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SUPREME COURT OVERSIGHT OF THE FEDERAL RULES: A PRINCIPAL-AGENT PROBLEM?

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When the conservative coalition on the Supreme Court seeks to leverage the Federal Rules of Civil Procedure to advance its anti-private enforcement agenda, it can give rise to a principal-agent problem. This is because a large share of the trial court and court of appeals judges that the Supreme Court's conservative coalition seeks to direct are to its ideological left and work in an institutional environment that moderates the impact of ideology on their decision-making. One solution to a principal-agent problem of this nature is for the Supreme Court to issue bright-line rules, avoiding discretionary decision-making and zones of indeterminacy, and increasing the likelihood of lower court compliance with the preferences of the Court's majority coalition. However, this rule-based strategy often will not work with Federal Rules bearing on private enforcement because many are indeterminate standards that delegate vast discretion to trial courts, providing a measure of insulation from Supreme Court control. This insulation, rooted in highly discretionary rules, is heightened by the fact that most trial court decisions under the Federal Rules are non-final and become unreviewable if the case settles, the plaintiff abandons the claim, or the would-be appellant later prevails on the merits. And if a Federal Rules decision is reviewed, it often will be under the highly deferential "abuse of discretion" standard administered by an appellate panel that is, on average, ideologically closer to the trial court than to the Supreme Court's conservative coalition. These institutional features of the Federal Rules and their implementation in the lower federal courts contribute to private enforcement's relative durability in the face of a hostile Supreme Court. They may also help to explain why a number of recent controversial changes in federal procedural law in the areas of pleading, class actions, and discovery appear not to have produced the magnitude of anti-plaintiff effects that many anticipated.

INTRODUCTION

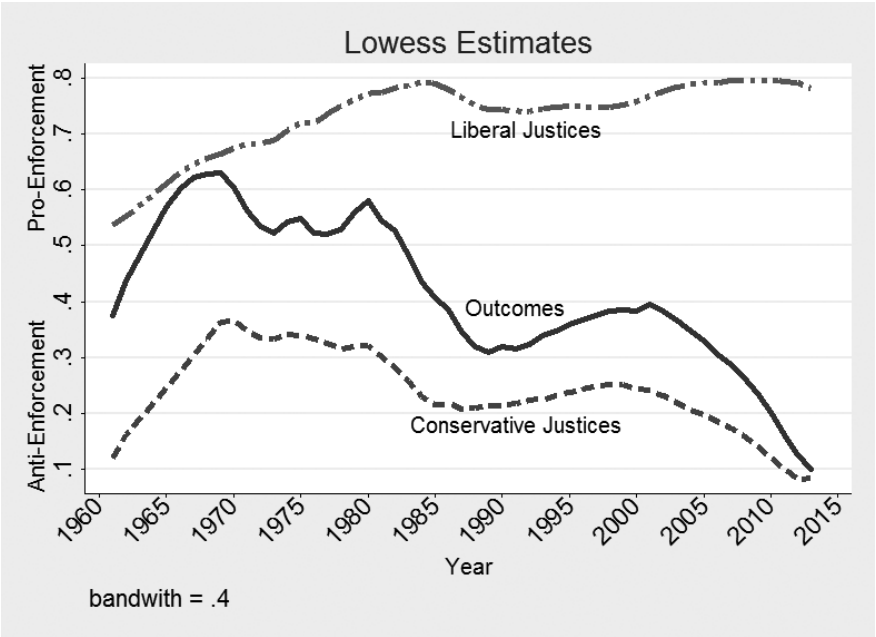
A great deal has been written in the last several decades about the Supreme Court's increasingly anti-private enforcement posture.[1] In work with Stephen Burbank, we analyzed decisions by the Supreme Court addressing private rights of action, fee awards, damages, stand-

1. *See, e.g.*, Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); 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 (2006); SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015); ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 17 (2017); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

ing, arbitration, and Federal Rules of Civil Procedure affecting private enforcement. We found that, in cases with at least one dissent, plaintiffs' probability of success when litigating private enforcement issues before the Supreme Court has been in decline for over four decades and that by 2014 (when our data ended) they were losing about 90% of the time.

This long decline in plaintiff success before the Supreme Court on private enforcement issues is reflected in Figure 1, where higher values on the vertical axis are associated with a higher probability of a pro-plaintiff outcome, and lower values are associated with a lower probability. The figure also shows the probability of pro-plaintiff votes for conservative and liberal justices separately, making plain that the anti-plaintiff trajectory of the Court's decisions was driven overwhelmingly by the votes of conservative justices, which in recent years has meant Republican-appointed justices.[2] The highly anti-plaintiff tenor of the Court's private enforcement decisions reflects the preference of the conservative majority coalition on the Court.

FIGURE 1: PROBABILITY OF PRO-PRIVATE ENFORCEMENT OUTCOMES AND JUSTICE VOTES IN PRIVATE ENFORCEMENT ISSUES WITH DISSENTS, 1960–2014



2. BURBANK & FARHANG, *supra* note 1, Ch. 4. We define conservative versus liberal justices based upon whether they are above or below the median Martin-Quinn score and find that the resulting categories fit conventional perceptions of justice ideology. *Id.* at 150–52.

Lawyers and legal academics rightly tend to regard the Supreme Court as an important institution whose procedural decisions matter not just to the parties but also to how the federal system functions. I think it is fair to say that we who produce the literature on private enforcement regularly—though definitely not always—talk about the increasingly anti-private enforcement Supreme Court as if its decisions are substantially reflected in the federal system. Our implicit premise is that the lower federal courts are faithfully implementing the will of Supreme Court majorities that produced the decisions in question.[3] This implicit premise is often true, but not always. The *nature of the issue* decided by the Court has a significant impact on the extent of lower court compliance with Supreme Court directives, using the term "compliance" to capture the idea of a lower court seeking faithfully to implement both the letter and spirit of a Supreme Court decision.

I begin with the observation that it is not clear that a number of high-profile anti-plaintiff Supreme Court decisions, in areas like pleading and class actions, had the dire impact feared and expected by liberal critics, including myself. Acknowledging the indeterminacy of the evidence on these decisions' impact in the lower federal courts, I nevertheless consider the challenges faced by the conservative coalition endeavoring to restrict access to court and weaken private enforcement via anti-plaintiff decisions in a distinctive subset of cases: those calling for interpretation of the Federal Rules.

I do so from a principal-agent perspective which emphasizes problems of control when the agent's preferences diverge from those of the principal. The lower federal courts are to the left of the conservative coalition. The process for selecting federal judges yields more ideologically extreme appointments to the Supreme Court and, as an empirical matter, over about the past decade nearly half of court of appeals panels were majority Democratic-appointees, and about half of district judges were Democrats. This preference divergence between the principal conservative coalition and its agents in the lower federal courts is heightened by institutional features of the lower federal courts. Courts of appeals panels are governed by more "collegial" decision-making dynamics than the more majoritarian Supreme Court, allowing preference-minorities on court of appeals panels to influence preference-majorities. This moderates the average court of

3. Having said that, Professor Burbank and I acknowledged that the impact of changes in law by the Supreme Court reflected in Figure 1 cannot be assumed to straightforwardly translate into limitations on plaintiffs' access to court on the ground, and we discussed reasons that this assumption could be misleading. *Id.* at 226–30.

appeals panel away from the poles and toward the center. Trial courts "managerial" posture leads them, on average, to even less ideological decision-making than the courts of appeals.

One strategy for the conservative coalition to manage the threat of non-compliance by lower federal court judges with divergent preferences is to bind them with clear, bright-line interpretations of the Federal Rules that offer little or no discretion. The problem, from the conservative coalition's point of view, is that many Federal Rules most salient to private enforcement, such as those governing pleading, class actions, and discovery, are indeterminate standards that delegate vast discretion to trial courts. This makes auditing lower court agents for departures from Supreme Court directives, and imposing sanctions for non-compliance, much more difficult.

Rules governing appeal of trial courts' Federal Rules decisions significantly increase the conservative coalition's challenge. Most such decisions under the Federal Rules are non-final and will rarely be reviewed unless the case reaches final judgment. They will not be reviewed after the case settles, the plaintiff abandons the claim, or the would-be appellant later prevails on the merits, making a substantial share of Federal Rules decisions by district judges effectively unreviewable. If they are ever reviewed, these mostly fact-bound procedural decisions are typically subject to the highly deferential "abuse of discretion" standard, which will usually be applied by a court of appeals panel ideologically closer to the trial court than to the Supreme Court's conservative coalition. Thus, institutional features of the Federal Rules and their implementation in the lower federal courts can provide a significant measure of insulation from Supreme Court control.

The claim is *not* that the Court's anti-private enforcement decisions are inconsequential. A large majority of them are not decisions applying the Federal Rules, and many are susceptible to resolution by bright-line rules that the lower federal courts implement relatively faithfully and vigorously. Decisions on the enforceability of binding arbitration agreements for statutory claims,[4] class action waivers in arbitration,[5] the general rule against prevailing plaintiff attorney fee awards absent statutory authorization,[6] and unavailability of pain and suffering damages under a discrete set of statutes,[7] are good examples

4. *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

5. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

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

7. Cummings v. Premier Rehab Keller, P.L.L.C., No. 20-219 (U.S. Apr. 28, 2022).

of this, and ones that are profoundly consequential. In the same vein, I am not arguing that the Court's anti-private enforcement Federal Rules decisions have not moved the legal status quo in the lower federal courts in the direction intended by the conservative coalition. Instead, I argue that Federal Rules salient to private enforcement present distinctive hierarchical control challenges for the conservative coalition on the Supreme Court, exploring institutional reasons that the impact of such decisions may be significantly blunted relative to the intent and hope of the conservative coalition, and the fears of its critics.

This insulation is an important feature of the federal litigation landscape. The Federal Rules are the rules of the game for private enforcement litigation in the federal system, and their model has been widely followed in the states. Stephen Burbank has called the federal rules a "litigation highway."[8] They were intended when promulgated in 1938 as "an ally of private enforcement," and they can "effectively determine access to court and likelihood of success in court for those seeking to enforce federal rights through litigation."[9] The Supreme Court itself well-recognizes this. As it explained:

> [T]his Court's rulemaking under the enabling Acts has been substantive and political in the sense that the rules of procedure have important effects on the substantive rights of litigants. . . . Rule 23 of the Federal Rules of Civil Procedure, for example, has inspired a controversy over the philosophical, social, and economic merits and demerits of class actions.[10]

I. THE (POTENTIAL) PUZZLE

A. Three Controversial Changes in Law

To concretely illustrate the question of lower court implementation of the Supreme Court's preferences on the Federal Rules, consider three relatively recent controversies in which the Supreme Court sought to shift the meaning of the Federal Rules in an anti-private enforcement direction. They concerned pleading, class actions, and discovery.

1. Pleading

The Federal Rules have long been understood to require "notice pleading," under which a plaintiff is required to state a claim that is

8. BURBANK & FARHANG, *supra* note 1, at 67.
9. *Id*. at 65.
10. Mistretta v. United States, 488 U.S. 361, 392 & n.19 (1989).

legally tenable on some set of facts that might be established, and only in sufficient detail to give the defendant fair notice of what that claim is. Federal Rule 8 requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief."[11] The drafters' goal was to foster adjudication on the merits after the opportunity for both parties to gather evidence in discovery, rather than deciding cases based on the face of the parties' pleadings.[12]

The Supreme Court embraced this approach squarely in *Conley v. Gibson* in 1957, where it held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[13] In two decisions, one from 2007 (*Twombly*)[14] and the other from 2009 (*Iqbal*),[15] the Court effectively overruled *Conley*, a landmark that had governed federal practice for a half-century. It was *Iqbal*, decided by a five-justice conservative majority, that made clear that the new rule applied across the board (to all types of cases). Under the new pleading regime, in order to withstand a motion to dismiss, a complaint must state facts—not conclusions—that give rise to a claim that is "plausible" according to "judicial experience and common sense."[16] As a matter of law, *Iqbal* represented a bold and unambiguous shift in the legal status quo in an anti-plaintiff direction, eliciting a firestorm of controversy.[17]

2. Class Certification

A second area of recent change in the Supreme Court's interpretation of the Federal Rules is class actions. Jay Tidmarsh has observed that "[i]t is fashionable these days to talk about the death of class actions."[18] Among the key causes of death identified by scholars are

11. Fed. R. Civ. P. 8.

12. BURBANK & FARHANG, *supra* note 1, at 135.

13. 355 U.S. 41, 45–46 (1957).

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

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

16. *Id.* at 679.

17. *See, e.g.*, Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 118 (2009); David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L. J. 117, 118–20 (2010); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 862–70 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527–36 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 831–33 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1311–12 (2010).

18. Jay Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691, 691 (2013) (summarizing the literature on the death of the class action); *see also* Robert H. Klonoff, *The Decline of Class*

Supreme Court decisions interpreting Rule 23. These include decisions taking a narrow view of both mass tort and settlement class actions in the late 1990s.[19] They also include the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*,[20] where the Court interpreted Rule 23(a)'s commonality requirement more restrictively than in prior precedent,[21] and its 2013 decision in *Comcast Corp. v. Behrend*,[22] typically seen as taking a restrictive approach to predominance under Rule 23(b)(3). These issues in *Wal-Mart* and *Comcast* were decided 5-4 with conservatives in the majority. Describing these and other Supreme Court decision interpreting Rule 23, John Coffee states: "The class action may be dying the death of one thousand cuts. No one judicial decision is fatal to it, but the cumulative impact of many decisions may prove to be."[23]

3. Scope of Discovery

A third example concerns an amendment to Federal Rule 26 governing discovery. Here the Supreme Court sought to affect a change in the Federal Rules not through interpretation, but instead through the Enabling Act process of rule amendment, which includes a proposal by the Advisory Committee on Civil Rules (all of whom are appointed by the Chief Justice), approval by the Supreme Court, and the acquiescence of Congress.[24] In 2015, Federal Rule 26 was amended to include "proportionality" limits in the rule's definition of the scope of discovery. The new rule provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering [1] the importance of the issues at stake in the action, [2] the amount in controversy, [3] the parties' relative access to relevant information, [4] the parties' re-

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Actions, 90 WASH. U. L. REV. 729, 729 (2013); JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 2 (2015).

19. Tidmarsh, *supra* note 18, at 692 (citing Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) and Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)).

20. 564 U.S. 338 (2011).

21. Tidmarsh, *supra* note 18, at 693; *see also* Jenna C. Smith, *"Carving at the Joints": Using Issue Classes to Reframe Consumer Class Actions*, 88 WASH. L. REV. 1187, 1196 (2013) ("To many, [*Wal-Mart*] signaled the death of mass-consumer class actions."); Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL'Y 73, 77 (2011) (*Wal-Mart* contributed to an environment in which "big companies know that it will be much harder to sue them in class actions").

22. 569 U.S. 27 (2013).

23. COFFEE, *supra* note 18, at 130.

24. BURBANK & FARHANG, *supra* note 1, at 121–25.

> sources, [5] the importance of the discovery in resolving the issues, and [6] whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.[25]

All but one of the six proportionality factors (the third) were already contained in different parts of the pre-amendment version of Rule 26. However, the rulemakers maintained that "greater emphasis on proportionality [was] needed," and moving them to the definition of the scope of discovery was intended to "make them more prominent, encouraging . . . courts . . . to remember them and take them into account in . . . [resolving] discovery disputes."[26]

Robert Klonoff observes that this amendment to Federal Rule 26 "was greeted with panic by the plaintiffs' bar (and the academy) and euphoria by the defense bar."[27] Both sides regarded the rule as limiting plaintiffs' access to discovery, and "predicted that the impact would be profound and immediate."[28] Few rulemaking endeavors in the history of the Advisory Committee on Civil Rules have elicited more comments, and over 120 witnesses testified before the committee.[29]

There is evidence that Chief Justice Roberts reached out to the Advisory Committee and prodded it to propose this rule.[30] And once proposed, the Chief Justice was eager that district judges and magistrate judges recognize the significance of their new marching orders. Devoting his year-end report for 2015 to the amendments, Roberts emphasized their importance, observing that although "[m]any rules amendments are modest and technical, even persnickety . . . the 2015 amendments to the Federal Rules of Civil Procedure are different." That is because "[t]hey mark significant change, for both lawyers and judges," and although they "may not look like a big deal at first glance . . . they are."[31]

B. Impact of the Changes?

What happened in the wake the Supreme Court's interventions on pleading, class actions, and discovery? It is very hard to know for sev-

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25. Fed. R. Civ. P. 26(b)(1) (numbers added).

26. Advisory Comm. On Civil Rules, Report of the Duke Conference Subcommittee 6 (2014).

27. Robert H. Klonoff, *Application of the New "Proportionality" Discovery Rule in Class Actions: Much Ado About Nothing*, 71 Vand. L. Rev. 1949, 1949 (2018).

28. *Id.* at 1949, 1952.

29. *Id*. at 1951–52.

30. Burbank & Farhang, *supra* note 1, at 123.

31. *Id.* at 124–25.

eral reasons. One is the scarcity of data that is either the universe of relevant trial court decisions or a random sample of one. The second, and more vexing, is that selection problems plague studies seeking to evaluate the impact of a Supreme Court decision or rule change by comparing lower federal court decisions before and after the intervention. The intervention itself may change the population of cases that are filed, the rate and timing of settlement, and what motions are made in the course of litigation. To simply compare decision patterns before and after the intervention in order to evaluate its impact may be to compare apples and oranges.[32]

1. Pleading

Of the three Federal Rule interventions above, only the pleading decisions have been studied in a manner that seriously grapples with data and selection problems, particularly in the work of William Hubbard[33] and Jonah Gelbach.[34] Those studies report results ranging be-

32. *See generally* David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013) (discussing these challenges in detail).

33. William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35 (2013); William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474 (2017); William H. J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693 (2016). In *The Effects of Twombly and Iqbal* Hubbard undertakes an analysis of "straddle" cases—those that were filed before *Twombly* and in which the district court ruled on a 12(b)(6) motion after *Twombly*—in order to isolate Twombly's impact on disposition of the motion while washing out the threat of selection via *Twombly*'s impact on plaintiffs' filing decisions. From his analysis of this data, Hubbard concluded that for represented plaintiffs, rates of dismissal with prejudice held steady before and after *Twombly*, motions to dismiss remained about as infrequent after *Twombly* as before, and settlement and filing patterns did not change appreciably after *Twombly* and *Iqbal*. He did find, however, some evidence of adverse effects on pro se plaintiffs.

34. Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L. J. 2270 (2012); Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369 (2016). In *Locking the Doors* Gelbach analyzes data from Joe S. Cecil, George W. Cort, Margaret S. Williams, & Jared J. Bataillon, *Motions to Dismiss for Failure to State a Claim After Iqbal*, Federal Judicial Center (2011), finding higher rates post-*Iqbal* of defendant motions to dismiss, with indistinguishable grant rates as compared to pre-*Twombly*. Gelbach concludes that *Twombly* and *Iqbal* negatively affected plaintiffs who actually faced a 12(b)(6) motion to dismiss in the post-*Iqbal* period, with the lower bound of the percentage of plaintiffs negatively affected, among those that actually faced a motion to dismiss, ranging between 15.4% and 21.5% depending on the policy subset examined. David Engstrom replicates Gelbach's analysis "replacing the Gelbach measurement approach keyed to grants as to one or more claims with an alternate approach keyed to 12(b)(6) grants with plaintiff-excluding effect," finding "substantially smaller lower-bound estimates of *Twiqbal*'s effect, particularly among civil rights cases, where the estimate is both small and statistically indistinguishable from zero." Engstrom, *supra* note 32, at 1233–34. Hubbard observes that when one translates Gelbach's lower bound into the lower bound for total filing plaintiffs negatively affected (as distinguished from plaintiffs in cases where a 12(b)(6) motion was made), the result is that plaintiffs were negatively impacted in about 1% of all cases. Hubbard, *The Effects of Twombly and Iqbal*, *supra* note 33, at 476. The reason for this very small lower bound effect in

tween statistical insignificance and modest anti-plaintiff effects.[35] This work seems fairly characterized as discerning an impact far short of that anticipated by *Twiqbal*'s critics. A lesson from the work is that excessive focus on Supreme Court opinions, and qualitative doctrinal analysis of their impact, may present a very misleading picture of what is happening on the ground in the federal civil justice system.

2. Class Certification

Regarding longitudinal patterns of class certification, we lack longitudinal data on district court certification decisions, and I am only aware of data on court of appeals dispositions of appeals from district court certification decisions. Based on court of appeals certification data collected in my collaboration with Stephen Burbank,[36] the left panel of Figure 2 displays the probability of a pro-certification outcome in all published certification decisions from 1970–2017, as well as displaying the probabilities separately for Democratic and Republican-majority panels. When panels were in the posture of making law, there was a long-run gradual decline in the estimated probability of a pro-certification outcome from 46% in 1975 to 39% in the mid-1980s, where it remained relatively flat for two decades. It turned upward around 2007 and grew 21 percentage points by 2017, ending the series with a 58% probability of certification—the highest in the forty-eight-year series. When unpublished decisions are added (right panel) for the period of 2002–2017,[37] the pattern is similar. In both panels of the Figure we see that the shift in a pro-certification direction occurred

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the total population of filings is that 12(b)(6) motions are very rare even after *Iqbal*. For cases filed in 2010, in only 6% of cases was there a motion to dismiss for failure to state a claim. *Id*. In the later-published *Material Facts*, Gelbach employed data on defendant-filed summary judgment motions to assess the impact of *Twombly* and *Iqbal* in filtering cases according to merit, taking into account selection effects. He concludes that even with a fairly ample dataset of nearly 2000 cases, it may not be possible to reach confident conclusions about *Twiqbal*'s ability to filter cases according to merit at the pre-discovery stage.

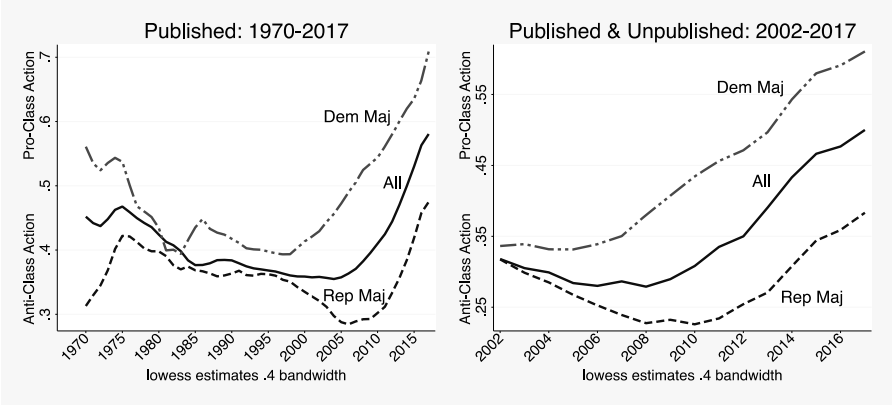
35. Engstrom shows persuasively that studies reporting significant and larger anti-plaintiff effects post-*Iqbal* are based upon data and/or research designs that are not credible. *See* Engstrom, *supra* note 32, at 1215–17.

36. Stephen B. Burbank & Sean Farhang, *Class Certification in the U.S. Courts of Appeals: A Longitudinal Study*, 84 LAW & CONTEMP. PROBS. 73, 88, 91 (2021).

37. We can only examine combined published and unpublished cases beginning in 2002, at which time the E-Government Act required that federal circuits begin making even non-precedential opinions publicly available, allowing them to be included in commercial databases. *See* Andrew T. Solomon, *Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?*, 26 MISS. COLL. L. REV. 185, 205–06, 208 (2007).

first among Democratic-majority panels, followed some years later by Republican-majority panels.[38]

FIGURE 2. PROBABILITY OF PRO-CERTIFICATION OUTCOMES ON THE COURTS OF APPEALS ON ALL THREE-JUDGE PANELS, & ON DEMOCRATIC V. REPUBLICAN MAJORITY PANELS



Consistent with these patterns, David Marcus reported the results of his analysis of every reported class certification decision in a federal public interest case between June 2011 and March 2020. Having noted his pessimism after the first three post-*Wal-Mart* appeals resulted in decertification orders,[39] he continued, "[b]ut a hard pro-defendant turn in the doctrinal regulation of the public interest class action has not materialized. Since the last of the three initial cases, the federal

38. It is natural to wonder whether outcome patterns vary over time depending on the specific class action issues presented. *Wal-Mart* and *Comcast* drew particular attention from those worried about an anti-certification turn in the federal courts. *Wal-Mart* is widely regarded as making commonality more difficult to satisfy, and *Comcast* is typically seen as taking a restrictive approach to predominance. We separated the data into decisions in which (1) the court addressed an issue of commonality, (2) the court addressed an issue of predominance, and (3) the court evaluated certification but addressed neither issues of commonality nor predominance. At a descriptive level, the probability of a pro-certification outcome in precedential cases presenting a commonality or predominance issue grew in the years after *Wal-Mart* and *Comcast*, consistent with the patterns in Figure 2. *See* Burbank & Farhang, s*upra* note 36, at 94. However, when we examined the combination of both precedential and non-precedential certification decisions in the 2002–2017 period, the probability of certification plateaued and/or declined modestly in decisions presenting commonality and predominance issues during the post-*Wal-Mart* and *Comcast* period, while continuing to grow strongly in all other certification decisions pooled. *Id*. This descriptive evidence is consistent with the possibility that *Wal-Mart* and *Comcast* arrested the ongoing growth in pro-certification outcomes when commonality and predominance issues were presented, and at the same time the overall rate of pro-certification outcomes on appeal grew strongly.

39. *See* David Marcus, *The Public Interest Class Action*, 104 GEO. L. J. 777, 780–81 (2016).

circuits have decided 22 additional appeals involving the propriety of class certification. Plaintiffs have won 17 of these cases. . . ."[40]

In a similar vein, Robert Klonoff wrote that after *Wal-Mart*, "[o]verall, despite some setbacks, the cases give reason for some optimism. [*Wal-Mart*], no doubt, will pose obstacles in some cases, but the fact that important cases seeking structural relief continue to be certified is encouraging,"[41] and that "the impact of [*Wal-Mart*] has been less profound than one might have predicted when it was decided in 2011."[42]

Plaintiffs appear to be winning class certification appeals at increasing rates at a time that the class action's death is being mourned by some and celebrated by others. Marcus hypothesizes that plaintiffs' growing win rate may be explained by a plaintiffs' bar that has elevated the quality of its certification advocacy in response to anti-certification decisions by the Supreme Court.[43] Klonoff hypothesizes that plaintiffs' success with certification after *Wal-Mart* and *Comcast* may be driven by defendants pushing weaker arguments on appeal.[44] I fully acknowledge that the threat of these and other selection dynamics, coupled with great uncertainty about the relationship between appellate and trial court certification patterns, make it impossible to confidently interpret these developments as pro-certification. I am nevertheless led to wonder whether class actions have been pronounced dead prematurely based on an excessive focus on the Supreme Court.

3. Scope of Discovery

The impact of the 2015 amendments to the scope of discovery under Rule 26 has received the least attention of the three interventions, which is unsurprising because it happened most recently. In 2018, Robert Klonoff conducted a study in which he reviewed every published federal district and magistrate opinion (approximately 135) ap-

40. David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 LEWIS & CLARK L. REV. 395, 409 (2020).

41. Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L. J. 1569, 1591 (2016).

42. Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 992 (2017).

43. Marcus, *supra* note 40, at 417 ("*Wal-Mart*'s demand for 'rigorous analysis' has forced lawyers and judges to articulate with more precision the contours of the substantive rights that [certain types of] plaintiffs vindicate.").

44. *See* Klonoff, *supra* note 42, at 981 (Suggesting that the Court has "become numb" to the "blackmail pressure to settle" argument and that "the business community has suffered a lack of credibility in its amicus strategy"); *id.* at 991 (noting that "defendants had virtually no success in selling their interpretation of *Comcast* to the circuits").

plying the new proportionality rule in the class action context since the rule's adoption. Some thought class actions would be disproportionately affected by the rule in an anti-plaintiff direction. He concluded that, at least in the class action context, the amendment was "much ado about nothing."[45]

On his reading of the cases, they did not reflect any change in core principles governing discovery, reached decisions that were substantially consistent with pre-amendment case law, and were generally liberal in allowing discovery. It appeared to Klonoff that the expectations of the plaintiffs and defense bar, and the hopes of the Chief Justice for significant change in discovery outcomes, were not realized. Again, the threat of selection is clear, and the dangers that published cases are not representative of the universe of decisions are well-known.[46] Indeed, Klonoff forthrightly characterizes his study as "necessarily anecdotal rather than empirical."[47] I am nevertheless led to wonder whether the consequences of the changes in the definition of the scope of discovery, like the Court's pleading and class action decisions, fell far short of expectations.[48]

These three examples lead me to consider the challenges facing a Supreme Court seeking to affect changes to the meaning of Federal Rules as a lever to retrench private enforcement litigation. I consider this question from the perspective of principal-agent models of Supreme Court control of the lower federal courts.

II. Hierarchical Control of the Federal Rules by the Supreme Court

Many scholars taking a positive political theory approach have conceptualized the issue of lower court compliance with Supreme Court decisions as a principal-agent problem, with the Supreme Court in the role of principal and the lower federal courts acting as its agents.[49] A principal-agent problem arises when there is divergence in the preferences of the principal and its agent. Songer, Segal, and Cameron offer this characterization:

45. Klonoff, *supra* note 27.

46. *See* Engstrom, *supra* note 32.

47. Klonoff, *supra* note 27.

48. One 2017 paper reports a growth in the frequency of successful proportionality challenges the year after the rule became effective as compared to the year before it. Steven Baicker-McKee, *Mountain or Molehill?*, 55 Duquesne L. Rev. 307, 313 (2017). However, the author provides no explanation of how they identified the universe of cases and thus it is not possible to know whether meaningful inferences from it are possible.

49. Jonathan P. Kastellec, *The Judicial Hierarchy: A Review Essay*, Oxford Rsch. Encyclopedia Pol. (2017) (reviewing literature).

> The Supreme Court is the principal, whose subordinates, the courts of appeals, are the agents. If the circuit courts consisted of faithful agents, they would obediently follow the policy dictates set down by the Supreme Court. But utility maximizing appeals court judges also have their own policy preferences, which they may seek to follow to the extent possible.[50]

In addition to simply deciding cases inconsistently with the intent of a Supreme Court holding which they disfavor, lower federal courts may elaborate doctrine fleshing out the meaning of such holdings so as to narrow and circumscribe their reach.[51]

Though the literature focuses on the courts of appeals as agents, district courts are agents as well. This fact is especially important to consider in the context of the Federal Rules, where most district court decisions are effectively unappealable to the courts of appeals, as I will discuss below. Further, while I agree with Songer, Segal, and Cameron that lower federal courts may seek to follow their own policy preferences to the extent possible, it bears emphasis that the principal-agent problem does not hinge on the view that lower federal courts will willfully defy the Supreme Court in the face of substantive disagreement. Some scholars taking a social psychological approach to studying judicial behavior suggest that legal decision-makers' preferences can influence their unconscious judgments of what legal arguments are most persuasive.[52] This could cause even a faithful lower court agent, intent on carrying out the Supreme Court's will, to deviate from a Supreme Court majority's own understanding of its holding, especially when a rule is discretionary and ambiguous, and its application is highly fact-bound, as is typical in Federal Rules decisions.

A. Variation in Judges' Preferences Across Levels of the Judicial Hierarchy

The Supreme Court is more ideological than the lower federal courts, and on divisive issues the conservative coalition is to the right of the lower federal courts. While this statement is unlikely to be very

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50. Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 675 (1994).

51. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2015).

52. EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION 21 (2009) (Using experimental evidence to show that legal decision-making impacted by "motivated reasoning," where decision-makers are unconsciously predisposed to regard as more convincing legal authority that aligned with their own preferences.); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 309–12 (2013) (reviewing the literature on motivated reasoning applied to legal judgment).

controversial, there is little evidence allowing a direct comparison of the behavior of judges at different levels of the federal judicial hierarchy. This is so because the ideological salience of the docket varies so greatly across levels. The pooled docket of the Supreme Court offers more opportunities for ideological voting than on the courts of appeals, which in turn offers more opportunities for ideological voting than in district courts.[53] However, this does not demonstrate differences in the average ideology of judges at the different levels.

Zorn and Bowie's study is the leading one that allows for direct comparison of judge votes across levels of the hierarchy.[54] They analyze a set of cases in which the same issue in the same case was decided by a district court, a court of appeals, and the Supreme Court. They find that there is no statistically discernable difference between Democratic and Republican district court judges' probability of ruling in the conservative direction, while *in the same set of issues* Republican judges on the courts of appeals had approximately a 50% higher likelihood of voting in the conservative direction, and on the Supreme Court they had about a 100% higher likelihood of doing so.[55]

Although Zorn and Bowie are unable to empirically identify the specific causal mechanism(s) driving this variation, they highlight some candidate explanations suggested by existing literature. One is simply that policymaking opportunities increase from the bottom to the top of the hierarchy, leading selectors of judges to place greater weight on candidates' known policy preferences as one moves up the hierarchy. At the Supreme Court level there are the highest "incentives for the appointment of single-minded policy seekers."[56] One obvious additional (or alternative) explanation for Zorn and Bowie's empirical results, which they acknowledge, is that there are declining probabilities of appellate review, and precedent is likely given lesser

53. CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 3–4 (2006).

54. Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment,* 72 J. POL. 1212–21 (2010).

55. *Id.* at 1218–19. Others have reached similar conclusions from comparing the votes of judges at different levels of the federal judicial hierarchy: moving from the district court, to the courts of appeals, to the Supreme Court, judges vote more ideologically in comparable cases as one moves up the hierarchy. *See* LEE EPSTEIN, WILLIAM M. LANDES, AND RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 213-16, 236-37 (2013).

56. *Id.* at 1213; *See also* Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Introduce Ideology into Judicial Selection,* 60 J. LAW & ECON. 559, 588 (2017) ("[C]onservative political actors are better off prioritizing [appointment] resources for the higher courts . . . where decision making may be more likely to be predicted by ideology and have greater consequences.").

weight, as one moves up the hierarchy, offering greater latitude for judges' preferences to influence their votes.

Bonica and Sen take an alternative approach to measuring judicial preferences that is independent of judges' caseloads and their position within the hierarchy. They leverage federally reported campaign contributions made by judges, measuring judges' ideology based upon the ideology of candidates to whom they contribute.[57] Applying this method to state trial, intermediate appellate, and high court judges, as well as to federal district court and court of appeals judges, they conclude that "the higher a court is in the judicial hierarchy," the greater the role played by ideology in judicial selection.[58] The Supreme Court is not included in their studies, presumably due to insufficient data. Bonica and Sen also find a notably greater ideological distance between Democratic and Republican-appointees to the courts of appeals as compared to appointees to district courts.[59] This widening ideological gap moving up the hierarchy is also consistent with greater emphasis on ideology in the selection of judges.

B. The Relationship Between Institutional Context and Judges' Preferences in the Judicial Hierarchy

1. Managerial Trial Judges

Whatever policy preferences judges bring to the bench, the institutional context of the level of the hierarchy in which they work can mediate how those preferences impact outcomes. Zorn and Bowie summarize classic works in the literature on the institutional context of district courts:

> [T]rial court judges often have both the broadest range of goals and the greatest degree of heterogeneity in how they prioritize those goals. Those goals include "getting the outcome right," facilitating the processing of their expansive workload, increasing their own visibility and prestige, communicating with relevant legal and extralegal audiences, avoiding reversal from appellate courts, and a host of other considerations. . . . [They] enforce[e] norms in criminal and civil cases rather than making doctrinal pronouncements. For instance, much of the work of district judges deals with routine matters such as supervising trials, approving plea agreements in

57. Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, 35 J. ECON. PERSPS. 97, 104–05 (2021); Bonica & Sen, *supra* note 55.

58. Bonica & Sen, *supra* note 55, at 575. Bonica and Sen's focus in this paper is to compare the ideology of judges to the ideology of attorneys. The key finding is that the distribution of ideology among attorneys is more liberal than other mainstream political actors, and the distribution of ideology among judges is to the right of attorneys. *Id.* at 561.

59. Bonica & Sen, *supra* note 56, at 113–14.

> criminal cases, overseeing settlements in civil suits, and ascertaining case facts. Even when the situation may arise for a district court judge to make policy, both the hierarchical nature of the system and the general atmosphere created by handling mostly routine cases discourages this even when a novel situation begs such a response. Thus, while ideological and policy-related influences undoubtedly play some role in their decisions, they are but two of several competing considerations, and in many instances not the most important ones.[60]

For present purposes, a key point is that the larger number of completing goals and considerations of district courts, relative to the Supreme Court, serve to moderate the impact of judges' ideology on decision-making. The ideological gap between those selected to be Supreme Court justices, as compared to district court judges, is further amplified by these institutional differences.

2. *"Collegial" Courts of Appeals Versus Majoritarian Supreme Court*

Courts of appeals judges, too, operate in an institutional environment that differs from the Supreme Court's in ways that mitigate the impact of ideology on the disposition of claims. A very important one concerns institutional norms for aggregating the preferences of judges on multi-member courts. The Supreme Court operates substantially on a majoritarian basis. Justices who disagree with majority opinions freely dissent and generally appear not to materially impact majority opinion content. Theoretical models have disagreed about the relative importance of the median justice on the court, the median justice in the majority, and the opinion author in determining the ideological location of a Supreme Court holding.[61] As an empirical matter, Clark and Lauderdale devise an innovative measure of opinion location in ideological space and find that the *median justice in the majority* more accurately predicts opinion location than either the median justice on the full court or the opinion author.[62]

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60. Zorn & Bowie, *supra* note 53, at 1213 (internal quotations omitted) (citing LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 24–25 (1997)); LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 9–22 (2006); HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE (2d ed. 1988); HERBERT JACOB, JUSTICE IN AMERICA 10–13 (4th ed. 1984); SHELDON GOLDMAN & THOMAS P. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM. 222 (2d ed. 1976)).

61. Kastellec, *supra* note 49, at 14–15, 18 (reviewing models); Tom S. Clark & Benjamin Lauderdale, *Locating Supreme Court Opinions in Doctrine Space*, 54 AM. J. POL. SCI. 871, 887–88 (2010) (same).

62. Clark & Lauderdale, *supra* note 60, at 876 (Relying on a measure of opinion location based on the assumption "that each opinion (both citing and cited) has a fixed location in a

Court of appeals three-judge panels—the key agents that elaborate the authoritative meaning of Supreme Court decisions—operate on a more "collegial" and less majoritarian basis, with important implications for ideological divergence between the Supreme Court and the courts of appeals. The literature shows that there is a "norm of unanimity" on three-judge court of appeals panels,[63] which have very low dissent rates even in domains of substantive law in which the partisan, gender, and racial composition of the panel is significantly associated with outcomes.[64] The key idea is that even in substantive areas of law characterized by systematic ideological disagreement among court of appeals judges *across* cases, *within* cases the same judges achieve a remarkably high level of unanimity. Moreover, when court of appeals judges' party, gender, and race are associated with votes, judges in the preference-minority on panels regularly influence the outcome votes of judges in the preference-majority.[65] I use the phrase "panel minority" to refer to a minority position on a panel that has divided prefer-

unidimensional space," and "that the probability of a positive citation is monotonically decreasing in the distance between the citing opinion and the cited opinion.")

63. *See* Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 242 (2020); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1331 (2009); FRANK B. CROSS, DECISION MAKING ON THE U.S. COURT OF APPEALS 160 (2007); SUNSTEIN ET AL., *supra* note 52, at 69.

64. *See* Burbank & Farhang, *Politics, Identity, and Class Certification*, *supra* note 62, 243, 255 ("[L]ow dissent rates prevail even within particularly contentious issue areas, where measures of panel outcomes are highly correlated with ideology," and reporting a dissent rate of 2% of in class certification decisions); Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Pleading Decisions on the U.S. Courts of Appeals*, 169 U. PA. L. REV. 2127, 2159 (2021) (reporting a dissent rate of 2% in appeals of disposition of motions to dismiss for failure to state a claim); VIRGINIA A. HETTINGER ET AL., JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 47 (2006); Daniel A. Farber, *Do Theories of Statutory Interpretation Matter?: A Case Study*, 94 NW. U. L. REV. 1409, 1430 n.120 (2000); DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 105 (2000).

65. *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1765–66 (1997) (finding that partisan minorities panel affect partisan majorities in environmental cases); Frank B. Cross & Emerson H. Tiller, Essay, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L. J. 2155, 2169, 2173 (1998) (finding that partisan minorities panel affect partisan majorities in judicial review of agency decision-making cases); SUNSTEIN ET AL., *supra* note 52, at 149 (finding that partisan minorities panel affect partisan majorities in a wide range of policy areas); Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J. L. ECON. & ORG. 299, 320–21 (2004) (finding that one woman panel affects a male majority in employment discrimination cases); Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 179 (2013) (finding that one African American panel affects a (predominantly white) non-African American majority in affirmative action cases); Burbank & Farhang, *Politics, Identity, and Pleading*, *supra* note 63, at 2132–33 (finding that one woman panel affects a male majority, and one non-white panel affects a white majority, in pleading decisions in a random sample of civil rights claims).

ences, regardless of whether the judge is in a majority or minority group on the circuit.

While panel minorities do not always influence panel majorities,[66] they regularly do. And even when minority panel effects do not exist with respect to outcome votes, they may be present with respect to other consequential aspects of opinion content, which empirical scholars tend to neglect.[67] As a result of panel effects, Sunstein et al. emphasize that mixed-party panels are notably less ideologically extreme and polarized than all-Republican or all-Democratic ones.[68] As contrasted with the Supreme Court, judges in the preference-minority are far more likely to impact outcomes on the courts of appeals.

Scholars have hypothesized a range of mechanisms to explain the impact of preference-minorities on the votes panel majorities. Four ideas are recurrent: (1) deliberation, (2) "cue-taking," (3) bargaining, and (4) whistle-blowing. The deliberative explanation for panel effects is about rational persuasion through the exchange of ideas and information. Judges take the perspectives, arguments, and information presented by one another seriously in the deliberative process, and this can cause judges on a heterogeneous panel, who exchange information and arguments from a wider range of perspectives than occur on a homogeneous panel, to change their views in the course of deliberations.[69] A second (related) mechanism offered to explain panel ef-

66. In our study of class certification decisions, Stephen Burbank and I find that the influence of panel minorities changed over time and varied across identity characteristics. *See* Burbank & Farhang, *Politics, Identity, and Class Certification*, *supra* note 62, at 260–65. Such panel effects were present for party in the 1967–1994 period, but not the 1995–2017 period, variation that we hypothesized may reflect the growing partisan contentiousness of class certification in the latter period, making it more difficult for a minority to wield influence over outcomes. At the same time, however, African American judges in a minority did have a substantial pro-certification influence on non-African American majorities in the 1995–2017 period. While a single woman did not panel affect a male majority, women in the majority exerted strong pro-certification panel effects over men in the minority.

67. *See* Farhang & Wawro, *supra* note 64, at 313 ("It must be emphasized that the task of measuring how a minority judge on a multijudge court might influence an opinion is a difficult one. The most clearly observable manifestation of influence is to increase the probability of a decision in favor of the plaintiff . . . However, changing the outcome entirely from the defendant to the plaintiff is the most extreme form of influence. A great deal of the bargaining and deliberation among judges focuses on how to frame a decision once it is decided which party will prevail. Judges almost always have choices between framing a decision in terms that range from having minimal or no policy consequences for future cases, to having far-reaching influence on a large class of future cases.")

68. *See* SUNSTEIN ET AL., *supra* note 52, 8–9.

69. *Id.* at 73, 76 (A more diverse panel will likely have a larger "argument pool" than a more homogeneous one, meaning that a wider range of arguments "are far more likely to emerge and to be pressed," and panel effects by panel minorities on majorities may thus be explained by "rational persuasion within the group" causing the majority to change its assessment of "the best understanding of the law" (or facts); Lewis A. Kornhauser & Lawrence G. Sager, *The One and*

fects is "cue taking." Cue taking is a dynamic whereby some judges, seeking an efficient path to rendering a decision, show greater deference to other judges (even in the preference minority) in issue domains in which they are perceived to be more credible or expert.[70] To the extent that an identity characteristic (like ideology, gender, or race) is associated with perceived expertise, it may explain the influence of panel minorities on a panel majority.[71]

The bargaining explanation for panel effects contemplates that panel minorities, aided by the norm of unanimity, extract concessions from panel majorities. Rather than being rationally persuaded or showing deference to expertise, panel majorities strategically change their position in a bargaining process calculated to avert a dissent and achieve unanimity. Scholars have suggested that court majorities may make concessions to would-be dissenters to enlarge a majority coalition beyond a bare majority because they value the appearance of apolitical and neutral decision-making, want to promote legal clarity and predictability, or are concerned about compliance, and believe that enlarging the majority coalition advances these goals.[72] Finally, a related but distinct idea is that would-be dissenters can threaten to "blow the whistle" (with a dissent) on a majority if it strays from governing law, thereby increasing the probability of appellate review and reversal by the Supreme Court. With this threat the panel minority can gain concessions in opinion content.[73] It is a form of bargaining, but the majority's goal is to avoid reversal rather than to secure institutional goals of legitimacy, clarity or compliance. Whatever mechanisms are actually at the root of the influence of panel minorities on panel majorities, the nature of "collegial" decision-making on the U.S.

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the Many: Adjudication in Collegial Courts, 81 CAL. L. REV. 1, 6 & n.11 (1993); CROSS, *supra* note 62, at 154–55; Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656–61 (2003).

70. *See* DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 31 (2002).

71. *See* Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1783 (2005) (suggesting that cue taking may explain how one woman on a panel influences the votes of two men in "gender-coded issues."); Kastellec, *supra* note 64, at 171–72 (observing that the mere presence of an African American judge in an affirmative action case, independent of the content of deliberations, may influence the behavior of white judges on the panel); Christina L. Boyd et al., *Untangling the Causal Effect of Sex on Judging*, 54 AM. J. OF POL. SCI. 389, 391 (2010) (suggest the same possibility with respect to gender, and they liken this to cue taking).

72. *See* HETTINGER ET AL., *supra* note 63, at 19; Farhang & Wawro, *supra* note 64, at 307–09; Edwards, *supra* note 67, at 1651; LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 107–08 (1997).

73. *See* Cross & Tiller, *supra* note 64, at 2173–74.

courts of appeals regularly affords panel minorities influence on outcomes.

In conceptualizing the partisan ideological preferences of appellate panels, it is useful to examine the frequency of different partisan panel combinations. For this purpose I draw on a random sample of 700 appeals from district court decisions on motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) decided from 2010 to 2020. This was about the decade following the Supreme Court's pleading decision in *Iqbal*, a decision by a five-justice conservative majority. The breakdown is contained in Table 1.[74]

TABLE 1: PARTISAN COMPOSITION OF COURT OF APPEALS PANELS IN 12(B)(6) APPEALS, 2010–2020

	% of Panels	Dissent rate
3 Republicans	13%	2.7
2 Republicans, 1 Democrat	38%	2.7
1 Republican, 2 Democrats	36%	3.6
3 Democrats	13%	0.6

Under the decision-making norms that govern the Supreme Court, the holding in *Iqbal* reflects the preferences of the unified Republican-majority (Kennedy, Roberts, Alito, Scalia, Thomas), and is (on average) most closely aligned with the median of the majority coalition—Justice Alito according to the widely used Martin-Quinn scores of Supreme Court justice ideology.[75] In only 13% of court of appeals panels was the panel unified Republican, like the *Iqbal* majority. If it is true that, on average, more conservative Republicans are appointed to the Supreme Court than the courts of appeals, then even all-Republican panels are to the left of the majority coalition that produced *Iqbal*. In 38% of panels, there is a Republican-majority panel that sat with (and may have been panel affected) by a single Democratic colleague. Those RRD panels achieved unanimity 97.3% of the time. Democrats were in the majority 49% of the time (including both DDD and DDR panels).

74. *See* Burbank & Farhang, *Politics, Identity, and Pleading*, *supra* note 63 for further description of the data.

75. *See Measures*, MARTIN-QUINN SCORES, https://mqscores.lsa.umich.edu/measures.php (last visited Jan. 15, 2023). I examined these justices' scores for 2009, the year *Iqbal* was decided.

As to district court judges, in recent years there is a roughly even partisan balance between Democratic and Republican appointees.[76] Overall, then, from the standpoint of the all-Republican *Iqbal* majority, there is preference divergence and a principal-agent problem. About half the trial court decisions are made by Democratic appointees; about half of the appellate panels deciding 12(b)(6) appeals are majority-Democrat, and only 13% are all-Republican.[77]

III. The Vast Reservoir of Discretion in Procedural Law and the Challenge of Hierarchical Control

A. Rules, Standards, and the Principal-Agent Relationship

In understanding the principal-agent relationship between the Supreme Court and the lower federal courts, the distinction between rules and standards is critical.[78] One conventional way of articulating the distinction is that "rules state a determinate legal result that follows from one or more triggering facts," while "[s]tandards . . . require legal decision makers to apply a background principle or set of principles to a particularized set of facts in order to reach a legal conclusion."[79] Standards delegate more discretion to the agent. Of course, the distinction between rules and standards is one between ideal types. There is, in reality, a continuum between bright-line rules that yield determinate results and highly discretionary standards that impose little constraint.[80]

From the standpoint of hierarchical control by the Supreme Court, the choice among more rule-like versus more standard-like doctrines presents a tradeoff. More determinate rules keep potentially noncompliant lower federal court judges on a shorter leash, limiting their

76. *See* Russel Wheeler, *Can Biden 'Rebalance' the Judiciary?,* Brookings (Mar. 18, 2021), https://www.brookings.edu/blog/fixgov/2021/03/18/can-biden-rebalance-the-judiciary/.

77. In this random sample of appeals of pleading decisions we found that party was not statistically significantly associated with outcomes in the decade following *Iqbal*, but that in an important and very large subset of civil rights cases one woman on a panel, and one non-white judge on a panel, did panel affect male and white majorities, respectively, in a pro-plaintiff direction. *See* Burbank and Farhang, *Politics, Identity, and Pleading*, *supra* note 64, at 2160-2170.

78. *See* Kastellec, *supra* note 49, at 11; Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. Rev. 383, 415–17 (2007).

79. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 Or. L. Rev. 23, 23 (2000); On rules versus standards, *see also* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22 (1992); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*. 42 Duke L. J. 557 (1992).

80. Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 961 (1995) ("There is a continuum from rules to untrammeled discretion, with factors, guidelines, and standards falling in between."); Frederick Schauer, *Rules and the Rule of Law*, 14 Harv. J. L. & Pub. Pol'y 645, 650–51 (1991) (degrees of "ruleness" fall along a continuum).

discretion to follow their own preferences at the expense of a Supreme Court majorities'. When a rule announced by the Supreme Court is more clear and determinate, rule of law values will likely exert more influence on lower court judges. Further, deviations from the rule will be easier for the Supreme Court to detect and audit, thereby increasing the probability of compliance by reversal-averse lower court judges. At the same time, however, bright-line rules can limit lower courts' ability to exercise (often subjective) contextual judgment, which may lead to undesirable outcomes from the standpoint of the same Supreme Court majority. Standards, in contrast, allow for such contextual judgment, but they carry the risk that it will be exercised in a way that increases non-compliance.[81]

B. The Discretionary Nature of Federal Procedure

By design, the Federal Rules are characterized by a "vast reservoir of judicial discretion" in their application, as Arthur Miller puts it.[82] They replaced a more rule-like system of "elaborate procedure rigorously enforced," which was regarded by reformers as excessively technical, costly and ineffective.[83] Paul Carrington explains:

> As a result, the committee consciously designed the 1938 Rules to leave much to the intelligence, wisdom, and professionalism of those who would apply them. Often the Rules are explicit in conferring discretion on the district judge. Sometimes the discretion or flexibility results from diction open to interpretation; sometimes it is the product of brevity.[84]

The Federal Rules deploy a combination of express delegation of discretion to trial courts, as well as delegation via general, vague, and indeterminate language. For example, under the Federal Rules a district judge should allow parties to amend their pleadings (e.g., to add a claim or defense) "when justice so requires."[85] When deciding whether evidence is discoverable, she must decide whether the discovery request is:

> [P]roportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and

81. *See* Kastellec, *supra* note 49, at 11; Kim, *supra* note 77, at 415–16.

82. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 92 (2010).

83. Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2082 (1989).

84. *Id.*

85. Fed. R. Civ. P. 15(a).

> whether the burden or expense of the proposed discovery outweighs its likely benefit.[86]

When deciding whether to certify a damages class, one key question is whether "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[87]

These are open-textured standards, and each of the three types of decisions can, under some circumstances, have a decisive impact on how a case is resolved. A key motive for this delegation of very broad discretion was rulemakers' desire to provide judges with "tools designed to expose the merits of cases, in the hope that their professionalism will cause the judges to use those tools to accomplish the substantive aims established by Congress and the Constitution."[88] This view of the Federal Rules as highly discretionary and standard-like is a point of broad consensus among scholars of the Federal Rules.[89]

A number of scholars have suggested that the abundant discretion exercised by trial judges under the Federal Rules produces undesirable consequences. Judith Resnik famously argued that such discretion was sometimes exercised by "managerial judges" in a manner producing undue and coercive pressure to settle, motivated by docket control concerns, and denying plaintiffs a full and public adjudication of their claim on the merits.[90] Stephen Burbank suggests that such high levels of discretion have produced "ad hoc" decision-making under the Federal Rules.[91] Jay Tidmarsh maintains that excessive trial court discretion under the Federal Rules yields "expense, delay, un-

86. Fed. R. Civ. P. 26(b)(1).

87. Fed. R. Civ. P. 23(b)(3).

88. Carrington, *supra* note 82, at 2083.

89. *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988) ("[T]he trend of modern procedural law has been away from rules that make policy choices towards those that confer on trial courts a substantial amount of normative discretion."); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1975 (1989) (Rulemakers intended to give trial judges "broad discretion to deal fairly with the case at hand," and to remove "limitations that prevented a case from being decided in all of its aspects."); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1967–70 (2007) ("[I]t is only a slight exaggeration to say that federal procedure, especially at the pretrial stage, is largely the trial judge's creation."); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 473 (2003) ("The Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules.").

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

91. Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987).

predictability, and abuse of power."[92] Resnik, Burbank, and Tidmarsh identify significant costs of very high levels of trial court discretion under the Federal Rules. I am highlighting that, perhaps ironically, the same discretion provides some measure of insulation from efforts by the Supreme Court's conservative coalition to leverage the Federal Rules in the service of its anti-private enforcement agenda.

C. Trans-Substantivity, Discretion, and Insulation from Oversight

The Federal Rules are trans-substantive. They apply to all cases regardless of the substantive nature of the cause of action[93] or the complexity of the case,[94] with the same rules cutting across simple slip-and-fall tort actions and complex anti-trust actions. Trans-substantivity in the Federal Rules was animated by the goal of replacing the prior system of "elaborate procedure rigorously enforced," where complex procedure varied materially across substantive causes of action, with a simpler and more uniform one.[95] It is an essential and defining feature of federal procedural law.[96] Summarizing scholarship on the relationship between trans-substantivity and discretion, Margaret Kwoka writes:

> [T]ranssubstantivity and discretion are inherently linked. Two of the most important . . . [features of] the Federal Rules are the separation between procedure and substance (and resulting transsubstantive design) and the Rules' expansive judicial discretion. In fact, since cases can differ vastly from one another, a failure to afford discretion to judges could . . . jeopardize the success of a transsubstantive code.[97]

Trans-substantivity is an engine of discretion.[98]

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92. Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 558 (2006).

93. David Marcus, *The Past, Present, and Future of TransSsubstantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010).

94. Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010).

95. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 942–43 (1987); Marcus, *supra* note 92, at 394–95.

96. While both Congress and rulemakers have occasionally created rules that distinctively regulate certain substantive causes of action, trans-substantive rules continue to clearly predominate in the federal system. Marcus, *supra* note 92, at 405–06, 413–14.

97. Margaret B. Kwoka, *Judicial Rejection of Trans-Substantivity: The FOIA Example*, 15 NEV. L. J. 1493, 1500 (2015) (internal quotations and brackets omitted) (citing Subrin, *Equity Conquered Common Law*, *supra* note 94, at 922–24, 942; Marcus, *supra* note 92, at 396; Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1747 (1992)); *see also* Burbank, *supra* note 88, at 715 (trans-substantivity contributes to the modern trend away from rules and toward discretion).

98. The significance of trans-substantivity to the principal-agent issues discussed here does not depend upon its effectiveness or desirability as a matter of institutional design, or the supposi-

This relationship between trans-substantivity and discretion can limit a Supreme Court seeking to restrict rights enforcement via Federal Rule interpretations. If a Court's goal, for example, is to curtail litigation by individuals against business and government defendants, trans-substantivity means that changes to the meaning of some rules could redound to the detriment of other classes of plaintiffs that the Court does not wish to limit, such as business plaintiffs suing business or government defendants. Some lower federal courts sought to avoid this dilemma by imposing a heightened pleading rule in certain civil rights cases. The Supreme Court could not abide this transgression of trans-substantivity,[99] opting instead for a heightened pleading standard across the board in *Iqbal*. If the Court's motivation in *Iqbal* was, as many suspect, to limit litigation by individuals against business and government defendants, it would have to rely on the discretion of lower federal courts to limit the impact of the rule outside that context, if they were so inclined. The trans-substantivity of the Federal Rules exacerbates principal-agent problems for a Supreme Court seeking to use those rules to retrench private enforcement. This contributes to the degree of insulation enjoyed by the lower federal courts in their implementation of the Federal Rules.

D. The Infrequency and Deference of Appellate Review

Principal-agent models addressing lower federal court compliance with Supreme Court decisions focus on reversal as the key lever of control. As Pauline Kim has observed, "[w]hat these models often overlook . . . is that legal rules also restrain the use of that reversal

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tion that the Federal Rules are actually *applied* consistently across substantive domains. Scholars of the Federal Rules give us reason to doubt both propositions. They have suggested that the Federal Rule's vast reservoir of discretion leads to "ad hoc" procedure rather the meaningful trans-substantivity. *See* Burbank, *supra* note 91, 1474 ("Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense."); Miller, *supra* note 81, at 92 (Vast judicial discretion under the Federal Rules weakens trans-substantivity); Tidmarsh, *supra* note 96, at 1747 ("[T]he discretion to fashion case-specific rules . . . threatens trans-substantivism . . . at the level of rule implementation in individual cases."); *see also* David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. Rev. 1191, 1204–05 (2013) (Suggesting that trans-substantive rules may be applied in a distinctive way within particular substantive domains, but differently across them). They have also suggested that formal trans-substantivity can obstruct rational and efficient changes to the rules, such as tailoring rules to address distinctive challenges in large and complex cases. *See* Burbank, *supra*; Subrin, *supra* note 93. For further critical discussion of trans-substantivity, *see* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 Pa. L. Rev. 1925, 1940 (1989); Burbank, *supra* note 17.

99. The Supreme Court rejected this substance specific approach in Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

power by reviewing courts,"[100] including the Supreme Court. The rules to which Kim refers include those governing when a decision can be appealed, and the standard of review to be applied when it is appealed. These rules further heighten the extent of insulation afforded to procedural decisions by trial courts from Supreme Court oversight.

Most significantly, the final judgment rule provides that appellate jurisdiction exists only over "final decisions" of district courts,[101] which are decisions that end the litigation "on the merits."[102] A substantial majority of decisions by trial courts applying the Federal Rules are non-final even if highly consequential to how the litigation develops. For example, decisions denying a motion to dismiss or for summary judgment are decisions *not* to end the litigation and thus they are not final decisions giving rise to appellate jurisdiction. Rulings on the joinder of parties, or orders compelling the production of evidence, are also non-final and therefore not immediately appealable. Although there are exceptions available that allow for interlocutory appeals of non-final decisions, the standards for achieving interlocutory review are challenging and such appeals represent a very small fraction of appeals.[103] While non-final decisions can generally be appealed at a later point in the litigation *if* there is a final judgment on the merits, appellate courts are sometimes disinclined to reverse a judgment after full adjudication based on an erroneous decision much earlier in the proceeding. This reluctance is encouraged by the statutory directive that appellate courts should not reverse for "errors or defects which do not affect the substantial rights of the parties."[104]

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100. Kim, *supra* note 77, at 417.

101. 28 U.S.C. § 1291.

102. Catlin v. United States, 324 U.S. 229, 233 (1945).

103. Kim, *supra* note 77, at 417–18 n.141; Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1174 (1990); *see also infra* note 105. One notable exception arises when a qualified immunity defense is asserted. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L. J. 2, 17–18 (2017). Another arises under Federal Rule of Civil Procedure 23(f), promulgated in 1998, which augmented access to interlocutory appeal of class certification decisions. *See* Burbank & Farhang, *supra* note 36, at 78–82. Interestingly, the story of that rule echoes, in some respects, the argument developed here that conventional expectations about the impact of a procedural intervention can be very misleading. The rule was regarded by many as likely to have anti-plaintiff effects, and in the first decade after the rule's promulgation, consistent with that expectation, defendants appeared to benefit disproportionately from the rule. *Id.* at 79, 91. However, ironically, in the aftermath of *Wal-Mart* and *Comcast*, Rule 23(f) became an important weapon that plaintiffs wielded to reverse successes that defendants enjoyed achieving denial of certification before trial courts. *Id*. at 91, 101. While the Supreme Court can gain review of non-final procedural decisions by granting cert to appeals from denial of interlocutory review by the appellate court, this is not a promising strategy for controlling the vast number of procedural decisions in district courts.

104. 28 U.S.C. § 2111.

More important, in practice many such non-final decisions become unreviewable at all if the case settles, the plaintiff abandons the claim, or the would-be appellant later prevails on the merits. Referring to non-final procedural decisions by district judges, Stephen Yeazell observed that in a majority of cases no appeal will *ever* be possible:

> [B]ecause one cannot appeal from an abandoned or settled case . . . *most of the rulings made by trial courts operating under the Federal Rules or similar systems cannot be appealed*. For such cases, the court of first instance is the only court; the system has allocated unreviewable power to the trial court judge. That is a striking result, an American experiment in judicial decentralization . . . .[105]

105. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 662 (1994); *see also* Kim, *supra* note 77, at 425–26 (Arguing in 2007 that case management decisions by district courts under the Federal Rules "entail considerable power over the outcomes in particular cases, [and] this power is concentrated primarily in the district courts. Such decisions typically do not satisfy the 'final judgment' rule . . . [and] are rarely subject to review by an appellate court. Given the sheer volume of such decisions in the district courts and the low probability of interlocutory appeal, district court judges exercise largely unreviewed discretion in these areas."); Bone, *supra* note 88, at 1962 (Arguing in 2007 that "it is only a slight exaggeration to say that federal procedure, especially at the pretrial stage, is largely the trial judge's creation."); Miller, *supra* note 82, at 92 (Noting in 2010 that the final judgment rule serves to amplify "the vast reservoir of judicial discretion in the application of the Federal Rules."); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1295 (2010) (With respect to case management decisions, appellate review does not "provide guidance to trial judges. Most managerial orders never reach the court of appeals, since they are not immediately appealable and most cases settle."); EPSTEIN, LANDES, AND POSNER, *supra* note 55, at 226 (Noting in 2013 that "in general only final orders are appealable in the federal judicial system," such that "a dismissal is appealable but a refusal to dismiss rarely is."); Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L. J. 1, 6 (2016) ("A district court's ruling on whether a particular discovery request comports with proportionality considerations . . . is an interlocutory ruling that is rarely subject to appellate review."); Schwartz, *supra* note 103, at 17 (Observing in 2017 that, "[g]enerally speaking, litigants in federal court can only appeal final judgments; interlocutory appeals are not allowed unless a right 'cannot be effectively vindicated after the trial has occurred.'"); Prentiss Cox, *Fractured Justice: An Experimental Study of Pretrial Judicial Decision-Making*, 88 U. CIN. L. REV. 365, 373 (2020) (District court decisions on pretrial case management matters, while often highly consequential to case outcomes, "are rarely rigorously reviewed at the appellate level."). Professor Alexandra Lahav takes a different view. In comments on this paper at the Clifford Symposium, Professor Lahav suggested that Yeazell's 1994 characterization (echoed in ensuing decades by other leading scholars of the Federal Rules) is outdated. Professor Lahav argues that beginning in the 1980s there was a "proliferation" of interlocutory review that has continued to the present period. Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 852–53, 854, 856 (2018) ("[W]hile the doctrinal beginnings of interlocutory appeals can be traced back to the late 1950s, their proliferation is a phenomenon of the 1980s through today."). However, Lahav provides no empirical evidence on the actual rate of interlocutory review over time, and more important, no evidence that it ever rose to levels inconsistent with the dominant view widely held by leading scholars of the Federal Rules that interlocutory review of district judges' non-final decisions applying the Federal Rules are rarely reviewed. For a few notable and well-known exceptions, *see supra* note 103.

A further feature of the institutional context of procedural law application is the standard of review, which can direct reviewing courts to exercise varying degrees of restraint when wielding reversal power. With respect to procedural decisions that resolve dispositive motions, such as a motion to dismiss for failure to state a claim or a motion for summary judgment, appellate review (if it can be obtained) is de novo, showing no deference to trial courts. But for the more voluminous types of decisions through which trial judges manage the litigation through mostly fact-bound procedural decisions in the pre-trial process, they are typically subjected to the highly deferential "abuse of discretion" standard.

One classic formulation of the standard is that a trial court's decision "cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[106] Yeazell explains that this standard "guarantee[s] substantial insulation from appellate supervision," giving district judges "essentially final power . . . *even when the trial decision is appealable* . . . [on such matters as] the conduct of settlement negotiations to discovery to permissive joinder."[107] And critically to the Supreme Court's principal-agent problem, the first layer of any review that does occur will be carried out by a court of appeals panel that is ideologically closer to the trial court than to the Supreme Court's conservative coalition.

Conclusion

The Supreme Court's well-known anti-private enforcement agenda is driven substantially by its conservative Republican majority.[108] That conservative coalition on the Court faces a potential principal-agent problem. A large share of the trial court and court of appeals judges whose conduct the Supreme Court seeks to direct are to its ideological left. This is so both because the ideological extremity of appointments

106. Kim, *supra* note 77, at 418–19 (citing In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954)).

107. Yeazell, *supra* note 104, at 652, 665; *see also* Thornberg, *supra* note 104, 1295–96 (Even when there is appellate review of trial courts' managerial decisions under the Federal Rules, "appellate courts are extremely deferential to the trial court's superior 'fact competence.' Unless the trial court takes some action that exceeds the court's power, the appellate court will merely recite that the standard of review is 'abuse of discretion' and that the court has acted appropriately within the scope of available options."); Kim, *supra* note 77, at 425–26 ("[I]n the rare cases when . . . [managerial trial court decisions] are immediately appealed, the reviewing court uses a highly deferential 'abuse of discretion' standard . . . [under which] appellate courts have limited ability to affect the outcomes of cases through review.").

108. *See supra*, Figure 1.

declines moving down the judicial hierarchy, and because over about the past decade nearly half of court of appeals panels were majority Democratic-appointees, only 13% were unified Republican, and about half of district judges were Democratic-appointees. The preference divergence between principal and agent is further widened by institutional features of the lower federal courts. Courts of appeals panels are governed by more "collegial" decision-making dynamics than the Supreme Court, moderating the average panel away from the poles and toward the center. Those dynamics embed more moderate collective preferences into how the courts of appeals elaborate the meaning of the Federal Rules and the Supreme Court's interpretation of them. Trial courts' managerial posture leads them to even less ideological decision-making than the courts of appeals.

One solution to a principal-agent problem arising from preference divergence between a higher and lower court is for the higher court to issue bright-line rules, avoiding discretionary decision-making and zones of indeterminacy. This increases the chances that rule of law values will foster compliance by lower court judges, and it makes noncompliance more transparent and easier for the Supreme Court to audit, thereby increasing the probability of compliance by reversal-averse lower court judges. However, this rule-based strategy often will not work with the Federal Rules of Civil Procedure. Many Federal Rules most salient to private enforcement, such as those governing pleading, class actions, and discovery, are indeterminate standards that delegate vast discretion to trial courts.

To make matters worse from the principal's point of view, most trial court decisions under the Federal Rules are non-final and will not be reversed after final judgment unless a reviewing court determines that they affected the substantial rights of the parties. They generally become unreviewable if the case settles, the plaintiff abandons the claim, or the would-be appellant later prevails on the merits. And if these mostly fact-bound decisions are ever reviewed it will often be under the highly deferential "abuse of discretion" standard by a court of appeals panel that is ideologically closer to the trial court than to the Supreme Court's conservative coalition. Thus, the Federal Rules and their implementation in the lower federal courts have institutional qualities that can provide a significant measure of insulation from Supreme Court control when the preferences of its majority coalition are not aligned with the lower federal courts.

It is important to stress what I am not arguing. I am not arguing that the Supreme Court's anti-private enforcement decisions are inconsequential. To the contrary, the argument in this paper helps to under-

stand why some of its anti-private enforcement decisions *are potently consequential* even when its preferences are not aligned with the lower federal courts. For example, decisions on the enforceability of binding arbitration agreements for statutory claims, class action waivers in arbitration, the general rule against prevailing plaintiff attorney fee awards absent statutory authorization, and unavailability of pain and suffering damages under a discrete set of statutes, can be very (or entirely) rule-like, leaving little or no discretion in implementation. Open defiance of a clear rule issued by the Supreme Court is rare. And non-compliance with clear and non-discretionary rules is easily detectable, making auditing more tractable.

Moreover, to say that Federal Rules salient to private enforcement present hierarchical control challenges for the conservative coalition on the Supreme Court is not to say that its anti-private enforcement Federal Rules decisions have not moved the legal status quo in the lower federal courts in the direction intended by the conservative coalition. It is only to suggest reasons that the impact may be significantly blunted relative to the hopes of the conservative coalition and the fears of its critics. Knowing the degree to which this is true will require that scholars be less transfixed by the doctrine announced by the Supreme Court and invest more time and effort in the very difficult work of assessing its actual impact on access to justice in the federal system.