rule's approval by the Advisory Committee, Supreme Court, and Congress creates a strong presumption that the rule is procedural (and thus within the Advisory Committee's power to promulgate), because the Court and Congress both understand the limits on the Enabling Act's delegation and are unlikely to approve a rule that goes beyond those limits.[182] Justice Harlan's *Hanna* concurrence suggests the key is to ask what is being regulated—activities in the real world (substantive law) or the business of the courts (procedure).[183] Later cases and scholarship have alternated among these basic approaches.[184]

While we are mindful of the need to approach intervening in such a long-running debate carefully, we think our approach reveals a key part of the picture, albeit one that only came into focus as the litigation state emerged in its mature form in the 1970s and 1980s. It is a basic principle of statutory

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179 312 U.S. 1, 14 (1941).

180 John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724–25 (1974).

181 *See* 380 U.S. 460 (1965).

182 *Id.* at 464, 471 ("When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

183 *See id.* at 475 (Harlan, J., concurring) ("To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether 'substantive' or 'procedural,' is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.").

184 *See, e.g.*, Shady Grove Orthopedic Assocs. v. Allstate Ins., 559 U.S. 393, 407 (2010); A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 654 (2019); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 283 (1989).

interpretation that statutes are to be read in context.[185] Equally foundational is that when Congress enacts overlapping statues, interpreters "must read the statutes to give effect to each if [they] can do so while preserving their sense and purpose."[186] Debates over the rulemakers' authority, however, have focused almost entirely on the Enabling Act and the meaning of "substance" and "procedure" as used in the Act. With the notable exception of Burbank,[187] participants in those debates have paid scant attention to private enforcement schemes that work hand-in-hand with the Enabling Act and the FRCP.

Those regimes have much to teach about how far court rulemakers' mandate to establish "general rules of practice and procedure" sweeps. When we understand that the FRCP "fill up the details" of incompletely-specified private enforcement laws, supplying the plumbing those statutes depend upon to function, the content of those laws bears importantly on what is a rule of practice and procedure. "Substantive" law, on this understanding, refers to the matters that Congress has chosen to address. It refers both to the legislatively-specified objectives of private enforcement regimes and to specific features of those regimes that Congress itself has legislated. For example, the text and structure of Title VII make plain that it is to be enforced through private, civil litigation, and the Rules must respect that choice.[188] But Congress has also specified particular aspects of the enforcement scheme, such as that prevailing parties receive reasonable attorney's fees.[189] Title VII's fee-shifting provision is *substantive*, notwithstanding the obvious sense in which it regulates the judicial process for enforcing rights and duties, because it reflects a policy choice, made by Congress, about how the statutory regime should operate.[190]

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185 *See, e.g.*, Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594–599 (2004).

186 *See* Watt v. Alaska, 451 U.S. 259, 267 (1981).

187 *See* Burbank, *supra* note 32, at 1106–07.

188 *See* 42 U.S.C. § 2000e-5 (detailing procedures and prerequisites for asserting civil claims).

189 *See id.* § 1988(b) (providing that the prevailing party in actions to enforce Title VII may recover a reasonable attorney's fee).

190 While our principal authority for this understanding of the substance/procedure divide is the text of the Enabling Act, read in conjunction with Congress's legislative enactments in the decades since the Enabling Act became law, our interpretation also has foundations in the original debates over the Act. Burbank quotes a 1926 Senate Judiciary Committee report that opined that "the grant of rulemaking power did not extend to 'matters involving substantive legal and remedial rights affected by the considerations of public policy.'" These included remedial choices that "define[] or limit[] . . . civil rights . . . using that term in its

"Procedural" law, in contrast, is the gap-filling law that Congress itself has not specified and that enables privately enforced laws to function. Procedural law fills up the details of regimes in which Congress has only supplied a private right of action, or in which Congress has supplied a private right of action and an incomplete set of procedures for asserting and adjudicating the statutory right. But it is more than the law that Congress failed to provide itself. It must provide the means of fairly and faithfully carrying out and implementing private statutory enforcement schemes that depend on court rulemaking.

This gloss on the limits of court rulemakers' authority is similar to Burbank's. Based on a detailed study of the legislative record of the Enabling Act, he concluded that Congress understood "procedure" and "substantive" rights "to demarcate the spheres of lawmaking appropriate for the Supreme Court acting as rulemaker and for Congress."[191] But there is a further sense in which Congress's design choices limit the scope of rulemaking under the Enabling Act that goes beyond the (correct) recognition that "substantive right[s]" are an area of congressional responsibility whereas "rules of practice and procedure" are the judiciary's domain.[192] In administrative law, it is common to consider whether agency regulation respects the overall structure of a statutory regime in addition to whether rulemakers respected express limits on their authority. For example, in *FDA v. Brown & Williamson Tobacco Corp.*,[193] the Supreme Court concluded that the original federal Food, Drug, and Cosmetic Act ("FDCA") did not authorize the FDA to regulate cigarettes.[194] The FDA made a strong argument that it had authority over cigarettes under the plain language of the Act, but the Court concluded that recognizing such authority was "inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme"—specifically, with regulatory carveouts for tobacco that left it subject to regulation under other federal statutes.[195]

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broad sense." Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 433 (1986) (quoting S. REP. NO. 69-1174, at 9–10, 17 (1926) (alterations in original)).

191 Burbank, *supra* note 32, at 1107.

192 *See id.* at 1108.

193 529 U.S. 120 (2000).

194 *Id.* at 132–43.

195 *Id.* at 126.

The same analysis applies to court rulemaking. In considering whether court rulemakers have respected the limits of their delegation, one must consider whether the Rules are consistent with the "overall scheme" of the statutes they are used to enforce. Since the Rules provide implementation machinery for thousands of private enforcement regimes, it is not enough that they respect specific procedural choices Congress has made in specific statutes. They must respect Congress's choice that enforcement occur through civil litigation, and provide a workable, and fair, set of cross-regime procedures through which private enforcement can occur.

A stylized example illustrates. Every private enforcement regime relies on adjudication to sort out which claims are valid and which are not. If the Rules adopted a procedure that required cases to be decided using a Magic 8-ball, their design would be at odds Congress's reliance on private enforcement. Without violating any specific statutory command, they would undermine Congress's expectation that civil proceedings sort meritorious claims from those lacking merit, on the basis of the law and the facts.

Of course, the actual choices rulemakers make are not as consequential as this stylized example. But the broader point holds: since the Rules provide implementation machinery for many different private enforcement regimes, they must respect Congress's choice to implement statutes through private enforcement. As we said, the appropriate lens for evaluating rulemakers' work is *faithful implementation*. When considering whether rulemakers have discharged their mandate, one must consider whether their choices allow for faithful implementation of statutory regimes enforced through the FRCP.[196]

D. Trans-Substantivity

Finally, our account affects another foundational assumption of federal court rulemaking: that the rules are and should

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196 While our principal argument is that the Enabling Act's substance/procedure distinction should be interpreted in light of the function that the FRCP perform in the modern regulatory state, we have no objection to Congress amending the Enabling Act to do away with the outmoded and often-confusing language commanding that the Rules shall not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The language could helpfully be replaced with a directive that the Rules "respect first-order policy decisions reflected in law and facilitate statutory enforcement objectives." Such an amendment, we believe, would provide more clarity for private enforcement rulemaking and set it on a firmer path.

be "trans-substantive." Trans-substantivity refers to the notion that the same procedures govern different kinds of actions—they run across (trans) substantive areas of law (substantivity).[197] This means that whether the civil dispute involves a civil rights, antitrust, or contract claim, the Rules are the same and apply the same.[198] Trans-substantivity has been a central—perhaps *the* central—component of the FRCP since their adoption in 1938.[199] Indeed, while the rulemakers and legislators have deviated from trans-substantivity in several instances, those deviations are the exception rather than the rule.[200]

A flurry of debate surrounds trans-substantivity. Some scholars question its continuing relevance. They claim that its one-size-fits-all approach makes less sense in a modern, complex litigation state[201] and that trans-substantive rules asymmetrically benefit and harm certain parties.[202] Others question whether trans-substantivity's underlying rationales still hold, and here the conversation largely mirrors the one about court rulemaking. Trans-substantivity was once thought to be justified by the fact that the separation between substance and procedure permitted rulemakers to make general, neutral rules divorced from particular substantive laws and applicable

197 *See* Marcus, *supra* note 70, at 372 (defining trans-substantivity as "the notion that the Federal Rules apply equally to all areas of substantive legal doctrine"); Suzette Malveaux, *A Diamond in the Rough: Trans-substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 456–57 (2014) (defining trans-substantive rules as those that "apply to all federal civil actions in the same manner, regardless of the substantive right being pursued").

198 Trans-substantivity, however, is not the same as uniformity. *See* Marcus, *supra* note 70, at 376–77 ("Procedural rules can be uniform but substance-specific (all jurisdictions must exempt student loan cases from the mandatory initial disclosure requirement, for example) or disuniform but trans-substantive (each jurisdiction can decide whether to allow telephonic depositions, for example).").

199 *See, e.g.*, Malveaux, *supra* note 195, at 456 (exploring how the trans-substantivity "principle has been a central tenet of the civil litigation system since the Rules' enactment in 1938").

200 Marcus finds that only six rules are substance-specific. *See* Marcus, *supra* note 70, at 413. Two deal with procedures for serving a complaint against an officer of the United States. *See* FED. R. CIV. P. 4(i)(1)(C), 4.1(b). One deals with serving answers in cases involving officers and employees of the United States. *See id.* 12(a)(3). Another deals with electronic access to Social Security documents. *See id.* 5.2(c). Perhaps the most prominent, Rule 23.1, delineates procedural requirements for derivative class actions. *See id.* 23.1. Another deals with proceedings condemning property pursuant to eminent domain. *See id.* 71.1.

201 *See, e.g.*, Malveaux, *supra* note 195, at 456–57.

202 *See generally id.*

across them.[203] As private enforcement highlighted the overlap between substance and procedure, this justification has fallen by the wayside.[204]

These conceptual and theoretical battles have unfolded as lawmakers outside the court rulemaking process have deviated from trans-substantivity in several instances. Congress and state legislatures have passed legislation providing different rules for, among other things, prisoner,[205] securities,[206] discrimination and sexual assault,[207] and medical malpractice suits.[208] For commentators, these innovations undermine the substance/procedure dichotomy and show procedures being made *with* the substantive ends of law in mind.[209] Federal rulemakers, too, have deviated from trans-substantivity, but only in a few instances, often involving suits against the government,[210] leading David Marcus to posit that the "various bodies that participate in the process for the promulgation of the Federal Rules have . . . remained committed to the trans-substantivity principle."[211]

These developments have not sounded the death-knell of trans-substantivity in practice or theory. For Bone, they

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203 *See* Marcus, *supra* note 70, at 373–74 (exploring how the substance/procedure distinction and a concomitant neutrality proposition worked together to justify trans-substantivity); *see also id.* at 379 ("Rules designed to apply equally across doctrinal categories require a level of abstraction that prevent them from explicitly expressing or manifesting a judgment as to the value of one area or another of substantive law.").

204 *See id.* at 401–04 (describing how changes in law and legal thought undermined the historical justifications for trans-substantivity).

205 *See* Prison Litigation Reform Act, Pub. L. No. 104–134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.) (prescribing different rules for the exhaustion of administrative remedies, filing fees, and for how district courts treat complaints).

206 *See* Private Securities Litigation Reform Act, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 and 18 U.S.C.) (prescribing different pleading standards for some securities suits).

207 *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, 9 U.S.C. §§ 401–402.

208 *See generally* Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 984–99 (2005) (cataloging differing pleading requirements in medical malpractice litigation).

209 *See* Marcus, *supra* note 70, at 409 (arguing that these "legislative developments strike at the jurisprudential prerequisite for and normative assumption of trans-substantivity" and "demonstrate that the terms substance and procedure, and thus their dichotomy, are theoretically incoherent").

210 *Id.* at 413, n.262.

211 *Id.* at 413.

undermine the notion that trans-substantivity exists as an independent value and mean that trans-substantivity needs to be justified "by balancing the costs and benefits of general versus more specific rules."[212] Marcus reasons that trans-substantivity might still be justified as an allocation of decisional authority between Congress and courts, with Congress legislating and courts making general dispute resolution rules.[213]

Here, as above, a modern account of Congress's reasons for delegating procedure-making to the judiciary shifts the terms of the debate. If we look at the prominence of the FRCP in the implementation of statutory policy not as a threat to court rulemaking but as a congressional direction to make default enforcement rules, then the trans-substantive shape of the rules can be appreciated differently. When Congress chooses judicial enforcement for a bevy of regulatory regimes and chooses not to specify holistic or regime-specific enforcement procedures, trans-substantive rules provide the architecture for enforcement of those laws—for, that is, cross-regime implementation. General rules are therefore useful and even necessary functionally and institutionally to play this structural gap-filling role in law enforcement. Thus, whatever one makes of trans-substantivity's historical rationales or lineage, it has over time come to play this structural, default procedural design role and can be justified in a modern republic of statutes and litigation state for fulfilling that role.[214]

In a sense, this view of trans-substantivity puts a new gloss on historic rationales for trans-substantive procedure. As Marcus describes, the substance/procedure dichotomy and concomitant view of procedural neutrality underlying trans-substantivity trace back at least to Jeremy Bentham, who viewed procedure as "the course taken for the execution of the laws."[215] Procedure for Bentham was a means to an end, namely, "the accomplishment of the will declared" in substantive law.[216] This view also influenced the forces behind the 1938 Rules, including Charles Clark, the reporter for the first Advisory

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212 Bone, *supra* note 130, at 333–34.

213 *See* Marcus, *supra* note 70, at 421–23.

214 *See generally* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 21 (2010) (elaborating a constitutional vision of the United States as a republic of statutes); FARHANG, *supra* note 6 (describing and analyzing the U.S. litigation state).

215 *See* Marcus, *supra* note 70, at 384; 2 JEREMY BENTHAM, *Principles of Judicial Procedure*, *in* THE WORKS OF JEREMY BENTHAM 5, 5 (John Bowring ed., 1843).

216 BENTHAM, *supra* note 213.

Committee.[217] Even though Clark was somewhat skeptical of a rigid distinction between procedure and substance,[218] he viewed general, flexible procedure as a mechanism for "aid[ing] in the efficient application of the substantive law."[219] Thus, although procedure connected to substance, he maintained that proceduralists should seek to train their sights on values of efficient and accurate implementation of law by creating general, flexible rules.[220] Our view is that the emphasis on procedure as execution infrastructure is warranted but needs to be updated for the modern legal order. Procedure is neither neutral nor disconnected from substance in the thickest senses, but by taking account of its modern law enforcement function and embracing it, trans-substantive procedure can create general infrastructure for modern legal enforcement that must stretch across a bevy of statutory programs. Thus, the overarching goal is still crafting effective law-execution infrastructure; the legal landscape has just changed.

Anchoring trans-substantivity to effective law implementation augments our reasons for choosing *among* trans-substantive procedures with their enforcement effects in mind. For example, the Supreme Court's reinterpretation of Rule 8 as requiring "plausibility" pleading in *Iqbal* and *Twombly* is an example of trans-substantive interpretation unmindful to enforcement effects.[221] The Court transformed pleading standards without any attention to how its decisions would affect private enforcement, particularly for civil rights and employment discrimination plaintiffs who lack access to the government's or their employer's information at the pleading stage, and focused exclusively on discovery costs for and the pressures of civil litigation on defendants.[222] The episode highlights the benefits of

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217 *See* Marcus, *supra* note 70, at 386–401 (exploring how these views influenced the procedural reform movement in the United States).

218 *See* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 519 (1925) ("[T]he line between [procedure and substance] is shadowy at best.").

219 *Id.*

220 *See id.* at 545.

221 *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009).

222 This complaint is, by now, a standard critique of *Iqbal* and *Twombly*. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 61 (2010) ("*Twombly*'s emphasis on the defendant's costs . . . reveals how one-sided the discussions about expense and the expressions of concern have become."); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110 (2009) (arguing the Supreme Court was "ill-equipped to gather the range of empirical data, and

making important procedural decisions through rulemaking that is adequately informed as to enforcement effects as well as the danger of judicial rule reinterpretations made based on impressionistic judicial views about the litigation system.[223]

This rationale for trans-substantivity, however, does not bring with it the implication that all deviations from trans-substantivity are unjustified. The guiding principle, again, is that the FRCP ought to provide infrastructure for faithfully implementing statutory law. Their general trans-substantive shape makes sense because they provide default architecture for cross-regime implementation. Faithful implementation, though, may at times mean that the demands or exigencies of certain statutory regimes justify deviating from trans-substantivity. That is, both complying with congressional goals and calibrating enforcement may require deviations from trans-substantivity in certain areas, especially if such deviations are carefully considered by the rulemaking committees.

Consider, for example, Jonah Gelbach and David Marcus's proposal for departing from trans-substantivity in the Social Security context.[224] Gelbach and Marcus explore how the half-million social security disability determinations by administrative law judges each year translate to roughly 20,000 actions for review of Social Security orders in the federal district courts.[225] While the substance of the cases and their procedural needs vary little, litigants are subjected to "a dizzying array of local

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lacks the practical experience, that should be brought to bear on the questions of policy, procedural and substantive, that are implicated in considering standards for the adequacy of pleadings even in a discrete substantive context"); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 187 (2010) (arguing that the Supreme Court has become a "pro-defendant gatekeeper" and has "foster[ed] an environment that is increasingly hostile to civil claimants, particularly those seeking to challenge the unlawful conduct of societal elites such as government officials, large corporations, or employers.").

223 As one of us has noted, the cases "leave[] a number of interpretative questions unresolved." David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 121 (2010). Others have written about their effects on employment discrimination and civil rights plaintiffs. *See, e.g.*, Malveaux, *supra* note 195, at 466–67; Joseph A. Seiner, *Plausibility and Disparate Impact*, 64 HASTINGS L.J. 287, 287 (2013). The empirical literature on the effects of *Iqbal* and *Twombly* on the rates courts grant motions to dismiss for failure to state a claim is inconclusive. *See* David Freeman Engstrom, *The* TWIQBAL *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1207–13 (2013) (summarizing studies).

224 *See* JONAH B. GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY DISABILITY LITIGATION IN THE FEDERAL COURTS (2016); *see also* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1097 (2018).

225 *See* GELBACH & MARCUS, *supra* note 222, at 4.

rules, district-wide orders, and individual judge preferences,"[226] and federal court decision-making is remarkably varied and, in their words, "erratic."[227] To better calibrate agency and judicial enforcement, they have argued for a single, national set of rules for social security litigation.[228] Such rules would depart from trans-substantivity, for example, by doing away with complaints and answers, replacing them with notices of appeal and filings of the administrative record.[229] But Gelbach and Marcus argue that this departure makes sense because complaints and answers tend to be boilerplate documents amounting to needless formalities.[230] Their larger point, in this example and others, is that the relationship between agency and federal court adjudication of social security disability claims has become unproductive and problematic, needlessly complicating and impoverishing statutory implementation rather than facilitating it. For this reason, their account of the rationales for a regime-specific departure from trans-substantivity comports with the faithful implementation principle. New rules for social security suits, largely modeled on their proposals, have been fashioned by the civil rulemakers and will take effect absent action by Congress.[231]

An emphasis on infrastructure for faithful implementation, however, also supplies a rationale for *restraining* departures from trans-substantivity: too many departures from trans-substantivity can undermine the effective enforcement of legislative policy. The more departures that rulemakers make, the more rules they have to lay down for various domains, which amounts to more rules for private enforcers to master to fulfill their law enforcement functions.[232] This vision of restraint thus ties the somewhat perennial concern with labyrinthian procedure to more modern concerns with faithful implementation of legislative policy.[233] Thus, trans-substantivity still has

226 *Id.* at 7.

227 *See id.* at 4.

228 *See id.* at 148–59.

229 *See id.* at 148–52.

230 *See id.* at 152–53.

231 *See Proposed Amendments to the Federal Rules of Civil Procedure*, SUP. CT. U.S. (Apr. 11, 2022), https://www.supremecourt.gov/orders/courtorders/frcv22_b8dg.pdf [https://perma.cc/2UAB-B6VZ].

232 *See, e.g.*, Subrin, *supra* note 32, at 940–56 (exploring how concerns about complex and elaborate procedure drove the reform efforts resulting in the 1938 Rules).

233 *See supra* notes 34–35 and accompanying text.

gravitational pull insofar as generally-applicable rules can offer the kinds of simplicity and flexibility that facilitate law enforcement processes. Calibrating the design of the FRCP with their modern function requires attention to how overly complex procedural design can undermine judicial enforcement of legislative rights. Domain-specific departures, then, may be justified but need to be made with adequate consideration of their effect on the larger regulatory enforcement ecosystem.

III
Rulemaking Processes, Information, and Actors

The prior Part reenvisioned the logic behind the Enabling Act's delegation of rulemaking power to the judiciary for the modern regulatory state. We showed that, while the original rationales behind the Enabling Act no longer stand up to serious scrutiny under modern conditions, delegating the design of court procedure to the judiciary is supported by a powerful institutional logic that is grounded in the rise of private statutory enforcement. By directing the courts to promulgate general rules of practice and procedure, Congress empowers itself to pass incompletely specified laws that are administered through private, civil litigation. The FRCP supply the plumbing necessary for those regimes to be elaborated and enforced, freeing Congress to focus on more pressing, and more politically salient, matters.

This account offers a partial response to claims that court rulemaking is operating in "crisis" or has "failed."[234] Even though the procedures court rulemakers design will inevitably affect substantive regulatory policy—and even though those procedures will inevitably be shaped by rulemakers' incentives and preferences—delegating procedure-making still captures important benefits for Congress that outweigh the costs. Our account also challenges long-established assumptions about the federal rules system. The Rules' role supporting private enforcement alters the kind of neutrality to which rulemakers should aspire, sheds new light on the limits of the rulemakers' authority under the Enabling Act, and both explains the endurance trans-substantivity and adds to the case for non-trans-substantive rules when necessary for the faithful implementation of specific statutory schemes.

234 *See* Friedenthal, *supra* note 138, at 676; Marcus, *supra* note 24, at 2488.

In this Part, we turn from the assumptions that have guided court rulemaking to the mechanics of the rulemaking process. Today's rules of civil procedure should strive not only to advance the traditional goals of fairness, efficiency, and accuracy, but should allow for faithful implementation of regulatory law. In performing the latter task, however, the rulemakers confront a fundamental problem: the court rulemaking process was never designed to perform this function. Just as an appreciation of the Rules' role in the modern litigation state unsettles foundational assumptions guiding court rulemaking, it highlights shortcomings in the rulemaking processes.

This Part surveys those shortcomings and offers a sketch of what reforms to align rulemaking with private enforcement would look like. In doing so, however, we do not write on a blank slate. Many other scholars have examined the rulemaking process's shortcomings, so we begin by summarizing critiques of the court rulemaking process that have already been developed in the scholarly literature. We then describe how understanding of the FRCP's role supporting private enforcement regimes strengthens the already compelling case that scholars have advanced for modernizing court rulemaking and paves the way towards further reforms.

A. The State of the Debate

The common point in debates over the court rulemaking process is that the Advisory Committee that crafts and amends the FRCP needs good information and access to a diverse range of views to carry out its statutory duties.[235] Scholars have argued that the rulemaking process falls short on both counts. With regard to representation, scholars have observed that Advisory Committee members are mainly white and male,[236] that rulemakers come overwhelmingly from the ranks of judges,[237]

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235 *See, e.g.*, Bone, *supra* note 130, at 322–25 (exploring how rulemaking was historically thought to be best accomplished by lawyer-rulemakers who were experts in litigation); *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) (exploring the history and logics of the rulemaking process).

236 *See generally* Coleman, *supra* note 132, at 407.

237 *See, e.g.*, Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1017 (2016) (exploring the increase of rulemakers who specialize in complex litigation); Coleman, *supra* note 132, at 412–13 (exploring the prominence of judges on the rulemaking committees); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 613–17, 636–37 (2001) (exploring the conservative and defense orientation of rulemakers); Elizabeth Thornburg, *Cognitive Bias, the "Band of Experts," and the Anti-litigation*

and that rulemakers tend to be ideologically conservative because they are unilaterally appointed by the Chief Justice of the United States—an office that, since 1971, has been held by Republican appointees.[238]

Apart from the composition of the Advisory Committee, scholars have critiqued the outmoded way in which the Committee gathers information, with Burbank going so far at one point as to call for a moratorium on further rulemaking until better empirical infrastructure could be constructed.[239] Questions about how the Advisory Committee gathers information have connected to debates about the procedures under which it operates. Until the Advisory Committee began to draw Congress's ire in the 1970s, it was subject to few formal procedural requirements. Major reforms such as the 1966 revision of Rule 23 were accordingly made through proceedings that mainly occurred behind closed doors.[240] Congressional discontent with the Advisory Committee led to greater scrutiny of its work and culminated in the 1988 amendments to the Enabling Act, which, as we described above, subjected civil rulemaking to recordkeeping and open-meeting requirements that in some ways parallel those governing administrative agencies.[241] Those changes have prompted debates over the extent to which the rulemaking process should be open—with public commenters sharing information and views on proposed rulemaking

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Narrative, 65 DEPAUL L. REV. 755, 767 (2016) (describing the rulemakers as "operat[ing] in the rarified world of complex litigation").

238 The Chief Justice's appointment power apparently derives from his authority to appoint members of Judicial Conference committees under 28 U.S.C. § 331. On the Chief Justice's preferences vis-à-vis appointees, see, e.g., Patricia W. Hatamyar Moore, *The Anti-plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-defendant Composition of the Federal Rulemaking Committees*, 83 U. CINN. L. REV. 1083, 1086–87 (2015) ("Given the makeup of the Advisory Committee and the Standing Committee, none of this is surprising. The members of both committees were all appointed by Chief Justice John Roberts, and except for a few tokens, they are ideologically predisposed to think like Federalist Society members, demographically predisposed to think like elite white males, or experientially predisposed to think like corporate defense lawyers.").

239 *See generally* Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for A Moratorium*, 59 BROOK. L. REV. 841, 842 (1993).

240 Though the details vary from telling to telling, no student of Arthur Miller can fail to recall the oft-told story of how he and Benjamin Kaplan drafted the text of the 1966 amendments to Rule 23 on the Martha's Vineyard ferry. *See, e.g.*, Samuel Issacharoff & Peter Zimroth, *An Oral History of Rule 23: An Interview with Professor Arthur Miller*, 74 N.Y.U. ANN. SURV. AM. L. 105, 119 (2018).

241 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702, §§ 401–407, 102 Stat. 4642, 4642–52 (1988) (codified as amended in scattered sections of 28 U.S.C.).

changes—or insulated so that rulemakers can labor without outside influence.[242] But, even with these changes, scholars continue to critique the Committee's empirical methods and, in particular, the extent to which it seems to be moved by "unrepresentative surveys masquerading as systematic data."[243]

B. Committee Composition

While scholars have explored how the current rulemaking process is poorly designed for the task of creating fair and efficient procedures, they have, if anything, understated the extent of the problem. The FRCP serve as infrastructure for thousands of state and federal private enforcement regimes, but the rulemaking process largely ignores this function.

The first area in which this disconnect is apparent involves the composition of the Advisory Committee. Other multi-member bodies charged with developing statutory policy have deliberately been structured to include decisionmakers with a range of viewpoints and expertise in different aspects of the agency's statutory mission.[244] To be sure, these structural choices can work at cross purposes with the White House's use of the President's appointments power to advance the President's agenda.[245] The aim, however, is to ensure that statutory policy is both informed by expertise and sensitive to the interests of different constituencies and political interests.

The Advisory Committee is not structured to achieve such ends. From its origins as a body of leading academics and practitioners,[246] the Advisory Committee in the 1970s and 1980s came to be dominated by sitting federal judges.[247] The

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242 *See, e.g.*, Mullenix, *supra* note 137, at 838–43 (connecting the crisis in rulemaking to questions about participation or traditionalist models).

243 Stephen B. Burbank & Sean Farhang, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery*, *in* WHO WILL WRITE YOUR RULES? YOUR STATE COURT OR THE FEDERAL JUDICIARY? 7 (2016), https://www.poundinstitute.org/wp-content/uploads/2019/04/2016-forum-report-1.9.18.pdf [https://perma.cc/4JYZ-G2U3].

244 For a classic account, see generally ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941).

245 *See generally* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 7 (2008).

246 *See, e.g.*, Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 710 (1998) (discussing the composition of the initial Committee, which included nine lawyers and five law professors).

247 *See* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1565 (2015); Coleman, *supra* note 235, at 1017 ("The [C]ommittee has profoundly changed between 1971

current committee includes only a few members who can be said to be invested in the implementation of private enforcement regimes. Their practice invariably focuses on high-stakes complex litigation; to our knowledge, the committee lacks any representatives whose day-to-day practice involves more workaday litigation of statutory private enforcement regimes.[248] Even more striking, the Advisory Committee lacks any member with training in policy design and evaluation. No member of the committee holds an advanced degree that would aid the Committee in gathering and analyzing sophisticated data about private enforcement.[249]

Scholars have highlighted how the surfeit of judges on the Advisory Committee skews the proposals that the Committee is likely to pursue and the views that inform its work.[250] Our concern is that judges, under resource constraints and demands to run their courtrooms more efficiently, are unlikely to understand the policy-implementation goals that private enforcement regimes seek to advance, are poorly positioned to understand how litigant behaviors respond to and influence those goals, are poorly positioned to evaluate whether the FRCP are succeeding or failing as infrastructure for the implementation of statutory regimes (and if so, which), and, in general, may focus too narrowly on litigant behavior and choices and not enough on the structural environment shaping private enforcement.[251]

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and the present day, with judges taking up more seats than practitioners and academics combined."); Past Members of the Rules Committees 2021, U.S CTS., ADVISORY COMM. CIV. RULES (2021), https://www.uscourts.gov/sites/default/files/committee_roster_for_web_current.pdf [https://perma.cc/TGL2-9G53] (stating that the Civil Rules Committee is chaired by a judge, includes two reporters who are law professors, and a general membership of eight judges, one member of the Department of Justice, a law professor, and four practicing attorneys).

248 The litigating members are: David J. Burman, Esq., Perkins Coie LLP; Joseph M. Sellers, Esq., Cohen Milstein Sellers & Toll PLLC; Ariana J. Tadler, Esq., Tadler Law LLP; and Helen E. Witt, Esq., Kirkland & Ellis LLP. *See* Past Members of the Rules Committees 2022, U.S CTS., ADVISORY COMM. CIV. RULES (2022), https://www.uscourts.gov/sites/default/files/2022_committee_roster_0.pdf [https://perma.cc/7GG8-A8XL].

249 *See id.*

250 For a forceful normative and historical critique of this practice, see Yeazell, *supra* note 138, at 231–32.

251 For accounts of how judges have taken on a more managerial role and faced pressures to run their courtrooms more efficiently, see generally Resnik, *supra* note 18; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 995 (2000). *See also* Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2181 (1989) (exploring the "demands that the Rules be revised or reinterpreted in such a way as to encourage quick or economic dispositions" as courts faced growing caseloads); Luke Norris, *Neoliberal Civil Procedure*, 12 U.C.

We recognize that the process for appointing members of the Advisory Committee is a major obstacle to the formation of a more qualified, more diverse committee. At present, the Chief Justice has unilateral authority to appoint committee members. As noted above, it has been fifty years since a member of the Advisory Committee was appointed by a Chief Justice who was appointed by a Democratic president.[252] This period has coincided with increasing Republican hostility towards private enforcement.[253] The hostility of many of these jurists for these suits is in part one for plaintiff-driven "regulation by litigation" and, likely, in part tied to Republican disfavor for "an interventionist state in the sphere of social and economic regulation."[254] While the conservative distaste for private enforcement is to some extent changing as Republican state legislatures embrace private enforcement to advance their political agendas,[255] we think it unlikely that the GOP's new embrace of private enforcement will be reflected in the Chief Justice's appointments to the Advisory Committee, especially as the lion's share of private enforcement actions still involve economic regulation.[256]

More to the point, our aim here is to elaborate a deeper theory of procedural rulemaking and to sketch out its implications for well-executed and legitimate rulemaking processes. We seek to highlight the shortcomings of current institutional arrangements, even though reform of those arrangements will depend on shifting political conditions that we as legal scholars are poorly positioned to predict. We urge Congress to revisit the

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IRVINE L. REV. 471, 518–22 (2022) (exploring how the various pressures on judges and judges helped effectuate a neoliberal turn in civil procedure).

252 *See supra* note 236 and accompanying text.

253 *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform, An Institutional Approach*, 162 U. PA. L. REV. 1543, 1545 (2014) ("[O]nce highly supportive of private enforcement, the Supreme Court, increasingly influenced by ideology and increasingly conservative, has become antagonistic.").

254 *See* BURBANK & FARHANG, *supra* note 6, at 5.

255 *See, e.g.*, 2021 Tex. Gen. Laws ch. 62 (codified at TEX. HEALTH & SAFETY CODE ANN. § 171.201–.212 (West 2021)) (Texas law authorizing "any person" to bring an action against anyone who "aids or abets the performance or inducement of an abortion"); 2021 Tenn. Pub. Acts ch. 452 (codified at TENN. CODE ANN. § 49-2-805 (2021)) (Tennessee law authorizing any student, teacher, or employee to sue if they have to share a restroom with a transgender person); 2021 Fla. Laws 571–72 (codified at FLA. STAT. ANN. § 1006.205 (West 2021)) (Florida law permitting students to sue if they are "denied an academic opportunity" by being required to play sports with a transgender person).

256 *See* Michaels & Noll, *supra* note 86, at 1191; *see also* Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1484 (2022) (distinguishing these suits from traditional private enforcement suits and critiquing their anti-democratic effects).

appointments process for the Advisory Committee and to mandate the appointment of members who, by professional training and background, will contribute to the Rules' enforcement function. At the very least, we agree with others that it is time to rethink vesting rulemaker appointment power in the Chief Justice alone.[257]

C. Information Gathering

The Rules' role supporting private enforcement also highlights deficiencies in the systems and processes that the Advisory Committee uses to gather information about the need for procedural reforms. Institutions such as the Federal Reserve, the Department of Labor, the Securities Exchange Commission, and the Social Security Administration have robust systems for gathering information necessary to the development of statutory policy.[258] In comparison, the Advisory Committee's ability to gather and analyze information is primitive.

There is some irony to this because, in certain ways, the rulemakers gather more information today than they ever have. After Burbank's call for a moratorium on rule changes that were not supported by a persuasive evidentiary record, the rulemakers increasingly made use of data gathered by the Federal Judicial Center on the functioning of the federal courts, and the rulemakers also have more access to electronic record-keeping in the federal district courts.[259] These resources, however, are geared more toward answering questions about the workload of the federal courts than to the operation of statutory regimes enforced through the FRCP. For example, rulemakers lack systematic and detailed data on the statutory programs that are enforced through civil litigation. They have very limited data about trends in enforcement of those regimes. They lack statute-level data about the disposition of cases filed under different laws. They lack data about the volume and amount of judgments and settlements associated with cases asserting violations of different regimes. They have not studied, in

257 *See* Coleman *supra* note 235, at 1064 (exploring the possibility of taking the appointment power away from the Chief Justice). Coleman notes that "[t]here is nothing in the Rules Enabling Act that requires the Chief Justice make the appointments, so it is possible to change this custom." *Id.*

258 *See* SAMUEL WORKMAN, THE DYNAMICS OF BUREAUCRACY IN THE US GOVERNMENT: HOW CONGRESS AND FEDERAL AGENCIES PROCESS INFORMATION AND SOLVE PROBLEMS 1–4 (2015); FRANK R. BAUMGARTNER & BRYAN D. JONES, THE POLITICS OF INFORMATION: PROBLEM DEFINITION AND THE COURSE OF PUBLIC POLICY IN AMERICA 61–87 (2015).

259 *See, e.g.*, Marcus, *supra* note 141, at 314 (summarizing these developments).

a statistically credible way, the effect of rule amendments, Supreme Court decisions reinterpreting the FRCP, or trends such as the explosion of forced arbitration. In short, rulemaking for private enforcement takes place in something of an empirical vacuum.

We think it obvious that rulemaking for private enforcement would benefit from such data, even if it initially focused on the handful of statutory programs that generated the largest number of filings. In some ways, this suggestion once again accords with Bone's call for the rulemaking committees to "adopt a more systematic approach, one that derives broad normative principles from core features of litigation practice."[260] But, as we have explained, beyond litigation practice, rulemakers should also pay more attention to the structural environment of litigation—to the congressional design choices that shape those practices and the regimes that procedure reaches across. In particular, the Committee should endeavor to gather systematic and timely information about all the statutory programs enforced in federal court and trends in enforcement of those programs.

The 2015 discovery proportionality amendments to Rule 26 highlight the lack of structural attention to the enforcement landscape. While the Advisory Committee gathered over two thousand comments, effects on private enforcement were conspicuously absent from the conversation and deliberations.[261] As Burbank observed, the amendment process did not "reflect serious or sustained consideration of the fact that limiting discovery may entail substantial costs for the enforcement of the substantive law, including law that Congress, legislating against the background of the federal rules, intended to be enforced through private litigation."[262]

D. Rulemaking Procedures

Finally, our account highlights how the procedures the Advisory Committee currently operates under are poorly designed for creating effective rules of private enforcement. The Committee, as noted above, is required by the 1988 Enabling Act amendments to conduct business in public, accept proposals

260 *See* Bone, *supra* note 128, at 320.

261 *See* BURBANK & FARHANG, *supra* note 6, at 123.

262 Letter from Stephen B. Burbank, to Comm. Rules Prac. & Proc., U.S. Courts 12–13 (Feb. 10, 2014), https://www.regulations.gov/comment/USC-RULES-CV-2013-0002-0729 [https://perma.cc/MH54-AC55].

for rules changes, and provide notice and an opportunity for comment before acting on proposed rules changes.[263] Rules amendments go through multiple layers of review, which provide opportunities for interest groups to offer evidence and argument and generally slow the process of amending the FRCP. As Burbank and Farhang argue, these procedures are best seen as an effort to establish "fire alarms" through which interest groups that follow the Advisory Committee's work can draw attention to amendments that threaten to retrench the infrastructure for private enforcement.[264]

These fire alarms are one of the few ways in which the Act is attentive to the risk that procedure might undermine private enforcement. But ironically, those fire alarms have not stopped the Supreme Court. The Court can *reinterpret* the Rules as well as formally amend them—and in interpreting them, it faces none of the procedural obstacles to retrenchment that characterize the rulemaking process. In a world where the Court's conservative appointees have shown a disposition towards upending longstanding law to match their views, the result is an environment predisposed toward procedural retrenchment. It is one where the Court can undermine private enforcement any time it has five votes to reinterpret the Rules and where amending the Rules to better support private enforcement requires the Advisory Committee to navigate an obstacle course of veto points.

One promising avenue for reform is to shift the center of gravity away from judicial interpretation and back toward the rulemaking process.[265] If the Committee were reconstituted to include members with greater diversity and experience—and its information-gathering processes improved—the need for fire alarms would be reduced and the procedures for promulgating rule amendments could be simplified. This would better position the Committee to respond to new developments, in both private enforcement and society at large. Increased rulemaking would displace some of the procedure-making-through-interpretation that now occurs through the Supreme Court's interpretations of the FRCP and related legislation.

While we support simplification of the rulemaking process, it should be coupled with other reforms that better support

263 *See supra* note 137 and accompanying text.

264 *See* BURBANK & FARHANG, *supra* note 6, at 20, 109.

265 For an article anticipating this argument, see Mulligan & Staszewski, *supra* note 147.

the FRCP's enforcement function. Scholars have documented that the Chief Justice exerts a powerful influence on the Committee's agenda and priorities.[266] As the Chief Justice's preferences are unlikely to track the goals of the legislative regimes enforced via the FRCP, we support proposals to better insulate procedural rulemaking from his influence.[267] Indeed, this form of judicial control is not central to the modern rationale for delegating the design of federal civil procedure to an institution outside Congress. The benefits that Congress captures through court rulemaking could be obtained if rulemakers were selected through another process, or arguably, if rulemaking itself occurred in an agency within Congress or even within the Department of Justice.[268]

Rulemaking for private enforcement should also account for the views of *all* constituencies that it affects. Following the Administrative Procedure Act, the Enabling Act gives interested parties the opportunity to propose rules changes and authorizes them to comment on rule amendments.[269] Yet, as generations of administrative law scholars have recognized, initiation and commenting rights hardly guarantee robust public participation in the rulemaking process: The groups that agency rulemaking affects face an array of collective action problems, from the need to identify rules changes that will affect them to the high costs of effective advocacy.[270] The main participants in agency rulemaking thus tend to be groups with the incentives, and the resources, to advocate on behalf of their interests.[271]

Administrative law scholars have advanced numerous proposals for addressing these problems that might be adapted

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266 *See* BURBANK & FARHANG, *supra* note 6, at 66.

267 *See supra* note 235–236 and accompanying text.

268 For an illuminating study of how executive departments and agencies already exercise substantial authority over court procedure, see Urja Mittal, Note, *Litigation Rulemaking*, 127 YALE L.J. 1010 (2018).

269 *Compare, e.g.*, 5 U.S.C. § 553(b) (giving interested parties "an opportunity to participate in [agency] rule making through submission of written data, views, or arguments"), *with* 28 U.S.C. § 2071(b) (requiring that court rules "be prescribed only after giving appropriate public notice and an opportunity for comment"), *and* § 2073(c) (requiring that meetings of court rulemaking committees be open to the public and that their minutes be made available to the public).

270 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1686–87 (1975).

271 *See* Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 45–47 (2019); Jason Webb Yackee & Susan Webb Yackee, *A Bias Toward Business? Assessing Interest Group on the U.S. Bureaucracy*, 68 J. POLITICS 128, 131 (2006).

to court rulemaking.[272] In the context of judicial interpretation of the FRCP, Brooke Coleman has argued that the Supreme Court should invite briefing from parties on how its procedural decisions, such those as in the pleading context, would affect the overall system of dispute resolution.[273] Borrowing from this model and de-centering judicial interpretation, rulemakers could also invite comments and commission studies on proposed changes with such systemic effects on enforcement in mind, drawing upon both the narratives of practice and more aggregated information. In this way, the rulemakers can and should take cues from administrative agencies—becoming more sophisticated in their data collection and analysis methods.

In doing so, it is not too much to ask that rulemakers be sensitive to the problems of inequality and unequal access that to some extent define our procedural era. Rule design for private enforcement demands that rulemakers commit to constructing procedural infrastructure that *actually facilitates* participation in enforcement processes in alignment with legislative prerogatives—including and especially for those often marginalized.[274] To even begin facilitating such participation, rulemakers need to understand and study how procedure relates to and perpetuates forms of marginalization.[275] And they should seek to remedy

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272 *See, e.g.*, Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 75–78 (2022); Brian D. Feinstein, *Identity-conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 1 (2022); MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT IN RULEMAKING 17–30 (2018).

273 *See* Coleman, *supra* note 235, at 1066.

274 For accounts of how participation norms might shape procedure, see generally Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 849 (2017); Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 87 (2022); Norris, *supra* note 254, at 1508–16.

275 *See, e.g.*, Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 154 (2021) ("To prevent civil procedure from reinforcing, or continuing to reinforce, racial subjugation, we need to understand how these seemingly technocratic or neutral rules and doctrine are already deployed in ways that reinforce existing hierarchies including white supremacy."). To begin such a process of understanding, the Advisory Committee might follow the lead of state courts, which recently undertook a review of their procedures with a focus on how they could "ensure that all parties to a dispute—regardless of race, ethnicity, gender, English proficiency, disability, socio-economic status or whether they are self-represented—have the opportunity to meaningfully participate in court processes." *See* Conf. Chief Justs. & State Ct. Adm'rs, *Guiding Principles for Post-Pandemic Court Technology* 2 (July 16, 2020), https://www.ncsc.org/__data/assets/pdf_file/0014/42332/Guiding-Principles-for-Court-Technology.pdf [https://perma.cc/N4AM-XJ4L].

these issues through rulemaking processes—including by considering reforms that reduce barriers to representation[276] and increase opportunities for litigant participation.[277]

We hasten to add that the reforms we suggest are interconnected. Streamlined rulemaking procedures, for example, would do little good if the Advisory Committee continued to be dominated by judges who are not invested in successful implementation of statutory regimes. Similarly, streamlined procedures should be coupled with improved capacity to gather and analyze information. We also acknowledge that, for some, the reforms we have suggested will represent a sea change in federal rulemaking. They pose a particular threat to groups who have captured various aspects of the existing rulemaking process and are able to use their power to thwart reforms or retrench regulatory enforcement through seemingly technical procedural interventions. So be it. Our proposed reorientation of federal rulemaking follows from an understanding of what federal courts applying the FRCP have come to do and an attempt to calibrate rulemaking to those functions. It is difficult to see why rules of *private enforcement* should be shaped less by experts in the enforcement of statutory policy than by actors who are centrally interested in maintaining or retrenching the status quo.

IV
Writing Federal Rules of Private Enforcement

Our goal thus far in this Article has been to develop a different, more productive vision of the FRCP and their place in the modern regulatory state. In particular, we have explored how private enforcement provides new rationales for court rulemaking and core aspects of procedural design and have called for substantial changes to the rulemaking process and infrastructure to accommodate procedure's private enforcement function. We expect that if court rulemaking and rulemakers

276 *See, e.g.*, Frederick Wilmot-Smith, Equal Justice: Fair Legal Systems in an Unfair World 86–90 (2019) (arguing for socializing legal services); *see also* Luke Norris, *Procedural Political Economy*, LPE Project Blog (Apr. 27, 2022), https://lpeproject.org/blog/procedural-political-economy/ [https://perma.cc/E7LJ-3G7T].

277 In the aggregate litigation context, questions of participation are especially salient today. *See, e.g.*, Cabraser & Issacharoff, *supra* note 272, at 849–51 (exploring how technological and other developments permit more participation in aggregate litigation); Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 5, 54–73 (2021) (exploring the participatory limits and possibilities of Multidistrict Litigation); Noll, *supra* note 116, at 465–72 (same).

reoriented themselves along the lines we have envisioned, the FRCP would look quite different than they do today. Yet, precisely because the changes we envision are so substantial, it is difficult to describe what a full set of rules that were designed for private enforcement would look like. Such rules would come out of a rulemaking process that constitutes itself, gathers and processes information, and understands its functions in ways that differ dramatically from today's process. Such a rulemaking process would naturally reflect those influences. Put otherwise, it is only when the rulemaking process has the right people, gathers and analyzes the right systematic information, and orients itself around executing its modern function that it will be possible for the rules to evolve and for their full shape and content to come into view.

While acknowledging these limitations, we can nonetheless begin to imagine what some federal rules of private enforcement might look like. To illustrate the implications of our analysis, this Part offers several case studies of how recognizing the FRCP's role in private statutory enforcement would influence procedural design. First, we consider how Rule 1, the foundational rule setting out the scope and purposes of the FRCP, might be amended to reflect the Rules' enforcement function. Second, drawing on a recent episode in federal rulemaking, we consider how Rule 4(k), which governs the federal courts' territorial jurisdiction, might be amended to facilitate private enforcement. Third, we trace how Rule 23, which provides for the certification of class actions without accounting for statutory enforcement priorities, has functioned as a private enforcement "wild card"[278] both supporting and destabilizing legislative efforts to mobilize private enforcement. Finally, reflecting on how privatization and contracting over procedure have weakened private regulatory enforcement, we explore how rulemakers might approach devising rules that limit parties' authority to contract around the FRCP in ways that undermine private enforcement.

Our aim in offering these case studies is less to offer a host of comprehensive "solutions" than to show the transformative potential of recognizing that our rules of civil procedure are also rules of private enforcement. We are conscious that all of our proposals raise legal and policy questions that would need to be vetted by a newly constituted Advisory Committee and leave many aspects of rule design to be taken up by other scholars and rulemakers.

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278 Burbank, Farhang & Kritzer, *supra* note 28, at 660.

Before proceeding, it is worth noting that federal rules of private enforcement would not, in their ultimate design, universally work to the benefit of plaintiffs. While attention to legislative enforcement goals will often require procedures that facilitate affirmative litigation, it also acts as a brake on procedural changes that recalibrate the enforcement environment absent legislative authorization. Federal rules of private enforcement would be more tightly tethered to legislative policies and judgments, not rules that reliably inure to the benefit of private-enforcer plaintiffs.

A. Rule 1

Rule 1 instructs that the FRCP "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."[279] The rule "sets forth the basic philosophical principle for the construction of the rules,"[280] one that teaches "how all the other Rules are interpreted and applied."[281] One court has thus referred to Rule 1 as a "command that gives all the other rules life and meaning and timbre in the realist world of the trial court."[282] Rule 1 has also been subjected to stringent criticism. As Elizabeth Porter observes, Rule 1 "sends murky, distinctly mixed, signals—if indeed it sends any signals at all."[283] Robert Bone notes that Rule 1 is "at best hopelessly vague and at worst downright misleading:"[284] vague "because it says nothing about what makes a determination 'just' or what to do when a just determination requires procedures that reduce speed or increase expense," and "misleading insofar as it suggests that all three goals can be achieved at the same time without making value choices or difficult tradeoffs."[285]

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279 FED. R. CIV. P. 1.

280 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1011, at 55–58 (3d ed. 2002).

281 Bone, *supra* note 128, at 288.

282 *In re* Paris Air Crash of Mar. 3, 1974, 69 F.R.D. 310, 318 (C.D. Cal. 1975).

283 Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 158 (2015); *see also* George Rutherglen, *The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals*, 56 SAN DIEGO L. REV. 1, 4 (2019) ("What appears at first glance to be a statement of noble aspirations turns out on examination to be an utterly unworkable guide to interpretation. On nearly every current view of the relationship between justice and efficiency, these two ideals come into conflict whenever individual rights collide with the interests of society as a whole.").

284 Bone, *supra* note 128, at 288.

285 *Id.*; *see also* Harold Hongju Koh, "*The Just, Speedy, and Inexpensive Determination of Every Action?*," 162 U. PA. L. REV. 1525, 1526–27 (2014) (reflecting

Rule 1 has also changed over the years. When initially adopted in 1938, the rule directed that the FRCP shall "be construed to secure the just, speedy, and inexpensive determination of every action"—lacking the focus on administrability and court and party responsibility embedded in the rule today.[286] A core purpose of the rule was to give federal trial judges the flexibility to resolve disputes on the merits and to avoid resolving or delaying disputes based on technicalities.[287] For a few decades after it was promulgated, federal judges largely employed Rule 1 to cure technical defects and move cases towards resolution on the merits.[288] Over time, however, the rule has been used by courts in restrictive ways—to curtail or end litigation in the name of cost-savings and efficiency.[289] Indeed, amendments to the rule in 1993 and 2015 importing in the administrability and party responsibility requirements have emphasized these cost-savings and efficiency goals.[290]

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on the decidedly mixed extent to which the FRCP achieve and balance these functions).

286 *See* FED. R. CIV. P. 1 (1938) (amended 1993).

287 Bone, *supra* note 128, at 289; Porter, *supra* note 281, at 158 ("Rule 1 was conceived of by its drafters as a statement of interpretive methodology, the goal of which was to prevent technicality and formalism from preventing disputes from being resolved on their merits"); Rutherglen, *supra* note 281, at 5 (Rule 1 had "its immediate effect in negative consequences that looked backward. It was almost wholly concerned with abolishing common law 'technicalities,' as the rulemakers called them, demoting them to the status of outmoded relics of a bygone era of legal reasoning.").

288 *See, e.g.*, City of Morgantown v. Royal Ins. Co., 337 U.S. 254, 257–58 (1949); Foman v. Davis, 371 U.S. 178, 181–82 (1962)*; see also* Bone, *supra* note 128, at 293–94; Porter, *supra* note 281, at 160.

289 *See* Bone, *supra* note 128, at 294 ("Over the past four decades, Rule 1 has lost much of its original guiding force. Moreover, it is used much more frequently today than in the past to justify restrictive interpretations of the Federal Rules."); *see also* Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325, 1392 (1995) (reflecting on the conflicting ways that courts have used Rule 1); FED. R. CIV. P. 1 (amended 1993).

290 Rule 1 was amended in 1993 to state that the FRCP "shall be construed *and administered* to secure the just, speedy, and inexpensive determination of every action." *Id.* (emphasis added). As the Advisory Committee Note explained, "[t]he purpose of this revision . . . is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay." *Id.* advisory committee's note to 1993 amendment. In 2015, it was amended again to state that the FRCP should be "construed, administered, and *employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." *Id.* (amended 2015) (emphasis added). This amendment, as the Committee Notes clarified, was designed to put an onus on the parties themselves "to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay." *Id.* advisory committee's note to 2015 amendment. The 2015

These amendments and the increasingly restrictive readings of Rule 1 have been fueled by the "litigation crisis" narrative and reflect the larger judicial effort to reinterpret the Rules to retrench private enforcement suits. Rule 1 today is thus Janus-faced—because of its opacity, it is employed flexibly to cure technicalities and more restrictively to trim back litigation in the name of efficiency goals.[291] Federal judges have levied Rule 1 as support for dismissing cases, restricting discovery, and promoting settlement.[292] While not all decisions have featured such restrictive readings of Rule 1, it is increasingly seen to "embody values of efficiency rather than justice" and to operate "as a general exhortation to keep the trains running on time."[293]

Despite its foundational nature, Rule 1 says nothing about faithful implementation of law. The rule provides a framework for interpreting the FRCP and guiding discretion, yet because it was shaped by traditional dispute resolution goals and notions such as the substance/procedure divide, it has become adrift in the modern litigation state. The rise of private enforcement and increase in private enforcement suits, here as elsewhere, has become cover for employing Rule 1 to retrench regulatory enforcement, rather than an opportunity to place important values of fidelity to congressional policy at the center of the FRCP. Indeed, Rule 1's extant values of efficiency, cost-savings, and justice might inform efforts to facilitate the faithful implementation of law, but they cannot do that ancillary work without fully anchoring the importance of law-implementation in Rule 1 itself.

To calibrate the design of the FRCP with their modern private enforcement function, we offer that Rule 1 should be amended to state:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and

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amendments thus, as Roger Michalski observes, "reflect a broad trend to increasingly emphasize speedy, private, and inexpensive adjudication"—an emphasis that often "comes at the expense of other procedural values like participation, fairness, and accessibility." Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 62–63 (2018).

291 *See* Bone, *supra* note 128, at 297 (Rule 1 today "provides little meaningful guidance. It can be used to justify strict or liberal interpretations depending on how a judge balances competing values.").

292 *See id.* at 297–99 (cataloguing cases); Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1,14–22 (2011) (same).

293 Porter, *supra* note 281, at 158, 161–62 (Rule 1 "has been recast to justify restrictive, rather than flexible, Rules interpretations in the name of cost-savings and systemic efficiency.").

> employed by the court and the parties to facilitate the faithful implementation of law and to secure the just, speedy, and inexpensive determination of every action and proceeding.

This rewriting would make Rule 1 function better as a modern guiding rule for the FRCP.[294] First, it clarifies that the FRCP are not merely designed for traditional dispute resolution goals—for facilitating private parties in resolving their disputes and arranging their affairs through the litigation system.[295] The FRCP are also, and primarily, the infrastructure supporting the enforcement and application of laws enacted by Congress and enforced in civil proceedings in federal court. This clarifies that the FRCP must be understood as taking a role in effectuating democratically-enacted policies—policies that serve public regulatory purposes and embody values beyond the resolution of parties' private disputes. Furthermore, we have placed faithful implementation as a guiding principle *before* the dispute resolution principles currently embedded in Rule 1 to reflect both the prominence of private enforcement in federal civil litigation and what is, in our view, the precedential importance of fidelity to legislative policy. That is, while we believe that the goal of facilitating private dispute resolution is important, more importance should attach to providing infrastructure to support the public enforcement goals articulated by Congress.

Second, our rewriting offers a way to balance the conflicting goals of Rule 1 by highlighting the overarching importance of law implementation. The demands for speed and inexpensiveness often conflict with the obtuse and ill-defined demand for justice. We do not think our rewriting will fully resolve the difficult conflicts these competing demands create. At the same time, the complexity of private enforcement actions, or even their sheer number, has led judges to place extra emphasis on speed and cost-savings, reading Rule 1 as relief from the demands of the modern litigation state. Our rewriting makes

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294 Bone also proposes an amendment focused on accuracy, error, and due process, among other variables. *See* Bone, *supra* note 128, at 300 ("They shall be construed and administered to distribute the risk of outcome error fairly and efficiently with due regard for party participation appropriate to the case, due process and other constitutional constraints, and practical limitations on a judge's ability to predict consequences accurately and assess system-wide effects.").

295 In this sense our, proposal is aligned with aspects of Bone's insofar as it recognizes the importance of enforcing law. As Bone puts it, "Adjudication has a public purpose. It is meant to enforce the substantive law . . . . As a result, outcome error should be measured in terms of how well litigation outcomes further these public goals, not in terms of how well they satisfy the preferences of parties to a suit." *Id.* at 303.

clear that this approach is not right. Once the courts and parties employing the FRCP understand that the Rules must be applied to faithfully implement legislative policies, they must recognize that the goals of cost-savings, efficiency, and justice must be pursued *within the limits of law implementation* and, in particular, with attention to the designs of legislative policy. The law will sometimes require a particular value to take priority over another.

Thus, our proposal both enters a new value into the Rule 1 calculus and suggests a gloss on the values already in it. Speedy and inexpensive determinations must not come at the cost of systematically thwarting parties from pursuing legitimate and valid private enforcement claims. Similarly, a just determination is not only one that facilitates traditional dispute resolution goals and the parties' pursuits of achieving peace, but also one that employs the FRCP to faithfully implement and facilitate the enforcement of statutory law.

We recognize, of course, that Rule 1 is only one of the factors that influence federal practice and procedure and certainly not the most powerful one. We harbor no illusions that our proposed amendment would work a fundamental change in courts' approach to private enforcement. But we also recognize that Rule 1, for some judges or perhaps many, shapes the moves that are acceptable in federal litigation. The amendment's effects could at the very least be felt at the margins where, we believe, they would better align practice under the Rules with the modern functions of private, civil litigation.

B. Rule 4(k)

Personal jurisdiction is a court's power "to determine the rights and interests of the parties themselves in the subject-matter of the action."[296] The exercise of personal jurisdiction is foundational to a court's ability to adjudicate a claim—whether the claim originates in a private enforcement scheme or derives from another legal source. In most cases, Rule 4(k) governs federal courts' exercise of personal jurisdiction over out-of-state defendants.[297] A remnant of a world where jurisdiction was more

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296 R.H. GRAVESON, CONFLICT OF LAWS: PRIVATE INTERNATIONAL LAW 98 (7th ed. 1974).

297 In some instances, there are other bases for exercising personal jurisdiction, such as when a federal statute provides it, FED. R. CIV. P. 4(k)(1)(C), or when third-party defendants and parties joined under Rule 19 are served within a hundred-mile radius of the courthouse, FED. R. CIV. P. 4(k)(1)(B). In addition, federal statutes like the Securities Act authorize nationwide service of process. *See* 15 U.S.C. §§ 77v(a), 78aa(a). We view such provisions as evidence that Congress

related to state boundaries and when diversity actions sounding in tort and contract were at the center of federal practice,[298] it pegs each federal district court's jurisdictional power to the reach of its host state's courts: "[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction *in the state where the district court is located*."[299]

This limitation is imposed by the civil rulemakers, not the Constitution or Congress.[300] It means that, in many cases, federal courts cannot exercise jurisdiction to the full extent the Constitution permits, and, as result, that the "jurisdictional reach of federal courts can vary from state to state, even though federal courts are courts of the same (national) sovereign."[301]

In cases brought under federal question jurisdiction to enforce federal regulatory statutes, Rule 4(k) has long outlived its utility and rationales. Designed in a context where diversity suits dominated the federal docket, the Rule today "hamper[s] a federal court's ability to reach and to adjudicate claims with respect to defendants accused of violating federal law."[302] As A. Benjamin Spencer has explored, the actions suppressed by the rule span the waterfront of congressionally sanctioned private enforcement regimes.[303] The rule produces a lack of uniformity across districts—and within them, as judges read Rule 4(k) differently—that undermines courts' ability to hear private enforcement actions.[304] In a context where the FRCP play an important role in regulatory enforcement—and where state

views nationwide service of process as a component of facilitating law-implementation and as a source of potential guidance for civil rulemakers.

298 *See* A. Benjamin Spencer, *Rule 4(k), Nationwide Personal Jurisdiction, and The Civil Rules Advisory Committee: Lessons from Attempted Reform*, 73 ALA. L. REV. 607, 609 (2022) ("Policy wise, as a geographically dispersed nation comprised of a union of previously separate colonies, limiting the ability of federal courts to summon persons from one state to another (by horse-driven means) likely was the only approach that was tenable if the federal courts were to exist at all.").

299 FED. R. CIV. P. 4(k)(1)(A) (emphasis added).

300 *See* Spencer, *supra* note 296, at 608–09 (exploring how the constitutional limits on personal jurisdiction are imposed by the Due Process Clause of the Fifth Amendment and differ from the limits proscribed by Rule 4(k)); *see also* Scott Dodson, *Rule 4 and Personal Jurisdiction*, 99 NOTRE DAME L. REV. 1, 29–30 (2023); Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703, 1703 (2020).

301 A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 985–86 (2019).

302 *See id.* at 986.

303 *See id.* at 987 n.40, 989–91 (cataloging cases).

304 *See id.*

lines matter less and purposeful contacts are the cornerstone of personal jurisdiction—Rule 4(k) feels like a relic.[305] And, because it poses complex doctrinal puzzles, much time is spent litigating personal jurisdiction issues under the rule that would be saved with a different rule, needlessly complicating private enforcement along the way.[306]

For these reasons and others, Spencer, a member of the Advisory Committee, has proposed amending 4(k) to sever Article III personal jurisdiction from state-court limits.[307] He has offered the following amendment:

> (k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. (1) ~~In General.~~
>
> Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: when exercising jurisdiction is consistent with the United States Constitution and laws [deleting the remainder of the present rule].[308]

This amendment would make Rule 4(k) better suited to faithfully implementing congressional enforcement goals. By

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305 *See* Spencer, *supra* note 296, at 610 (arguing that federal court "are well-established forums for disputes that cross state lines or touch on topics of national concern, and they should be available to hear such cases, especially when the doors to state court would be closed"); *id.* ("[T]he minimization of inconvenience that modern communications and transportation technology provide, have made it unnecessary to view state boundaries as the relevant touchpoints for the disputes that federal courts entertain.").

306 *See* Spencer, *supra* note 299, at 991 ("Rule 4(k)(1)(A) needlessly hobbles federal courts and litigants . . . with having to perpetuate and endure expensive, wasteful, and time-consuming satellite litigation over jurisdictional disputes that would largely be obviated under a regime governed solely (or primarily) by the Due Process Clause of the Fifth Amendment.").

Spencer also suggests that current Rule 4(k) is ultra vires, because only Congress may "delineate the jurisdictional reach of the inferior federal courts" and a jurisdictional rule is not a rule of practice and procedure under 28 U.S.C. § 2072(a). Spencer, *supra* note 183, at 711. His argument to this effect, which trains on the meaning of "substance" and "procedure," illustrates the benefits of reading the Enabling Act's delegation to court rulemakers in the manner we suggest in Part II.C. If one reads that delegation as first and foremost a direction to respect congressional policy choices, there is no obvious reason why the FRCP cannot address the lower federal courts' personal jurisdiction. While Congress has specifically addressed the lower federal courts' *subject matter* jurisdiction, it has not legislated similar limits on their personal jurisdiction. Personal jurisdiction—an obviously "procedural" matter in ordinary legal usage—thus falls within the gap-filling infrastructure that Congress charged court rulemakers with formulating in the Enabling Act. Nevertheless, even if one takes the perspective that congressional action *is* required, we believe it would be justified here.

307 For an overview of the process of formulating and seeking the amendment, see generally Spencer, *supra* note 296.

308 *Id.* at 610–11.

creating a system of nationwide personal jurisdiction for the federal courts, it would ensure that artificial limits on personal jurisdiction do not interfere with the exercise of personal jurisdiction over parties adjudicating federal and state private enforcement claims. The amendment would also vastly simplify the process. Federal courts could exercise general jurisdiction over litigants who call the U.S. home—persons domiciled in the U.S. or corporations having a headquarters or place of incorporation in the U.S.[309] And federal courts could, subject to reasonableness constraints,[310] exercise specific jurisdiction over persons and entities who have contacts with the U.S. as a whole.[311] Lest one think that the reach of such jurisdiction would mean that all federal district courts would be open to all cases, venue doctrines and slight modifications to the federal venue statute to better reflect a revised Rule 4(k) can limit the sphere of district courts to those with a connection to the dispute or to the defendants in the litigation.[312]

Spencer recently described his experience of seeking unsuccessfully to amend Rule 4(k) along these lines; it is worth pausing to reflect on how his experience both confirms and bolsters our argument that the rulemaking process is not well-designed to produce rules that faithfully implement congressional policy.[313] Among the issues he sees with the civil rulemaking process are its "[p]roblem-solving, not policymaking orientation" and the prominence of judges among the ranks of the Advisory Committee (and significant lack of other voices and perspectives).[314] With regard to the former, Spencer notes that the Committee is focused on small-bore, practical changes.[315] The Committee seeks to make "adjustments or accommodations that attempt to address an identifiable concern raised by practitioners and members of the judiciary rather

309 *See* Spencer, *supra* note 299, at 997–98 (outlining how general jurisdiction analysis would operate under a revised Rule 4(k)).

310 *See id.* at 999–1003 (exploring how reasonableness factors would apply under a revised Rule 4(k)).

311 *See id.* at 999 (outlining how specific jurisdiction analysis would operate under a revised Rule 4(k)).

312 *See id.* at 1005–12. For instance, to maintain a rough equilibrium between federal and state courts' power to enforce state private enforcement schemes, the venue statute could be amended to provide that venue is presumptively improper where a party asserts exclusively state law claims and the home state court would lack personal jurisdiction over an out-of-state party.

313 *See generally* Spencer, *supra* note 296, at 615–17 (emphasis omitted).

314 *Id.*

315 *See id.* at 615–16.

than reforms designed to alleviate policy-oriented perceived ills or injustices."[316]

With regard to the prominence of judges, Spencer reports that the absence of actors with other perspectives and other expertise tends to "bias" the process "towards institutional conservatism;" their perspective "tends to be oriented towards the types of snags that undermine the efficient processing of matters to some sort of resolution, *as opposed to concerning themselves with the more fundamental and global implications of the rules on the regulatory and remedial goals of the civil justice system*."[317] In his effort to press for amending Rule 4(k) and other experiences with the rulemaking process, Spencer sees precisely the dynamics we have outlined and critiqued: a rulemaking process neither staffed nor designed to think and act in a systematic fashion and to design infrastructure that facilitates legislative enforcement goals.

C. Aggregation

The Rules' treatment of aggregation is still another area in which their inattention to legislative efforts to mobilize and regulate private enforcement is striking. The ability to aggregate claims, and the ease or difficulty of doing so, exert a powerful influence on plaintiff's attorneys' selection of clients to represent and areas of specialization.[318] But in specifying when a party may aggregate claims, the FRCP take no account of legislative enforcement policies. Their focus on neutral process criteria uncouples the availability of aggregation from statutory policy and has facilitated judicial retrenchment of private enforcement through procedural decisions that were unlikely to provoke backlash from the public and Congress. The result is both restriction of private enforcement suits Congress seeks to facilitate (through retrenchment) and facilitation of ones Congress has not explicitly sought to facilitate (through inattention to enforcement goals).

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316 *Id.* at 616.

317 *Id.* at 615, 617 (emphasis added).

318 This is because aggregating claims permits attorneys to capture economies of scale and can thereby transform "negative value" cases (those where the expected judgment is less than the costs of litigation) into "positive value" ones (those where the judgment exceeds the costs of litigation). *See, e.g.*, Kathryn E. Spier, *Litigation* § 3.8.1, *in* HANDBOOK OF LAW & ECONOMICS (A. Mitchell Polinsky & Steven Shavell, eds., 2007).

The FRCP's primary provision on aggregation is Rule 23, the class action rule.[319] Despite its importance to private enforcement, the Rule was not consciously designed to facilitate the assertion of statutory causes of action. Indeed, Rule 23's history reflects surprisingly little awareness of the importance of aggregation to private enforcement or the way it would transform the private enforcement landscape.[320]

The original 1938 version of Rule 23 sought to codify equity practice and provided for the certification of three kinds of somewhat rudimentary class actions, dubbed "true," "hybrid," and "spurious" classes.[321] Each type of class action had specific preclusive effects, and the distinction among them turned on an abstract inquiry into the nature of the rights at issue in a case.[322] The almost metaphysical nature of that inquiry, combined with the absence of instructions in the Rules about how certified class actions should be managed, led class action practice to "become snarled."[323] In 1962, the Advisory Committee began work on an overhaul of Rule 23 that culminated in the landmark 1966 amendments to the Rule.[324]

The '66 amendments discarded the true/hybrid/spurious typology and instead sought to "describe[] in more practical terms the occasions for maintaining class actions."[325] The older forms of class actions were carried forward in Rule 23(b)(1). Rules 23(b)(2) and (b)(3) recognized two new forms of class actions. Rule 23(b)(2) provided that a case could proceed as a mandatory (non-opt-out) class action when the plaintiff sought a remedy that affected "the class as a whole."[326] Rule 23(b)(3) provided for an opt-out class action where common issues "predominate over any questions affecting only individual members" and the court finds "that a class action is superior to other

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319 FED. R. CIV. P. 23.

320 Our account owes a debt to Stephen Burbank and his coauthors, who have explored Rule 23's inattention to legislative policy in a number of works. *See, e.g.*, BURBANK & FARHANG, *supra* note 6, at 75–76; Burbank, Farhang & Kritzer, *supra* note 28, at 660; Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 25 (2010).

321 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1752 (4th ed.).

322 Burbank & Wolff, *supra* note 318, at 53–54.

323 *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 385 (1967).

324 *See* John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 333 (2005).

325 FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

326 *Id.* 23(b)(2) (1966) (amended 2007).

available methods for fair[ly] and efficient[ly] adjudicati[ng] of the controversy."[327]

In one respect, the '66 amendments were sensitive to the role of civil litigation in enforcing statutory (or more accurately, *constitutional*) policy. As David Marcus has uncovered, the Advisory Committee consciously designed Rule 23(b)(2) to facilitate desegregation litigation in the aftermath of *Brown v. Board of Education*.[328] In providing that a class action could be maintained where the plaintiff sought class-wide declaratory or injunctive relief, the rule disabled courts who were hostile to *Brown* from denying certification on the ground that litigation would not produce inconsistent standards of conduct for the defendants it targeted.[329] Giving plaintiffs greater power over certification through the remedy they sought ensured that they could obtain judgments that protected similarly situated class members, an important contribution to the NAACP's litigation against de jure discrimination in the Deep South and Midwest.[330]

Rule 23(b)(3), however, also functioned as something of a "wild card," catalyzing forms of private enforcement that Congress and state legislatures never intended and diverting attorneys from areas where Congress and state legislatures *did* seek to mobilize private enforcement.[331] This resulted from two features of the Rule: (1) its trans-substantive applicability to all types of claims and (2) its interaction with the equitable "common fund" doctrine.

Under the new Rule, a party's ability to obtain certification of a class depended entirely on neutral process values. Implicitly contrasting a class action with a series of individual proceedings, the Rule directed courts to consider "the class members' interests in individually controlling the prosecution or defense of separate actions," "the extent and nature of any litigation concerning the controversy already begun by or against class members," "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," and "the

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327 *Id.* 23(b)(3).

328 David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 695–711 (2011).

329 *Id.* at 704 (describing Advisory Committee member Charles Alan Wright's attention to "a recent case where a well-known segregationist judge had denied class treatment, then limited the injunction desegregating the defendant's bus lines to the three named plaintiffs").

330 *See generally* EPP, *supra* note 101, at 66.

331 Burbank, Farhang & Kritzer, *supra* note 28, at 660.

likely difficulties in managing a class action."[332] The Rule nowhere directed courts to consider whether aggregating claims would support or undermine enforcement policies reflected in the legislation that created the plaintiff's cause of action.

These aspects of Rule 23 might not have had major ramifications for private enforcement if courts had not also held that attorneys could recover a contingent fee for bringing a Rule 23(b)(3) class action. As noted above, however, courts extended the "common fund" doctrine to recoveries obtained through (b)(3) actions, holding that parties who recovered a fund on behalf of a certified class (and the attorneys who represented them) could recover attorney's fees for their work.[333] Enterprising attorneys soon realized the opportunity to "do well by doing good" under the new rule. Anytime an attorney recovered a fund on behalf of a class—in *any* substantive area—the attorney could recover a contingent fee. Class actions took off, giving rise to whole new fields of civil rights, antitrust, and securities litigation.[334] Notably, while Congress had deliberately encouraged private enforcement of the civil rights laws, it never consciously adopted private enforcement as a means of enforcing, say, the securities laws.[335] What we today think of as a major area of private enforcement is largely the handiwork of the courts and an enterprising plaintiff's bar.

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332 FED. R. CIV. P. 23(b)(3).

333 *See, e.g.*, Kopet v. Esquire Realty Co., 523 F.2d 1005, 1008 (2d Cir. 1975) ("[A]s the Supreme Court has developed the 'common fund' rationale for awarding attorney fees, assessment of such fees to a group of beneficiaries may be predicated on the conferral of benefits which are neither monetary in nature nor explicitly sought on behalf of the entire group . . . federal courts may award counsel fees based on benefits resulting from litigation efforts even where adjudication on the merits is never reached, e.g., after a settlement."); Lindy Bros. Builders of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 166 (3d Cir. 1973) (awarding fees directly to attorney on the ground that "his conduct of the suit conferred a benefit on all the class members, that one or more class members has agreed by contract to pay for the benefit the attorney conferred upon him, and that the remaining class members should pay what the court determines to be the reasonable value of the services benefiting them."); *see also* Oppenlander v. Standard Oil Co. (Ind.), 64 F.R.D. 597, 605 (D. Colo. 1974) (stating that "[t]he authority and discretion for fixing attorneys' fees in connection with the approval of [a class action] settlement arises, therefore, under the general equitable powers of the Court").

334 *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 672–74 (1979).

335 *See id.* at 693 (noting that "the federal courts have played a major role in the increase of [securities] litigation, particularly by watering down some, although not all, of the common law fraud requirements for claims under rule 10b-5").

The Advisory Committee's recorded deliberations and decisions extending the common fund doctrine to 23(b)(3) class actions show little awareness of the new Rule's transformative effects on private enforcement. In the Advisory Committee, "technical procedural concerns dominated committee deliberations."[336] Decisions applying the common fund doctrine to Rule 23(b)(3) focused on the potential that class members would be unjustly enriched if attorneys could not recover their fees; they never grappled with the common fund doctrine's effects on attorneys' willingness to litigate cases in area where legislation sought to mobilize private enforcement.[337] This omission was all the more striking given that, in 1975, the Supreme Court described the decision to shift attorney's fees from the losing party to the winner as "a policy matter that Congress has reserved for itself," which required analysis of "the importance of the public policies involved in particular cases."[338] The policy implications of allowing attorneys to recover fees from *plaintiffs'* recoveries are just as great, and require just as much

336 David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 608 (2013). Reviewing the transcripts of the Advisory Committee meetings, Marcus reports that Benjamin Kaplan "and his allies on the committee drafted Rule 23(b)(3) with litigation like *Union Carbide & Carbon Corp. v. Nisley*, an important antitrust case, in mind." Kaplan wanted "a flexible rule to ensure that the 'line of thought' they sensed in the case law but could not exactly describe would continue to develop." *Id. Cf.* Rabiej, *supra* note 322, at 334 ("The key questions [reflected in minutes of the 1966 Advisory Committee] were whether a procedure could be developed to distinguish which actions were suitable for class treatment and whether proper safeguards could be fashioned to control its application."). Decades later, reflecting on his service on the advisory committee, Kaplan remarked at an academic conference that an observer of the committee's deliberations "could foresee that [the new opt-out rule] would apply particularly in certain substantive fields such as securities fraud; and, with no great flight of imagination, one might predict that the working of the rule must bring about changes of substance—as it has in fact done in the very fraud field." Benjamin Kaplan, *Comment on Carrington*, 137 U. PA. L. REV. 2125, 2126 (1989).

337 *See* sources cited *supra* note 331. In *Boeing v. Gemert*, 444 U.S. 472, 472 (1980), the Supreme Court endorsed the lower courts' application of the common fund doctrine to class action recoveries, reasoning that if attorney's fees could not be recovered, class members would be unjustly enriched by the work of the named plaintiff and class counsel. The central passage of the Court's analysis reads as follows: "[t]o claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs." *Id.* at 480.

338 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975).

line-drawing, but the Supreme Court never suggested that the matter should be left to Congress.[339]

The creation of an all-purpose trans-substantive class action in the 1966 amendments not only uncoupled attorneys' ability to aggregate claims from legislative policy, but enabled the retrenchment of private enforcement through decisions interpreting Rule 23. As Part I.C noted, conservative Supreme Court Justices have systematically weakened private enforcement regimes in recent decades by adopting restrictive interpretations of the FRCP.[340] Restrictive interpretations of Rule 23 have been a centerpiece of that project. Burbank and Farhang find that, beginning in the 1980s, there was a "long decline" in the likelihood that Justices would vote in favor of private enforcement in cases that "turned on either an interpretation of Rule 23 or an issue explicitly linked to policies underpinning Rule 23."[341] While the effect of political ideology on Justices' votes on class action cases was relatively modest prior to 1995, ideology became "substantively large" thereafter, "more than doubling by one measure, and more than tripling by another," with conservative Justices more likely to cast votes that weakened private enforcement.[342] As Burbank and Farhang observe, the "lower visibility" of technical private enforcement cases "enlarged conservative Justices' latitude to pursue the retrenchment project with little public notice," and without triggering a congressional response.[343] Rule 23 has thus been a vehicle both for retrenching private enforcement that Congress contemplates and seeks to facilitate and for facilitating private enforcement Congress did not explicitly envision.

How could the Rules, and Rule 23 in particular, be better aligned with laws that make use of private enforcement? One approach would be for the Advisory Committee to develop targeted rules along the lines of Rules 23.1 and 23.2.[344] for cases under civil rights, consumer, antitrust, and other categories

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339 *See* sources cited *supra* note 335.

340 *See supra* notes 143–147 and accompanying text.

341 Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1517, 1518 (2017).

342 *Id.* at 1527.

343 Burbank & Farhang, *supra* note 159, at 307.

344 *See* FED. R. CIV. P. 23.1 (establishing special procedures for "when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce"); *id.* 23.2 (establishing special procedures for "an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties.").

of laws. In the interests of space, we will not attempt to canvas the enforcement policies legislatures have adopted in those areas or all of the ways that targeted class action rules might further them. Our point is simply that, because the rules would *not* be trans-substantive, they could account for and respond to those policies.[345]

Another approach more in keeping with the FRCP's general preference for district court discretion would be to amend Rule 23 to require district courts to consider whether certification of a class action is consistent with the enforcement policies of the law or laws at issue in an action. Taking cues from our proposed amendment of Rule 1, a new Rule 23(c) might provide:

> (c) In determining whether to certify a class action, the court shall give substantial weight to whether certification of a class would facilitate legislative enforcement objectives.

On one hand, the addition of this instruction to pay attention to Congress and state legislatures would facilitate the certification of class actions in areas where the governing law contemplates, and seeks to encourage, private enforcement. On the other hand, the amendment would *check* the certification of class actions that were at odds with statutory enforcement policies—for example, those that attempted to aggregate thousands of statutory damage awards into a billion-dollar aggregate liability for technical statutory violations.[346] The effect of the amendment, then, is neither to make certification available anywhere and everywhere nor a broad retrenchment of class actions. Instead, the amendment would nudge district courts to pay greater attention to legislated enforcement policy. In contrast to many of the changes we propose, this change could, conceivably, overcome the institutional roadblocks that have thwarted prior at Rule 23 reform. Coupling the class certification decision to statutory policy, the amendment offers something to parties on both sides of the "v."—easier aggregation when it is contemplated by the governing statutory program

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345 For instance, non-trans-substantive rules could clarify what issues must be capable of class-wide proof in an employment discrimination class, and which may be resolved in individual proceedings, replacing *Wal-Mart v. Dukes*' trans-substantive requirement of common issues "apt to drive the resolution of the litigation." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

346 *See generally* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103 (2009).

and greater limits on it when the governing law is inconsistent with aggregation.

Again, we are cognizant that rule language is only one of the factors that influence judicial behavior. Rather than working a transformation in class action practice, the effects of the amendment may well be felt at the margin. Any changes to the rule would operate in tandem with other forces influencing class certification, most importantly the Supreme Court's glosses on the rule. At the margin, however, the amendment would better calibrate certification decisions with enforcement policies in legislation that private parties enforce through civil litigation.

D. Procedural Contracting

A final area where the FRCP would look different if rulemakers reckoned with their enforcement function involves contractual control over procedure—more precisely, pre-dispute procedural contracting. Pre-dispute contracts allow parties to select the forum for suit, the decisionmaker who will preside over proceedings, and the procedures to be followed, and can limit parties' ability to use procedures ordinarily available under the Rules.[347] Party control has always been part of the FRCP regime. Parties control the claims and defenses that are in dispute in the pleadings, have somewhat broad control over discovery, and many provisions of the Rules grant the parties power to adopt procedures or dispose of issues by agreement.[348] The Rules, however, say nothing about the enforceability of these pre-dispute contracts,[349] an omission that repeat-player corporate defendants have used to stack procedure in their

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347 *See, e.g.*, Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2804 (2014); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 533–55 (2011).

348 For example, Rule 41(a)(1)(a)(II) provides that a plaintiff, without permission of the court, may dismiss an action by filing "a stipulation of dismissal signed by all parties who have appeared," and Rule 29 provides that the "parties may stipulate that . . . a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified . . . and . . . other procedures governing or limiting discovery be modified." FED. R. CIV. P. 29, 41(a)(1)(a)(II). For further examples, see Stephen D. Susman & Johnny W. Carter, *Better Litigating Through Pre-trial Agreements*, 38 LITIGATION 1, 22 (Fall 2011).

349 *See, e.g.*, Jessica Erickson, *Bespoke Discovery*, 71 VAND. L. REV. 1873, 1899 (2018) ("There are few statutes or rules that delineate when parties can opt out of procedural rules.").

favor.[350] Rules of private enforcement would grapple with parties' authority to modify procedure by contract and potentially regulate forms of procedural contracting that undermine legislative enforcement priorities.

The rise of procedural contracting and its relationship to private enforcement could fill an entire article. In brief, as private enforcement expanded in the decades after the '64 Civil Rights Act, major corporate defendants organized a campaign to expand private parties' ability to dictate procedure by contract then used their new authority to change how and where they were sued.[351] Simplifying somewhat, the campaign focused at first on establishing contracting parties' ability to select the forum for suits.[352] It then turned to moving cases from public court to private dispute resolution systems through arbitration provisions,[353] and then to manipulating the procedures (in courts and arbitration) that were used to resolve civil cases.[354] As courts enforced more types of agreements governing the forum and procedures for suit, they extended the same treatment to legal boilerplate lacking traditional indicia of contract.[355]

From the beginning, the campaign aimed to eliminate access to class actions and other forms of aggregate litigation that enable individual plaintiffs to overcome collective action problems that prevent them from asserting their rights.[356] These efforts to privatize dispute resolution have been growing at

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350 *See* ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION (Sept. 17, 2017), https://files.epi.org/pdf/135056.pdf; CONSUMER FIN. PROT. BUREAU [https://perma.cc/DD8T-DV8C]; CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), at 7 (Mar. 2015), https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/ [https://perma.cc/UBC5-5VRY].

351 For overviews of this campaign, see, e.g., SARAH L. STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 4–7 (2015); COLVIN, *supra* note 348, at 1–2; IAN R. MCNEIL, AMERICAN ARBITRATION LAW: REFORM, NATIONALIZATION, INTERNATIONALIZATION (1992).

352 *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 1 (1972); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

353 *See, e.g.*, David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665, 678-82 (2018) (summarizing the Supreme Court's expansion of the scope of arbitration under the Federal Arbitration Act).

354 *See, e.g.*, Kindred Nursing Ctrs. Ltd. v. Clark, 581 U.S. 246, 246 (2017); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 333 (2011).

355 For a sustained critique of this development, see MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 19–32 (2013).

356 *See* Southland Corp. v. Keating, 465 US 1, 4 (1984) (considering, but declining to resolve, motion to enforce class action waiver in 7-Eleven franchisor's franchise contract).

breakneck pace. Consider the employment context. By 2017, one study found that 53.9% of non-unionized private-sector employees were bound by mandatory arbitration procedures.[357]

The spread of procedural contracting has obvious implications for the functioning and effectiveness of statutory programs that are enforced through the FRCP. Most obviously, changes to dispute resolution procedure can manipulate the financial returns from private enforcement and, in so doing, redirect enforcement from areas of legislative concern. Commentators, however, have devoted relatively little attention to those effects, focusing instead on parties' legal authority to dictate procedure by contract,[358] the normative and conceptual issues procedural contracting raises,[359] and the optimal allocation of procedure-making authority among contacting, court rulemaking, and other institutions.[360] Only at the tail end of the contract procedure revolution (and only in a handful of works) have scholars focused sustained attention on the enforcement effects of procedural contracting.[361] Systematic empirical work is still lacking in the literature.

The response to contract procedure from the court rulemaking process has been, if anything, still more muted. After tentatively holding in 1972 that federal courts sitting in admiralty must enforce forum selection clauses in international

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357 *See* COLVIN, *supra* note 348, at 1. Under *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019), virtually all of these employees will be required to arbitrate on an individual basis, because the governing contractual provisions do not expressly provide for class proceedings and frequently often prohibit them.

358 *See, e.g.*, IMRE STEPHEN SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1103 (2011); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331.

359 *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1352–84 (2012); Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1069 (2011); Judith Resnik, *Procedure As Contract*, 80 NOTRE DAME L. REV. 593, 594 (2005).

360 *See, e.g.*, Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 507 (2011); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704 (1998).

361 *See, e.g.*, Zachary D. Clopton & David L. Noll, *An Arbitration Agenda for the Biden Administration*, ILL. L. REV. ONLINE 104, 104 (2021); David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 986 (2017); Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* DR Horton *and* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 175, 179 (2014); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052 (2015); RADIN, *supra* note 353.

agreements,[362] the Supreme Court embraced ever more expansive procedural contracting, holding, for example, that mandating individual arbitration does not conflict with the right to engage in concerted activity for mutual aid or protection under the National Labor Relations Act,[363] that a state cannot require wrongful death claims against nursing homes to be heard in court as a means of regulating the quality of care,[364] and that sellers of predatory financial products can force their victims into individualized arbitration.[365] Throughout this line of cases, the Court has consistently found that legal authorities other than the FRCP control the enforceability of procedural contracts and that the FRCP give way to those authorities—even when such authorities are nothing more than federal common law.[366] The Advisory Committee, meanwhile, has never undertaken a major study of procedural contracting's effects on any aspect of federal civil procedure, much less private enforcement. And it has never seriously considered a rule amendment governing parties' authority to dictate procedure through contract. The entire area, the Committee seems to believe, is a matter for the Supreme Court to handle by deciding cases engineered by advocacy organizations and industry groups.

A rulemaking process that acknowledged and accounted for the FRCP's role in private enforcement would approach procedural contracting differently. As a starting point, such a process would recognize the Rules' integral place in statutes that are enforced through private, civil litigation. This recognition raises fundamental questions about the Rules' status vis-à-vis legislation and federal common law that the Court has interpreted as displacing them. For instance, in *American Express v. Italian Colors Restaurant*, the Supreme Court denied that Rule 23 creates a right to seek certification of federal statutory claims, based on the fiction that class certification is a

362 The Bremen v. Zapata Off-Shore Co., 407 U.S. 1,1 (1972).

363 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018).

364 Kindred Nursing Cts. Ltd. v. Clark, 581 U.S. 246, 246 (2017).

365 CompuCredit Corp. v. Greenwood, 565 U.S. 95, 95 (2012).

366 *See, e.g.*, Atl. Marine Const. Co. v. U.S. Dist. Ct., 571 U.S. 49, 55 (2013) (interpreting the federal venue statute, 28 U.S.C. 1391, to require enforcement of forum selection clauses); Am. Exp. v. Italian Colors Rest., 570 U.S. 228, 234–35 (2013) (rejecting argument "that federal law secures a non-waivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration"); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (interpreting federal maritime law to require enforcement of forum selection clause contained in cruise plate boilerplate).

mere procedural right that does not affect substantive regulatory policy and a case holding that there was no such right to seek class certification of state law contract claims.[367] The Court's conclusion cannot be squared with the role that the FRCP play in implementing congressionally sanctioned private enforcement regimes. A rulemaking process attuned to private statutory enforcement would explore the statutory contexts in which an opportunity to seek class certification is critical to Congress's legislated enforcement goals and the extent to which that opportunity could be secured through amendments to the FRCP. Where rulemakers lacked authority to override the Court's reconfiguration of the FRCP, they would work with Congress to clarify their authority.

Next, a process that acknowledged and accounted for the FRCP's enforcement role would study the effects of procedural contracting on private enforcement of different statutory regimes. The goal of such work should be to identify—where possible, quantitatively—the effect of procedural contracting on statutory enforcement priorities. The question then becomes how procedural contracting affects the incentives for parties and attorneys to bring claims arising under regulatory statutes that make use of private enforcement, and to study the extent of those effects.[368]

Finally, a rulemaking process that acknowledged and accounted for the FRCP's role in private enforcement would explore rule amendments that regulated forms of procedural contracting that interfered with legislative enforcement priorities. Though it is impossible to say the exact form such rules would take without a proper rulemaking record, we hasten to add that, because federal statutes differ widely in the extent to which they seek to encourage private enforcement, such rules might well take a more tailored approach targeted to legislative enforcement priorities under different laws. In this way, important questions about the enforceability of procedural contracting would move from Supreme Court cases interpreting vague legal authorities to a setting where those questions would be informed by systematic empirical analysis of the effects of procedural contracting and where the policy implications of such

367 570 U.S. at 234–35.

368 Noll, *supra* note 351, at 1044–45 ("[T]he crucial question is whether . . . procedural contracting reduces or eliminates incentives for attorneys to represent clients asserting claims under regulatory statutes . . . .").

contracting could be weighed by an expert body operating with a synaptic view of the enforcement environment.

CONCLUSION

Aging infrastructure is a problem for any democracy—and any legal system. A great deal of the U.S. legal infrastructure was built in the 1930s, when a burst of energy produced the foundations of the modern regulatory state and our system of federal civil procedure. What the procedure-makers did not anticipate, however, was how quickly the regulatory state would intrude on procedure's domain. As private litigation became an increasingly important tool of regulatory governance, it became more and more evident that the FRCP were created for a different era and responded to a different set of problems. Yet, those tasked with writing the FRCP failed to view these challenges as just that—a provocation to update the infrastructure crumbling beneath their feet. In federal civil procedure, as elsewhere in our society, the energy that created colossal and impressive infrastructure has not been summoned again to renovate or recreate it.

Our approach in this Article has been to view the changes that rocked the Rules as an opportunity to rethink their functions and to update their infrastructure for the modern regulatory state. Congress placed the modern regulatory state and the FRCP into conversation by creating more and more private rights of action in regulatory statutes and making it attractive for litigants and their lawyers to enforce them. In viewing the confrontation between the FRCP and regulatory state as an opportunity for adaptation rather than a threat, we have endeavored to produce a more contemporary vision of Congress's ongoing delegation of procedure-making to the courts, of what the court rulemaking process should look like, and of the principles that should inform federal court rulemaking.

While our account has shifted the conventional story in many ways, we have, so far, said little about the Supreme Court's role in reshaping federal civil procedure and the "restrictive ethos" that scholars see in the Court's recent civil procedure jurisprudence.[369] In procedure scholarship, the traditional story about private enforcement is one of retrenchment. As Part I explained, a prominent line of scholarship shows that the Court under Chief Justices Rehnquist and Roberts acted

[369] A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010).

strategically to retrench disfavored forms of regulation through technical decisions that interpreted the rules governing private enforcement.[370] The Court's retrenchment of federal litigation, on this view, is an extension of the Republican Party's counter-revolution against the Rights Revolution—one that succeeded because the barriers to judicial retrenchment are lower than those to retrenching legislation through Congress or the court rulemaking process.

We do not disagree that the Court has acted this way, but our account shines new light on another part of the story that is worth reflecting on, especially in light of the power the Court exercises today. The parallel development of the FRCP and private enforcement that we traced in Part I made the Rules and the processes through which they are made ill-designed to support private enforcement. This structural glitch in the federal rules system deserves pride of place in the larger story of procedural retrenchment because it paved the way for the Court to suppress private enforcement. Had Congress amended the Enabling Act to clarify that the Rules must provide for faithful implementation of regulatory legislation, or had the rulemakers themselves recognized the task they were being called upon to perform and updated their processes to account for Congress's continued reliance on private enforcement, the story might well be different. Civil rulemakers might have risen to the occasion to make federal rules of private enforcement, delimiting the Court's power, and refashioning rulemaking so that it did not ossify and instead flourished in the modern litigation state. At the very least, the Court's moves would have been harder to pull off and stood on shakier foundations. The larger point is this: the responsibility for the retrenchment of federal litigation is broadly held. The Justices' role is undeniable, but they are not the only culprit.

This broader, more complicated, and more comprehensive account of the retrenchment of federal litigation does not justify the Court's actions restricting private enforcement so much as explain the background conditions that enabled them. But, in another sense, our account clarifies just how problematic it is for the Court, which has been delegated rulemaking authority by Congress to ensure that its policies are faithfully implemented, to interpret the Rules to undermine those very functions. By taking seriously the modern reasons for Congress to delegate rulemaking and elaborating what rulemaking

370 *See supra* notes 143–147 and accompanying text.

for private enforcement should look like, our account demonstrates the yawning gap between the Court's construal of the Rules and the functions they play in the modern legal system.

Our larger project, though, goes beyond the Court and in some ways de-centers it. We have sought to rethink the functions of the FRCP and the rulemaking process in the contemporary litigation state, centering Congress and civil rulemakers in a structural, democratic account of rulemaking faithful to congressional enforcement goals. In this way, the Article envisages a possible future for democratically-sound rulemaking and rules that function as engines of the modern legal system.