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Pragmatism Rules

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PRAGMATISM RULES

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The Roberts Court's decisions interpreting the Federal Rules of Civil Procedure are reshaping the litigation landscape. Yet neither scholars, nor the Court itself, have articulated a coherent theory of interpretation for the Rules. This Article constructs a theory of Rules interpretation by discerning and critically examining the two starkly different methodologies the Roberts Court applies in its Rules cases. It traces the roots of both methodologies, explaining how they arise from—and reinforce—structural, linguistic, and epistemological tensions inherent in the Rules and the rulemaking process. Then, drawing from administrative law, it suggests a theoretical framework that accommodates both. This theory simultaneously advances our understanding of the Rules and challenges the hegemony of statutes, which currently provide the dominant—if not sole—blueprint for theories of interpretation.

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INTRODUCTION

Now well into its "civil procedure revival,"[1] the Roberts Court has decided more cases involving the Federal Rules of Civil Procedure in ten years than the Rehnquist Court did in twice that time.[2] Many of these decisions are big news. *Iqbal* and *Twombly* alone have been cited almost 430,000 times—more than *Miranda*, *Chevron*, and *Brown v. Board of Education* put together.[3] Scholars have hotly criticized the tenor, the reasoning, and the outcome of these cases.[4] Despite this voluminous criticism, there has been no sustained focus on the interpretive methodologies the Roberts Court uses in reaching its Rules decisions.[5] The study of interpretation is preoccupied entirely with statutes. In comparison, the Rules are the girl-next-door of legal texts—overlooked in a comfortable, seductively familiar way.

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

2 See cases cited *infra* note 32 for a complete list.

3 According to Westlaw, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), has been cited over 250,000 times, while *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), has been cited over 180,000 times. *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966) (108,000); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (70,000); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (21,000).

4 *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 826 (2010) ("*Twombly* and *Iqbal* changed everything."); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013) (lamenting that the Court has "placed a thumb on the justice scale favoring corporate and government defendants"); Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731, 1737 (2014) (criticizing "dubious" interpretations of Rules 8, 23, and 56); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1841 (2014) ("[T]he core values of [the civil] rules have been eviscerated by judicial decisions.").

5 Only a handful of scholars have addressed Rules interpretation over the past three decades, and none have sought to identify or analyze the Roberts Court's methodologies. *See* Joseph P. Bauer, Schiavione*: An Un-*Fortune*-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720, 723 (1988) (criticizing the Court's cramped, "inflexible" interpretation of the Rules); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 930 (2011) (noting "the dearth of interpretive theory for the Federal Rules"); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1039–40 (1993) (questioning the Court's trend toward a "plain meaning" interpretative approach and advocating instead for the Court to take a more "activist role"); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1100–01 (2002) (stating "few scholars have addressed the interpretation of other sets of rules, such as the Federal Rules of Civil Procedure").

This Article remedies that methodological neglect. It builds a Rules interpretive theory by discerning and critically examining the two starkly different methodologies the Roberts Court applies in its Rules decisions. It traces the roots of both methodologies, explaining how they arise from—and reinforce—structural, linguistic, and epistemological tensions inherent in the Rules and the rulemaking process. Then, drawing from administrative law, it suggests a theoretical framework that accommodates both. In setting forth a coherent theory of Rules interpretation, this Article simultaneously advances the understanding of the Rules and challenges the hegemony of statutes, which currently provide the dominant—if not sole—blueprint for theories of interpretation.[6]

To begin, this Article identifies and critiques the Roberts Court's methodology of Rules interpretation. Or, more accurately, its *methodologies*—because the Roberts Court has two. These dueling interpretive paradigms emanate from different sources of power and send different messages about the Court's view of its authority to establish litigation norms. Yet because we take the Rules for granted—because they are part of the judicial furniture—we have thus far failed to recognize, much less regulate, these contradictory methodologies. The result is a Rules jurisprudence that is sprawling yet elusive; familiar yet foreign.

On one side of the duel between paradigms is the Court's "statutory" mode of Rules interpretations. This mode's weapons are the familiar tools of statutory interpretation. Justice Scalia once described the Rules as "binding as any statute."[7] As his use of simile suggests, the Rules are not in fact statutes.[8] But—because our understanding of interpretation is dominated by a single-minded focus on statutes—the Court's decisions in this mode treat Rules and statutes as functionally

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6 As others have noted, scholars' and courts' single-minded focus on federal statutory interpretation has displaced needed attention from other important areas of textual interpretation. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1753 (2010) (arguing that scholars have wrongly ignored state courts' theories of statutory interpretation); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 357–58 (2012) (criticizing neglect of study of the interpretation of agency regulations).

7 *See* Bank of N. S. v. United States, 487 U.S. 250, 255 (1988) (describing a Rule as "binding as any statute").

8 Congress delegated to the Court the power "to prescribe general rules of practice and procedure" for cases in federal district courts and courts of appeals, subject to congressional acquiescence. 28 U.S.C. § 2072(a) (2012). Thus, the Rules are more akin to agency regulations. *See infra* Part I for a description of the rulemaking process.

interchangeable. Whether interpreting gatekeeper Rules such as Rule 8 and 23, or other less controversial provisions, the Court's statutory Rules cases are straightforward and clear, if perhaps a touch dull. In its statutory mode, the Court disclaims its power to influence the Rules. It frequently admonishes litigants and lower courts that changes to the Rules must come through the rulemaking process and not through judicial adjudication.[9] The implication is that even if the Court might prefer a different result, its hands are tied.[10]

Until, of course, they are not tied. On the other side in this duel—and steadily gaining ground—is a starkly different, almost antistatutory methodology: one oriented toward pragmatism and power. When it operates in this second paradigm, which this Article denotes its "managerial" mode, the Roberts Court ignores the analogy between the Rules and statutes. Instead, the Court treats the Rules as an organic part of itself—an extension or component of its common-law judicial power. Accordingly, it eschews the tools of statutory interpretation in favor of the hallmark rhetorical techniques of common-law decision-making: analysis of precedent, a deep focus on the facts of the particular case before it, and implicit or overt reliance on public policy,[11] with an occasional dash of textualism thrown in for decorative purposes.[12] Modern legal scholarship has documented the evolution of trial court judges from neutral "umpires" to hands-on litigation "managers."[13] Managerial judges are less neutral, less restrained—more hands-on—than their more neutral predecessors.[14] As the Roberts Court's second interpretive paradigm proves, this managerial mindset has

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9 *See, e.g.*, Jones v. Bock, 549 U.S. 199, 224 (2007) ("We once again reiterate, however—as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill*—that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.").

10 *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622 (1997) ("Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted.")

11 *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 13–14 (1921) (observing the "extreme individualism" of the common law, which "tries questions of the highest social import as mere private controversies").

12 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (half-heartedly feigning to attribute heightened pleading requirements to the word "show" in Rule 8).

13 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982) ("Many federal judges have departed from their earlier attitudes [of disengagement and dispassion]; they have dropped the relatively disinterested pose to adopt a more active, 'managerial' stance.").

14 *Id.* at 378; Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1027 (2013) (describing a managerial judge as "involved in case management from the outset of the litigation and attentive

trickled up into the Supreme Court's Rules decisions. Although the Roberts Court did not invent managerial Rules interpretation, it has taken it to a new prominence. In this Court, pragmatism rules.[15]

The Court's watershed decision in *Wal-Mart Stores, Inc. v. Dukes*[16] offers a side-by-side demonstration of the Court's dueling interpretive paradigms. *Wal-Mart* involves two questions about Rule 23, and the Court unmistakably shifts interpretive modes as it moves between the two questions. The first question—the scope of Rule 23(a)(2)'s commonality requirement[17]—was decided by a divided Court, firmly in managerial mode. The much-criticized majority opinion ignores the standard of review and barely glances at the text of (a)(2);[18] nor does it attempt to divine the intent of the Rule 23 drafters by any of the traditional approaches of statutory interpretation. In fact, although purportedly the "crux" of the case,[19] (a)(2) plays an oddly secondary role in the Court's analysis: the Court treats it almost as a vehicle through which to address substantive questions about Title VII.[20] This part of *Wal-Mart* radiates a sense of the Court's inherent power to set litigation norms through common-law rulings—a sense of managerial control.[21]

In answering the second question in *Wal-Mart*, however, which concerned the availability of Rule 23(b)(2) certification to classes seeking back pay, the Court—now unanimous—shifts abruptly into its statutory paradigm. This part of the opinion relies on such traditional interpretive factors as the provision's

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throughout the proceedings to the impact of her decisions on settlement dynamics").

15 For an example of a managerial approach in the Rehnquist Court, see Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367 (1992) (creating the more flexible "significant change in circumstances" standard for modifying certain consent decrees under Rule 60(b)(5), rather than extending application of its "grievous wrong" standard); *see also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (federal common law, not Rule 41, governs the claim preclusive effect of a dismissal upon the merits).

16 131 S. Ct. 2541 (2011).

17 In order to obtain class certification, Rule 23 requires plaintiffs to show "commonality," i.e., that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2).

18 *See, e.g.*, Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 29 (2011) (agreeing with "the intuition that the majority might be performing some kind of alchemy on the 23(a)(2) commonality requirement").

19 *Wal-Mart*, 131 S. Ct. at 2550.

20 *See* Wolff, *supra* note 14, at 1034 (observing that "[t]he handful of statements on Rule 23 and commonality play only an equivocal role in the analysis").

21 *See id.* at 1044 (describing *Wal-Mart* as an example of "robust interstitial federal common law").

text, its historical purpose, and the structure of Rule 23 as a whole.[22] Whereas 23(a)(2) was almost an afterthought in the first part of the opinion, the Court's Rule 23(b)(2) analysis is straightforward, Rule centered, and deferential to the intent of the rulemakers.[23] The (b)(2) section of the opinion might almost have been written by a different justice; certainly it emanates from a different locus of judicial power.

The Roberts Court's dueling Rules methodologies use different techniques and manifest different attitudes toward the rulemaking process; they don't talk the same talk. It might thus be tempting to argue that only one of these paradigms—the restrained, if staid, statutory paradigm—is valid, and that the Court's managerial Rules decisions are an abuse of power.[24] But this Article explains why the opposite is true: both paradigms are potentially problematic, yet both have value. Moreover, both are here to stay. The uneasy coexistence of these contradictory paradigms is the natural and predictable result of tensions that are fundamental to—indeed, baked into—the Rules and the rulemaking process.

The first such tension is structural: The Court sets policy through promulgating the Rules and through interpreting them in adjudication.[25] The Court's role as a rulemaker supports the more constrained, statutory reading of the Rules, but its adjudicative powers point in the opposite direction. The second tension is internal to the Rules themselves. Starting with Rule 1, the Rules deliberately use abstract, discretion-

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22 *Wal-Mart*, 131 S. Ct. at 2558 ("Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b).").

23 *Id.* (citing Advisory Committee Note, 39 F.R.D. 69, 102 (1966), summarizing cases interpreting (b)(2)).

24 *See* Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 PA. L. REV. 1731, 1738 (2014) (describing key decisions interpreting Rule 8, 23, and 56 as "[a]ll promis[ing] to discourage suits, burden plaintiffs, and defeat large numbers of claims"); *see also* Brooke Coleman, *Civil-izing Federalism*, 89 TUL. L. REV. 307, 310–11 (2014) (arguing that in procedural cases, the Justices' views of the litigation system are better predictions of their position than their alleged commitments to federalism); *see generally* Lumen N. Mulligan & Glen Staszewski, *The Supreme Court's Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L. REV. 1188 (2012) (arguing that the Court should refer to the rulemaking process all Rules-based questions that it cannot resolve through statutory interpretation); Purcell, Jr., *supra*, at 1760 (stating that the "conservative Justices adapted their judicial methodologies to serve their ideological purposes").

25 *See* Mulligan & Staszewski, *supra* note 24, at 1190 ("[T]he Court's role in civil procedure is to set policy . . . through case-by-case adjudication . . . or by promulgating generally applicable rules through a notice-and-comment rulemaking procedure.").

ary—almost poetic—language in order to allow district courts to achieve the flexible goal of procedural due process.[26] But the same malleable language that gives trial courts breathing space also confers interpretive latitude on the Supreme Court. The Rules have play in the joints, and that limberness creates interpretive instability. Finally, the Court's conflicting methodologies for interpreting the Rules arise from unresolvable epistemological tensions between procedure and substance, and between the Rules' trans-substantive ideal and their case-bound, fact-specific reality.[27] The Court's statutory mode for interpreting the Rules rests on a firm, if slightly artificial, distinction between procedure and substance.[28] Its managerial interpretations undermine that distinction at every turn.

These interpretive fault lines, which are as certain as death—or at least taxes—defeat any attempt to conflate the Rules with statutes. They also offer theoretical support for both of the Roberts Court's Rules methodologies. Any framework for Rules interpretation must therefore consider and accommodate both paradigms rather than simply wishing one away. At the same time, both approaches should be regulated. Brittle textualism in the statutory mode could undermine the Rules' vision of an accessible, merits-focused civil justice system. On the other end of the spectrum, the Roberts Court's managerial interpretations have frequently intruded too far into the realm of the *true* managerial courts—the lower courts. From *Wal-Mart* to *Twombly*, it is the fact-intensive, merits-determining tendency of the Roberts Court that defines the worst elements of its Rules decisions.[29]

Drawing on administrative law, this Article proposes a *Chevron*-inspired deference regime that would preserve the Court's flexibility while simultaneously reining in its interpretive excesses. The selection of administrative law is purposeful: The Rules are not statutes, and it is therefore important not to construe them by reflexively applying a statutory lens. In their promulgation and implementation, the Rules

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26 FED. R. CIV. P. 1 (the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

27 *See infra* Part II.C; *see also* Hanna v. Plumer, 380 U.S. 460, 472 (1965) (noting that the Rules "regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either").

28 *See Hanna*, 380 U.S. at 471 ("The line between 'substance' and 'procedure' shifts as the legal context changes.").

29 *See infra* Part I.B.

much more closely resemble agency regulations. Indeed, recently other scholars have also analogized the Court to an agency, in order to demonstrate that the Court is insufficiently deferential to the rulemaking process.[30] But this proposed *Chevron*-style regime is different: It is aimed at protecting deference to the lower courts, not to rulemakers.[31] Because the Rules are more akin to administrative regulations than to statutes, the traditional standards of review that the Court applies to its review of statutes are not perfectly apt. And as the Roberts Court's cases show, they are also not being respected.

The suggested deference framework would support the Court's use of traditional tools of statutory construction in Rules cases presenting pure questions of law. It would also recognize as legitimate the Court's managerial mode of interpreting the Rules, with an important caveat: in managerial cases, which typically involve the application of the Rules to particular facts, the Court should not impose its view of the merits, as the Roberts Court has often done. Instead, having announced its interpretation of a Rule, under this framework the Court should remand to the lower courts. This dichotomy, which finds its roots in *Chevron*, is familiar and workable as a restraint on the Court's interpretation of regulations, including the Rules.

Part I of this Article establishes the dueling interpretive approaches of the Roberts Court in its Rules decisions. Part II shows how these competing approaches to Rules interpretation are the inevitable result of unresolvable tensions that are fundamental to the Rules and the rulemaking structure. Part III argues for a theory of *Chevron*-inspired deference that would accommodate these tensions while restraining the Court's currently unbridled interpretive power. The Article concludes by showing how this deference structure is the foundation for a theory of interpretation that gives the Rules the context-sensitive attention they require.

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30 *See, e.g.*, Mulligan & Staszewski, *supra* note 24, at 1192 (arguing that administrative law principles require the Court to defer to the rulemaking process rather than setting policy through adjudication).

31 This suggested regime parallels the so-called "weak" version of *Chevron* deference championed by Justice Stevens (*Chevron*'s author). *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 541–50 (6th ed. 2013) (documenting struggle between competing "weak" and "strong" readings of *Chevron*); *infra* Part III (noting that although the "strong" view of *Chevron* has prevailed at the Supreme Court, the "weak" version is more appropriate as a deference framework for the Rules).

I
THE PARADIGMS OF RULES INTERPRETATION

In its first decade, the Roberts Court decided seventeen cases interpreting the Federal Rules, ranging from watershed decisions on Rule 23 and Rule 8 to several drier, or at least less media-accessible, rulings on issues such as the relation back of a new party and relief from judgment.[32] One commentator has described the Court's methodologies for the Federal Rules as varying "wildly and inexplicably."[33] In fact, at least for the Roberts Court, there are methodologies to the madness. This Part documents them.

A. Statutory Interpretation

In many of its Rules cases, the Roberts Court reflexively interprets the Rules as if they are statutes.[34] The implication appears to be that the Rules are ultimately creatures of Congress, and therefore, for all practical (and theoretical) purposes, are just another form of statute.[35] The Court's statutory interpretations of the Rules tend to be rational, cleanly structured, and to reach a conclusion that provides clear guidance

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32 Teva Pharm. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015); Johnson v. City of Shelby, Miss., 135 S. Ct. 346 (2014); Marx v. Gen. Revenue Corp., 133 S. Ct. 1166 (2013); Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Amgen, Inc. v. Conn. Retirement Plans & Tr. Funds, 133 S. Ct. 1184 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010); Krupski v. Costa Crociere S.p.A., 560 U.S. 538 (2010); Ashcroft v. Iqbal, 556 U.S. 662 (2009); Horne v. Flores, 557 U.S. 433 (2009); Republic of Philippines v. Pimentel, 553 U.S. 851 (2008); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Scott v. Harris, 550 U.S. 372 (2007); Erickson v. Pardus, 551 U.S. 89 (2007); Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006); Mayle v. Felix, 545 U.S. 644 (2005).

In contrast, it took the Rehnquist court two decades to decide sixteen substantial procedural opinions. Marek v. Chesny, 473 U.S. 1 (1985); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Schiavone v. Fortune, 477 U.S. 21 (1986); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987); Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120 (1989); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc., 498 U.S. 533 (1991); Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367 (1992); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993); Henderson v. United States, 517 U.S. 654 (1996); Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); United States v. Beggerly, 524 U.S. 38 (1998); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Becker v. Montgomery, 532 U.S. 757 (2001); Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001).

33 Marcus, *supra* note 5, at 928.

34 *See* Bank of N. S. v. United States, 487 U.S. 250, 255 (1988) (describing a Rule as "binding as any statute").

35 *See Shady Grove*, 559 U.S. at 400 ("Congress . . . has ultimate authority over the Federal Rules of Civil Procedure.").

for lower courts. Mirroring its approach to statutes, the Court's analytical departure point is the text and structure of the Rule at issue. Several justices also rely upon the Advisory Committee Notes to ascertain the purpose and meaning of a Rule, although currently Justice Scalia is challenging that usage on textualist grounds.[36]

Statutory Rules decisions may feel familiar—even slightly dull—but those qualities do not equate with insignificance. The Court sometimes adopts this interpretive perspective even in cases concerning controversial Rules, such as those governing class actions and pleading. Nor does this form of interpretation equate with unanimity. These cases yield dissents, although typically they are respectful. The treatment of Rules as statutes does not even guarantee that a particular justice will be consistent in his or her approach across Rules cases.[37] These decisions raise significant interpretive questions. For example, scholars have noted and questioned an increasing tendency toward a more rigid textualism in these types of cases—one that might undermine the Rules' purposive vision.[38] Nevertheless, the debate in such cases draws on the statutory part of the Court's brain, with all of the rich experience—and theoretical baggage—that such an approach entails.

Krupski v. Costa Crociere S.p.A. epitomizes the Roberts Court in this statutory mode. In *Costa Crociere*, written by Justice Sotomayor, the Court interpreted Rule 15 to clarify the circumstances under which an amended complaint that seeks to add a party "relates back" to the time of the original filing in order to satisfy the statute of limitations.[39] In reaching its conclusion, the opinion relies primarily on the plain language of Rule 15, and it defines terms within the Rule by reference to

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36 The Advisory Committee Notes are mandatory explanatory statements promulgated by the drafters and accompanying each rule. Struve, *supra* note 5, at 1113. "Notes are drafted, redrafted, voted on, and approved in much the same manner as the text of the proposed Rules." *Id.* at 1114. Although they are not intended to be binding, they indicate the rule's purpose, aid in interpretation, and provide practice tips. *Id.* at 1112–13. To compare with Justice Scalia's perspective on the persuasiveness of the Notes, see *infra* note 264 and accompanying text.

37 *See* Scott Dodson, *Justice Souter and the Civil Rules*, 88 WASH. U. L. REV. 289, 291 (2010) (maintaining that Justice Souter "is not uniformly historicist, textualist, formalist, instrumentalist, pragmaticist, or minimalist when it comes to the civil rules"). While in *Costa Crociere*, 560 U.S. 538, Justice Scalia argued for a strict textualism, he has also written or joined opinions, such as *Wal-Mart*, 131 S. Ct. 2541, that embody the values of managerial interpretation. *See supra* notes 16–22 (describing interpretation of *Wal-Mart*).

38 *See* Wasserman, *supra* note 1, at 336 (noting phenomenon of "[s]tricter textualism in rule interpretation").

39 *Costa Crociere S.p.A.*, 560 U.S. 538.

dictionaries.[40] In addition, the Court supports its reading of the Rule with contextual sources, including citations to the 1966 Advisory Committee Notes.[41] In his lone concurrence, Justice Scalia agrees with the Court's reading of Rule 15 but rejects the Court's reliance on the Advisory Committee Notes, contending that "the Committee's *intentions* have no effect on the Rule's meaning."[42] As a form of statutory interpretation, nothing about *Costa Crociere* is unsurprising; even Justice Scalia's concurrence is comforting in an old-married-couple-bickering sort of way.

Other Rules decisions of the Roberts Court—including those written by liberal as well as conservative justices—employ a similarly pedestrian range of statutory interpretation tools. Construing Rule 50, the Court in *Unitherm Food Systems, Inc. v. Swift-Ekrich, Inc.* held that the text of the Rule—as confirmed by precedent dating as far back as the 1940s—did not permit an appellate court to review a question of sufficiency of the evidence unless the party seeking such review had first filed a post-trial motion seeking such review in the district court.[43] Writing for a seven-Justice majority, Justice Thomas relied upon the plain language of Rule 50(a) and (b), as well as the structural purpose of the Rule—to give the trial court judge, with her closer knowledge of the evidence, an initial opportunity to evaluate the party's claims.[44]

Notably, Justice Stevens's dissent in *Unitherm* sounds in a different key. Justice Stevens attempts to recast the question as one of legal norms and judicial power, rather than one of Rule interpretation—a quintessential example of the managerial interpretation discussed below.[45] According to Stevens, "[t]he spirit" of the Rules includes a "power to avoid manifestly

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40 *Id.* at 547–48.

41 *Id.* at 541; *see also id.* at 551 (finding that "the Advisory Committee clearly meant their filings to qualify as mistakes under the Rule").

42 *Id.* at 557 (Scalia, J., concurring in part and concurring in the judgment); *see also* Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment) (stating that while "the Notes are assuredly persuasive scholarly commentaries—ordinarily *the* most persuasive— . . . they bear no special authoritativeness as the work of the draftsmen . . . .").

43 546 U.S. 394, 404 (2006) (holding that "a party is not entitled to pursue a new trial on appeal unless that party makes an appropriate postverdict motion in the district court").

44 *Id.* at 400, 405 (explaining why the text of Rule 50 both "confirms" and "supports" the Court's ruling).

45 *Id.* at 407 (Stevens, J., dissenting) ("This is not a case, in my view, in which the authority of the appellate court is limited by an explicit statute or controlling rule.").

unjust results in exceptional cases."[46] But the majority in *Unitherm* privileges the text of the Rule over this abstract "spirit," thus remaining firmly in statutory mode. Other recent Roberts Court decisions manifest a similarly statutory methodology.[47]

It might theoretically be possible that the Court adheres to this statutory paradigm except in the rare cases when it confronts gatekeeping provisions like Rules 8, 23, and 56 that inevitably raise difficult policy questions. But the Roberts Court often adopts its statutory approach even in cases addressing controversial, gate-keeper Rules. For example, in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, the Court concluded that a securities class action plaintiff need not prove the materiality of the defendant's alleged misrepresentations at the certification stage in order to satisfy the predominance requirement of Rule 23(b).[48] In rejecting the defendant's effort to ratchet up the proof requirement at the certification stage, the Court relied upon the text of the Rule as well as the Advisory Committee Note.[49] In conclusion, the Court refused to adopt "an atextual requirement" requiring heightened pre-certification proof of materiality by securities class action plaintiffs.[50]

The Court employed a similarly textual mode of analysis in its recent per curiam in *Johnson v. City of Shelby, Mississippi*, which summarily reversed a Fifth Circuit decision interpreting Rule 8 in a section 1983 suit against a municipality.[51] The succinct, Ginsburgian opinion contrasts sharply with the tone as well as the interpretive approach the Court employed in its prior section 1983 pleading case, *Ashcroft v. Iqbal*—a paradigmatic managerial case discussed below.[52] In *Johnson*, the Court curtly (in two pages) dismisses the Fifth Circuit's effort to mandate that plaintiffs explicitly invoke section 1983 in their

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46 *Id.*

47 *See* Teva Pharm. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831, 836 (2015) (finding Rule 52's standard of review to be a "clear command"); Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1172–73 (2013) (stating that the Court would apply identical statutory construction to construe Rule 54 and to the FDCPA, and using a treatise to support its textualist reading).

48 133 S. Ct. 1184, 1191 (2013).

49 *Id.* at 1194–95 (quoting the Advisory Committee Note of 2003 for the proposition that "an evaluation of the probable outcome on the merits is not properly part of the certification decision").

50 *Id.* at 1201.

51 135 S. Ct. 346 (2014).

52 *Id.* at 347 (distinguishing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), as "not in point").

complaints. Finding no such requirement in the text of Rule 8, the Court sends a clear message to lower courts to avoid reading *Iqbal* and *Twombly* as mandating "a punctiliously stated 'theory of the pleadings.'"[53] Instead, the Court in *Johnson* harks back to its pre-*Twombly* decision in *Leatherman v. Tarrant County*,[54] which stated bluntly that Rule 8 "meant what it said."[55] Thus, even in cases addressing key gatekeeper Rules, the Court sometimes treats the Federal Rules as simply another form of statute—one that it is not free to amend outside of the rulemaking process.[56]

Importantly, even when the Court construes the Rules as statutes, the language of a particular Rule may require a fair degree of discretion in that interpretation. In such instances, the Court is still operating in the realm of statutory interpretation, but with strong undertones of pragmatism.[57] Thus, in *Mayle v. Felix*, the Court construed the scope of relation back under Rule 15(c)(2) as it applied to a pro se prisoner's habeas petition.[58] Justice Ginsburg's majority opinion conflicted sharply with the dissent by Justice Souter over the meaning of Rule 15(c)(2)'s requirement that a new claim, in order to relate back, must "[arise] out of the conduct, transaction, or occurrence" in the original pleading.[59] The Court's interpretation of this language was complicated by the collateral constraints of the habeas process, particularly including the habeas rule that requires heightened specificity in pleading, and the one-year statute of limitations on habeas claims imposed by the Antiterrorism and Effective Death Penalty Act.[60] Ultimately, the majority construed the "transaction" language of Rule 15 narrowly, largely based on its reading of the tight restrictions that it believed Congress intended to place on habeas review.[61]

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53 *Id.*

54 *Id.* (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)).

55 Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

56 *See, e.g.*, *id.* (instructing that modification of Rule 8 must come from the rulemaking process rather than from interpretation).

57 *Cf.* John F. Manning, *The New Purposovism*, 2011 SUP. CT. REV. 113, 119 (2011) (noting that even nontextualist justices "rely on the text to structure and constrain their sense of purpose" in statutory cases).

58 545 U.S. 644 (2005).

59 FED. R. CIV. P. 15(c)(1)(B).

60 *Mayle*, 545 U.S. at 648–49.

61 *Id.* at 664 (concluding that a constrained reading of Rule 15 "is consistent with the general application of Rule 15(c)(2) in civil cases, . . . with Habeas Corpus Rule 2(c), . . . and with AEDPA's installation of a tight time line for [section] 2254 petitions").

The dissent, finding the language of Rule 15 ambiguous, would have chosen a broader construction.[62] But both the majority and the dissent, notwithstanding reaching different conclusions, were engaged in the activity of interpreting the text and the intended purpose of Rule 15.

Analogously, Justice Scalia's plurality opinion in *Shady Grove Orthopedic Associates v. Allstate Insurance Company* engaged in a statutory interpretation of Rule 23.[63] The plurality concluded that the unambiguous language of Rule 23 displaces state procedural rules that might otherwise limit the Rule's scope.[64] In contrast to this clean and simple (perhaps over-simple) statutory interpretation of Rule 23, Justice Ginsburg's dissent took a more managerial approach, consistent with her nuanced approach to *Erie* questions, under which the Court must interpret federal procedural law with "sensitivity to important state interests."[65] Thus, Justice Scalia's plurality treats the interpretation as a matter of routine statutory interpretation and draws a convenient though artificial line between procedure and substance. In contrast, the dissent finds ambiguity that requires a narrower, politically sensitive construction of the Rule. Arguably the clash between the plurality's textualism and the dissent's contextualism still takes place within the realm of traditional statutory interpretation theory, but Justice Ginsburg's delicate construction of Rule 23 shades into the norm-setting managerial interpretation described in the next section.

B. Managerial Interpretation

Notwithstanding what appears to be a consensus that the Court will treat Rules the same as it does statutes, several of the Roberts Court's procedural rulings evince a contradictory mode of interpretation, one that is rooted less in the Rules and more in the Court's inherent power of adjudication.[66] When it is acting in this gestalt, mother-knows-best mode, the Court

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62 *Id.* at 676 n.9 (Souter, J., dissenting) (stating that "this case requires us to apply text that is ambiguous," and disagreeing with the Court's resolution of that ambiguity).

63 559 U.S. 393 (2011).

64 *Id.* at 398–400 (finding that plain text of Rule 23 mandates availability of class action to plaintiffs who meet the Rule's criteria).

65 *Id.* at 442 (quoting Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996)).

66 *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 332–33 (2006) (explaining that the Court uses supervisory power to "announce procedural rules not otherwise required by Congress or the Constitution"); *see also* John F. Manning, *Textualism and the Equity of the Stat-*

significantly downplays the text of the Rules and gives short (or no) shrift to the Advisory Committee Notes. Decisions in this vein, like those above, feel familiar—but not in a statutory way: these decisions follow the rhetorical and structural traditions of equity, and the interpretive dynamism of the common law. While it might be possible to describe these cases as examples of Professor Eskridge's "dynamic" statutory interpretation,[67] such a label stretches the term so far as to render it almost meaningless. In these cases the Court is not merely interpreting the Rules. Like enterprising trial courts, in managerial mode the Roberts Court is strategizing and innovating to achieve normative goals. Whereas in statutory mode the Court tends to seek clarity and uniformity, its managerial cases seem almost willfully equivocal. Where the Court's statutory cases defer to the rulemaking process, in managerial mode the Court uses adjudication to re-set the rulemaking agenda. Among these managerial cases are the watershed Rules decisions of the Roberts Court.

In addition to *Wal-Mart*, discussed above,[68] the twin symbols of managerial Rules interpretation are the Court's pleading cases, *Bell Atlantic Corporation v. Twombly* and *Iqbal v. Ashcroft*.[69] *Twombly* candidly replaces the Court's longstanding, broad interpretation of Rule 8 in *Conley v. Gibson*[70] with a new, much more discretionary gloss, under which a plaintiff's claims must pass "the line between possibility and plausibility."[71] As it eviscerates *Conley*, the Court in *Twombly* barely glances at the text of Rule 8.[72] In particular, the Court does not cite Rule 8(a), which mandates that pleadings "be construed so as to do justice."[73] Its textual analysis is primarily confined to its statement—in a footnote—rebutting the argument that the Court is effectively broadening Rule 9 to include antitrust cases within the other categories of claims that require heightened

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ute, 101 COLUM. L. REV. 1, 22 (2001) (describing "equity of the statute" theory of interpretation which advocates this claim is grounded in inherent judicial power).

67 William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (arguing that "[s]tatutes . . . should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context").

68 *See supra* notes 16–23 and accompanying text.

69 550 U.S. 544 (2007); 556 U.S. 662 (2009).

70 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. 544.

71 *Twombly*, 550 U.S. at 557.

72 FED. R. CIV. P. 8(a)(2) (calling for "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also* Dodson, *supra* note 37, at 297 (stating that Justice Souter in *Twombly* "only casually relied upon Rule 8's textual requirement").

73 FED. R. CIV. P. 8(e).

specificity in pleading.[74] Moreover, rather than cite the Advisory Committee Note on Rule 8, the Court instead cites a separate Advisory Committee report on the expense of discovery.[75] Similarly, *Iqbal* makes only a faint attempt to link its analysis to the text of Rule 8, tying its reasoning loosely to Rule 8's statement that the plaintiff "*show*" entitlement to relief implies the plausibility requirement.[76] Nowhere does *Iqbal* refer to the Advisory Committee Notes or to any other aspect of the rulemaking process. The majority in *Iqbal* seems far more preoccupied with protecting the right of government officials to be free from the burden of litigation.[77] In these cases, the Court is not approaching Rule 8 with the statutory tools that it employs in run-of-the-mine cases interpreting a legislative text.[78] Instead, in the classic common-law manner, the Court canvasses precedent and scholarship, policy and (its view of) purpose, to arrive at a new, twenty-first century pleading norm—plausibility.[79]

Scott v. Harris is perhaps the next most infamous Rules case that embodies managerial interpretation.[80] In *Scott*—a section 1983 suit against a police officer who rammed the plaintiff's vehicle after the plaintiff fled from a traffic stop—the Court altered the summary judgment standard in light of a video from the police car's dashboard camera. Examining the case in the light most favorable to the nonmoving party, the plaintiff, the district court, and the court of appeals denied summary judgment to the defendant police officer.[81] The Supreme Court reversed, on the ground that the videotape rendered the plaintiff's version of the facts a "visible fiction" that no reasonable juror could believe.[82] In the presence of the video, the Court held, the court of appeals should have altered the summary judgment standard: rather than examining the facts in the light most favorable to the plaintiff, "it should have

74 *Twombly*, 550 U.S. at 569 n.14.

75 *Id.* at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)).

76 Iqbal v. Ashcroft, 556 U.S. 662, 679 (2009) (stating that complaint "has not 'show[n]'" entitlement to relief).

77 *Id.* at 685.

78 Indeed, the Court in *Conley* approached the question in a similar way, with only passing reference to Rule 8. Conley v. Gibson, 355 U.S. 41, 47–48 (1957).

79 *Twombly*, 550 U.S. at 558–59 (citing scholarship documenting expense of abusive antitrust discovery).

80 550 U.S. 372 (2007).

81 *See id.* at 376.

82 *Id.* at 380–81.

viewed the facts in the light depicted by the videotape."[83] Given the proliferation of video technology, this view of Rule 56 has the potential to alter the standard of review in the many instances in which there is visual evidence.[84] But the Court in *Scott* did not stop with that single disruption of a legal standard. Rather than remand the case for reconsideration of the officer's summary judgment motion in light of the video, the Court in *Scott* interpreted the video itself and held that the defendant police officer had not violated the Fourth Amendment.[85] The Court did not merely advise the lower courts; it assumed their role.

The Roberts Court has also taken a managerial approach in less famous Rules decisions. Both *Horne v. Flores* and *Republic of Philippines v. Pimentel* arise out of Rules that, like class actions, have equitable roots: Rule 60(b)'s relief from judgment in *Horne*, and Rule 19's compulsory joinder in *Pimentel*.[86] It therefore makes sense that the Rules' text is somewhat capacious and that the Court's interpretation would aim to capture the Rules' purpose—their equitable essence.[87] But both *Horne* and *Flores* go further: these decisions use this purposive inquiry in order to explicitly alter or reinforce antilitigation norms that extend far beyond the text or purpose of the Rules at issue.

In *Horne v. Flores*, the Court used Rule 60(b)(5) as a departure point for an extended critique of (almost a rant against) institutional reform litigation, i.e., litigation that requires judicial oversight of a consent decree or other order in order to

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83 *Id.* at 381.

84 *See* Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1767–68 (2014) (describing impact of *Scott* and noting that "the impulse expressed by the Court—that photo evidence should trump legal presumptions—indicates a real danger that multimedia advocacy will erode traditional decision-making structures").

85 *Scott*, 550 U.S. at 381 ("Judging the matter [in light of the videotape], we think it is quite clear that Deputy Scott did not violate the Fourth Amendment.").

86 Horne v. Flores, 557 U.S. 433 (2009); Republic of Philippines v. Pimentel 553 U.S. 851 (2008); *see* Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After* Horne v. Flores, 46 U.C. DAVIS L. REV. 1435, 1449 (2012) (explaining that 60(b) was intended to reflect longstanding judicial practice of courts using "inherent equity power to grant relief" from judgment); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923 (1987) (showing that many of the Rules, including Rule 19, are the product of equitable considerations).

87 *See* Manning, *supra* note 66, at 8 (describing scholarly literature supporting "the equity of the statute," an allegedly ancient common-law model of statutory interpretation under which judges had broad equitable powers to construe a statute in order to effect its purpose).

ensure institutional compliance with the law.[88] Rule 60(b)(5) does not directly address institutional litigation; it permits relief from a judgment if "applying it prospectively is no longer equitable."[89] Almost thirty years prior to *Horne*, the Court had recognized 60(b)(5) as a possible vehicle for modification or abrogation of an institutional reform consent decree, but it had cautioned against using the Rule as a loophole to escape enforcement.[90] Although not explicitly overruling that precedent, a sharply divided Court in *Horne* took the opposite stance, practically inviting those operating under consent decrees to file 60(b)(5) motions and strongly signaling lower courts to get out of the business of institutional reform, which it described in no uncertain terms as antithetical to federalist and democratic values.[91] Despite characterizing its decision as adhering to a "flexible approach," the Court made clear that such "flexibility" had but one purpose: to return oversight responsibility to state and federal officials as soon as possible.[92] *Horne* has received remarkably little scholarly attention, but one commentator described it as a "categorical and unilateral reinterpretation of Rule 60(b)(5)."[93]

Like in *Horne*, the Court in *Pimentel* uses a Federal Rule as a springboard to reinforce an extrinsic norm—this time, the immunity of sovereigns from suit. In dismissing an interpleader action seeking assets to enforce a judgment in favor of a plaintiff class against the estate of Ferdinand Marcos for widespread human rights violations, the Court found that the lower courts had given short shrift to the sovereign immunity of

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88 *See also* David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1018 (2004).

89 FED. R. CIV. P. 60(b)(5). But this Article employs the term to describe not the Rules themselves, but rather the mode of analysis the Court selects (typically without explaining why) when it confronts a Rule-centered question. In housekeeping mode, the Court tends to rely on the same methods of interpretation that it applies when it interprets statutes.

90 *See* Rufo v. Inmates of Suffolk Cty. Jail, 502 U.S. 367, 383 (1992) (stating that Rule 60(b)(5) provides relief only when enforcement is no longer equitable, "not when it is no longer convenient," and placing on the party seeking revision the "burden of establishing that a significant change in circumstances warrants revision of the decree").

91 *Horne*, 557 U.S. at 448 (stating that "institutional reform injunctions often raise sensitive federalism concerns"); *id.* at 449 ("Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby 'improperly deprive future officials of their designated legislative and executive powers.'" (quoting Frew v. Hawkins, 540 U.S. 431, 441 (2004))).

92 *Id.* at 449 ("A flexible approach allows courts to ensure that 'responsibility for discharging the State's obligations is returned promptly to the State and its officials.'" (quoting Frew v. Hawkins, 540 U.S. 431, 442 (2004))).

93 *See* Kim, *supra* note 86, at 1435.

the defendants, and the comity and dignity inherent in sovereignty.[94] The Court concluded that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign."[95] In a subsequent case on the Foreign Sovereign Immunities Act, the Court confirmed this broad prosovereign principle.[96] As one scholar has noted, with its weighty emphasis on sovereignty "the Court gestured to concerns not easily located within the text of Rule 19."[97]

Finally, the outcome of the Court's decision in a pending case concerning Rule 68, *Campbell-Ewald Company v. Gomez*, is likely to turn on the Court's interpretive approach to Rule 68. In *Gomez,* the question is whether a plaintiff's claim becomes moot—and therefore nonjusticiable—when the defendant makes a Rule 68 offer of judgment that grants the plaintiff complete relief, and whether the result is the same if the offer of judgment applies to a named plaintiff in a putative class action.[98] In responding, the Court could interpret Rule 68 according to its plain language, which says nothing about a plaintiff's case becoming moot under such circumstances. Indeed, in a recent dissent Justice Kagan characterized what she perceived as the Court's belief that a plaintiff's claim in such a situation would be rendered moot as "wrong, wrong, and wrong again."[99] According to Justice Kagan, "An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect."[100] Yet the malleable, judicially created doctrines of justiciability make it very likely that in *Gomez* a majority of the Court will not be confined to the text of Rule 68 or to the background rules governing settlement. When judge-made doctrines such as mootness and ripeness

94 Republic of Philippines v. Pimentel, 553 U.S. 851, 865–66 (2008) (stating that the court gave "insufficient weight to their sovereign status").

95 *Id.* at 867.

96 Samantar v. Yousuf, 560 U.S. 305, 324 (2010).

97 Katherine Florey, *Making Sovereigns Indispensable:* Pimentel *and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 709 (2011).

98 Petition for Writ of Certiorari, Campbell-Ewald Co. v. Gomez, No. 14-857 (2015) (Question Presented).

99 *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting) (arguing that the majority's decision is based on an implied understanding of Rule 68 that is "wrong, wrong, and wrong again").

100 *Id.*

collide with the Rules, the Court has ample room to interject its own preferences regarding litigation norms into the debate.[101]

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As the above cases demonstrate, the Roberts Court's Rules decisions are not as erratic as they might seem; yet neither are they reducible to a unitary, statutory methodology. To be sure, sometimes the Court analyzes the Rules at arms'-length, treating them functionally as statutes. But in other instances the Roberts Court rules from its common-law hip. The next Part shows how these seeming inconsistencies are in fact intrinsic to—and a healthy part of—the rulemaking structure.

II
THE FAULT LINES OF RULES INTERPRETATION

This Part identifies three tensions—interpretive fault lines—in the structure of rulemaking and the Rules themselves that together explain, and justify, the Roberts Court's interpretive bipolarity. The first such fault line, described in subpart A, arises from an institutional design that renders the Court's relationship to the Federal Rules inherently unstable. Subpart B documents a second set of inherent tensions, this time in the structure and text of the Rules themselves. Finally, subpart C argues that a third, epistemological instability—the perpetually puzzling tension between procedure and substance, between trans-substantivity and particularity—gives rise to, and reinforces, the two paradigms of Rules interpretation.

A. Institutional

The Federal Rules date to 1938. Surprisingly, however, scholars have not reached consensus on the Court's role in the rulemaking process, or on the related question of the relationship between the Court's rulemaking role (however that might be defined) and its Article III powers of adjudication.[102] The Court's dual roles as legislative rulemaker and judicial adjudi-

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101 For an excellent analysis of the Rule 68 issue, see Bradley Girard, Note, *Don't Try This at Home: The Troubling Distortion of Rule 68*, 103 GEO. L.J. 723 (2015).

102 *See, e.g.*, Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 Nw. U. L. REV. 447, 449 (2013) (noting that one source of unease with the rulemaking process is the Court's tendency to "engage[ ] in amendment by case law instead of through the [rulemaking] process").

cator complicate any understanding of Rules interpretation.[103] While this dual role arguably violates "fundamental principles of separation of powers,"[104] it is an inherent and unquestioned aspect of the Court's relationship to the Rules.[105]

Contrasting scholarly narratives have emerged—narratives that also manifest in the Court's Rules decisions.[106] One narrative depicts the Court as a paramount force in the legislative process creating the Rules.[107] The other narrative, drawing a forceful analogy to administrative agencies, argues that the robust administrative process for rulemaking that Congress established in 1988, combined with the Court's historical lassitude in rulemaking, together dictate that the Court should refrain from rulemaking by adjudication and instead defer to the administrative process, by which scholars mean the process of rulemaking by committees.[108] The problem with these competing narratives is that both contain important elements of truth, but neither tell the whole story. It is correct that the Court is only one element of the rulemaking process, and that the Court should not flout that process by judicial fiat in the course of adjudication. Simultaneously, however, the Court has broad power to interpret texts, including the Rules, when it decides cases, and that interpretive power is an important and valuable voice in the shaping of the Rules. The unresolved tension between these two visions of the Court's role creates a fault line in Rules interpretation—one that ultimately supports both of the Court's methodologies for interpreting the Rules.

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103 *See* Bauer, *supra* note 5, at 720 ("In construing the Federal Rules, the courts are interpreting standards which the Supreme Court itself has promulgated.").

104 Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring); *see also* Order of Jan. 21, 1963, 374 U.S. 865, 870 (1963) (Black & Douglas, JJ.) (describing "the embarrassment of having to sit in judgment on . . . rules which we have approved and which as applied in given situations might have to be declared invalid").

105 *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1306 (2006) (noting that, "as a practical matter," the Enabling Act's constitutionality is not in doubt, but nevertheless arguing that the Act gives rise to "serious constitutional difficulties").

106 *See infra* Section II.A.2.

107 *Id.*

108 *Id.*

1. *The Court's Uncertain Role*

The Court plainly has some power in creating and interpreting the Federal Rules; the question is how much.[109] Unfortunately, neither the formal rulemaking structure nor the practices of the Court with regard to rulemaking provide a clear answer.

At one level, the answer should be simple: the Court is in charge of the Rules. In the Enabling Act, Congress granted the Court such rulemaking authority, subject only to congressional acquiescence and the limitation in section 2072(b) that the rules "shall not abridge, enlarge or modify any substantive right."[110] Beneath this broad grant of power, however, is a more complex, more administrative reality. The Court has never itself performed the heavy lifting of rulemaking.[111] Thus, in 1958 the Court advocated in favor of the formation of the Judicial Conference to assist with rulemaking, and in addition the Court has always employed an Advisory Committee, composed primarily of judges and academics, to initiate the drafting process.[112]

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109 *See* Moore, *supra* note 5, at 1045 (observing that "embedded in this outwardly simple statutory framework for the promulgation of the Rules is the resolution of a major separation of powers controversy").

110 *See* 28 U.S.C. § 2072(a)–(b) (2012) (empowering the Court "to prescribe general rules of practice and procedure" for cases in federal district courts and courts of appeals). With rare exceptions, Congress has deferred to the Rules transmitted by the Court for its acquiescence. *See infra* note 116 and accompanying text; *see also* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1018–19 (1982) (noting the lack of interference from Congress in the Court's promulgation of procedural rules). It has chosen instead to focus its regulation of the courts on threshold jurisdictional questions through the use of jurisdictional statutes. *See, e.g.*, 28 U.S.C. § 1367 (2012) (supplemental jurisdictional statute that codifies—with some modifications—the prior court-created doctrines of pendent and ancillary jurisdiction). The outer limits of this limitation are uncertain, and the Court has applied an "REA avoidance canon"—*i.e.*, a practice of interpreting the Rules in such a way as to reaffirm their compliance with the REA. *See generally* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (describing history of the REA); *see also* Struve, *supra* note 5, at 1102 (explaining the avoidance canon as "the Court giv[ing] the Rules a presumption of validity, but constru[ing] them so as to avoid [violating the REA's restrictions]").

111 *See* Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Rulemaking*, 39 N.M. L. REV. 261, 274 (2009) (noting that when the REA passed, "no one expected the Supreme Court itself to draft and promulgate the Rules"); Marcus, *supra* note 5, at 931 (noting that the Court formed the Advisory Committee "[o]n its own initiative" to draft the rules and that the committee has existed except during a brief period from 1956-1958 when the Court disbanded it for undocumented reasons).

112 Notably, the Court supported formation of the Judicial Conference. *See* H.R. REP. NO. 85-1670, at 4 (1958) (letter of Warren Olney III, Director of Admin. Office of the U.S. Courts, to Hon. Sam Rayburn, speaker of the House, stating that

Congressional enactments in the 1980s further removed the Court from the nitty-gritty of the rulemaking process by mandating additional layers of review—bringing the total to seven steps—and inviting greater public participation.[113] As a key element of these changes, the Enabling Act inserted a new review body between the Advisory Committee and the Judicial Conference. Congress charged this new body, called the Standing Committee, with holding public meetings to communicate its review and analysis of any proposed changes to the Rules.[114] The Judicial Conference further refined this process, mandating that the initial rulemaking body, the Advisory Committee, provide notice of any proposed changes in the Federal Register, followed by a period of six months for public comment, including public hearings.[115] In light of these refinements—some implemented by Congress, and some by the Judicial Conference—the judicial rulemaking process now more closely resembles the rulemaking process in administrative agencies. But while these modifications are clearly intended to make the rulemaking process more transparent, more accountable to the public, and presumably more effective, it is unclear what effect, if any, this revised process has on the Court's formal rulemaking power. In theory, Congress can also override the administrative process, but in practice it has done so rarely.[116]

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the Court could not itself spend the time and resources necessary for continuous study of the rules); Jack H. Friedenthal, *The Rulemaking of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675–76 (1975) (observing that "judges . . . are busy and cannot be expected to have the time to draft reform proposals; they therefore delegate that task to commissions, usually composed chiefly of legal scholars and senior lawyers").

113 *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4649 (1988) (codified at 28 U.S.C. § 2073 (2006)) (repealing and replacing the prior 28 U.S.C. § 2072).

114 28 U.S.C. § 2073(b) (2012) (stating that the standing committee "shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence . . . as may be necessary to maintain consistency and otherwise promote the interest of justice"); *id.* at (c)(1) (open meeting requirement); *id.* at (d) (requirement to create report). The REA revisions also put Rules changes on a formalized schedule, requiring the Court to transmit any proposed changes to Congress by May 1. 28 U.S.C. § 2074(a) (2012).

115 *See* Notice of Public Hearings, 54 Fed. Reg. 13,752 (Apr. 5, 1989); *see also id.* at 13,753 (noting that in rare instances, where "the administration of justice" so requires, the time period and hearing requirement may be modified or eliminated).

116 Congress has only occasionally reacted to Federal Rules. See Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 908 (1999) (observing that under the traditional model "Congress will exercise its veto power under the Rules Enabling

Further obscuring the Court's formal role in the rulemaking process, the Court's practical role is not well understood—in large part because there is a dearth of data.[117] One justice has described the Court's role as "perfunctory,"[118] and another stated that the Court's approval of proposed Rules is "more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves."[119] But there is no way to know if those descriptions will hold uniformly true over time or among justices. Unlike the Advisory Committee, the Court does not conduct its deliberations in public.[120] Instead, the Court's approach to evaluating proposed changes to the Rules appears to mirror its black-box certiorari process:[121] the Court may reject a proposed rule change (refusing to transmit it to Congress) without explanation, just as it does the overwhelming majority of certiorari petitions it reviews; it may transmit Rule changes to Congress without comment, signaling either neutrality, enthusiasm, or a mix of views among the nine justices (somewhat similar to the Court's typical grant, which does not technically signal the Court's predisposition on the merits); or, on rare occasions, the Court may transmit proposed Rule changes to Congress with accompanying statements by one or more justices, just as occasionally justices write separate statements on denial of certiorari. In this certiorari-like process, the Advisory Committee Notes appear to function as a clerk's cert-pool

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Act only rarely"); Moore, *supra* note 5, at 1053–54 (describing rare situations where Congress delayed the implementation of a rule, rejected, or modified a rule).

117 *See* Moore, *supra* note 5, at 1064 (noting that "deliberations on proposed rule changes are secret").

118 Dissent of Justice Douglas to the Court's approval of the proposed Rules of Evidence. 34 L. Ed.2d lxvi (1972) (Douglas, J., dissenting).

119 Order of Apr. 29, 1980, 446 U.S. 997, 998 n.1 (1980) (Powell, J., dissenting); *see also* Friedenthal, *supra* note 112, at 676 (stating that "[i]t seems clear that the Justices relied completely on the work of the Advisory Committee" and describing the Court as "lulled into complacency" by congressional acquiescence); Marcus, *supra* note 5, at 961 ("Although they have formal roles, the Judicial Conference, Supreme Court, and Congress act largely as rubber stamps in the rulemaking process.").

120 *See* Struve, *supra* note 5, at 1154 (noting that "the extent to which a majority of the Court even considers the merits of a proposed Rule is unclear"). Documents memorializing the Court's rulemaking considerations might appear in a Justice's papers, but under current law such papers are the private property of the individual Justices. *See generally* Kathryn A. Watts, *Judges and Their Papers*, 99 N.Y.U. L. REV. 1665, 1686 (2013) (noting that federal judges have exclusive, private ownership rights over their papers and advocating for a different model that would grant some public access to these documents).

121 For a description of the Court's process for granting certiorari, see Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 7–18 (2011).

memo: vital to the efficiency of the process, yet utterly nonbinding.[122]

Finally, to the extent that they feel constrained by the formal or cultural limitations of rulemaking, members of the Court may believe they have little choice but to communicate their views through adjudication, a realm in which their power and skills are unquestionable.[123] This appears to have been the case with Rule 8. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Court adhered respectfully to the text of Rules 8 and 9, but it also unmistakably communicated that it believed some reform of the pleading standards to be necessary.[124] Ultimately, however, despite much debate, the Advisory Committee took no action.[125] In the face of such inertia,

> [l]ike a bull in a china closet, the Court came crashing in and said, in effect, to rulemakers: out of my way. Can't you see that modern litigation is totally different from what it was in 1938? Why haven't you done something by now?[126]

Ironically, then, the Court's position at the top of the administrative hierarchy effectively cuts it out of the process of initial revisions of Rules.[127] Given these constraints, it is logical that the Court would use its most powerful tool—adjudication—to contribute its voice to the agenda and process.

Finally, the details of the rulemaking process—whether robust or thin, whether designed by the Judicial Conference or by

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122 Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 557 (2010) (Scalia, J., concurring) (stating his opinion that "[t]he Advisory Committee's insights into the proper interpretation of a Rule's text are useful to the same extent as any scholarly commentary," but noting that "the Committee's *intentions* have no effect on the Rule's meaning").

123 Individual Justices might speak out in speeches, books, or—in rare instances—directly to Congress, but generally the Justices are reticent about speaking out about any non-case-related topics. *See* Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 299–300 (2013) (describing most justices as "pretty much wallflowers" but noting as an exception the "Hughes-Brandeis letter to Congress in 1937 obliquely criticizing Roosevelt's Court-packing plan").

124 507 U.S. 163, 168 (1993) (speculating that resolution of the case would be different if Rules 8 and 9 were rewritten, but "that is a result which must be obtained by the [rulemaking] process . . . .").

125 *See* Lonny Hoffman, *Rulemaking in the Age of* Twombly *and* Iqbal, 46 U.C. DAVIS L. REV. 1483, 1503–11 (2013) (describing unsuccessful attempts by rulemakers to reach consensus on revising Rule 8).

126 *Id.* at 1512 (emphasis omitted).

127 *See* Mulligan & Staszewski, *supra* note 24, at 1205 n.98 (acknowledging that "the current court rulemaking model is best described as a bottom-up process, whereas agency rulemaking is traditionally described as a top-down process").

Congress—do not necessarily provide much insight into the methodologies appropriate to interpret the Rules once they are promulgated and the subject of a live controversy.

2. *Clashing Narratives*

Given the ambiguities over the scope of the Court's legislative and adjudicative power over the Rules, it is hardly surprising that the handful of scholars to have examined the Court's interpretive power over the last thirty years have subscribed to sharply different visions. Scholars in the 1980s and 1990s, frustrated with the Court's new emphasis on textualism in its Rules decisions, construed the rulemaking structure as conferring enormous power on the Court to liberally interpret the Rules.[128] In contrast, more recent scholarly analyses—reacting to the Court's perceived disrespect for the Rules' text—have argued that the rulemaking structure requires the Court to exercise interpretive restraint.[129] These opposing views of the Court's role and responsibility correspond precisely with the two opposing paradigms of the Roberts Court's Rules interpretation.

In the late 1980s and early 1990s—frustrated with what they perceived to be an emergent trend in the Court toward a rigid textualist interpretation of the Federal Rules—two scholars argued that the Court has not only broad *power* to interpret the Rules, but a concomitant *responsibility* to use that power to effectuate the due process purposes of the Rules.[130] According to these scholars' view, both under the Enabling Act and as a matter of inherent adjudicative power, the Court is ultimately in charge of the Rules. Although it might seem incongruous for the Court to engage in legislative activity, the congressional delegation of power in the Enabling Act removes any constitutional taint.[131] As a later commentator framed it, "Why should

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128 *See generally* Bauer, *supra* note 5, at 726 (justifying "liberal interpretation" of the rules); Moore, *supra* note 5, at 1040 (arguing for "more activist role for the Court in interpreting the [rules]").

129 *See generally* Marcus, *supra* note 5, at 929 (an interpreter of the rules should defer to the rulemakers' intent and "resist[ ] the urge to let its own preferences drive textual application"); Struve, *supra* note 5, at 1102 ("Congress's delegation of rulemaking authority should constrain, rather than liberate, courts' interpretation of the Rules.").

130 *See* Bauer, *supra* note 5, at 720 (criticizing the Court's "unnecessarily grudging" interpretation of Rule 15(c)); Moore, *supra* note 5, at 1085 (criticizing use of plain meaning interpretation in Rules cases as "misguided, unwarranted, and inappropriate").

131 *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 24 (1985) (arguing there is no separation of powers objection to federal courts adopting rules for internal operation or for control of litigation); *id.*

the Court—ostensibly the rulemaking principal by the terms of the Rules Enabling Act—have to defer to what the Court itself forges?"[132] In the view of Joseph Bauer and Karen Nelson Moore, the Court's dual role as legislator and adjudicator of the Rules expands, rather than constrains, the Court's power.[133] It is widely understood that the Court's interpretation of statutes is based upon its role as a "faithful agent" of Congress.[134] But in the context of the Rules—where the Court has independent authorial power—the faithful agent metaphor is not a perfect fit. As Bauer stated:

> In construing the Federal Rules, the courts are interpreting standards which the Supreme Court itself has promulgated. Therefore, some of the problems which occur during statutory interpretation, such as ferreting out legislative intent, deferring to another branch of government, or avoiding violations of principles of federalism by deferring to state interests, are in large measure eliminated.[135]

Bauer was writing in 1988, so his perspective may not have taken Congress's significant 1988 modifications to the rulemaking procedure into account. In 1993, however, Moore took the same position, concluding that, "[g]iven these substantial, although largely unexercised, powers of the Court in the promulgation process, a more activist role in the interpretative stage, one that considers purpose and policy, is appropriate."[136]

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at 41 (arguing that when a "delegation of lawmaking power" to the judiciary is intentional and circumscribed, "it does not violate the principles of federalism, separation of powers, or electoral accountability"). Reflecting upon separation of powers concerns regarding judicial rulemaking, Judge Weinstein has observed, "The rule-making power is one of the most important examples of practical necessity dictating that a twilight area be created where activities of the separate branches merge." JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 54 (1977) (citation omitted).

132 Marcus, *supra* note 5, at 942.

133 Bauer, *supra* note 5, at 727 (arguing that "it is the Supreme Court itself which has been given the responsibility for promulgating and implementing the Rules"); Moore, *supra* note 5, at 1093 ("Congress has explicitly delegated to the Court rulemaking power, and it is not inconsistent to imply the Court has greater power to interpret Rules than it does to interpret statutes.").

134 *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature.").

135 Bauer, *supra* note 5, at 720.

136 Moore, *supra* note 5, at 1093; *cf.* Marcus, *supra* note 5, at 929 (arguing, by contrast, that "as a functional matter, a court should pursue the same interpretive goal for the Federal Rules that the faithful agent concept recommends for courts as they interpret statutes").

Moore, who urged the Court to take "a more activist role in interpreting the Federal Rules,"[137] remains the staunchest scholarly voice in favor of this broad view of the Court's interpretive power. Rather than confining itself the text of the Rules[138] or the Advisory Committee Notes,[139] Moore maintained that the Court should reject textualism in favor of contextualism—a broader inquiry into the purposes and policy surrounding a Rule.[140] She also concluded that the Court should interpret the Rules dynamically, to establish legal norms and to preserve the Rules' flexibility.[141] Echoing Moore and Bauer, other scholars have similarly criticized "rules formalism"—a tendency of the Court to hide behind statutory interpretation of the Rules in order to deflect responsibility for its decision onto the rulemaking process rather than openly debating the relevant legal norms.[142] These criticisms were responses to the issue of the time—a perception that the Court was interpreting the Rules grudgingly in order to limit their usefulness as tools to solve important litigation problems.

More recently, in response to a different problem—namely, a perception that the Court is ignoring the Rules in favor of its own policy preferences—a handful of scholars have taken the opposite stance. In their view, the rulemaking structure con-

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137 Moore, *supra* note 5, at 1093.

138 *Id.* at 1084 (concluding that "it is not appropriate or adequate to focus exclusively on a plain meaning analysis, except in those rare cases in which the Rules text is unquestionably explicit with respect to the issue in question").

139 *Id.* at 1094.

140 *See id.* ("It is possible that the Court, in adopting a particular Rule, had a different view of purpose or policy that may or may not have been expressed publicly and that should be considered when interpreting a Rule."). This argument notably does not take into account that the members of the Court change over time and that there is no requirement that the Court maintain public (or private) records of its reasoning beyond what it transmits to Congress. *See* Struve, *supra* note 5, at 1154 (noting that "the extent to which a majority of the Court even considers the merits of a proposed Rule is unclear"). Documents memorializing the Court's rulemaking considerations might appear in a Justice's papers, but under current law such papers are the private property of the individual Justices. *See generally* Watts, *Judges*, *supra* note 120, at 1686 (arguing that the private ownership model of judicial papers should be abandoned).

141 *See* Moore, *supra* note 5, at 1094–95 ("Rules should be interpreted to reflect changed circumstances.").

142 *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 373 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 351 ("The retreat to rules formalism in both *Amchem* and *Ortiz* is unfortunate because it implies that the failure to resort to the formal processes of rule amendment is what doomed the proposed settlement class resolution of asbestos litigation.").

strains, rather than empowers, the Court,[143] and therefore rulemaking, rather than adjudication, should set procedural norms.[144] These scholars are part of an emerging trend in which scholars seek to constrain the Court's adjudicative power by analogizing the Court to an administrative agency.[145] While earlier scholars urged the Court to use its adjudicative power to set legal norms, the purpose of the agency analogy is to delegitimize the Court's managerial interpretive practices and to put significant limits on the Court's influence over the Rules.

Over a decade ago, Catherine Struve led the vanguard of the trend toward emphasizing the agency-like qualities of the Court as a rulemaker. To Struve, the 1988 amendments to the Enabling Act represent an institutional turning point: a clear signal that Congress intended to create a more transparent, accountable process for vetting the Federal Rules—one that significantly reduced the Court's adjudicative power over policy in favor of agency-like rulemaking.[146] Both formally and practically, Struve championed the transparency and public participation of the post-1988 rulemaking structure,[147] to the tendency of judges to interpret the Rules "in light of their intuitions or policy preferences."[148] Echoing that sentiment, David Marcus argues that the rulemaking committee's expertise and

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143 *See* Struve, *supra* note 5, at 1102.

144 *Id.* ("[A]lterations to the Rules should undergo the process specified in the Enabling Act, rather than taking effect through judicial fiat.").

145 *See, e.g.*, Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 687 (2014) (examining "the problem of managing litigation through an administrative law lens"); Mulligan & Staszewski, *supra* note 24, at 1194 ("[T]he Supreme Court functions much like an administrative agency when it makes law in the field of civil procedure."); Watts, *supra* note 121, at 6 (suggesting that "both certiorari and administrative law involve the same underlying concerns of accountability and reasoned decisionmaking").

146 *See* Struve, *supra* note 5, at 1105 (noting that the 1988 amendments manifest "a trend away from unilateral Supreme Court decision making and toward a process that includes multiple gatekeepers"); *see also* Marcus, *supra* note 5, at 933–34 ("The 1988 amendments to the Rules Enabling Act ensure that significant changes to the Federal Rules benefit from a multi-layered, open, and expert-driven process."); Mulligan & Staszewski, *supra* note 24, at 1200 (observing that "[t]he 1988 Act also increased representation and public participation in the rulemaking process").

147 Marcus, *supra* note 5, at 947 (stating that opportunity for public comment and practice of searching for consensus "strengthen the legitimacy of procedural rulemaking by a metric of deliberative democracy"); Struve, *supra* note 5, at 1110 (noting that the Advisory Committee's composition "ensures that at least some practitioners, as well as a number of judges, will be involved in the rulemaking process"); *id.* at 1125 (arguing that delegation to the judiciary "privileges the decisions of a less politically accountable branch").

148 Struve, *supra* note 5, at 1137–38; *see also* Marcus, *supra* note 5, at 946.

access to public input render them far better suited than the Court to establishing litigation norms through Rules.[149]

In depicting the Court as an agency for purposes of rulemaking, Struve and others aim to severely limit the Court's power over the Rules, both as a rulemaker and as an adjudicator. In a traditional administrative agency, the head of the agency sets the agenda—a top-down process.[150] But in the Court-as-agency model, rulemaking is driven almost exclusively by the fourteen-member Advisory Committee at the very bottom rung of the administrative ladder.[151] The Court, in this view, is practically just another member of the public: "Though the Court, like other entities, can suggest changes for the rulemakers' consideration, it cannot promulgate such changes against the wishes of the other participants in the rulemaking process."[152] According to this view, the Court's only remaining power to influence the Rules is limited to suggesting changes and—at the outside—vetoing a proposed rule with which it disagrees.[153] Although not stated directly, Mulligan, Struve, and others appear to assume that the Advisory Committee's members—and therefore the rulemaking process—will be more proplaintiff than the five-Justice majority of the Court behind *Iqbal*, *Wal-Mart*, and other controversial decisions, and therefore will refrain from amending the Rules in ways similar to what the Court is doing through adjudication. While perhaps true in the past, this assumption will not necessarily hold true in the future, particularly in light of increased activism by con-

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149 *See* Marcus, *supra* note 5, at 944 (arguing that rulemaking committees have "procedural expertise that far outstrips that of the Court").

150 Mulligan & Staszewski, *supra* note 24, at 1205 n.98 ("[A]gency rulemaking is traditionally described as a top-down process." (citing William N. Eskridge, Jr., *Public Law from the Bottom Up*, 97 W. VA. L. REV. 141, 173–74 (1994))).

151 *See* Marcus, *supra* note 5, at 961 ("Although they have formal roles, the Judicial Conference, Supreme Court, and Congress act largely as rubber stamps in the rulemaking process.").

152 Struve, *supra* note 5, at 1129–30; *see also* Mulligan & Staszewski, *supra* note 24, at 1193 (arguing for "a presumption in favor of rulemaking for all civil rules issues that do not rest upon a question of statutory interpretation").

153 Struve, *supra* note 5, at 1127 (describing the Court's role as merely a "'conduit' from the rulemakers to Congress" and also noting that the Court's veto power under the REA "is not a mandate for subsequent revision"). Struve also acknowledges that the Court—like all courts—has inherent rulemaking power. *Id.* at 1131. But she argues that such amorphous power "should . . . be irrelevant to the Court's interpretation of a Rule." *Id.* See *infra* Subpart II.B for a further discussion of the impact of different forms of adjudicative power on the Court's role as interpreter of the Rules.

servative groups during the public comment period of the rulemaking process.[154]

In addition to narrowly defining the Court's rulemaking authority, Court-as-agency proponents propose tight restrictions on the Court's interpretive powers. For example, in order to give full effect to the intent of the rulemakers (by which she does not mean the Court), Struve insists that the Advisory Committee Notes should be binding on courts' interpretations of a Rule.[155] In a similar vein, Lumen Mulligan and Glen Staszewski argue that if the Court cannot resolve a Rules question by resort to traditional methods of statutory interpretation, or when resolution of a question depends on legislative facts, the Court should refrain from adjudication and instead refer the question to the rulemaking process.[156] Under this view, the Court's interpretive hands are largely tied.

3. *The Power of Ambiguity*

Each of the above narratives—especially when seen in contrast to the other—depicts a rather extreme view of the Court's power as a rulemaker and as an adjudicator. As such, neither narrative is wholly convincing. The Court-centric theory advanced by Bauer and Moore does not adequately account for Congress's purposeful expansion of the rulemaking structure

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154 Over one year ago, a conservative commentator urged interest groups to make public comments on the proposed amendments to the discovery rules. *See* Jon Kyl, *A Rare Chance to Lower Litigation Costs: A Federal Committee Wants to Hear Your Ideas on the Subject. Speak Up.*, WALL ST. J., Jan. 20, 2014, http://www.wsj.com/articles/SB10001424052702304049704579321003417505882 [http://perma.cc/3TCV-8EBW] (urging businesses to "provide the [Advisory] committee with meaningful comments explaining how the current discovery system needs to be improved"). As Patricia Moore argued last September, the proposed amendments to Rule 26(c) reflect those prodefense values. *See* Patricia W. Moore, *"Corporate and Defense Perspective" Prevails in the Proposed Step Toward Cost-Shifting in Rule 26(c)*, CIV. PROC. AND FED. CTS. BLOG (Sept. 11, 2014), http://lawprofessors.typepad.com/civpro/2014/09/corporate-and-defense-perspective-prevails-in-the-proposed-step-toward-cost-shifting-in-rule-26c.html [http://perma.cc/45X7-R8ZZ]; *see also* Patricia W. Moore, *Proposed Rule 37(e): Failure to Preserve Electronically Stored Information*, CIV. PROC. AND FED. CTS. BLOG (Sept. 12, 2014), http://lawprofessors.typepad.com/civpro/2014/09/proposed-rule-37e-failure-to-preserve-electronically-stored-information.html [http://perma.cc/A9J3-6JUY](arguing that the proposed amendments to the discovery rules "include all three top priorities of the defense-oriented 'Lawyers for Civil Justice,'" a group that Moore demonstrated in her Sept. 11, 2014 post is closely tied to the Federalist Society).

155 Struve, *supra* note 5, at 1152 (arguing that the Notes have "distinctive claims to authority"); *id.* at 1158 ("[T]he Notes in some ways resemble text more than legislative history."); *see also* Marcus, *supra* note 5, at 929 (arguing that "courts should defer to rulemaker expectations").

156 Mulligan & Staszewski, *supra* note 24, at 1215.

to include greater public input into judicial policymaking. It also places few, if any, constraints on the Court's interpretation of the Rules, leaving all such decisions within the discretion of the Court itself. This view makes very little distinction between the Court's Rules decisions and its inherent supervisory powers. One scholar has criticized the Court and other scholars for taking such supervisory powers for granted.[157] The same is true here. Neither Bauer nor Moore has a particularly complex justification for their conclusions. What they have is a slim but nevertheless persuasive tautology: the Court is the Court. The Court is powerful. Ergo it is powerful.

On the other hand, the Court-as-agency proponents go too far in their effort to enfeeble the Court vis-à-vis the Rules. Understandably frustrated with the Court's recent disruption of litigation norms, these proponents aim to limit the interpretive tools on which the Court can legitimately rely in Rules cases. In this sense, Struve and Mulligan downplay the inherent adjudicative power of the Court as head of the judicial branch. In the realm of the Rules, they aim to relegate the Court to a housekeeping role.[158] At the same time, the agency theory attempts to drastically minimize the Court's role in the rulemaking process. In so doing, these scholars fail sufficiently to account for the Court's delegated power under the Enabling Act, which they have in essence imagined away. They also put undue faith in the Advisory Committee which, despite receiving significant public input, is not as politically accountable or as responsive as they depict.[159]

Conversely, neither is the Court as path-marking in its Rules decisions as is often depicted: far from writing on a clean slate, it is engaged in a dialogue with lower courts, Congress,

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157 *See* Barrett, *supra* note 66, at 325 (observing that, without reflection, "[b]oth the Court and scholars . . . have assumed that the Court's assertions of supervisory authority are legitimate" exercises of "the inherent authority that every federal court possesses over procedure").

158 *See generally* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 926–32 (1990) (decoding and critiquing the law's use of "housekeeping," primarily as a way of labeling something as lesser or insignificant).

159 *See* Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 474 (2013) (The Committee is "[a] group capable of leadership on significant issues [that] has too often failed to lead."); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 434 (2003) (observing that "[t]he Federal Rules have not been immune to the complication, trivialization and ossification pathogens that have plagued earlier procedural systems"); *see also supra* notes 125–26 and accompanying text (describing the Advisory Committee's inertia in the face of the Court's stated dissatisfaction with pleading standards).

rulemakers, and the Bar. For example, although the Court's interpretation of Rule 8 in *Twombly* shocked commentators, the concept of raised pleading standards was hardly a new one. In addition to the Court's pointed request that the Advisory Committee consider revising Rule 8,[160] in practice many district courts were already modifying the *Conley* standard as they managed a wide variety of complex cases.[161] In response to these on-the-ground and from-the-top developments, the Committee had actually taken up proposals to heighten Rule 8's standards that very much resembled the path the Court took in *Twombly* and *Iqbal*. Unable to reach consensus on change, however, the Advisory Committee ultimately took no action.[162]

Finally, the Court-as-agency theory dramatically understates the Court's expertise, as well as its power, in setting policy through adjudication. Unlike agency heads or lower courts, the Court has control over its docket. The essence of certiorari is that the Court will select for review those few cases that involve important, unresolved questions—questions that inevitably have policy implications.[163] Moreover, it is unclear whether the Court would feel any degree of constraint from a suggestion that it must either use traditional statutory interpretation tools or route a Rules interpretation question through the rulemaking process. In the words of Thomas Merrill, even if a federal statute "limits lawmaking by federal courts, it does not necessarily follow that it prohibits all forms of textual *interpretation*."[164] In any case, if the Court wished to interpret a Rule through adjudication, it could simply squeeze its policy views through the lens of statutory interpretation.[165] Short of

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160 *See supra* note 124 and accompanying text.

161 Hoffman, *supra* note 125, at 1508–09 (describing comments of Judge Lee Rosenthal, chair of the Civil Rules Advisory Committee, stating that "lower courts have appeared to continue to insist on heightened pleading in some cases, notwithstanding the Supreme Court's express directives to the contrary").

162 *See id.* at 1487–88 ("Having repeatedly declined over the years to alter the existing pleading rules, rulemakers suddenly faced a remarkable turn of events starting in the summer of 2007 when the Court appeared to rewrite the rules along lines very similar to those that rulemakers had consistently declined to follow in the past.").

163 *See* Watts, *supra* note 121, at 14–15 (observing that the Court's "extreme selectivity means that, in many ways, the process of 'deciding to decide' is just as important as the Court's decisions on the merits of cases, if not even more important").

164 Merrill, *supra* note 131, at 31.

165 For an example of this technique, see Justice Rehnquist's opinion for the Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which significantly shifted summary judgment norms under the guise of a plain-language interpretation of Rule 56.

congressional intervention, it is difficult to see who, other than the Court itself, would police that line.[166]

Yet notwithstanding weaknesses in these competing visions of the relationship of the Court to the Rules, both visions—of the Court as adjudicator-in-chief on one hand, and as a rung on the technocratic ladder on the other—also capture essential truths. Together, they reveal the strangely conflicted position the Court occupies as it straddles its dual responsibilities. These scholarly theses also reveal the Court's lack of transparency and self-reflection about its two roles. What is interesting about Rules interpretation isn't the controversy surrounding the debate, but the relative paucity of debate. Paradoxically, however, because both of these views have significant elements of truth—and because neither view alone offers an airtight normative explanation of how the Court should operate in Rules cases—the Court in effect subscribes to both visions without attempting to reconcile them. When it wants to declaim interpretive power, the Court interprets the Rules narrowly using traditional statutory interpretation tools, and urges dissatisfied parties to seek recourse through rulemaking. But when it is frustrated with the rulemaking process or otherwise wants to recalibrate litigation norms, the Court toggles seamlessly into the other paradigm—the paradigm of broad, almost unbounded, common-law power. There is an inborn tension in the Court's de jure and de facto relationship to the Rules. Consciously or not, the Court exploits the vast interpretive space opened up by that tension.

B. Linguistic

The second fault line creating pressure on the interpretation of the Federal Rules is the Rules themselves. Since their origin in 1938, the Rules have remained preternaturally resilient against a background of enormous upheaval in the law, including the explosion of federal civil rights statutes and state tort law in the 1960s that together spurred wild innovation in complex litigation, the flood of asbestos litigation in the 1980s and 1990s, and the ongoing technological transformation of discovery and other litigation practices. They are a combination of high culture and low culture, of law and equity. Some Rules, like Rule 23 and Rule 26, reshape the range of possibilities that lawyers and courts can imagine. Others, like Rule 6,

166 *See* Merrill, *supra* note 131, at 20 (noting the Framers' intent that "the principal barrier" to judicial overreaching be "self-restraint").

serve more clerical functions.[167] Through it all, the Rules have gone far toward being all things to all litigants over a period of decades, often without any significant interpretive guidance from the Supreme Court at all.[168]

But the very malleability of the Rules undermines any effort to put forth a unitary theory of interpretation. The abstract, Panglossian aspirations of Rule 1—arguably the most important (though underappreciated) canon of Rules interpretation—frustrate any simplistic methodology for construing the Rules. Compounding Rule 1's ambiguity, many of the Rules intentionally rely upon nonliteral—almost poetic—language to give life to the need for judicial discretion in Rules interpretation, especially in those Rules with equitable roots. These deliberate linguistic ambiguities in the Rules, intended to increase their adaptability to ever-changing conditions, simultaneously increase the range of possible and appropriate interpretive methodologies. The Rules are limber; that very limberness fuels the Court's interpretive independence.

1. *The Mixed Signals of Rule 1*

Rule 1, which instructs that the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding,"[169] has been described as the "master Rule."[170] According to Professor Robert Bone, Rule 1 "affects how all the other Rules are interpreted and applied."[171] A major treatise on civil procedure concurs, referring to Rule 1 as "the most important rule of all."[172] Recently Harold Koh used Rule 1's language as a framing lens through which to ask big questions about whether the federal courts are meeting its vision of a fair and reasonable litigation system.[173] With its abstract language and focus on justice, Rule 1 admirably serves this rhetorical purpose.

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167 FED. R. CIV. P. 6.

168 For example, the Court has never given significant consideration to the following Rules: 2, 4.1, 5, 5.1, 5.2, 7.1, 7, 18, 20, 21, 22, 23.2, 25, 27, 29, 30, 31, 32, 36, 40, 44, 44.1, 47, 62, 62.1, 63, 64, 66, 67, 70, 71, 72, 75, 77, 78, 80, 84, 85, and 86.

169 FED. R. CIV. P. 1.

170 Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 288 (2010).

171 *Id.*

172 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROC. § 1101, at 60 (3d ed. 2002).

173 *See* Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525 (2014).

When it comes to its impact on interpretation of the Rules, however, Rule 1 sends murky, distinctly mixed, signals—if indeed it sends any signals at all.[174] Rule 1 was conceived of by its drafters as a statement of interpretive methodology, the goal of which was to prevent technicality and formalism from preventing disputes from being resolved on their merits.[175] In this sense, Rule 1 functions as the Rules equivalent of an agency's regulatory preamble—a statement of basis and purpose.[176] However, the interpretive power of Rule 1 has either disappeared from consideration by courts as an interpretive tool, or else—over the past few decades—it has been recast to justify restrictive, rather than flexible, Rules interpretations in the name of cost-savings and systemic efficiency.[177] What remains, then, is a malleable set of principles that can support a Court's statutory interpretation of a Rule, but that simultaneously provides textual support within the Rules themselves for the Court's managerial Rules interpretations. In other words, to the extent that Rule 1's interpretive guidance is considered a source of interpretive influence at all, it can help to justify both of the Roberts Court's reigning, and seemingly contradictory, interpretive paradigms.

To be influential, however, a Rule must be recognized, and Rule 1's defining trait might be anonymity, at least in any sense beyond its somewhat common use as a rhetorical maxim.[178] To take one obvious example, most major civil procedure texts and treatises either omit Rule 1 entirely, refer to only the first

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174 Bone, *supra* note 170, at 288 (describing Rule 1 as seeming "at best hopelessly vague and at worst downright misleading").

175 *See id.* at 293 ("An optimal system was constructed around the core elements of adversarial process freed from code and common law technicalities and designed to . . . manage litigation toward just decisions on the merits."). The language of Rule 1 seems first to have appeared in a 1917 bill reported by Senator Sutherland, which charged the Court, when making Rules, to have "regard to the simplification of the system of pleading, practice, and procedure in said courts, so as to promote the speedy determination of litigation on the merits." Stephen B.Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1067 (1982) (quoting S. 4551, 64th Cong., 1st Sess. (1916), *reprinted in* S REP. NO. 892, 64th Cong., 2d Sess. 1 (1917)).

176 *See* Stack, *supra* note 6, at 360–61 (noting that, unlike statutes, regulations must contain a statement of purpose, and arguing that this requirement supports a purposive form of regulatory interpretation).

177 *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (justifying heightened pleading standards as necessary "to avoid the potentially enormous expense of discovery in cases"); *see also supra* note 77 and accompanying text (same rationale applies in *Iqbal*, in order to relieve government officials of burdens of litigation).

178 *See, e.g.*, Joanna C. Schwartz, *Gateways and Pathways in Civil Procedure*, 60 UCLA L. REV. 1652, 1654 (2013) (quoting Rule 1's language as a rhetorical device rather than an interpretive tool).

sentence of the Rule—which is unrelated to interpretation[179]—or, at most, contain an oblique embedded reference to Rule 1's purposive language in the context of analyzing a different Rule.[180] This lack of attention to Rule 1 in textbooks indicates that law students (i.e., future lawyers and judges) likely do not connect Rule 1's purposive statement to a methodology of Rules interpretation. In parallel with—or as an outgrowth of—this lack of pedagogical attention, Rule 1 does not appear to be influential among the few scholars who have sought to develop interpretive methodologies for the Rules.[181] In general, Rule 1 has drawn minimal scholarly attention.[182]

Rule 1's lack of influence on Rule interpretation may in part reflect the modern frustration with the concept of purpose as an interpretive force in the interpretation of statutes. With various forms of textualism currently ascendant in the Supreme Court, Hart and Sacks's purposivism has waned in theoretical influence, given the view of many that it is incompatible with the dominant view that the Court acts as Congress' "faithful agent" when it interprets statutes.[183] The faithful agent metaphor is less appropriate in the context of the Rules—where the Court and Congress share power—but the conflation of Rules with statutes carries the faithful agent baggage into the realm of the Rules. Perhaps reflecting this, Catherine Struve's

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179 *See* FED. R. CIV. P. 1 (2010) ("These rules govern the procedure in all civil actions and proceedings.").

180 *See, e.g.*, GEOFFREY C. HAZARD, JR., COLIN C. TAIT, WILLIAM A. FLETCHER & STEPHEN MCG. BUNDY, PLEADING AND PROCEDURE 504, 696 (10th ed. 2010) (one citation to the first sentence, one embedded citation in the context of discussing Rule 15); ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION (4th ed. 2012) (no citation); STEPHEN C. YEAZELL, CIVIL PROCEDURE 306, 614 (8th ed. 2012) (citing Rule 1 only for the proposition that the Rules join law and equity); RICHARD D. FREER, CIVIL PROCEDURE 5 (3d ed. 2012) (one reference to Rule 1).

181 *See* Marcus, *supra* note 5 (no reference to Rule 1); Moore, *supra* note 5 at 1096 (arguing without analysis that Rule 1 should inform courts' Rules interpretations). *But see* Bauer, *supra* note 5 (only a passing reference to Rule 1).

182 Only a smattering of scholarly articles squarely address Rule 1, and even these are generally aimed at using the Rule to promote cost savings, rather than as a canon of interpretation. *See generally* Bone, *supra* note 170, at 287–88 (describing the history and possible reforms to Rule 1); Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 2 (2011) (arguing for Rule 1 as a tool to limit discovery abuses); Rebecca Love Kourlis & Jordan M. Singer, *Managing Toward the Goals of Rule 1*, 4 FED. CTS. L. REV. 1, 8–13 (2010) (arguing for changes to pretrial schedules and discovery limits to help judicial case management achieve efficiency goals of Rule 1).

183 *See* Stack, *supra* note 6, at 421 (explaining that, "[a]t least as a theory of judicial statutory interpretation, purposivism has been in retreat in the face of textualist critiques"); Manning, *supra* note 66, at 18 (noting the "root of the textualist position is . . . [the] faithful agent theory").

article on Rules interpretation dismisses Rule 1 in a footnote as too vague to be of value.[184]

Courts, too, have given relatively little attention to Rule 1. In the first decades after its promulgation, courts sometimes relied on the Rule to mitigate the harsh effects of technical defects or "to excuse strict compliance with the Federal Rules when there was no significant prejudice to any party's substantive right."[185] But that use of Rule 1 lost, rather than gained, momentum over time. As a Rules-based canon of interpretation, Rule 1 fell later almost into desuetude. While district courts appear to be citing Rule 1 in increasing numbers of late,[186] the Supreme Court has given the Rule only a desultory glance: although occasionally the Court refers to Rule 1 as a command to interpret the Rules in order to achieve procedural due process, in practice the Court's rare references to Rule 1 tend to be rhetorical rather than constructive.[187]

Finally, to the extent that Rule 1 *is* used by courts—including the Supreme Court—as an interpretive tool, its message is distinctly mixed. In fact, due to significant cultural and semantic drift over the past fifty years, the modern incarnation of Rule 1 in key respects means almost the opposite of its originally intended meaning. The drafters intended for Rule 1 to embody the spirit of nontechnicality and flexibility of procedural due process, in reaction against the perceived inefficiency and injustice of the earlier, hypertechnical requirements such as code pleading.[188] The drafters' goal was to move disputes toward resolution at trial.[189] Seventy-five years later, however, in light of a drastically-changed litigation landscape, the drafters' focus on individual litigants and on resolving disputes on

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184 *See* Struve, *supra* note 5, at n.177 (expressing skepticism that Rule 1 would solve any problems).

185 Bone, *supra* note 170, at 293–94 (also noting that courts so interpreting Rule 1 tended not to focus on particular language in the Rule, but rather to treat it as a gestalt message in favor of liberal procedure).

186 *See* Cabraser & Lehe, *supra* note 182, at 4 (asserting, based on an empirical analysis of Rule 1 citations, that the Rule "has finally been discovered as a working component of the Federal Rules").

187 *See, e.g.*, Schiavone v. Fortune, 477 U.S. 21, 27 (1986) (rejecting petitioner's claims under Rule 15 "[d]espite [Rule 1's] . . . loftily stated purposes").

188 *See* Bone, *supra* note 170, at 293 (stating that Rule drafters believed "[a]n optimal system was constructed around the core elements of adversarial process freed from code and common law technicalities and designed to ferret out facts and evidence and manage litigation toward just decisions on the merits").

189 *See* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1715 (2012) (explaining that the Rules were originally "designed to achieve a fundamental goal: to facilitate the resolution of cases on their merits").

the merits—ideally at trial—now seems almost quaint.[190] In federal courts trial has become a vanishing (although increasingly expensive) art—more of a cultural trope than a practical reality; and the rise of the managerial judging paradigm together with the new preeminence of settlement and arbitration have further eroded the adversarial, trial-driven system.[191]

As Maria Glover has emphasized, the Federal Rules—still infused with a now-hypothetical goal of resolving disputes on their merits—are not uniformly effective in the new world of settlement and aggregation.[192] At a minimum, courts and litigants have been forced to adapt their use of the Rules, using old weapons to fight new battles.[193] This is not the equivalent of using cavalry against tanks. Winter is not coming. Nevertheless, because the fit is no longer perfect, the Rules have evolved to meet changing litigation norms.

Rule 1 is no exception. Rule 1's text as well as its interpretive force evolved in tandem with this cultural shift. Textually, in 1993, the Rule was amended to include the words "and administered" after "construed," to "highlight the importance of reducing cost and delay and to emphasize the value of active case management."[194] In terms of interpretation, language that originally conveyed a sense of fairness to individual litigants now instead conveys the concepts of Pareto-optimality and systemic efficiency that have permeated modern legal culture.[195] In other words, Rule 1 now may embody values of efficiency rather than justice. And where Rule 1 formerly inspired interpretive liberality, some modern courts now cite the same text as support for a strict construction of the rules; the need to comply rigidly with Rule requirements is seen as essen-

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190 *See id.* at 1717 (examining "the maladaptiveness of the Federal Rules to a world of settlement").

191 *See id.* at 1720 (describing federal civil trials as a "rarity"); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1955 (2009) (stating that, in 2005, approximately 1.3% of federal civil cases reached trial); *see also* Civil Justice Reform Act, 28 U.S.C. §§ 471, 482 (2012) (mandating that courts promulgate an expense and delay reduction plan).

192 *See* Glover, *supra* note 189, at 1717 (arguing that "pretrial procedural mechanisms, designed largely as 'way-stations' on the road to trial, fail to promote and at times hinder meaningful merits-based settlement terms").

193 *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 34–36 (2010) (describing how *Twombly* has ushered in "a new model of civil procedure").

194 Bone, *supra* note 170, at 298 (citing FED. R. CIV. P. 1 Advisory Committee Notes to 1993 amendment).

195 *See* Bone, *supra* note 170, at 297 (noting that "there has been a noticeable shift over the past thirty years toward use of Rule 1 to support stricter interpretations of the Federal Rules").

tial to making dispute resolution "speedy," and "inexpensive," criteria that now seem synonymous with "just."[196]

This shift is reflected in some of the justices' rare references to Rule 1. For example, Justice Scalia's concurrence in *Torres v. Oakland Scavenger Company* captures the semantic recalibration:

> The principle that "mere technicalities" should not stand in the way of deciding a case on the merits is more a prescription for ignoring the Federal Rules than a useful guide to their construction and application. By definition all rules of procedure are technicalities; sanction for failure to comply with them always prevents the court from deciding where justice lies in the particular case, on the theory that securing a fair and orderly process enables more justice to be done in the totality of cases.[197]

To Justice Scalia, Rule 1 essentially provides no interpretive insight at all, except as a general exhortation to keep the trains running on time.[198]

Rule 1 continues to evolve today. In light of the provision's weakness and ambiguity, Professor Bone has suggested rewriting the text of the Rule to reemphasize fairness to the parties rather than more abstract questions of "system-wide effects."[199] But the Advisory Committee seems to have gone in a different direction, based on amendments to Rule 1 that are currently awaiting comment from the Supreme Court. Rather than emphasizing the interpretive force of the Rule, the proposed modification instead expands on the concepts of administration and cost-minimization by inserting additional

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196 *See* Cabraser & Lehe, *supra* note 182, at 5–14 (describing lower courts' use of Rule 1 to contain ballooning discovery costs).

197 Torres v. Oakland Scavenger Co., 487 U.S. 312, 319 (1988) (Scalia, J., concurring); *see also* Herbert v. Lando, 441 U.S. 153, 176 (1979) (invoking Rule 1 in support of strict compliance with Rule 26 to prevent "mushrooming litigation costs").

198 *See Torres*, 487 U.S. at 318 (Scalia, J., concurring) ("It seems to me . . . that we should seek to interpret the rules neither liberally nor stingily, but only, as best we can, according to their apparent intent. Where that intent is to provide leeway, a permissive construction is the right one; where it is to be strict, a permissive construction is wrong. Thus, the very first of the Rules of Civil Procedure does not prescribe that they are to be 'liberally construed,' but rather that they are to be 'construed to secure the just, speedy, and inexpensive determination of every action.'" (quoting FED. R. CIV. P. 1)).

199 Bone, *supra* note 170, at 300 (proposing a revised Rule that reads: "[The Rules] shall be construed and administered to distribute the risk of outcome error fairly and efficiently with due regard for party participation appropriate to the case, due process and other constitutional constraints, and practical limitations on a judge's ability to predict consequences accurately and assess system-wide effects").

language making it explicit that the parties should use the Rules to advance litigation efficiencies. The proposed Rule 1 states that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination" of disputes.[200] These modifications are unquestionably aimed at lowering litigation costs, and they also seem potentially designed to level the playing field between plaintiffs and defendants (by, for example, preventing wealthy corporate defendants from deliberately draining plaintiffs' resources through unending discovery and other similar tactics).[201] Simultaneously, however, the proposed revisions further minimize the interpretive force of Rule 1, further constraining it to a cost-savings role that is either distant from interpretive purpose or that may potentially serve as a tool for stricter, more rigid Rules interpretations in the name of efficiency.

The combined effect of the weak influence of Rule 1 as an interpretive guide to courts, its shift in meaning toward cost-savings and systemic efficiency over the last several decades, and the revisions aimed at deepening that efficiency focus is to reduce the purposive force of Rule 1. Nevertheless, because of its indeterminacy, particularly in the context of its recently increased association with efficiency, Rule 1 provides an internal, text-based anchor for the Roberts Court's managerial Rules interpretation. If the Court wishes to focus on systemic efficiency, Rule 1's "speedy and efficient" language provides support for that. If, instead, it chooses to interpret the Rules in an atextualist manner, the Rule might also provide support for that: after all, one person's justice is another's litigation loss.

2. *The Poetry of Equity*

Rule 1 is only one of the mysterious interpretive byways of the Federal Rules. There is a poetry—an irreducible opacity—to many of the Rules, permeated as they are with the indeterminate, open-ended philosophy of equity.[202] Rules such as

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200 Proposed Amendment to FED. R. CIV P. 1, as stated in a letter to Judge Jeffrey Sutton, Chair, Standing Comm. on Rules of Practice and Procedure from Judge David G. Campbell, Chair, Advisory Comm. on Federal Rules of Civil Procedure (June 14, 2014) (underlined text in original to show revised text).

201 *See* Cabraser & Lehe, *supra* note 182, at 15 (documenting "the strategy of attrition via discovery abuse" in tobacco litigation and more generally). Cabraser, a member of the Advisory Committee, charges litigants and courts "to enforce, in particular, Rule 1 as our daily practice." *Id.* at 42.

202 *See* Subrin, *supra* note 86, at 922 ("The underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law.").

those governing joinder and class actions, or even the impenetrable simplicity of Rule 12(b)(6)[203] or Rule 60(b)(5),[204] use every-day language to press the boundaries of legal interpretation, just as poetry simultaneously expands and undermines our unexamined beliefs about prose. Frequently the question at the heart of these poetic Rules is the same as the unanswerable, eternally attractive question at the heart of another legal poem, Justice Cardozo's opinion in *Palsgraf*.[205] Like the court in *Palsgraf*, the Rules governing joinder or class certification must answer questions of degree and relativity: how unrelated is too unrelated? How unwieldy is too unwieldy? How much—of whatever is at stake—is too much?

In *Palsgraf*, Cardozo answered with his own theory of relativity, in the form of a two-page poem. Stripping away factual clutter, Cardozo placed the plaintiff (whom he stripped of all characteristics beyond gender) on what seems like a barren, postmodern way-station rather than a bustling train platform. In a series of short, almost disconnected, sentences, Cardozo used language to doom the plaintiff's claim, foreshadowing a holding of disconnection and distance.[206] In dissent, Judge Andrews interpreted the same case record but found connection instead of detachment, proximity instead of isolation.[207] And therein lies the most famous *koan* of the common law.[208]

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203 FED. R. CIV. P. 12(b) (stating that "a party may assert the following defense[ ] by motion: . . . (6) failure to state a claim upon which relief can be granted").

204 FED. R. CIV. P. 60(b) ("On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding [if] . . . (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable").

205 Palsgraf v. Long Island R. Co., 162 N.E. 99 (1928).

206 *Id.* at 99 ("Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it.").

207 *See id.* at 101–05 ("There was no remoteness in time, little in space. And surely, given such an explosion as here, it needed no great foresight to predict that the natural result would be to injure one on the platform at no greater distance from its scene than was the plaintiff.").

208 *Koan* is a Japanese word (originally derived from the Chinese *kung-an*) meaning "a paradox to be meditated upon that is used to train Zen Buddhist monks to abandon ultimate dependence on reason and to force them into gaining sudden intuitive enlightenment." *Koan*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004). The poetic equivalent in constitutional jurisprudence is the command in *Brown v. Board of Education II* ordering schools to desegregate with "all deliberate speed." Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 301 (1955); *see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 253–54 (1986) (1962) (noting that the phrase "resembles poetry and resembles equity techniques of discretionary accommodation between principle and expediency").

Meanwhile, in the realm of procedure, analogs include such recurring phrases such as "transaction or occurrence," "common question of law or fact," and "genuine material fact," all of which use simple yet undefinable language to pose the questions of relation, connection, and legal obligation.[209] Although these equitable Rules might not invite simple—or even consistent[210]—answers, the questions are part of what unite our profession. These are the words to the chorus of the song of procedure, and we can sing along with them even without quite knowing what we are saying.

When the Rules' drafters tied the poetry of equity practice to the prose of the law, they invited the case-specific, innately discretionary spirit of equity into the interpretation of many of the Rules.[211] After all, historically the powers of equity "were as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex relations could demand."[212] The ancient common-law theory of "the equity of the statute" is another way to justify this flexible, purpose-driven form of interpretation. That theory posits that inherent judicial power—the power "to say what the law is"—historically encompassed an equitable power to refashion statutes to accomplish their purpose.[213] John Manning has argued that such purposivism is incompatible with the theory that the Court acts as Congress's "faithful agent" when it interprets statutes.[214] Whatever the merits of that argument, once the Rules come out from the shadow of statutes, the faithful agent metaphor loses its force. Unconstrained by that "faithful agent" mentality, and in view of Rule 1, the "equity of the stat-

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209 *See, e.g.*, FED. R. CIV. P. 20 (permissive joinder for claims "arising out of the same transaction, occurrence, or series of transactions or occurrences" where the parties allege "any question of law or fact common to" all plaintiffs or all defendants); FED. R. CIV. P. 23(a) (to qualify as a class, there must be "questions of law or fact common to the class"); FED. R. CIV. P. 56(a) (summary judgment appropriate if "the movant shows that there is no genuine dispute as to any material fact").

210 *See* Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012) (arguing that consistency in interpretation across the joinder rules does disservice to the varying purposes of each of those Rules).

211 *See id.* at 773 (noting that joinder Rules "are meant to be highly flexible and context specific, yet simultaneously demand an elusive base line of commonality"); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1970 (2007) (arguing "the Federal Rules license discretion . . . by incorporating vague language inviting case-specific discretion").

212 Main, *supra* note 159, at 434.

213 Manning, *supra* note 66, at 7.

214 *Id.* at 10 (noting that proponents of "equity of the statute" reject the "faithful agent" theory as "an ahistorical and unjustifiable conception of the judicial power").

ute" may more accurately be described as "the equity of the Rule."

At least in theory, however, such equitable power—whatever its source—is primarily intended to belong to the trial judge, who by virtue of her close relationship to the case is in a better position than appellate courts to grasp the facts and the relationship between parties.[215] Some scholars have questioned whether district court judges have the significant institutional competence that such discretion presumes.[216] Whatever the limits of that competence, the Supreme Court suffers the same limitations to a greater degree, due to their detached consideration of a cold record. Inevitably, however, the same capacious language that gives district courts license to creatively manage cases also gives the Court freedom to write opinions that hover above—rather than being constrained by—the Rules' text. But there are inevitable differences in the way these different courts will use that freedom. In contrast to trial court judges, whose primary consideration is the competing positions of the parties to a dispute, the Court is in a much broader dialogue with a range of competing stakeholders, including rulemakers, Congress, perhaps the United States as amicus, the plaintiffs' and defense bars—and only then, almost as an afterthought, the parties.

Notably, there is no connection between the poetic language of a Rule and the rhetorical or aesthetic power of the Court's decisions interpreting that Rule. To the contrary, the poetry of equity has led to several distinctly unpoetic decisions by the Roberts Court. The quirky simplicity of Rule 8 is obliterated by the unwieldy, turgid opinions in *Twombly* and *Iqbal*.[217] Indeed, it is only the Court's recent retreat to statutory interpretation of Rule 8 in its *City of Shelby* per curiam written by Justice Ginsburg that evokes the compact meaningfulness of poetic language.[218] Justice Ginsburg may accurately be described as the poetic Justice. Her trademark disciplined, preternaturally precise language has a slightly unconventional meter for prose; her judicial voice simultaneously defines the

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215 *See* Bone, *supra* note 211, at 1967–69 (explaining that "critical normative judgments are left for the trial judge to make in individual cases").

216 *See id.* at 1986–2001 (arguing that bounded rationality, insufficient access to information, and the strategic role of the modern judge together limit the efficacy of judicial discretion in Rule implementation).

217 *See* Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 645–46 (2011) (summarizing commentators' views of *Twombly* and *Iqbal* as "inscrutable" and "cryptic").

218 Johnson v. City of Shelby, 135 S. Ct. 346 (2014).

law and asks serious readers of her opinions to self-consciously celebrate the written word.[219]

Also notable, the Roberts Court has not tempered the interpretive freedom the Rules' abstract language affords with respect for the abuse-of-discretion standard of review or the canon of judicial minimalism.[220] The Roberts Court has sidestepped those obstacles with the nimbleness of a matador. For example, in *Wal-Mart*—a case whose very raison d'etre is the idea that courts cannot question discretionary decisions[221]—the majority opinion does not even mention the abuse-of-discretion standard of review; nor does it justify its decision to lead with its 23(a)(2) commonality analysis, the entirety of which was arguably unnecessary for the Court to decide given the unanimous rejection of class certification under (b)(2).[222] Similarly, in *Republic of Philippines v. Pimentel*, the Court breezily evades the standard of review of a Rule 19 "indispensable party" analysis, which should almost certainly have been abuse of discretion: "Whatever the appropriate standard of review," it holds, "*a point we need not decide*, the judgment could not stand."[223] These opinions make clear that, at least for the Roberts Court, once it has granted review of a procedural case,

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219 Justice Ginsburg has often stated her dream of being an artist—an opera diva, however, rather than a poet. *See, e.g.*, Paige Lavender, *Ruth Bader Ginsburg: "In My Dreams, I Can Be a Great Diva,"* HUFFINGTON POST (July 31, 2013, 10:57 AM), http://www.huffingtonpost.com/2013/07/31/ruth-bader-ginsburg-diva_n_3682452.html [http://perma.cc/M88S-7G5S].

220 *See infra* Part III for discussion of how renewed respect for these traditions is an essential aspect of a functional interpretive methodology for the Federal Rules.

221 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553 (2011) ("The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.").

222 *See generally Wal-Mart*, 131 S. Ct. 2541 (2011) (failing to provide in the majority opinion either an abuse of discretion standard of review and a justification of its 23(a)(2) commonality analysis). Justice Ginsburg's dissent, in contrast, does cite the standard of review, and concludes that no such abuse of discretion occurred. *See id.* at 2562 (Ginsburg, J., dissenting in part) ("Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality."); *id.* at 2564 (characterizing the district court's commonality analysis as "hardly infirm").

223 553 U.S. 851, 864 (2008) (emphasis added). In *Horne v. Flores*, to take another example, the Court subtly rephrases the standard of review, stating that once a party has met its burden of establishing changed circumstances warranting relief under Rule 60(b)(5), a court abuses its discretion if it fails to provide such 60(b)(5) relief. 557 U.S. 433, 447 (2009). But the courts below in *Horne* had specifically not found that changed circumstances warranted relief. *Id.* at 443–44. It is the Court that reinterprets the facts to find that the state has met its burden, after which a finding of abuse of discretion was inevitable. *Id.* at 450–51. *See infra* Part III for a discussion of the Court's blurring in *Horne* of the distinction between fact and law.

it will put its own—de novo—imprimatur upon it, the stamp of the managerial court.

In light of this blank-slate approach, the Court's managerial interpretations of the Rules embody the freedom and spirit of discretion—the "equity of the Rule." And to some degree, that spirit is a deliberate part of the design of the Rules: Put simply, the drafters "recognized that the system they were creating lacked restraint."[224] The question is whether that flexibility was intended to apply equally to lower court and Supreme Court interpretations. As of now, the Roberts Court's position seems to be that it does. Just as trial courts are intended to do, the Court balances the factual and procedural factors it perceives as relevant and it considers the likely preferences of a variety of different, and perhaps conflicting, stakeholders. But when a district court does this, it typically addresses a single case or at most a set of cases. In contrast, when the Supreme Court employs similar interpretive liberality, it sets (and potentially disrupts) nationwide legal norms.

C. Epistemological

The final fault line in Rules interpretation is abstract, yet familiar: the recurring and unresolvable tensions between substance and procedure, between the goal of the Rules to be trans-substantive and the inherent need to interpret those Rules in the context of highly variable individual cases.[225]

1. *Procedure v. Substance*

The first of these tensions—the interrelationship between substance and procedure—may be described in complex legal terms,[226] or it may be described to a ten-year-old sports fan by reference to one of any number of football- or baseball-related controversies where a change in rules is literally game chang-

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224 *See* Subrin, *supra* note 86, at 975.

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

226 *See, e.g.*, Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 106 (2011) ("blurring of the substance-procedure dichotomy [is] inappropriate" and "based on a misguided aspiration to accommodate state substantive policies at the expense of federal procedure"); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 784 (2006) (arguing that constitutional criminal procedural protections have had unintended negative substantive consequences); Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 881 (2011) ("rules of procedure inevitably change the value of substantive entitlements and claims").

ing.[227] For a variety of reasons, the Rules' drafters subscribed to a clear, almost scientific delineation between the two categories,[228] a belief embodied in the Enabling Act's prohibition against abridging, enlarging or modifying "any substantive right."[229] The Court's early Rules decisions confirmed this somewhat artificial dichotomy.[230] However, in part under pressure from *Erie*'s requirement that federal courts apply state substantive law in diversity cases,[231] and in part from a recognition that procedure and substance are never entirely distinguishable,[232] the division between procedure and substance has substantially eroded. This blurring has led to metaphysical hand-wringing among scholars.[233] While some have argued that the procedure-substance divide is a harmful fiction, others maintain that the distinction is—if not perfect—at least serviceable: it provides doctrinal and analytic clarity, and it promotes the predictable functioning of the litigation system.[234]

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227 *See generally* Dustin E. Buehler & Steve P. Calandrillo, *Baseball's Moral Hazard: Law, Economics, and the Designated Hitter Rule*, 90 B.U. L. REV. 2083 (2010) (analyzing the effects on game strategy of the designated-hitter rule in baseball, according to which American League teams, unlike their National League counterparts, can designate a player to hit in place of the pitcher); *see also* Warren Sharp, *Dropped Balls: The Patriots Became Nearly Fumble-Proof After a 2006 Rule Change Backed By Tom Brady*, SLATE (Jan. 26, 2015, 5:42 PM), http://www.slate.com/articles/sports/sports_nut/2015/01/stats_show_the_new_england_patriots_became_nearly_fumble_proof_after_a_2006.html [http://perma.cc/D53X-U2UA] (not that we Seattleites are bitter).

228 *See* Subrin, *supra* note 86, at 929–31 (arguing that the emergence of legal treatises and standardized law school curricula, the integration of equity and law, and the separation of powers problems associated with increased legislative activity were factors that led the Rules' drafters to promote the concept of a unified, segregated procedural code).

229 28 U.S.C. § 2072(b) (2012).

230 *See* Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941) (upholding validity of Rule 35's medical examination requirement against an Enabling Act challenge and dismissing the idea that "in regulating procedure this court should not deal with important and substantial rights"); *see also* Hendricks, *supra* note 226, at 114 (noting that "*Hanna* implicitly recognized that the Federal Rules are federal laws like any other").

231 Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

232 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[the Rules] regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either").

233 *See* Redish & Amuluru, *supra* note 105, at 1314, 1320 (stating it as "beyond controversy today that many Federal Rules of Civil Procedure implicate substantial policy issues, often going to the core of modern political and ideological debates" and arguing that substance-procedure conflation casts constitutional doubt on the Enabling Act).

234 *See* Hendricks, *supra* note 226, at 107–08 (defending a "black-white approach" to the substance-procedure conundrum); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a*

The Roberts Court's two interpretive paradigms for interpreting the Rules correspond neatly to the two sides of this debate. The belief in a hermetically-sealed category of procedure illuminates many of the Roberts Court's statutory Rules decisions. In cases like *Krupski* and *Unitherm*, for example, the Court approaches the Rules as forms of positive law with firmly identifiable meaning.[235] The Court's managerial interpretation cases, by contrast, consistently challenge the premise of the substance-procedure divide.

Perhaps the clearest example of this philosophical dichotomy is the Roberts Court's recent *Erie* case, *Shady Grove*.[236] The resolution of *Erie* cases inevitably hits on a pressure point between (state) substantive law and (federal) procedural law.[237] Led by Justice Ginsburg, in a somewhat uncharacteristic departure from her predisposition toward statutory mode in Rules cases, some members of the Court have sought to develop an *Erie* framework that accommodates state law as much as possible within the confines of federal procedure.[238] Thus, in *Shady Grove*, Justice Ginsburg argued on behalf of four Justices that Rule 23's framework for class certification should not be construed as displacing a New York statute that would, if applicable, have prevented the plaintiff's underlying claims from being brought as a class action.[239] In so arguing, Justice Ginsburg did not focus on the text of Rule 23 or of the state law provision at issue. Instead she sought to fulfill what she believed to be the purpose of the state law by minimizing Rule 23's ambit.[240] Justice Ginsburg's pragmatic, policy-driven in-

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Halfway Decent Job in its Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963 (1998).

235 *See, e.g.*, *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 405–06 (2006) (requiring Court to look at plain text of Rule 50 to dictate outcome of case).

236 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

237 *Erie* requires that federal courts sitting in diversity jurisdiction apply federal procedural law but state substantive law (rather than federal common law). Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

238 *See Shady Grove*, 559 U.S. 393 (2010); Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

239 *Shady Grove*, 559 U.S. at 449 (Ginsburg, J., dissenting) ("The absence of an inevitable collision between Rule 23 and [the New York law] becomes evident once it is comprehended that a federal court sitting in diversity can accord due respect to both state and federal prescriptions.").

240 *Id.* at 402 (Scalia, J.) (noting that "[t]he dissent all but admits that the literal terms of [the New York law] address the same subject as Rule 23 . . . but insists the provision's *purpose* is to restrict only remedies" (emphasis in original)). In a lone, lengthy, and highly irritating concurrence, Justice Stevens appeared to

terpretation of Rule 23 in her *Shady Grove* dissent is quintessentially managerial. As one scholar put it, "the Court has thus embarked on a new phase of *Erie* doctrine, a phrase that replaces 'yes' or 'no' with 'Let's see what we can work out.'"[241]

Meanwhile, in a plurality opinion representing the views of another four Justices, Justice Scalia—despite often being on the vanguard of managerial interpretations of the Rules—retreated to the black-white version of the substance-procedure divide. Echoing the *Sibbach* shibboleth and avoiding citation to the "accommodation" strain of *Erie* precedents, he found that Rule 23 "really regulates procedure,"[242] and therefore "provides a one-size-fits-all formula for deciding the class-action question."[243] Justice Scalia's textual interpretation of Rule 23—which one scholar described as "especially deferential, even simplistic"[244]—places his opinion squarely in the statutory interpretation camp.[245]

2. *Trans-substantivity v. Specificity*

Related to the tension between procedure and substance, the Roberts Court's Rules interpretations also reflect a tug-of-war between the Platonic ideal of the Rules as trans-substantive[246] formulations impervious to the vagaries of substantive law, and the reality that the Rules—like the Wonder Twins—must take on different forms to actuate their powers appropriately to the need of the moment.[247]

Robert Cover is credited with putting a name to procedural trans-substantivity.[248] As Cover observed, we are "transfixed"

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concur with the reasoning of Justice Ginsburg, but in applying that reasoning he agreed with the conclusion reached by Justice Scalia's plurality. *Id.* at 416–24 (Stevens, J., concurring).

241 Hendricks, *supra* note 226, at 103.

242 *Shady Grove*, 559 U.S. at 411 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

243 *Id.* at 399.

244 Hendricks, *supra* note 226, at 123.

245 *Shady Grove*, 559 U.S. at 398–99 (resting interpretation on Rule 23's language stating that "[a] class action may be maintained" if the Rule's criteria are met).

246 *See* David Marcus, *The Past, Present, and Future of Trans-substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 372 (2010) (explaining that federal procedural rules are trans-substantive because they "apply equally to all areas of substantive legal doctrine" and arguing that this feature "reduces complexity" and engenders simplicity).

247 *Cf.* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 698 (1988) (describing the Justices as having "visions of uniformity dancing in their heads").

248 *See* Cover, *supra* note 225, at 718; *see also* Marcus, *supra* note 246, at 372 (acknowledging Cover's contribution in this regard).

with trans-substantivity.[249] Notwithstanding the importance of trans-substantive values in procedural law, Cover observed, "there are also demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law."[250] Since their promulgation, the overwhelming tenor of the Federal Rules has been trans-substantive;[251] in contrast, Congress's procedural enactments have frequently addressed targeted subject areas.[252]

When it comes to interpreting the Rules, the Roberts Court's decisions fluctuate significantly in their fidelity to a trans-substantive ideal. Just as the Roberts Court's divergent interpretive paradigms approach the substance-procedure conundrum from very different angles, the two modes of interpretation are imbued with contradictory views about the value of trans-substantivity. The Court's statutory interpretations of the Rules tend to adhere to the norm of trans-substantivity—or at least be very explicit about any departure from that norm—while its managerial decisions often seem to be deliberately unclear about whether they are limited to particular subject areas or have trans-substantive objectives.

The common-law methodology that seems to undergird the Court's managerial interpretations exacerbates this substance-specific tendency. Common-law decisions are responsive to evolving legal and social conditions: "As new cases arise within a given class, for example, vehicular accidents or communications among people forming contractual arrangements, they are initially decided on their facts, a case at a time."[253] General rules emerge after a period of maturation. Something very like this common-law process was at work in the Court's pleading decisions. As one commentator noted, it was initially unclear whether *Twombly*'s telecommunications-specific analysis was intended to apply outside that context, but the Court's decision

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249 Cover, *supra* note 225, at 718.

250 *Id.*

251 *See* Marcus, *supra* note 246, at 376 (stating that "[t]he vast majority of the Federal Rules are trans-substantive").

252 *See, e.g.*, Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012) (specifying removal procedures for class actions); Prison Litigation Reform Act, 42 U.S.C. § 1997e (1994 ed. & Supp. II); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 15 U.S.C. § 78u-4(b)(3)(D) (2012) (statutorily imposing stay of discovery in securities litigation pending ruling on a motion to dismiss).

253 *See* FREDERIC R. KELLOGG, OLIVER WENDELL HOLMES, JR., LEGAL THEORY, AND JUDICIAL RESTRAINT 28 (2007).

in *Iqbal* two years later served as a "trans[-]substantive exclamation point."[254]

The Court's class action cases are also instructive. In *Wal-Mart*, the majority uses its discussion of Rule 23(a)(2) to make strong—very detailed—pronouncements about the difficulty of proving Title VII discrimination in *any* suit against an employer when the employer's policies prioritize discretionary decision making against a stated background policy of nondiscrimination.[255] That presumption permeates the Court's commonality discussion, particularly its demand that the plaintiff class show "significant proof" of discriminatory policies or practices at the certification stage.[256] The result of this tight integration of procedure and substance is a high degree of analytic imprecision concerning the showing necessary for commonality outside of *Wal-Mart*'s particular Title VII context.

In contrast, the Rule 23(b)(2) analysis in *Wal-Mart* draws a clear line against using the (b)(2) class mechanism to seek monetary remedy—regardless of the substantive law under which a class might seek that remedy.[257] In that same vein, despite explicitly acknowledging that the case "involves the interaction between federal securities-fraud laws and Rule 23's requirements for class certification,"[258] the majority opinion in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds* preserves Rule 23's trans-substantivity. *Amgen*'s holding "rest[s] . . . entirely on the text of Rule 23(b)(3),"[259] and only refers to the specific substantive question—whether the plaintiff must prove materiality at the certification stage—insofar as is necessary to dispel "free-ranging merits inquiries."[260] The Court declines to massage Rule 23 to achieve securities-litigation-specific aims, finding that Congress has employed other tools, including heightened pleading standards, to deal with settlement pressures in that area.[261]

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254 *See* Hoffman, *supra* note 125, at 1485.

255 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011) (stating without evidence that "left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all").

256 *Id.* at 2553.

257 *Id.* at 2557.

258 Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1191 (2013).

259 *Id.* at 1196.

260 *Id.* at 1194–95.

261 *Id.* at 1200; *see also id.* at 1201 ("Because congress has homed in on the precise policy concerns raised in Amgen's brief, 'we do not think it appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 to

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The "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."[262] When it comes to judicial interpretation of the Rules, that shift in emphasis has trickled up: the Supreme Court has—and exercises—tremendous interpretive flexibility. This flexibility stems from the inherent and delegated power of the Court as head of the judiciary; from the deliberately limber language and structure of the Rules; and from the perpetual incursion of substance into what is purported to be a purely procedural, trans-substantive realm. The interpretive space created by these ineluctable theoretical fault lines allows the Court to shift seamlessly between disclaiming its interpretive power—by casting the Rules in the role of statutes—and asserting its power by deploying common-law interpretive techniques in a way that resembles the not-quite-neutral managerial role of the modern trial court. A theory of Rules interpretation must be able to migrate across this vast interpretive space—the Great Plains of pragmatism.

III
TOWARD A THEORY OF RULES DEFERENCE

One decade in, the Roberts Court has taken full advantage of its interpretive muscle in cases implicating the Rules. Perhaps not surprisingly, then, it is the Roberts Court's managerial Rules cases that have drawn scholarly focus and a good deal of ire. The Court's statutory Rules decisions—which tend to interpret pure questions of law—have largely been uncontroversial, notwithstanding the risk that the Court will follow Justice Scalia's impulse to apply the same brittle textualism to the Rules that it now does to statutes.[263] For now, however, the Court's statutory cases are not making waves. Despite occasional dissents among the Justices, and notwithstanding low-level disputes about the deference due to the Advisory Committee Notes,[264] the Court's statutory decisions have served their purpose of giving clarity and predictability to

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make likely success on the merits essential to class certification in securities-fraud suits.'" (quoting Schleicher v. Wendt, 618 F.3d 679, 686 (C.A.7 2010))).

262 Burbank, supra note 247, at 715.

263 For a discussion of the Court's statutory opinions, see *supra* Subpart I.A.

264 *See* Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 557 (2010) (Scalia, J., concurring) (rejecting reliance on the Advisory Committee Notes as authoritative because "it is the text of the Rule that controls").

courts and litigants regarding the application of the Rules. In contrast, the Court's managerial decisions—which frequently involve situations where the district court was required to apply a legal standard to a particular set of facts—have created confusion rather than clarity, disruption rather than stability.[265]

This Article recognizes the legitimacy, and the inevitability, of both of the Court's methodologies for interpreting the Rules. As the three fault lines discussed above demonstrate, the Court's power over the Rules cannot be artificially confined within narrow statutory or administrative contours.[266] The Court has both inherent and congressionally-delegated authority to set legal norms through Rules adjudication.[267] In addition, neither Congress nor rulemakers have realistically demonstrated the ability to effectively take on that role single-handedly. Finally, there are important reasons to think of the Rules outside of the traditional statutory interpretation box. The Rules are imbued with a sense of flexibility and fairness: a rigid textual approach may seem cleaner and more forthright, but it may nevertheless foreclose consideration of the important policy considerations inherent in the Rules' equitable roots.[268] The Court's managerial approach to the Rules provides an important escape route from a system that might otherwise tend toward becoming hypertechnical and harsh. A theory of Rules interpretation must be sensitive to the Rules' unique position in the federal system; it must not suffocate that uniqueness by forcing the Rules through a statutory lens.[269]

Nevertheless, the Rules require a theoretical framework that will provide some limits on its managerial interpretations.

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265 For a discussion of the Court's managerial opinions, see *supra* Subpart I.B.

266 *See supra* Part II (describing scholars' attempts to reduce the Court's adjudicative authority in favor of rulemaking).

267 *See* Mulligan & Staszewski, *supra* note 24, at 1190 ("[T]he Court's role in civil procedure is to set policy . . . through case-by-case adjudication . . . or by promulgating generally applicable rules through a notice-and-comment rulemaking procedure."); *see also supra* note 133 and accompanying text.

268 *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 531 (2013) (reviewing ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) ("For any difficult case, there will be as many as twelve to fifteen relevant 'valid canons' cutting in different directions, leaving considerable room for judicial cherry-picking."); Moore, *supra* note 5, at 1080–85 (criticizing Rehnquist Court's textualist interpretation of the Rules as insufficiently attuned to the Rules' purpose and intent).

269 *See, e.g.*, *supra* notes 128–41 and accompanying text (describing certain scholars' view that liberal, flexible interpretation of the rules is better than a constrictive, text-based interpretation).

The Court's power to pragmatically interpret the Rules is not a free-ranging license for substantive judicial policymaking, which at time seems to be the case under the Roberts Court.[270] The common-law style of managerial interpretation is a more dialogic, less textual method than statutory interpretation, but it requires its own traditions of restraint, traditions that are not currently much in evidence. In particular, the Roberts Court has not only imitated but *displaced* managerial district courts by aggressively inserting its view of the merits into its Rules decisions. From *Wal-Mart* to *Horne* to *Scott*, the Roberts Court has not simply set procedural standards through interpretation but it has used a procedural lens to adjudicate the merits of those procedural cases.[271] Such interference with lower court discretion is not only unnecessary; it is a break from the Rehnquist Court.[272] In the vernacular of constitutional interpretation, the Roberts Court's managerial decisions might be described as a failure of judicial minimalism.[273]

Drawing from administrative law, this Article argues that the Court's interpretive excesses in managerial interpretation cases should be framed as a problem of deference. The choice of administrative law as a lens is deliberate: it purposefully challenges the unquestioned hegemony of statutes as the blueprint for Rules interpretation. Statutory interpretation fails to capture essential aspects of the Rules. Moreover, in their structure and their implementation, the Rules are more akin to regulations than to statutes.[274] In recognition of that similarity, others have analogized the Court to an administrative agency in an effort to curtail its adjudicative power in favor of the administrative rulemaking process.[275] The analogy of

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270 Take, for instance, the Court's opinion in *Pimentel*. *See supra* note 97 and accompanying text.

271 As one scholar has noted, "[t]he Supreme Court has neither a solid theory nor a steady practice when it comes to using lower-court precedent." Aaron-Andrew P. Bruhl, *Following Lower Court Precedent*, 81 U. CHI. L. REV. 851, 853 (2014).

272 *Cf., e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597–98 (1993) (overturning well-established *Frye* standard but remanding to lower courts for determination of merits under new standard).

273 *See* Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1899 (2006) (describing minimalism as a "preference for narrow rulings, closely attuned to particular facts").

274 *See supra* note 8 and accompanying text.

275 *See generally* Marcus, *supra* note 5 (arguing that the Court should look to rulemakers' intent, rather than strict textualism, in interpreting the Rules); Mulligan & Staszewski, *supra* note 24 (advocating for the Court to refer certain categories of civil procedure issues to the Advisory Committee's notice-and-comment rulemaking process); Struve, *supra* note 5 (explaining that aspects of Congress's

the Court to an agency is apt. But the narrow scholarly focus on the tug-of-war between rulemaking and adjudication has obscured from view the reality that many of the Court's excesses reside within the adjudicatory realm—they are problems of interpretation rather than authority. The proposed deference framework would address these interpretive excesses.

This Article proposes a familiar, workable, *Chevron*-inspired deference regime[276] that would strike a balance between preserving the interpretive authority of the Supreme Court over the Rules and giving lower courts—which are the true, on-the-ground implementers of the Rules—the breathing space to flexibly apply them.[277] This framework would allow the Court to conduct de novo review of pure questions of law—that is, questions that can be resolved using the tools of statutory interpretation. The Court's statutory Rules decisions involve such pure questions of law. For example, in *Johnson v. City of Shelby, Mississippi*, the Court held that the text of Rule 8 does not give courts authority to dismiss complaints that do not technically state the legal theory supporting their claims.[278] To reach this conclusion, it was not necessary for the Court to evaluate the particular claims at issue. Similarly, the Court's analysis of Rule 23(b)(2) in *Wal-Mart* set a clear standard limiting the use of that provision for suits seeking monetary damages; its holding was based on the text and structure of Rule 23, not on the substance of the underlying Title VII claims.[279] The Court's statutory mode of interpreting the Federal Rules would remain intact under the deference framework proposed here, with the Court continuing to decide pure questions of Rules interpretation de novo.

The Court's managerial mode would also be supported as legitimate. In particular, the managerial mode of interpretation provides a needed restraint on what otherwise might be a tendency toward rigid textualism in the Court's statutory Rules decisions. Yet the proposed deference framework would simul-

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delegation of civil procedure rulemaking power to the Court should constrain the Court's interpretive latitude over the Rules).

276 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (requiring that, unless Congressional intent is clear, courts must defer to an administrative agency's reasonable interpretation of its enabling statute).

277 *See* Manning, *supra* note 66, at 118 (noting that "the *Chevron* doctrine held that, for purposes of judicial review of agency action, judges should read a vague or open-ended statute as an implicit delegation of policymaking discretion to the entity charged with implementing the statute").

278 135 S. Ct. 346 (2014) (per curiam).

279 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2557 (2011).

taneously provide important restraints on the Court's managerial Rules interpretation. Namely, as to cases in the managerial mode—which tend to turn on the application of a Rule to particular facts—the deference framework would require the Supreme Court to defer to lower courts' applications of the Rules absent an abuse of discretion.[280] If, upon reviewing a lower court ruling on a procedural question, the Court clarifies or revises the meaning of a Rule, then—rather than reaching out to decide the merits, as for example the Court did when it held that the plaintiffs in *Wal-Mart* had not proven commonality under Rule 23(a)(2), or in finding the *Twombly* complaint implausible—the Court would be required to remand to allow lower courts to assess the applicability of the new standard to the facts in the first instance. This doctrine would preserve the Court's interpretive authority while simultaneously giving lower courts breathing space to innovate in their fact-specific applications of the trans-substantive Rules.

The blueprint for this framework comes from the so-called "weak" form of *Chevron* deference in administrative law. Justice Stevens's 1984 decision in *Chevron* established a two-step process for determining when courts should defer to an agency's reasonable interpretation of statutory ambiguity.[281] In the wake of the Court's decision in *Chevron,* the Justices debated whether *Chevron* swept broadly, or whether it was more confined in its reach.[282] On one side of the debate, Justice Scalia championed a "strong" view of *Chevron*, which gives agencies broad interpretive authority over statutes even in situations where courts could resolve a statutory question

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280 The standard under *Chevron* deference is reasonableness, but this proposal seeks to adapt *Chevron*'s framework to the specific judicial framework in Rules cases, where abuse of discretion is more appropriate. *See* Effron, *supra* note 145, at 725–26 (describing use of abuse of discretion standard).

281 *Chevron*, 467 U.S. at 842–43.

282 *Compare, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (Stevens, J.) (finding, over a vociferous disagreement in a concurring opinion by Justice Scalia that deference does not apply to pure questions of law, but rather only applies in situations where traditional tools of statutory construction cannot answer an interpretive question), *with* Negusie v. Holder, 555 U.S. 511, 524 (2009) (Kennedy, J.) (remanding to an agency for an interpretation of a governing statute over arguments by Justices Stevens and Breyer that the Court should have used statutory interpretation tools to decide the question, rendering remand unnecessary). *See generally* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014) (explaining that the Justices who decided *Chevron* may not have anticipated the profound impact their decision would have); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 302–03 (1988) (identifying and discussing "strong" and "weak" forms of the *Chevron* doctrine).

by resolution to the traditional judicial tools of statutory interpretation.[283] That view ultimately won out at the Court. However, embrace of the "strong" reading of *Chevron* was not universal.

Justice Stevens (the author of *Chevron*) and Justice Breyer have advocated for a "weak" form of *Chevron* deference, which would draw a line between "pure question[s] of statutory construction," as to which the courts would not defer to agencies, and questions "which can only be given concrete meaning through a process of case-by-case adjudication," as to which courts must give broad deference to agency interpretations.[284] This line corresponds precisely to the two interpretive paradigms in the Roberts Court's Rules decisions.[285] By analogy to the "weak" form of *Chevron*, the Court properly applies de novo review in its statutory interpretation cases—cases that involve pure questions of law and are not dependent on the vagaries of individualized claims. In such cases, the Court is essentially functioning as the head of an agency interpreting a governing statute. In its managerial interpretation cases, however, it is the *lower* courts that function as the on-the-ground agency representatives. After all, the Federal Rules are promulgated for the district courts and courts of appeals, not for the Supreme Court.[286] The analogy to the "weak" form of *Chevron* indicates that in such contexts the Court should apply a generous and meaningful form of deference to lower court findings that involve application of the Rules to particular facts.

This deference framework confirms the legitimacy of the Court's use of de novo review when it uses statutory interpretation tools to interpret the Rules. Thus, the proposed deference framework would leave the Court's statutory paradigm for Rules interpretation intact. It would, however, affect the Court's framework for analysis in managerial cases, because in such cases the Roberts Court has tended to side-step consideration of the deference due to lower courts, imposing de novo review even when it is reviewing decisions that involve the lower courts' application of a legal standard to the particular facts of an individual case. As described above in Part II, cases

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283 *See, e.g.*, NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO, 484 U.S. 112, 133–34 (1987) (affording discretion to agency interpretations of ambiguous statute).

284 *Cardoza-Fonseca*, 480 U.S. at 446, 448.

285 *See supra* Part I.

286 28 U.S.C. 2072(a) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals.").

such as *Scott v. Harris*, *Republic of Philippines v. Pimentel*, and *Wal-Mart Stores, Inc. v. Dukes* are classic examples of this tendency of the Roberts Court.[287] So, for example, the question of whether a putative class sufficiently alleges common "questions of law or fact" for purposes of Rule 23(a)(2) inevitably implicates the intersection of (a)(2) with the plaintiffs' factual allegations and with the background substantive law. Because of the fact-specific nature of the inquiry, a rule of deference would mean that in *Wal-Mart*, once the Court clarified its understanding of commonality in Rule 23(a)(2), the Court should have followed the suggestion in Justice Ginsburg's dissent and remanded to the Ninth Circuit for reevaluation of the Rule 23(a)(2) question.[288] Similarly, in *Horne v. Flores*, having stressed the importance of Rule 60(b)(5) in the context of institutional reform litigation, the Court should have resisted the urge to set forth a precise blueprint that essentially ordered the lower court to apply a particular Rule 60(b)(5) analysis to the facts—a blueprint that contravened the lower courts' findings on multiple factual grounds.[289] Instead, the Court should have remanded. Managerial interpretation is not micromanagerial interpretation.

As of now, no such deference doctrine exists, and the Court seems largely untroubled by any limits that a standard of review might impose on the scope of its interpretive power. As discussed above,[290] many of the Court's managerial cases decide questions de novo when an abuse of discretion standard would be more appropriate.[291] Notably, the Court's managerial interpretation cases are rarely resolutions to pressing circuit splits—the prototypical vehicle for Supreme Court review.[292]

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287 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); Republic of Philippines v. Pimentel, 553 U.S. 851 (2008); Scott v. Harris, 550 U.S. 372 (2007).

288 As Justice Ginsburg noted, because of the Court's other holding in *Wal-Mart* eliminating certification under (b)(2), it was not necessary for the Court to reach the Rule 23(a)(2) question to resolve the case. *Wal-Mart*, 131 S. Ct. at 2561–62 (Ginsburg, J., dissenting).

289 Horne v. Flores, 557 U.S. 433, 459–461 (2009) (remanding "for a proper examination of . . . factual and legal changes that may warrant the granting of relief," but providing unambiguous and highly specific advice on research on English Language Learning instruction, the No Child Left Behind Act, and the Equal Education Opportunity Act, all for the obvious purpose of limiting the lower courts' independent review on remand).

290 *See supra* Part II.

291 *See* Effron, *supra* note 145, at 730 (noting that abuse of discretion is the appropriate standard of review for legal rulings that "are heavily fact-contingent and implicate managerial concerns").

292 *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 241 (9th ed. 2007) (citing Justice Ginsburg, Address, Remarks and Addresses at the 71st ALI Annual

Instead, these cases draw the Court's attention because of some perceived error of importance. In other words, the Court enters managerial mode when it grants cases in order to reverse them. Given its predisposition to find error, the Court's lack of attention to the standard of review appears to be based on an implicit (or, as in *Pimentel*, explicit[293]) conclusion that once the Court perceives errors, such errors perforce rise to the level of errors of law that are susceptible to de novo consideration.[294] Yet as *Wal-Mart*, *Iqbal*, and *Scott* indicate, the Roberts Court's managerial interpretations sometimes require construction of revised factual narratives that are inseparable from the legal analysis. The Roberts Court's failure to give respect to lower courts' complex, fact-intensive decisions feeds perceptions of, and actual, overreaching in its managerial Rules cases. A consistently-applied doctrine of Rules deference would ameliorate both the perception and the reality of overreach.[295]

Robin Effron has wisely suggested that the Rules incorporate "an ideal standard of review" into the Rules, as well as other revisions intended to channel the reasoning of appellate courts reviewing Rules cases.[296] This suggestion seems aimed at accomplishing the same goals as the proposed framework, but the Court—and scholars—seem to treat the standard of review as a mere suggestion. In addition, the standard of review, which is so deeply tied to judicial review of statutes, fails adequately to capture the regulatory nature of the Rules. The *Chevron* framework, in contrast, is well respected as an appropriate mechanism for reviewing regulations. In recognition of the apt analogy, other scholars, specifically Mulligan and Staszewski, have argued in favor of applying a deference framework to the Court in Rules cases. But they have sought to apply that framework to require the Court to defer to the rulemaking process, not to the lower courts; in other words,

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Meeting 57 (1994)) (stating that about 70% of cases in which the Court grants certiorari present circuit conflicts or conflicts between state courts of last resort).

293 *See supra* note 223 and accompanying text (discussing the Court's dismissive treatment of the standard of review in *Pimentel*).

294 *See*, *e.g.*, Republic of Philippines v. Pimentel, 553 U.S. 851, 863–64 (2008) (describing Rule 19 inquiries as "case specific, which is consistent with a Rule based on equitable considerations," but declining to articulate a standard of review on the ground that the courts below made "errors of law" requiring reversal regardless of which standard should apply).

295 Effron, *supra* note 145, at 730–31.

296 *Id.* at 730.

they view the problem as one of judicial authority, rather than a problem of interpretation.[297]

In the context of the Rules, this deference-to-rulemakers proposal misses the mark. First, the issues that the Court cannot answer using tools of statutory construction inevitably confront thorny fact-specific, substance-specific problems that would not be susceptible to resolution through rulemaking, particularly given the lengthy, consensus-based rulemaking process.[298] Such discretionary, fact-laden questions are not within the institutional competence of rulemakers. To the contrary, doctrinal evolution through fact-bound applications over time is the bread and butter of the common law.[299] The rulemakers' expertise is far more likely to be relevant in the case of rule-like Rules than in navigating the murky standards that bedevil the courts. In addition, it is unclear how courts could resolve any questions involving equitable discretion rather than statutory interpretation—questions that are endemic to Rules interpretation—under the division of labor proposed by Mulligan and Staszewski. They attempt to circumnavigate this problem by arguing that their rulemaking default would apply only to the Supreme Court, and not to lower courts, thus allowing common-law percolation of Rules-related questions among the lower courts.[300] But a doctrine of judicial deference would accomplish the same thing, without requiring lower courts to go without guidance until the Supreme Court (1) grants certiorari over a case; (2) prepares for and hears the case; (3) decides by a majority vote that it cannot resolve the case using traditional statutory interpretation tools; (4) refers the question to the rulemakers; and (5) the rulemakers; take up and hopefully resolve the question.

Second, and relatedly, there are genuine logistical problems associated with this view. If the Court adhered to Mulligan and Staszewski's suggested rulemaking framework, the rulemakers would now be simultaneously contending with unresolved questions about commonality,[301] plausibility,[302]

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297 *See* Mulligan & Staszewski, *supra* note 24, at 1221 (arguing the Court should "refer issues that arise in civil procedure cases to the court rulemaking process when those issues would be resolved pursuant to the second step of a *Chevron*-like inquiry").

298 See *supra* Section II.A.1 for a description of the rulemaking process.

299 *See supra* note 253 and accompanying text.

300 Mulligan & Staszewski, *supra* note 24, at 1226–27.

301 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

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

the impact of video evidence on the standard of review,[303] and the standard for evaluating changed circumstances that might warrant relief from judgment under Rule 60(b)(5).[304] Some of these questions, such as the minimal requirements for pleading, are more trans-substantive and thus appropriate for rulemaking than others, such as the proper Rule 60(b)(5) standard for institutional reform litigation. Complicating matters further, it is unclear how the Court would even frame its referral to rulemakers. How could it ask them to redefine commonality with sensitivity to Title VII?[305] But even assuming the rulemakers could appropriately handle all of these questions, resource constraints, the lengthy rulemaking process, and a likely lack of consensus would be serious obstacles to responsive reform.

Third, these suggested forms of deference inaccurately cast the Court as an outsider to the rulemaking process, when, as discussed above—despite a lack of clarity over the Court's precise role as a rulemaker—it is undisputed that Congress has delegated rulemaking power to the Court.[306] It may even be the case that the rulemaking committees are the functional equivalent of law clerks to the Justices—important and influential, yes, but not in charge. Recognizing the power of the Court as a rulemaker gives theories of deference to rulemaking a whiff of circularity, if not of self-dealing.[307] For similar reasons, members of the Court have recently expressed skepticism about the *Auer* doctrine, according to which courts should defer to agencies' interpretations of their own regulations.[308] It

303 *See* Scott v. Harris, 550 U.S. 372 (2007).

304 *See* Horne v. Flores, 557 U.S. 433 (2009).

305 *See* discussion of *Wal-Mart*, *supra* Section II.C.2 (explaining interrelation of commonality and Title VII in the majority's opinion).

306 28 U.S.C. § 2072(a) (2012) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure.").

307 Struve takes the opposite stance, arguing that by confining itself to the Advisory Committee Notes when interpreting the Rules, the Court avoids the problem of "self-delegation,"—that is, interpreting its own laws. *See* Struve, *supra* note 5, at 1168–69. As explained above, however, *see supra* Part II, the Court's dual power as adjudicator and rulemaker is a valid aspect of the Rules' unique posture.

308 *See, e.g.*, Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013) (Roberts, C.J., concurring) (acknowledging that [i]t may be appropriate to reconsider [*Auer*]," but preferring to "await a case in which the issue is properly raised and argued"); *id.* at 1339, 1340 (Scalia, J., concurring in part and dissenting in part) (arguing that "[e]nough is enough" and the Court should put an end to *Auer* deference); *see also* Leading Cases, *Clean Water Act* — Auer *Deference*— Decker v. Northwest Environmental Defense Center, 127 HARV. L. REV. 328, 337 (2013) (noting "the Chief Justice's unmistakable call for litigation challenging *Auer*" and concluding that its "days may be numbered").

now seems likely that *Auer*'s hours are numbered—and perhaps for good reason; at a minimum, therefore, *Auer* does not bolster the view that the Court should defer to its own rulemaking process.[309]

Finally, and most basically, the focus on the tug-of-war between the Supreme Court and the rulemaking committees draws focus from the central relationship between the lawmakers and those who are charged with implementing those laws—in this case, the lower courts. In the administrative law context, Congress is the lawgiver, while the agencies interpret and implement Congress's will. In the analogous context of the Rules, the Court as rulemaker is the lawgiver, and it is the lower courts that are charged at least in the first instance with implementing the broad strokes of the law in more particularized contexts. The weak form of *Chevron*-style deference proposed here captures this distinction. It also perfectly tracks the dual nature of the Court's interpretive practices, sanctioning both the statutory and managerial paradigms while providing a consistent and coherent limiting framework. Although the "weak" version of *Chevron* deference has not prevailed as the standard in administrative law, in the analogous structure of the Federal Rules, the doctrine would effectively limit the Roberts Court's interpretive excesses while preserving its adjudicative authority to use managerial interpretation in Rules cases.

The proposed *Chevron*-inspired deference framework is familiar and workable. In practice, it would affect the Court's decisions in two ways. First, the framework would require the Court to be explicit regarding whether it is applying its statutory approach to a Rules question—in which case no deference would be required—or whether it is confronting an issue that involves judicial discretion in particular contexts, i.e., a managerial Rules question. That transparency alone would likely mitigate some of the Court's tendencies toward merits-intensive overreach in managerial decisions.

Second, the framework would return the Court to a tradition of narrower, more genuinely minimalist procedural decisions. As an example, compare the Roberts Court's pleading decisions to the Rehnquist Court's landmark decision in

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309 *See Decker*, 133 S. Ct. at 1339 (Scalia, J., concurring in part and dissenting in part) ("The canonical formulation of *Auer* deference is that [a court] will enforce an agency's interpretation of its own rules unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" (citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945))).

Daubert v. Merrell Dow Pharmaceuticals, Inc.[310] Like *Twombly*, *Daubert* disrupted settled litigation norms: Just as the Court in *Twombly* abolished the prior *Conley* standard for evaluating notice pleading, the Court in *Daubert* overruled the well-established *Frye* standard for admissibility of expert testimony in federal courts.[311] Notably, however, the Court—having rejected *Frye* and established new governing criteria—did not attempt to force its view of the application of that standard onto the Ninth Circuit on remand. Even without such a step, Chief Justice Rehnquist and Justice Stevens dissented, arguing that the Court had violated minimalist principles by construing FRE 702 and 703 rather than simply overruling *Frye* and remanding.[312]

In comparison with the Roberts Court's decisions interpreting the Federal Rules, *Daubert* respects lower court expertise while providing guidance on an important procedural question. The proposed deference framework would guide the Court toward this narrower, less merits-intrusive form of adjudication. For example, had it applied this framework, the Court in *Scott v. Harris* would not have resolved the question of whether the defendant officers were entitled to summary judgment. The Court would have noted the lower courts' failure to explain their consideration of the police car dashboard video, and then remanded for further proceedings. Without this framework, the Court could not resist imposing its own view of the merits. Similarly, in *Wal-Mart*, the Court would have articulated a new commonality standard without then analyzing the validity of the statistical evidence put forth by the plaintiffs. It would have allowed the Ninth Circuit district court to reexamine that question. In that same vein, in *Twombly* the Court would have abrogated the *Conley* pleading standard without itself finding that the complaint in that case had failed to state a claim.

CONCLUSION

Our deep, almost obsessive, focus on statutory interpretation has obscured from scholarly and judicial attention the significance of interpretive theories for other legal texts, including the Federal Rules of Civil Procedure. The Rules are strange

310 509 U.S. 579 (1993).

311 *Id.*

312 *Id.* at 598–601 (Rehnquist, C.J., dissenting) (refusing to join the Court's opinion construing FRE 702 and 703 on the ground that it was unnecessary and will raise countless questions in application by district courts).

creatures: they are not statutes, yet not quite traditional agency regulations; they are promulgated by the Court, yet in some ways external to it; and they are universal, yet they are always applied in particular contexts. But our interpretive theories do not fully account for the Rules' quirky, intersectional nature. Perhaps because we learn the Rules in the first days of law school—before we take on the difficult project of interpretation—we do not approach the Rules with the same skepticism that we do statutes. To lawyers, and to courts, the Rules seem natural—a part of us. Yet the Rules are no more natural than other legal texts. Just as is true for statutes, the Rules have no meaning outside of an interpretive act: theory dictates practice. Currently the Roberts Court's theories of Rules interpretation are fueling significant changes in the cultural norms of litigation. In order to assess and regulate those changes, we must first have a theory for evaluating them.

This Article begins that project. It builds an interpretive theory of the Rules by identifying the two very different—but equally valid— methodologies that the Roberts Court applies in its Rules cases, and then suggesting a theoretical framework that will accommodate, and regulate, both. This framework starts from a presumption that the Supreme Court's interpretive role with regard to the Rules should reflect and support the unique position of the Rules within the federal litigation system. Thus, this Article turns to administrative law, rather than to traditional statutory interpretation, to propose a regime for regulating the Court's Rules interpretation. It argues that a *Chevron*-inspired deference regime will provide a workable, familiar mechanism for regulating, without suffocating, the Court's interpretive freedom. As this Article shows, a coherent theory of Rules interpretation is valuable for the Rules themselves; it also sheds light on the extent to which our zeal for statutory interpretation may inadvertently impoverish our understanding of vital, but nonstatutory, legal texts.