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THE COLLAPSE OF THE FEDERAL RULES SYSTEM

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A prominent federal judge who knows the field well suggested that I immerse myself in Steve Burbank’s work when I started as a civil procedure scholar and teacher. “Burbank could have dined out his whole career on the Enabling Act history alone,” I recall the judge telling me. This advice was sound for reasons that went well beyond scholarly inspiration. The judge’s advice prompted me to send Professor Burbank an e-mail asking for feedback on one of my first articles. I had hoped for just enough of a response to warrant including his name in the article’s acknowledgments. I could never have imagined all that followed. Professor Burbank has given me years of generous,

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† Professor of Law, UCLA School of Law. I am grateful to Bob Bone, LaToya Baldwin Clark, Zach Clopton, Blake Emerson, David Grewal, Rick Marcus, Luke Norris, Nina Rabin, Judith Resnik, Joanna Schwartz, Matthew Shapiro, Norm Spaulding, and Tobias Wolff for comments on previous drafts. Steve Burbank has been a generous mentor, supporter, and friend. I wish I could thank him in a manner commensurate with all he has done for me.

undeserved mentorship. By his example, he has shown me time and again how a revered colleague draws on a rich reservoir of professional capital to build a national community of scholars. His guidance and friendship have enriched my career beyond measure. I am deeply honored to contribute to this Festschrift.

Professor Burbank's scholarship grapples with nearly every aspect of what I call the "Federal Rules System." This is the dominant procedural system for American civil justice, one taught in virtually every American law school's first-year civil procedure course.<sup>1</sup> Although the Federal Rules of Civil Procedure and their use in the federal courts lie at the system's center, it includes much more. Importantly, the Federal Rules System, by my definition of the term, embraces the procedural regimes of many American jurisdictions.<sup>2</sup> They share many of the system's constituent components, particularly a trans-substantive default architecture for civil litigation.<sup>3</sup> These components also include the assignment of a procedural regime's maintenance, at least in part, to court-supervised experts working outside the political process and under judicial supervision.<sup>4</sup> They also involve a set of cultural expectations about litigation, particularly its adversarial and party-driven nature.<sup>5</sup>

Professor Burbank wrote the canonical history of the Federal Rules System's origins.<sup>6</sup> He has subjected nearly every aspect to influential theoretical, doctrinal, and empirical scrutiny.<sup>7</sup> He has played central roles in the system's evolution.<sup>8</sup> Immersion in Professor Burbank's work that this

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<sup>1</sup> David L. Noll, *A Reader's Guide to Pre-Modern Procedure*, 65 J. LEGAL EDUC. 414, 414-15 (2015); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1902 (1989).

<sup>2</sup> E.g., Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 (1987) ("Approximately half of the states adopted almost identical rules, and procedural rules in the remainder of the states bear their influence."); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2237 (1989) ("[The Federal Rules] have been adopted in a majority of the states and have been a principal source of borrowing in states with strong traditions of autonomy in matters of procedural law, notably California, Illinois, and New York."); see also Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 897 (1999) [hereinafter Bone, *Process*] ("Enthusiasm for court rulemaking and the Federal Rules spread rapidly after World War II. Many states followed the federal lead in giving the rulemaking function to the courts.").

<sup>3</sup> Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 872-73 (2018).

<sup>4</sup> E.g., ARIZ. REV. STAT. ANN. § 12-109 (delegating rulemaking power to the Arizona Supreme Court and providing that these rules "shall not abridge, enlarge or modify substantive rights of [any] litigant").

<sup>5</sup> E.g., David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1969 (1989) ("The Federal Rules . . . have become part of the consciousness of lawyers, judges, and scholars who worry about and live with issues of judicial procedure.").

<sup>6</sup> Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

<sup>7</sup> The list of works that fits this description is too long to summarize.

<sup>8</sup> Professor Burbank helped draft the 1988 amendments to the Rules Enabling Act and 28 U.S.C. § 1367. He played a special master role in the *Amchem* litigation. He contributed essential research that supported amendments to Rule 11. This is just a partial list.

Festschrift occasioned thus invites immodestly broad claims. I marshal a lot of Professor Burbank's scholarship to support mine. With apologies,<sup>9</sup> here it is: the Federal Rules System has collapsed.

The erosion of the system's two core pillars has triggered this collapse.<sup>10</sup> The first, the *principle of rulemaker primacy*, steered primary responsibility for procedural change and reform to an apolitical rulemaking process. The second core pillar, the *principle of substantive neutrality*, legitimated the principle of rulemaker primacy. If meaningful procedural change can proceed without ideologically-fraught regulatory or distributive consequences, then it can take place outside politics. Over the past fifty years, the domain of what could plausibly pass muster as substantively neutral has shrunk considerably. As a result, rulemaker primacy has become increasingly impossible to sustain. Power over meaningful procedural change has passed to other institutions, hollowing out the Federal Rules System.

To anyone conversant in bitter procedural battles of the past twenty years, the question is not so much whether the Federal Rules System has indeed suffered. Rather, how did a procedural system dependent on a claim of substantive neutrality ever operate in the first place?<sup>11</sup> This question's answer helps identify the cause of decline. I provide one in Part I. The key moment is 1966. Rule 23 came into effect that year, generating the modern class action. The class action's vast regulatory and distributional consequences make this landmark reform, exemplifying the principle of rulemaker primacy, unthinkable today. What made it possible was the "postwar liberal consensus," a period during which American elites believed in and advocated for universal agreement on political, economic, and social fundamentals.<sup>12</sup> Meaningful procedural change could come from the rulemaking process without violating the principle of substantive neutrality, because everyone—or everyone who "mattered"—agreed on the substance.

Since 1966, conditions of consensus have yielded to conditions of polarization and inequality. The domain of substantive neutrality has shrunk dramatically, eroding the basis for rulemaker primacy and leaving rulemakers

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<sup>9</sup> Stephen B. Burbank, *Thinking, Big and Small*, 46 U. MICH. J.L. REFORM 527, 530 (2013) ("I think that an apology is more often appropriate for attempts to think big, at least in the field of procedure.").

<sup>10</sup> I draw these principles from the "foundational assumptions" Professor Burbank identifies here: Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 536.

<sup>11</sup> Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691, 699 (2016) ("In many ways, it seems striking that anyone would have argued that the civil rules were at any time 'apolitical'; but that characterization is precisely what made them such powerful tools for social reform, and what kept rulemaking authority insulated for so long.").

<sup>12</sup> Michael Heale, *Historians and the Postwar Liberal Consensus*, in *THE LIBERAL CONSENSUS RECONSIDERED: AMERICAN POLITICS AND SOCIETY IN THE POSTWAR ERA* 29, 29, 32 (Robert Mason & Iwan Morgan eds., 2017).

able to generate mostly technocratic adjustments to settled practice.<sup>13</sup> I describe the consequences for the Federal Rules System in Part II. Its hallmarks now include delegation and acquiescence, as rulemakers yield their power, and irrelevance, as the needs of American civil justice exceed the system's capacity to address them.

The Federal Rules System left Camelot long ago, as others have argued for decades.<sup>14</sup> But my diagnosis of collapse differs from previous diagnoses of decline. The latter hold the promise of reversal—if the system can just produce better rules,<sup>15</sup> for instance, or if some new source of legitimacy can rejuvenate it.<sup>16</sup> With the system's core principles eroded, I believe it is time to move on, to identify new principles for a new system. The conditions that triggered the Federal Rules System's collapse make the choice unavoidably political. The conservative legal movement has already fashioned what I term the *principle of neoliberalism* to guide its preferred path for procedural evolution.<sup>17</sup> I end by introducing how progressives might craft an alternative, a principle rooted in a conception of equality meaningfully responsive to some of the inequities that have ended the Federal Rules System.

To be clear, the causal story I tell here does not assign blame to any particular institution. Rulemakers and courts deserve scrutiny for the choices they make, to be sure. If I am right, however, deeper currents in American political, social, and economic life have largely determined possibilities for the evolution of procedural doctrine. The appreciation that procedure necessarily mirrors the conditions of American political culture makes the recognition of a new principle all the more urgent.

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<sup>13</sup> Bone, *Process*, *supra* note 2, at 916.

<sup>14</sup> E.g., Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1841 (2014) (arguing that “we are now in a distinct, fourth era” during which the “core values” of the Federal Rules “have been eviscerated”); Bone, *Process*, *supra* note 2, at 889 (“The level of discontent [with the Federal Rules] is unprecedented in the sixty-five year history of federal rulemaking in the field of civil procedure.”); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2220 (1989) [hereinafter Resnik, *Domain*] (“[T]he issue that dominates most discussions of procedure today is whether the Rules enable speedy dispositions and help to control judicial workload.”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494-95 (1986) [hereinafter Resnik, *Failing Faith*] (“Many in the legal profession now criticize aspects of the Rules and demand revision.”).

<sup>15</sup> E.g., Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 942 (2020) (“While there are valid critiques of the rulemaking process, it is still an excellent vehicle for rule reform.”); Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 320 (2008) [hereinafter Bone, *Effective*] (arguing that the current “Advisory Committee is in a good position to take on this challenging task” of reforming the Federal Rules).

<sup>16</sup> Bone, *Process*, *supra* note 2, at 940-43.

<sup>17</sup> Luke Norris has also suggested that recent directions in procedural evolution follow a neoliberal path. Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. (forthcoming 2022) (draft at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3793658](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793658) [<https://perma.cc/BZG9-YM2Z>].

## I. THE CONDITIONS OF SUBSTANTIVE NEUTRALITY: 1938 AND 1966

A. *The Principles of Rulemaker Primacy and Substantive Neutrality*

Originating in 1938, the Federal Rules System centers around the Federal Rules of Civil Procedure and the apolitical rulemaking process the Rules Enabling Act of 1934 created.<sup>18</sup> The Federal Civil Rules Advisory Committee, a group of experts appointed by the Chief Justice and ultimately supervised by the Supreme Court, dominates this process. But the system includes more than a set of rules and a core institution or their state equivalents. It also encompasses a litigation culture, one embodied in the procedural systems of almost every state. The basic architecture for a civil lawsuit the Federal Rules establish provides the default norm for what adjudication looks like—an architecture premised on adversarial, party-driven litigation activity.<sup>19</sup> Participants in the system conceive of procedural problems and possible solutions in terms of rules and possible reforms.

The twin pillars on which this system rested reflect two of the “foundational assumptions” Professor Burbank has identified for “modern American procedure.”<sup>20</sup> The first, echoed by the principle of rulemaker primacy, assumes that “once made through ‘The Enabling Act Process,’ [the Federal Rules] can only be changed through that process (or by legislation).”<sup>21</sup>

The principle of substantive neutrality follows from the second, that “the ‘general rules’ required by the 1934 Rules Enabling Act should not only be uniformly applicable in all federal district courts, but uniformly applicable in all types of cases . . . .”<sup>22</sup> The Federal Rules’ trans-substantivity honors this

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<sup>18</sup> I appreciate that the terms “apolitical” and “substantive neutrality” are contestable as descriptions of the Federal Rules System as crafted, intended, and in operation at any point in time. *E.g.*, Resnik, *Domain*, *supra* note 14, at 2225-26 (“[N]either the theory of neutrality nor the theory of anonymity [of the Federal Rules] turns out to be as true in practice as in theory.”). But I also believe the bipartisan support for federal rulemaking during the years preceding the enactment of the Rules Enabling Act, the remarkable dearth of controversy the Rule 23 amendments prompted in 1966, and the Advisory Committee’s commitment to consensus in recent decades all evidence a longstanding commitment to and reality of a kind of neutrality that distinguishes rulemaking from other policymaking domains.

<sup>19</sup> Resnik, *Failing Faith*, *supra* note 14, at 516-17.

<sup>20</sup> Burbank, *supra* note 10, at 536.

<sup>21</sup> *Id.*; see also David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 504 (2010) [hereinafter Marcus, *Legal Realism*] (describing Charles Clark’s argument for a standing Advisory Committee with the authority to “make changes in the rules . . . and thus function as a built-in pragmatic mechanism to ensure good rules”).

<sup>22</sup> Burbank, *supra* note 10, at 536; see also Bone, *Effective*, *supra* note 15, at 324 (“[P]rocedural rules could and should be general in nature and ‘trans-substantive,’ meaning that a single set of rules should apply to all civil cases despite varying substantive stakes.”); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2079 (1989) (“Federal Rules of Civil Procedure are seldom written . . . in terms designed to operate differently according to the substantive nature of a claim or defense.”); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME

assumption. This design feature prevents rules from serving or diserving particular ends of substantive justice. Trans-substantive rules therefore claim value-neutrality, a quality that honors limits on the scope of power delegated to the rulemaking process.<sup>23</sup> As Professor Burbank's canonical history of the Enabling Act reveals, Congress intended to retain control over procedural lawmaking "where the choice among legal prescriptions would have a predictable and identifiable effect on . . . rights" "recognized by federal or state substantive law . . . and interests recognized by the Constitution."<sup>24</sup> Otherwise, rulemaker primacy prevailed.

The principle of substantive neutrality both defined the domain within which the principle of rulemaker primacy could operate, and it gave the institutional preference the latter principle conveys essential normative support.<sup>25</sup> An expert-driven process outside of politics could exercise power over procedural change legitimately if this change did not entail choices of substantive value.<sup>26</sup> By contrast, the principle of substantive neutrality routed responsibility for procedural change to other institutions if the change's regulatory or distributional consequences prompted ideologically salient controversy.

### B. *Substantive Neutrality and the 1938 Generation*

Most of us would probably accept as substantively neutral something like a rule that requires parties to meet-and-confer on a format for the exchange of electronically stored information in discovery. But more significant procedural reform invariably prompts deep controversy little different from fighting over substantive legal change.<sup>27</sup> This could not always have been so, however, because the Federal Rules System once generated not just meaningful but seismic procedural reform. What did "[t]he myth of procedure as the neutral facilitator of the substantive law" mean in 1938, when

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L. REV. 693, 713 n.140 (1988) ("The question whether uniformity [of the Federal Rules] necessarily entails trans-substantive uniformity was not addressed, probably because it was assumed.")

<sup>23</sup> David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 374 (2010).

<sup>24</sup> Burbank, *supra* note 6, at 1113-14; *see also* Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1007 (1983) ("Congress' concerns seem to have been rulemaking in areas where choices would have a predictable and identifiable impact or rights claimed under the substantive law or on interests claimed under the Constitution . . .").

<sup>25</sup> Marcus, *supra* note 23, at 398; Bone, *Process*, *supra* note 2, at 896.

<sup>26</sup> Bone, *Process*, *supra* note 2, at 894-96; *cf.* Burbank, *supra* note 10, at 543 (suggesting that every "advisory committee" has honored the "foundational assumption" of trans-substantivity because "departures from it raise questions of institutional power and legitimacy").

<sup>27</sup> Dana S. Reda, *What Does It Mean to Say That Procedure Is Political?*, 85 FORDHAM L. REV. 2203, 2205-07 (2017).

one generation of rulemakers created the Federal Rules System?<sup>28</sup> What about in 1966, when their successors unleashed the modern class action?

Neither my research into the 1938 generation nor the landmark studies by Professor Burbank and others offer conclusive answers.<sup>29</sup> The 1938 rules may have seemed nonpartisan because reformers of all ideological stripes had championed the decades' long campaign for the Enabling Act.<sup>30</sup> Perhaps rulemakers as good New Dealers and Progressives believed that technocratic expertise made their choices legitimate, whatever substantive effects their new rules had.<sup>31</sup> The 1938 generation may have genuinely believed in a meaningful substance/procedure dichotomy, albeit one divided by a shadowy boundary.<sup>32</sup> Given the boundary's uncertain location, perhaps rulemakers felt confident to proceed so long as their work could plausibly claim substantive neutrality's mantle.<sup>33</sup>

None of these explanations entirely satisfies. Surely others agreed with Thurman Arnold's insistence in 1932 that "[s]ubstantive law is canonized procedure," and "[p]rocedure" simply "unfrosted substantive law."<sup>34</sup> His realist allies spilled oceans of ink challenging law's autonomy from politics. The notion that they would have deemed "adjectival law" immune from their most basic charge seems farfetched.<sup>35</sup> This is especially so given that the 1938 generation labored after a decades-long progressive campaign against the procedural advantages that systematically favored turn-of-the-century corporate litigants.<sup>36</sup>

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<sup>28</sup> Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 228 (1997); cf. Hazard, *supra* note 2, at 2246 ("[The] relationship between civil justice and social justice was not anticipated in 1938.").

<sup>29</sup> My research is available at Marcus, *Legal Realism*, *supra* note 21. Landmark studies include Burbank, *supra* note 6; Bone, *Process*, *supra* note 2; and Subrin, *supra* note 2.

<sup>30</sup> E.g., Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 108-10 (2006) (describing the overlapping and conflicting support both progressives and conservatives voiced for the Federal Rules).

<sup>31</sup> Jordan M. Singer, *The Federal Courts' Rulemaking Buffer*, 60 WM. & MARY L. REV. 2239, 2276-80 (2019); Bone, *Process*, *supra* note 2, at 895-96.

<sup>32</sup> Marcus, *supra* note 23, at 399-400; Bone, *Process*, *supra* note 2, at 895-96.

<sup>33</sup> Cf. Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?*, JUDICATURE Jan.-Feb. 2008, at 163, 166 ("The insight of the Legal Realists that there is no bright line between 'procedure' and 'substance' was for decades the main redoubt of those responsible for procedural lawmaking when challenged for overreaching."). The Supreme Court effectively endorsed this permissive take on substantive neutrality in 1941 when it interpreted the Enabling Act's delegation of power to allow any rules that "really regulate[] procedure." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); see also Burbank, *supra* note 6, at 1108 (critiquing *Sibbach*).

<sup>34</sup> Thurman Arnold, *The Rôle of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 645 (1932).

<sup>35</sup> Cf. Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 513-14 (2017) (describing the political motivations of New Deal-era supporters of procedural reform).

<sup>36</sup> EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, 4 (1992); Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 682 (1999).

Perhaps there is simply no good answer to the question of what substantive neutrality meant in 1938. To quote Richard Marcus, 1938 was the Federal Rules System's "Big Bang."<sup>37</sup> An attempt to reconcile its generation's work with the principle of substantive neutrality tries to square the circle. This generation had a system to create. Principles could come later.

### C. Substantive Neutrality and the 1966 Generation

The 1966 generation worked well after the Big Bang. Its revisions to Rule 23 had vast regulatory and distributive consequences. How did Benjamin Kaplan (the Advisory Committee's reporter), Albert Sacks (its associate reporter), and Charles Alan Wright (a key member) stretch the license given them by the principle of substantive neutrality far enough to create the modern class action?

To a significant extent, the 1966 generation worked behind a veil of ignorance. The chief substantive legal developments that would turn the class action into an engine of regulation and redistribution had not fully flowered before the Advisory Committee finished most of its work.<sup>38</sup>

But Kaplan, Sacks, and Wright did not stumble around entirely in the dark. Among other motivations, they wanted to codify procedural advances that some federal judges had made to aid plaintiffs in desegregation class actions.<sup>39</sup> The 1966 generation crafted a trans-substantive rule. But a clear ideological impetus animated at least part of their efforts. I know of no answer buried in archival records to the question of how to reconcile the work they did to champion desegregation litigation with the principle of substantive neutrality. The question may never have occurred to the 1966 generation as a problem to solve.

Situating the 1966 generation's work in jurisprudential and political context, however, permits at least some speculation as to how its members might have responded. Kaplan and Sacks, had strong—in Sacks' case, foundational—connections with legal process theory.<sup>40</sup> Its adherents attempted to reconcile the realist insistence that legal decisionmaking necessarily entailed policymaking with a claim to law's autonomy from

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<sup>37</sup> Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 300-301 (2008).

<sup>38</sup> See David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 606-07 (2013) (describing changes to regulatory regimes commonly enforced in class actions "that happened with eerie coincidence just as the ink dried" on the revised Rule 23).

<sup>39</sup> David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702-08 (2011).

<sup>40</sup> Sacks's legal process bona fides need no proof. For Kaplan and legal process, see, e.g., Benjamin Kaplan, *Civil Procedure – Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 430 (1960); see also William N. Eskridge, Jr., *Metaprocedure*, 98 YALE L.J. 945, 964 (1989) (reviewing ROBERT M. COVER, OWEN M. FISS & JUDITH RESNIK, *PROCEDURE* (1988)) ("The legal process synthesis . . . characterizes the 1953 edition of Field and Kaplan . . .").

politics.<sup>41</sup> This synthesis included two core claims.<sup>42</sup> First, when a dispute arises, a lawyer's central concern is which institution should settle it, "with authority allocated according to each institution's relative 'competence' to handle the matter."<sup>43</sup> The second was the "principle of institutional settlement": "decisions which are the duly arrived at result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society . . ."<sup>44</sup> Together, these claims offered a measure of legitimation minimally beholden to claims of substantive value.<sup>45</sup> When the institutionally competent entity, whether legislature, court, or agency, makes a decision pursuant to the procedures and modes of reasoning appropriate to it, the resolution is legitimate even if participants could disagree on the substance.<sup>46</sup> Law's neutrality, in other words, flowed from procedural rigor.

To process theorists, expertise legitimated agencies' policymaking choices, provided agencies stayed within the boundaries of delegated power.<sup>47</sup> The capacity to resolve problems with "reasoned elaboration" gave judicial decision-making its particular competence.<sup>48</sup> Reasoned elaboration includes the requirement that the judge's "decision is to be arrived at by reference to impersonal criteria of decision applicable in the same fashion to any similar case."<sup>49</sup> Process theorists accepted the realist insistence that judges made policy, and no one doubted that agencies did too. But an expertise-driven decision within the bounds of delegation, or a principled decision arrived at through reasoned

<sup>41</sup> Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561, 567 (1988); *id.* at 569; William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 695 (1987); Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 517 (1997).

<sup>42</sup> On these claims and their relationship, see, e.g., William M. Wiecek, *American Jurisprudence After the War: "Reason Called Law"*, 37 TULSA L. REV. 857, 869 (2002). For a richer account of the substantive value embedded in process theory than what I offer here, see Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1292-94 (1995).

<sup>43</sup> William N. Eskridge, Jr., & Philip P. Frickey, *Commentary, The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2043 (1994); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 255 (1995).

<sup>44</sup> Henry M. Hart, Jr., & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4 (1958) (unpublished manuscript).

<sup>45</sup> See Robert G. Bone, *Judging as Judgment: Tying Judicial Education to Adjudication Theory*, 2015 J. DISP. RESOL. 129, 138-39 (2015) (describing process jurists' focus on institutional design and interest in "well-designed institutions" "vest[ing a] decision with legitimacy apart from the substantive values it implemented"); Peller, *supra* note 41, at 567 (describing process theory's "model of legal legitimation" as premised on a "neutral, apolitical, reasoned . . . discourse" that emphasized "process" apart from "substance").

<sup>46</sup> See Peller, *supra* note 41, at 570 ("Procedural and jurisdictional legitimacy could be neutrally and apolitically determined, even if substantive legitimacy could not.").

<sup>47</sup> *Id.* at 597.

<sup>48</sup> DUXBURY, *supra* note 43, at 260; Michael Wells, *Beyond the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 619-20 (1991).

<sup>49</sup> Wiecek, *supra* note 42, at 870 (quoting Hart & Sacks materials).

elaboration, could claim normative legitimacy by a measure of value independent of whatever regulatory or distributive consequences this decision had.

As a hybrid judicial-administrative body, the Advisory Committee could draw upon both expertise and reasoned elaboration as a source of legitimacy for its work.<sup>50</sup> The principle of substantive neutrality, then, only modestly constrained the 1966 generation's power. The Enabling Act, interpreted permissively in 1941,<sup>51</sup> delegated wide berth to the Advisory Committee, and an expert assessment of procedural need could surely leave open a number of legitimate options. Transsubstantivity, the Federal Rules System's signature design feature, ensured that rules would measure up by "impersonal criteria of decision."<sup>52</sup> The multilevel process for rule promulgation that rulemaking followed in the 1960s all but guaranteed reasoned elaboration.<sup>53</sup> Preferences or motivations, then, did not matter to a rule's consistency with the principle of substantive neutrality.

In 1954, Sacks identified "the triumph of a principle" as the "outstanding feature" of *Brown v. Board of Education*.<sup>54</sup> He also lauded the decision for "the care" the Court took "in the process of reaching and promulgating" it.<sup>55</sup> *Brown*, in other words, succeeded by a legal process metric, one independent of its regulatory or distributional consequences. To someone like Sacks, Rule 23 could be *Brown's* procedural equivalent—a "triumph" by a legal process metric of legitimacy, even if it also happened to mesh with Sacks' ideological priors.<sup>56</sup>

But there is more to the 1966 generation's story, one not as substantively bereft as the foregoing suggests.<sup>57</sup> A substantively thick set of assumptions in postwar American political culture made a thin, procedurally-justified measure of value plausible. Legal decision-making can seem substantively neutral if everyone—or everyone who matters—agrees fundamentally on the substance.

This was just the case for the elites, including process theorists, who championed the "post-war liberal consensus."<sup>58</sup> This "sunshine and morning

<sup>50</sup> Bone, *Process*, *supra* note 2, at 897-99; *cf.* Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 252 (1951) (discussing competence of courts and legislatures to reform procedure).

<sup>51</sup> *See supra* note 33 (discussing *Sibbach*).

<sup>52</sup> *See* Wiecek, *supra* note 42, at 870 (quoting Hart & Sacks materials).

<sup>53</sup> *A Self-Study of Federal Judicial Rulemaking*, 168 F.R.D. 679, 685-86 (1995).

<sup>54</sup> Albert M. Sacks, Foreword, *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 96 (1954).

<sup>55</sup> *Id.* at 97.

<sup>56</sup> On Sacks' commitment to the civil rights movement, see Eskridge & Frickey, *supra* note 43, at 2050 & n.114.

<sup>57</sup> For a rich account of other aspects of process theory's substantive commitments, see Bone, *supra* note 42, at 1311-13.

<sup>58</sup> *E.g.*, Peller, *supra* note 41, at 573 ("[M]ainstream American intellectual cultural in the post-War years was unified around a self-imagined of tolerance, pluralism, and modernist sophistication, within which the distinction between process and substance could seem to play a progressive and liberal role."); DUXBURY, *supra* note 43, at 242-43 (asserting that the time recentered liberal-democratic values); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*,

glory vision of American political culture”<sup>59</sup> viewed American capitalism as “capable of generating abundance for every stratum of society . . . without necessity for hard choices.”<sup>60</sup> Several decades of postwar economic growth made “perplexities and conflicts long thought endemic to market economics appear[] . . . to have resolved themselves.”<sup>61</sup> The consensus also understood “social problems in America” as “residual” and capable of being “‘cured’ by the action of government.”<sup>62</sup> Racism, primarily a phenomenon of a “backward region”—the South—that did not truly represent the United States, was “an aberration, a ‘running sore’ on an otherwise healthy body politic.”<sup>63</sup> Traditional gender roles went unquestioned.<sup>64</sup> Most fundamentally, the consensus viewed American democracy as a broadly representative process able to distribute fairly the largesse of an ever-expanding economic pie.<sup>65</sup> The postwar liberal consensus, with process theory as its jurisprudential expression, celebrated the American status quo as basically good and only in need of modest adjustment.<sup>66</sup>

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100 HARV. L. REV. 761, 765 (1987) (“An additional reason for the prevailing faith in the autonomy of law was the remarkable political consensus of the late 1950s and early 1960s.”); G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L. REV. 819, 829 (1986) (describing the Pre Civil Rights Era as a time of “deep consensus among Americans about values and institutional roles”); G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 296 (1973) (noting a “disintegration of common values or goals” in the 1970s).

<sup>59</sup> Reuel Schiller, *Law, Liberalism, and the New History of the Civil Rights Movement*, 61 HASTINGS L.J. 1257, 1271 (2010) (reviewing THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008)).

<sup>60</sup> Geoffrey Hodgson, *Revisiting the Liberal Consensus*, in *THE LIBERAL CONSENSUS RECONSIDERED*, *supra* note 12, at 12, 22.

<sup>61</sup> David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 THEORETICAL INQUIRIES L. 61, 62 (2017); *see also* Gary Gerstle, *Race and the Myth of the Liberal Consensus*, 82 J. AM. HIST. 579, 579 (1995) (“Everyone agreed that the productivity of American capitalism . . . had made questions of class inequality meaningless . . .”).

<sup>62</sup> Hodgson, *supra* note 60, at 22; *see also* Gary Gerstle, *The Reach and Limits of the Liberal Consensus*, in *THE LIBERAL CONSENSUS RECONSIDERED*, *supra* note 12, at 54 (advancing the mid-twentieth-century idea that “the federal government could be called upon to solve a great variety of social problems”).

<sup>63</sup> Gerstle, *supra* note 61, at 579, 582; *cf.* Grewal & Purdy, *supra* note 61, at 66 (describing how symptoms of racism—like economic exclusion of African-Americans—were regarded as “exceptions” to a system working for everyone).

<sup>64</sup> Helen Lavin, *Gender in an Era of Liberal Consensus*, in *THE LIBERAL CONSENSUS RECONSIDERED*, *supra* note 12, at 245, 246 (“[T]he strongly gendered nature of the division between public and private spheres . . . lay at the heart of the ideology of liberal consensus.”).

<sup>65</sup> Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1399–1401 (2000); DUXBURY, *supra* note 43, at 247–48.

<sup>66</sup> Hodgson, *supra* note 60, at 14 (“America’s destiny is to spread the message of the benefits of capitalism to the rest of the world.”); Eskridge & Frickey, *supra* note 43, at 2050 (“Legal process thinkers did not consider substantive fairness to be a primary element of political legitimacy, and this suggestion amounted to an acquiescence in the status quo.”); Eskridge & Frickey, *supra* note 41, at 697 (describing the “optimistic pluralism assumption” of the time); Gerstle, *supra* note 61, at 579 (“Everyone agreed that the productivity of American capitalism and its capacity to spread affluence

Less a description of a reality than a “political project,”<sup>67</sup> the postwar consensus attracted support from a “liberal elite” bent on defending the supremacy of American politics and culture amidst Cold War stresses.<sup>68</sup> Their ranks included “lawyers and academics of the eastern and western megapolises,” precisely the homogenous stratum from which the 1960s Advisory Committee drew its members.<sup>69</sup> To them, a rule designed to favor desegregation plaintiffs may have had an ideological impetus. But Rule 23 could still claim the mantle of substantive neutrality, as a reform exemplifying the sort of modest change that corrected for flaws in an otherwise healthy legal system. Desegregation litigation helped to dismantle barriers that excluded Black Americans from the essential goodness of American life. A class action that aided this litigation strengthened, rather than altered, the status quo as men like Sacks, Kaplan, and Wright may have envisioned it.

The conditions of consensus that made Rule 23 possible were disintegrating by mid-1960s, just as the Advisory Committee finished its work on the modern class action.<sup>70</sup> The “*trente glorieuses*” of post-war economic growth that excused a reckoning with economic inequality ended.<sup>71</sup> The fury with which Northern whites in the late 1960s and 1970s resisted residential desegregation and busing proved the depths of the postwar consensus’s race illusion.<sup>72</sup> So did the burgeoning of a right-wing reaction to postwar liberalism, a backlash that elites could overlook in the 1960s but not by the 1970s.<sup>73</sup> Second wave feminism upended gender roles that had hardened after World War II.<sup>74</sup>

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throughout the social order had made questions of class inequality meaningless and that political conflict would be limited to well-regulated and institutionalized struggles among interest groups over how much affluence would come their way.”).

<sup>67</sup> Wendy L. Wall, *The 1930s Roots of the Postwar “Consensus”*, in *THE LIBERAL CONSENSUS RECONSIDERED*, *supra* note 12, at 67, 69.

<sup>68</sup> Hodgson, *supra* note 60, at 25.

<sup>69</sup> *Id.* at 23; cf. Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 *AM. J. COMPAR. L.* 675, 700 (1997) (commenting on rulemaker homogeneity).

<sup>70</sup> Eskridge & Frickey, *supra* note 43, at 2051 (noting that “[b]etween 1963 and 1973, the socio-political conditions for the legal process synthesis ended” as “the ideological consensus exploded” and “America rediscovered scarcity”).

<sup>71</sup> David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 22 (2014).

<sup>72</sup> Gerstle, *supra* note 62, at 60.

<sup>73</sup> See Heale, *supra* note 12, at 36-37 (examining the “roots [of] the New Right” and the grassroots movement that developed in the decades before and after the 1960s).

<sup>74</sup> E.g., Constance Grady, *The Waves of Feminism, and Why People Keep Fighting Over Them, Explained*, *VOX* (July 20, 2018, 9:57 AM), <https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth> [<https://perma.cc/8T2T-J6WG>] (describing second-wave feminists’ advocacy against traditional gender roles); see also Laville, *supra* note 64, at 246-48 (detailing the erosion of gender roles post-World War II).

Disenchantment with rulemaking dates to the beginning of the postwar liberal consensus's end, a coincidence whose timing suggests anything but.<sup>75</sup> The 1966 generation finished its work in 1970, ending its term with consequential and “decidedly” pro-private enforcement reforms to discovery rules.<sup>76</sup> The failure of a 1970s-long effort to amend Rule 23 followed, illustrating how quickly the world had shifted from the 1960s.<sup>77</sup> The next round of significant proposals, to amend Rules 11 and 68, proved “intensely controversial” in the 1980s.<sup>78</sup> Ambitious efforts to reform Rule 23 largely fizzled in the 1990s.<sup>79</sup> Modesty and caution has characterized rulemaking this century.<sup>80</sup>

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To Professor Burbank and his co-author Sean Farhang, “[i]t is not easy to explain the relative restraint of the [Advisory Committee] over the last decade . . . .”<sup>81</sup> They cite the 1988 amendments to the Enabling Act as an institutional explanation, noting the barriers it heightened between a proposed rule and its promulgation.<sup>82</sup> A complementary explanation reckons with the fundamental conditions of political culture that determine the scope of rulemakers’ legitimate prerogative. Rulemaker primacy requires substantive neutrality. When everyone agrees on substance, the domain of substantive neutrality has expansive boundaries, and rulemakers like the 1966 generation enjoy a wide berth. But the domain of what can plausibly pass as neutral shrinks as political, social, and economic consensus disappears. Divided attitudes toward race and racism, political polarization, and deepening economic inequality are the stories of American public life over the past forty years.<sup>83</sup> The conditions of consensus that once made rulemaker

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<sup>75</sup> Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 236 (1998); Bone, *Process*, *supra* note 2, at 900.

<sup>76</sup> Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1566 (2015).

<sup>77</sup> Marcus, *supra* note 38, at 619.

<sup>78</sup> Burbank & Farhang, *supra* note 76, at 1585; *cf.* Yeazell, *supra* note 75, at 233 (identifying the efforts in the 1980s as the last major rulemaking endeavor before the century’s end).

<sup>79</sup> STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 118 (2017).

<sup>80</sup> Burbank & Farhang, *supra* note 76, at 1592.

<sup>81</sup> *Id.* at 1593.

<sup>82</sup> BURBANK & FARHANG, *supra* note 79, at 20, 109-20.

<sup>83</sup> On political polarization, see, e.g., Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POLI. SCI. 129, 130 (2019) for an argument that there is an increasingly wide gap in understanding between the two major political parties in America. On increasing economic inequality, see, e.g., Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s> [https://perma.cc/VT5A-HVLU], which discusses the rise of economic inequality in the face of the

primacy possible have yielded to conditions of fracture. The domain of substantive neutrality has shrunk, and with it the ranks of procedural problems legitimately subject to the principle of rulemaker primacy.

## II. THE FEDERAL RULES SYSTEM AFTER ITS COLLAPSE

Professors Burbank and Farhang have exhaustively documented how, over time, procedural reform with distributional or regulatory consequence has moved almost entirely out of the rulemaking process.<sup>84</sup> But the pageantry of the Federal Rules System continues. The Advisory Committee spent years considering but ultimately passing on significant reforms to Rule 23 in the mid-2010s.<sup>85</sup> It now has federal multidistrict litigation (“MDL”) in its sights.<sup>86</sup> Scholars and advocates press for significant rule changes to correct one perceived procedural ailment or another.<sup>87</sup> While some commentators believe the rulemaking process is essentially healthy, others implore it to do better.

Such expectations, demands, and advocacy will founder on the shoals of a blunt reality. The Federal Rules System is the sick man of American civil justice.<sup>88</sup> We act like its empire remains powerful even as it totters on eroded principles of rulemaker primacy and substantive neutrality. In this Part, I take stock of the system as the lamps are about to go out.<sup>89</sup> It has three important hallmarks. The first is delegation.<sup>90</sup> Rulemakers decline to make procedural

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2020 Presidential election. On divides over racial attitudes, see, e.g., 4. *Views on Race and Immigration*, PEW RSCH. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/views-on-race-and-immigration/> [<https://perma.cc/283J-MSHC>].

<sup>84</sup> BURBANK & FARHANG, *supra* note 79, at 20, 49; Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37, 48 (2018).

<sup>85</sup> Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 921-33 (2018).

<sup>86</sup> *E.g.*, Minutes, Civil Rules Advisory Committee 11-19 (Apr. 1, 2020), [https://www.uscourts.gov/sites/default/files/2020-04-01\\_cv\\_minutes\\_final\\_o.pdf](https://www.uscourts.gov/sites/default/files/2020-04-01_cv_minutes_final_o.pdf) [<https://perma.cc/KK3X-7ZJU>] (describing Advisory Committee consideration of rulemaking for MDL).

<sup>87</sup> *E.g.*, Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1684-85 (2017) (proposing the promulgation of non-trans-substantive rules); Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 98 (2018) (discussing the promulgation of rules tailored to particular contexts based on complexity or substance); Robert G. Bone, *Walking the Class Action Maze: Toward a More Functional Rule 23*, 46 U. MICH. J.L. REFORM 1097, 1114-24 (2012) (outlining a plan to revise Rule 23). Lawyers for Civil Justice, a defense-oriented organization, advocates for rule amendments that would have significant distributive effects. *E.g.*, Allocate Discovery Costs, LAWS. FOR CIV. JUST., <https://www.lfcj.com/requester-pays-discovery.html> [<https://perma.cc/9MYT-4YMZ>] (advocating for a rule that would require the requester to pay the costs of discovery across the board).

<sup>88</sup> This is a reference to a metaphor used to describe the Ottoman Empire during the nineteenth century, up to World War I.

<sup>89</sup> This reference stays with the same theme and invokes Sir Edward Grey’s famous comment at World War I’s start.

<sup>90</sup> I am grateful to Blake Emerson for helping me to tease apart delegation and acquiescence.

policy choices themselves and empower courts to do so instead. The second is acquiescence. Rulemakers have yielded as courts have wrested control over the procedural agenda from them. The third is irrelevance. American civil justice's most serious problems have regulatory and distributional significance that places them beyond the system's capacity to address.

### A. Delegation

If the principle of substantive neutrality requires conditions of consensus to enable meaningful change through the rulemaking process, then rulemakers laboring in our fractured political culture cannot drive procedural reform of significance. They will necessarily delegate. Professor Burbank and others have characterized the Federal Rules as “charters for discretionary decision-making,” with “the actual choices” left “to federal trial judges.”<sup>91</sup> One of this century's most controversial rule changes, the amendment to Rule 26 requiring that judges consider the proportionality of discovery requests, exemplifies this sort of handover to district judges.<sup>92</sup> The 2015 amendment simply moved proportionality, originally added to Rule 26 in 1983, to its provision defining the scope of discovery.<sup>93</sup> More than anything else, this change may have offered the Chief Justice an occasion to jawbone federal judges, to exhort them to require parsimony in discovery.<sup>94</sup> Whether the post-2015 proportionality requirement will explode as a “bomb” and limit discovery significantly will depend not on any direct choice the committee made for discovery governance but on what judges decide to do with it.<sup>95</sup>

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<sup>91</sup> Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 48 (2010); see also Bone, *Effective*, *supra* note 15, at 326-27 (“Rather than resolving difficult and often divisive normative questions at the rulemaking stage, the Advisory Committee tends to draft general rules with vague standards that in effect leave the hard questions for trial judges to resolve in individual cases.”).

<sup>92</sup> Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 45-46 (2016); BURBANK & FARHANG, *supra* note 79, at 123.

<sup>93</sup> Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117, 123-34 (2017); cf. *Schultz v. Sentinel Ins. Co.*, Civ. No. 15-4160, 2016 WL 3149686, at \*7 (D.S.D. June 3, 2016) (“The more things change, the more they stay the same.”).

<sup>94</sup> 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6-7, [supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf](https://publicinfo/year-end/2015year-endreport.pdf) [https://perma.cc/MS9E-AF5H]; cf. *Roberts v. Clark Cnty. Sch. Dist.*, 312 F.R.D. 594, 603-04 (D. Nev. 2016) (discussing the 2015 Amendments and the Chief Justice's report and concluding that change to discovery practice “is long overdue”); *Dowdy v. GEICO Gen. Ins. Co.*, Civ. No. 16-303, 2017 WL 10765264, at \*4 (M.D. Ga. June 30, 2017) (discussing the Chief Justice's Report to support an order limiting discovery); BURBANK & FARHANG, *supra* note 79, at 124-25 (emphasizing the Chief Justice's belief that the 2015 discovery amendments would be influential).

<sup>95</sup> Letter from Stephen B. Burbank to Committee on Rules of Practice and Procedure 11 (Feb. 10, 2014); see also *Kennicott v. Sandia Corp.*, 327 F.R.D. 454, 471 (D.N.M. 2018) (arguing that the proportionality requirement will turn federal judges into “Plato's enlightened guardians”).

Rule 23(f) is delegation in a different, more novel register. It does not enable trial court discretion but rather enhances judicial power to craft binding class action doctrine. Added in 1998, Rule 23(f) facilitates appellate review of class certification decisions but itself does not prescribe standards for class certification or settlement. It emerged after several years of intense rulemaker debate over changes to class action practice in the mid-1990s, during which the Advisory Committee considered but ultimately declined to refashion class certification requirements.<sup>96</sup> It instead opted for Rule 23(f), an amendment that has “substantially expand[ed] the opportunities for conservative federal appellate courts, including the Supreme Court, to control the course of class-action jurisprudence.”<sup>97</sup> The fruits of this appellate engagement have included prohibitions on incentive payments for class representatives, changes to commonality, requirements for arbitration clause enforcement, and limits on cy pres availability.<sup>98</sup> The doctrinal design choices for class actions that the Advisory Committee itself has made have had a comparatively slight impact on the class action’s availability. The 2018 Rule 23 amendments, for instance, eschewed more controversial, fundamental changes for modest tweaks to notice obligations and procedures for dealing with objectors and for settlement approval.<sup>99</sup>

The Rule 23 and 26 amendments do not exemplify the principle of rulemaker primacy but its opposite—a delegation to federal judges, to empower them to make doctrinal design choices with distributional or regulatory consequence.<sup>100</sup> Proportionality may fit longstanding rulemaking practice, but Rule 23(f) amounts to a surrender of the power to make binding procedural doctrine.

Of course, the Advisory Committee has made some important choices of procedural design over the past twenty-five years. To Richard Marcus, the 2006

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<sup>96</sup> For the Working Papers of the Advisory Committee that reflect these deliberations, see *FJC Studies and Related Publications*, U.S. CTS., <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/fjc-studies-and-related-publications> [<https://perma.cc/VQG8-5S8X>].

<sup>97</sup> Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1515 (2017).

<sup>98</sup> *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020) (prohibiting incentive payments); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (changing commonality doctrine); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (requiring enforcement of arbitration clauses); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) (limiting cy pres availability).

<sup>99</sup> See Marcus, *supra* note 85, at 921-36 (describing controversial issues of class action procedure and contrasting them with modest changes the 2018 amendments actually made).

<sup>100</sup> Proportionality was one of three changes to discovery with an alleged “anti-litigation” skew. Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 759 (2016). Another, to narrow the scope of discoverable material in Rule 26(b)(1), prompted little controversy during the rulemaking process and appears to have had little effect. Memorandum from Jeffrey S. Sutton to Scott S. Harris on Summary of Proposed Amendments to the Federal Rules 7 (Sept. 26, 2014); *Eramo v. Rolling Stone LLC*, 314 F.R.D. 205, 209 (W.D. Va. 2016). The other change, to include “the allocation of expenses” among terms that a court might include in a protective order, codified an already-existing power. Memorandum, *supra*, at 9.

amendments governing the discovery of electronically stored information (ESI) prove that rulemaking is “not dead yet.”<sup>101</sup> Proposed amendments to govern social security disability benefits cases, if they succeed, would significantly improve practice in 20,000 cases filed annually.<sup>102</sup> But the digital revolution prompted the ESI amendments, and the social security amendments would bring order to procedural chaos caused by the use of trial court rules for what is really appellate litigation.<sup>103</sup> These technocratic reforms remain within a shrunken domain of substantive neutrality because they have no distributional or regulatory slant. In a mature procedural system, meaningful opportunities for such changes and fixes will rarely present themselves. Otherwise, substantive neutrality’s shrunken domain leaves rulemakers room for little more than modest, arguably picayune, adjustments.<sup>104</sup>

### B. Acquiescence

Delegation happens when rulemakers opt to empower courts. Acquiescence, or the decision to yield when courts muscle in on rulemakers’ territory, confirms even more powerfully the demise of rulemaker primacy. This principle’s success had hinged on a norm of deference by the Court to the Advisory Committee.<sup>105</sup> Lawmaking norms tend to buckle as conditions of dissensus deepen in American public life.<sup>106</sup> The Advisory Committee’s response to *Twombly* and *Iqbal*, the Supreme Court’s decisions raising the federal pleading standard, illustrates the result for rulemaking—a dynamic of retreat.<sup>107</sup> Substantive neutrality’s shrunken domain made the Committee’s unwillingness to reinstitute notice pleading, the Federal Rules System’s cornerstone, unavoidable.

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<sup>101</sup> Marcus, *supra* note 37, at 300, 318; *see also* Letter from Stephen B. Burbank, *supra* note 95, at 10 (praising the 2006 amendments as a “model of careful and inclusive rulemaking”).

<sup>102</sup> JONAH GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS 143 (2016).

<sup>103</sup> *See id.* at 127 (“District courts function as courts of appeals for social security claimants. The Federal Rules of Civil Procedure therefore do not work well for these cases, as they are designed for civil actions litigated in the first instance. As a result, districts and even individual judges have forged their own workarounds. A kaleidoscopic proliferation of procedures is the result.”).

<sup>104</sup> Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 466 (2013) (agreeing that “the politicization of judicial rulemaking” has “channel[ed]” the Advisory Committee’s work toward “noncontroversial, largely meaningless efforts”).

<sup>105</sup> *E.g.*, *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting the lower court’s effort to craft a heightened pleading requirement for civil rights litigation against local governments and insisting that such “a result . . . must be obtained by the process of amending the Federal Rules”).

<sup>106</sup> *See generally* Joseph Fishkin & David E. Pozen, Essay, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018) (describing the role that constitutional norms play in American government and how increased political polarization has threatened these norms).

<sup>107</sup> For other accounts, *see* Coleman, *supra* note 15, at 923-36; Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483, 1512-31 (2013); Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms*, 15 NEV. L.J. 1093, 1095-97 (2015).

*Twombly* and *Iqbal* prompted years of Committee deliberations over pleading. An assertion of rulemaker primacy, at least of a sort, surfaced for a time in its discussions. Shortly after *Iqbal*, Congress considered legislation that would have reinstated notice pleading.<sup>108</sup> To the Committee, this prospect created a “very difficult and delicate problem for the rules process.” Its members resolved in response “to protect institutional interests under the Rules Enabling Act.”<sup>109</sup> To “promote the integrity of the rulemaking process,” Committee leadership sent letters to Congress “to urge [it] to use that process, rather than legislation, to address pleading issues.”<sup>110</sup> One of these letters insisted that the Committee was “deeply involved” in deliberations over pleading, “precisely the type of work Congress required in the Rules Enabling Act.”<sup>111</sup>

This assertion of institutional prerogative proved feeble when the Committee ultimately decided to defer pleading doctrine to “the evolutionary process of common-law development.”<sup>112</sup> At first, members resolved to “allow time for lower courts to work through the *Twombly* and *Iqbal* invitation to reconsider pleading practices” before any Committee action.<sup>113</sup> As the Committee determined in 2011, “a sense that practice has not fully crystallized in the lower courts, and the possibility that the Supreme Court will have more to say, . . . undercut arguments that the time has come to begin preparing rules revisions for publication and eventual adoption.”<sup>114</sup> By 2014, however, “a growing sense that pleading practice has evolved to a nearly mature state under the *Twombly* and *Iqbal* decisions” prompted the Committee to take pleading reform off its agenda.<sup>115</sup>

The process of common law evolution, in other words, had to happen before the Committee could consider reforms. But once this evolutionary process ended, it left the Committee no work to do. This acquiescence makes sense if uniformity in federal practice is rulemaking’s sole concern, and if the lower courts had come to a common understanding of Rule 8 after *Twombly* and *Iqbal*. But a procedural system’s health requires more than uniformity. Pleading

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<sup>108</sup> Committee – Draft Minutes, in *Agenda Book*, Advisory Committee on Civil Rules, Atlanta, GA 5, 10 (Mar. 18-19, 2010).

<sup>109</sup> *Id.* at 11, 16.

<sup>110</sup> June 2010 Standing Committee – Draft Minutes, in *Agenda Book*, Advisory Committee on Civil Rules, Washington, D.C. 5 (Nov. 15-16, 2010).

<sup>111</sup> Letter from Lee H. Rosenthal & Mark R. Kravitz to Patrick J. Leahy, Chair, Committee on the Judiciary (Dec. 9, 2009), in *Agenda Book*, Advisory Committee on Civil Rules, Atlanta, GA 147, 148 (Mar. 18-19, 2010).

<sup>112</sup> June 2010 Standing Committee – Draft Minutes, *supra* note 110, at 22; Hoffman, *supra* note 107, at 1488-89 (discussing rulemakers’ decision that it would be better to “wait for the post-*Iqbal* case law to develop . . . before making any decisions about how to proceed”).

<sup>113</sup> *Agenda Book*, Advisory Committee on Civil Rules, Austin, TX 28 (Apr. 4-5, 2011).

<sup>114</sup> *Agenda Book*, Advisory Committee on Civil Rules, Washington, DC 41 (Nov. 7-8, 2011).

<sup>115</sup> Draft Minutes, Civil Rules Advisory Committee, October 30, 2014, in *Agenda Book*, Advisory Committee on Civil Rules, Washington, DC 39, 72 (Apr. 9-10, 2015).

doctrine lies at “the very heart of the revolutionary 1938 Federal Rules of Civil Procedure” and represents “the very soul of the current civil justice system” as the Committee recognized.<sup>116</sup> The Committee could indeed “be pardoned for proceeding with self-conscious deliberation” and deferring an inquiry into what pleading doctrine ought to be after it gained a robust empirical understanding of the decisions’ effects.<sup>117</sup> But the Committee did not just postpone this normative engagement. It declined such engagement altogether.

The Supreme Court can reject a proposed rule amendment, so an attempt by the Committee to assert its institutional prerogative and undo *Twombly* and *Iqbal* could have triggered an unprecedented rulemaking crisis. The Committee’s forbearance, then, had the virtue of prudence. But any such rulemaking *realpolitik* does not lessen a dynamic of acquiescence but underscores it. Future efforts by the Court to refashion rules through interpretation will leave the Committee similarly handcuffed. At any rate, the Committee did not just stay its hand. It entrenched the Court’s choice by abrogating the illustrative forms appended to the Federal Rules.<sup>118</sup> One had illustrated the modest pleading standard Rule 8 as originally designed contemplated. *Twombly*, *Iqbal*, and the “clear tension” between these decisions and the form complaint clearly pushed the Committee to act.<sup>119</sup>

With conditions of consensus long gone, the acquiescence to the Supreme Court by a rulemaking process acutely aware of limits to its authority was inevitable. *Twombly* and *Iqbal* sparked intense controversy, because they appeared to empower defendants to thwart plaintiffs’ efforts to vindicate rights. Deliberations indicate an understanding that a Committee response to *Twombly* and *Iqbal*, however complicated institutionally by the Court’s veto power over a proposed amendment, would trigger legitimacy concerns. A member asked “whether it is possible to determine whether any heightened rate of dismissals is a good thing or bad . . . .”<sup>120</sup> While “it is important to gather data” about the decisions’ impact, this member agreed, “‘in the end’ the design of pleading doctrine ‘will be a policy decision.’”<sup>121</sup> But “[i]t is

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<sup>116</sup> January 2009 Standing Committee – Draft Minutes, *in* Agenda Book, Advisory Committee on Civil Rules, Chicago, IL 34 (Apr. 20-21, 2009).

<sup>117</sup> Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 Or. L. Rev. 955, 959 (2012).

<sup>118</sup> *E.g.*, Coleman, *supra* note 15, at 937-40 (discussing the Committee’s abrogation of Rule 84 and elimination of Form 11).

<sup>119</sup> *E.g.*, June 2012 Standing Committee – Draft Minutes, *in* Agenda Book, Advisory Committee on Civil Rules 69, 107 (Nov. 1-2, 2012) (noting that the abrogation project had received an “impetus” from *Twombly* and *Iqbal* and the “clear tension between simplicity” of the form complaint and “the pleading requirements announced in the Supreme Court’s decisions”).

<sup>120</sup> Draft Minutes, Civil Rules Advisory Committee, March 18-19, 2010, *in* Agenda Book, Advisory Committee on Civil Rules, Washington, D.C. 55, 67 (Nov. 15-16, 2010).

<sup>121</sup> *Id.*; *see also* Cooper, *supra* note 117, at 959 (“The hard part will be reaching judgments about the desirability of the new practices, if indeed the new practices become firmly established.”).

distinctly difficult for the rules committee to make policy decisions in a way that is not political, or seen to be political.”<sup>122</sup>

Pleading doctrine, long a target for ideologically-charged civil justice reformers,<sup>123</sup> fell outside the shrunken domain of substantive neutrality. Once the Court reset the pleading threshold, the rulemaking process could do nothing but go along.

### C. Irrelevance

Acquiescence’s companion is irrelevance. If the principle of rulemaker primacy must yield when procedural needs implicate matters of regulatory or distributional consequence, then procedural reform guided by the principle of rulemaker primacy can only happen if no such needs arise. This is manifestly not the case for American civil justice.<sup>124</sup>

Within the federal courts, nothing poses a more obvious threat to the Federal Rules System’s relevance than MDL, a species of litigation through which billions of dollars flow each year. Although the Federal Rules apply in MDL,<sup>125</sup> and although the gap between MDL and more quotidian federal litigation can be overstated,<sup>126</sup> a fair amount of “ad hoc,” judge-fashioned procedure governs at least some key matters in important MDL proceedings.<sup>127</sup> The Advisory Committee is presently exploring the possibility of MDL-specific amendments to various of the Federal Rules, recognizing the fact that rules for ordinary litigation have yielded in important ways to bespoke MDL case management practices.<sup>128</sup> But, as Andrew Bradt writes, “the push for MDL reform” through rulemaking

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<sup>122</sup> Draft Minutes, Civil Rules Advisory Committee, March 18-19, 2010, *supra* note 120, at 67.

<sup>123</sup> *E.g.*, WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 90-107 (1991).

<sup>124</sup> For a synoptic and troubling account of the pathologies of American civil justice circa 2021, see Norman W. Spaulding, *The Ideal and the Actual in Procedural Due Process*, 48 *HASTINGS CONST. L.Q.* 261, 270-90 (2021).

<sup>125</sup> See *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020) (“[In MDL] the relevant law takes the form of the Federal Rules of Civil Procedure”).

<sup>126</sup> See Zachary D. Clopton, *MDL as Category*, 105 *CORNELL L. REV.* 1297, 1300 (2020) (challenging the notion of MDL as a “category” and suggesting that claims about unorthodox or ad hoc procedural governance, while perhaps accurate for large MDLs, do not describe all MDLs); Alexandra D. Lahav, *Multidistrict Litigation and Common Law Procedure*, 24 *LEWIS & CLARK L. REV.* 531, 533 (2020) (challenging the claim that the relationship between the Federal Rules and MDL procedural governance is more attenuated or different than the Federal Rules’ relationship to procedural governance in more standard litigation).

<sup>127</sup> Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 *U. PA. L. REV.* 1669, 1688-89 (2017) (explaining that the “very hallmark” of MDL is that the judge can “remain flexible and creative”); David L. Noll, *MDL as Public Administration*, 118 *MICH. L. REV.* 403, 423 (2019) (“MDL is a world of ad hoc procedure.”).

<sup>128</sup> On the MDL Subcommittee’s work, see Minutes, *supra* note 86, at 11-19.

“remains about power and control.”<sup>129</sup> Defense-side interests champion restrictive proposals to constrain a system of aggregate litigation that has enabled mass tort litigation to flourish after the class action’s retreat.<sup>130</sup> Given substantive neutrality’s shrunken domain, the push for significant rule-based governance will likely falter.<sup>131</sup>

MDL surely warrants close attention, but by nearly any metric it pales in significance as a pressing matter of procedural policy to a crisis of inequality roiling American civil justice. Systemic dysfunctions now plague litigation in state courts, where 98% of American civil cases proceed.<sup>132</sup> The proliferation of consumer debt collection lawsuits has made these courts part of a vast system of economic domination.<sup>133</sup>

As Judith Resnik argued in 1986, the Federal Rules System rests on a “faith” in “adversarial exchanges as an adequate basis for adjudication,”<sup>134</sup> a process that assumes that “competition between balanced opponents . . . will lead to the triumph of truth.”<sup>135</sup> The bases for this faith have not just declined. They have collapsed. Parties to civil cases in 1986 may have routinely litigated on unequal terms,<sup>136</sup> but the percentage of civil cases in state courts of general jurisdiction in which both sides at least had representation exceeded 95%.<sup>137</sup> This figure has fallen by a staggering amount, to under 50%.<sup>138</sup> The spike in American consumer debt, itself a function of growing inequality, has driven this change.<sup>139</sup>

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<sup>129</sup> Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 *FORDHAM L. REV.* 87, 105 (2018).

<sup>130</sup> *Id.*

<sup>131</sup> Draft Minutes, Civil Rules Advisory Committee, April 1, 2020, in *Agenda Book*, Advisory Committee on Civil Rules 93, 111-13 (Oct. 16, 2020) (summarizing committee members’ skepticism about the need for an MDL rule and concluding that “in the end” the committee may “conclude that there is no need to recommend a new Civil Rule”).

<sup>132</sup> *E.g.*, STEPHEN C. YEAZELL, *LAWSUITS IN A MARKET ECONOMY* 5 (2018) (describing how the “dispersion” of the justice system across multiple layers of government results in the “vast majority” of lawsuits occurring in state court).

<sup>133</sup> *See generally* HUMAN RIGHTS WATCH, *RUBBER STAMP JUSTICE: US COURTS, DEBT BUYING CORPORATIONS, AND THE POOR* 16 (2016) (observing that two debt collection companies earned almost \$1 billion through debt collection litigation).

<sup>134</sup> Resnik, *Failing Faith*, *supra* note 14, at 505.

<sup>135</sup> *Id.* at 513 (describing a “series of assumptions” one must make about the participants in order to “rely on lawyer-based adversarialism”).

<sup>136</sup> *Id.* at 517 (describing how “major difficulty” in the era was the “problem of parity”).

<sup>137</sup> PEW CHARITABLE TRUSTS, *HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS* 13 (2020); *see also* NAT’L CTR. FOR STATE CTS., *CIV. JUST. INITIATIVE, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 31-35 (2015) (noting that before the decline attorney representation was over 95%). *See generally* Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 *BYU L. REV.* 899, 901, 903 (describing the current “breakdown in adversary procedure” due to the “unrealistic demands” of the paradigm in today’s judicial system).

<sup>138</sup> PEW CHARITABLE TRUSTS, *supra* note 137, at 13.

<sup>139</sup> *Id.* at 11.

This explosion has created immense amounts of litigation over modest medical, credit card, and student loan amounts.<sup>140</sup> Creditors and debt buyers now bring 25% of the country's civil cases in order to obtain judgments they can use to garnish wages, seize bank accounts, and sometimes force debtors into jail.<sup>141</sup> (Another 29% are landlord-tenant disputes.)<sup>142</sup> Most defendants, by nature financially strapped, lack counsel.<sup>143</sup> The vast majority default.<sup>144</sup>

Debt collection litigation proceeds almost exclusively in state courts and thus beyond the formal reach of the federal rulemaking process. But the Federal Rules System encompasses most of American civil justice, not just federal civil procedure. Most states' procedural regimes resemble the Federal Rules System in key respects.<sup>145</sup> Many states have rulemaking processes modeled on the Enabling Act's.<sup>146</sup> Furthermore, as Scott Dodson argues, "[i]n every state, federal rulemakers have exerted an extraordinary gravitational pull on state rulemakers."<sup>147</sup> Forty years ago, when both sides to the median civil action had counsel,<sup>148</sup> federal procedural reforms had important, if indirect, significance for state court cases.<sup>149</sup> Now, a tranche of American civil litigation, one far larger than the MDL docket, proceeds with hardly any procedural governance at all, whether because cases are filed in small claims court, or because pro se defendants lack the wherewithal to use procedure.<sup>150</sup>

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Id.* at 8.

<sup>142</sup> NAT'L CTR. FOR STATE CTS., *supra* note 137, at iii.

<sup>143</sup> PEW CHARITABLE TRUSTS, *supra* note 137, at 13.

<sup>144</sup> *Id.* at 2; URBAN JUSTICE CENTER, DEBT WEIGHT: THE CONSUMER CREDIT CRISIS IN NEW YORK CITY AND ITS IMPACT ON THE WORKING POOR 9 (2007).

<sup>145</sup> Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707-19 (2016) ("Most states' rules now mirror the Federal Rules, and the rest have been pulled toward the Federal Rules in significant way").

<sup>146</sup> Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 9 (2018) (finding that forty-one states follow a model of the federal system of court-based rulemaking); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356-57 (2002) ("[W]hile true replica jurisdictions were in the minority, the federal model of civil procedure was indeed the dominant model among the states . . .").

<sup>147</sup> Dodson, *supra* note 145, at 710.

<sup>148</sup> See Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 751 (2015).

<sup>149</sup> E.g., Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 334-59 (2001) (reporting the results of a survey of pleading practice in three code pleading states and showing how state pleading practice converges with federal pleading practice). *But cf.* Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RESRV. L. REV. 501, 513-16 (2016) (describing a slowed pace of formal amendments to state rules following federal rule changes).

<sup>150</sup> Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 205 (2014) (finding that 83% of cases proceed as small-claims cases "in which few or no rules of evidence are applied and in which few if any procedural safeguards are observed").

Procedure itself is not irrelevant to what ails debt collection litigation.<sup>151</sup> Reforms to rules regarding service,<sup>152</sup> pleading,<sup>153</sup> mandatory initial disclosures,<sup>154</sup> and default judgment procedures<sup>155</sup> could help rid it of some of its worst abuses. These changes would have to come from the states, although federal rule changes designed for the considerable number of pro se litigants in federal court could help to galvanize coordinated responses across the country.<sup>156</sup> In fact, several states have adopted or are considering debt collection-specific rule changes.<sup>157</sup> As Zachary Clopton has documented, state rulemaking committees tend to have more diverse memberships than the federal Advisory Committee.<sup>158</sup> States also have more homogenous political cultures than the

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<sup>151</sup> See Steinberg, *supra* note 148, at 746 (arguing that “an overhaul of the processes and rules that govern litigation” is necessary to protect unrepresented parties).

<sup>152</sup> E.g., PEW CHARITABLE TRUSTS, *supra* note 137, at 16 (describing how many people may not respond to debt claims because they have not been notified, do not recognize the company that filed the lawsuit, or have been a victim of fraudulent service practices); HUMAN RIGHTS WATCH, *supra* note 133, at 36 (“[I]nadequate notice and even ‘sewer service’—when process servers falsely claim to have served a defendant with notice—have been real problems in many debt buyer lawsuits.”).

<sup>153</sup> E.g., Hannah Lieberman, *Uncivil Procedure: How State Court Proceedings Perpetuate Inequality*, 35 YALE L. & POL’Y REV. 257, 263-64 (2016) (stating that pleadings in debt-buyer cases “frequently fail to meet either fact or notice pleading standards”); FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION iii (2010) (“States should require collectors to include more information about the debt in their complaints.”).

<sup>154</sup> See NEW YORK APPLESEED, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER CREDIT CASES 4 (2010) (recommending making “certain discovery and court inquiries into the answer automatic upon the filing of certain defenses”).

<sup>155</sup> E.g., NEW ECONOMY PROJECT, THE DEBT COLLECTION RACKET IN NEW YORK: HOW THE INDUSTRY VIOLATES DUE PROCESS AND PERPETUATES ECONOMIC INEQUALITY 4 (2013) (“[N]o application by a debt buyer for a default judgment complied with New York law.”).

<sup>156</sup> On the catalyzing influence of federal rulemaking efforts on the states, see, e.g., Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 424-34 (2018). On the size of the non-prisoner federal pro se docket, see JEFRI WOOD, PRO SE CASE MANAGEMENT FOR NONPRISONER CIVIL LITIGATION vii (2016).

<sup>157</sup> E.g., Verónica C. Gonzales-Zamora & George Bach, Civil Procedure Update 2020: New Mexico Annual Judicial Conclave 3-4 (June 19, 2020) (presentation available in the University of New Mexico School of Law Faculty Scholarship Digital Repository) (describing proposed New Mexico rule amendment); *Proposed Amendments, VT. JUDICIARY*, vermontjudiciary.org/attorneys/rules/proposed [https://perma.cc/3F7J-5ZCG] (describing proposed amendments to Rules 9.1 and 55(c)(7) of the Vermont Rules of Civil Procedure and Rules 2(a), 3, and 8(c) of the Vermont Rules of Small Claims Procedure; PEW CHARITABLE TRUSTS, *supra* note 137, at 21 (providing an overview of different states’ policy changes by statute and court rule since 2009).

<sup>158</sup> Clopton, *supra* note 146, at 40-43 (describing how the increased diversity on state rulemaking committees may result in a higher level of group competence and information). On a lack of diversity on the federal Advisory Committee, see Brooke D. Coleman, #Sowhitemale: Federal Procedural Rulemaking Committees, 68 UCLA L. REV. DISC. 370, 388 (2020). On the benefit of diversity on rulemaking committees, see *id.* at 397-400.

United States overall.<sup>159</sup> Both features may enable reforms in some jurisdictions that can shield debtors against at least some of this litigation's worst excesses.

But the principle of substantive neutrality will impose a formidable obstacle to significant, widespread reforms to debt collection litigation through rulemaking processes. The existence of a \$100 billion debt-buying industry depends on an unceasing flow of default judgments.<sup>160</sup> For it, procedure *is* substance. The mockery that debt collection litigation makes of the adversarial assumption behind the Federal Rules System needs something along the magnitude of Rule 23, as revised in 1966, as a response. To achieve this scale of reform, rulemakers would have to wade deeply into the politics of inequality.

To Judith Resnik, *Goldberg v. Kelly*, decided in 1970, “exemplifie[d]” the migration of “a commitment” to “the value choices expressed in the Federal Rules of Civil Procedure” into administrative adjudication, among other domains.<sup>161</sup> As such, *Goldberg* represented a high-water mark of sorts for the Federal Rules System. Debt collection litigation is the anti-*Goldberg*. Caseload pressures, inadequate access to counsel, and other problems have distorted a number of administrative adjudication systems that ensnare marginalized groups. These pathologies have infected state court dockets, challenging any further claim that the Federal Rules System, with its assumptions about litigation culture, continues to characterize American civil justice in any broad sense.<sup>162</sup>

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To the extent that Supreme Court decision-making is representative,<sup>163</sup> the current elaboration of procedural doctrine in the federal judiciary proceeds in a manner utterly inconsistent with the principle of substantive neutrality. As Professors Burbank and Farhang document, justices' votes have a significant ideological skew in cases addressing procedural aspects of the enforcement of

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<sup>159</sup> E.g., Alan Greenblatt, *All or Nothing*, GOVERNING, Jan. 2019 at 40, 42-43 (describing the increasing dominance of one-party government in American states).

<sup>160</sup> Holland, *supra* note 150, at 186 (“[D]ebt buyers employ a high volume default judgment business model, and . . . their legal pleadings, evidence and tactics are rarely exposed to the adversary process”).

<sup>161</sup> Resnik, *Failing Faith*, *supra* note 14, at 517.

<sup>162</sup> See Spaulding, *supra* note 124, at 285-90 (describing administrative adjudication pathologies); *id.* at 270-79 (describing state court pathologies); *id.* at 266 (“[W]hat most Americans experience is, in truth, nothing like . . . the design debates about procedure in the federal courts . . .”).

<sup>163</sup> For evidence that circuit-level decision-making on procedural issues tracks ideology, see Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 237 (2020).

regulatory regimes through litigation. Indeed, the imbalance exceeds that of their votes in cases addressing the substance of these regimes.<sup>164</sup>

The ghost of substantive neutrality might have contributed to this pattern.<sup>165</sup> The veneer of impartiality the Federal Rules System could once claim may have depressed an impulse to bind judicial hands with the equivalent techniques of statutory interpretation or agency deference doctrines that separation of powers concerns require.<sup>166</sup> The extent to which the Federal Rules license federal common-lawmaking,<sup>167</sup> the extent to which the Rules Enabling Act imposes meaningful limits on rulemaking,<sup>168</sup> the degree to which federal courts must defer procedural change to the rulemaking process,<sup>169</sup> and the obligation judges have to use particular methodologies for rule interpretation all boil down to questions of power.<sup>170</sup> Each one of these—and many more—needs a satisfying answer, lest American civil procedure drift away from its principled moorings in the Federal Rules System toward the assertion of judicial whim.

<sup>164</sup> BURBANK & FARHANG, *supra* note 79, at 190-91.

<sup>165</sup> Professors Burbank and Farhang attribute this extreme polarization to the lower public salience that decisions involving seemingly technical, non-substantive matters have, and thus the weaker constraint that public opinion can exercise. *Id.* at 192.

<sup>166</sup> *E.g.*, Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1122 (2011) (noting that theories of statutory interpretation imply theories both about Congress itself and how Congress should relate to courts or agencies); Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 275 (2011) (“[T]he foundation for the *Chevron* doctrine is anchored in the separation of powers . . .”).

<sup>167</sup> Burbank & Wolff, *supra* note 91, at 49-50, 75 (discussing the use of federal common law in the context of Rules 13 and 23); Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Rest, and Federal Common Law*, 167 U. PA. L. REV. 1, 8 (2018) (discussing how the tolling rule emerging from *American Pipe* under Rule 23 is a rule of federal common law).

<sup>168</sup> Burbank, *supra* note 6, at 1034, 1108; Burbank & Silberman, *supra* note 69, at 699.

<sup>169</sup> Compare *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999); *Hall v. Hall*, 138 S. Ct. 1118, 1129-30 (2018); and *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017), with Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule *Twombly* and *Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 149 (2009) (describing *Twombly*'s inconsistency with the admonition that the Court must defer to the Advisory Committee).

<sup>170</sup> See Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2175-79 (2017) (documenting the Court's “vacillation”); Scott Dodson, *Justice Souter and the Civil Rules*, 88 WASH. U. L. REV. 289, 291 (2010) (examining Justice Souter's fairness approach to construing the civil rules). Compare *Krupski v. Crosta Crociere S.p.A.*, 560 U.S. 538, 557 (2010) (Scalia, J., concurring); and *Tome v. United States*, 513 U.S. 150, 167-68 (1995) (Scalia, J., concurring), with A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013) (providing a thorough textualist critique of Scalia's analysis of Rule 23(a)(2)). See also Hermann et al., *supra* note 169, at 161 (challenging a defense of *Twombly* and *Iqbal* as plausible interpretations of Rule 8 and insisting that “the degrees of separation” “between interpretation and judge-made law” “approach one hundred and eighty” in the two cases). For a defense of current rule interpretation practices, see Mark Moller, *Internal Separation of Powers, Compensating Adjustments, and Court Rulemaking*, 36 REV. LITIG. 579 (2018).

## III. TOWARD A NEW PRINCIPLE

The time has come to craft new principles for the post-Federal Rules System era. This recommendation is not a call for a revolution in procedural governance.<sup>171</sup> Even within a shrunken domain of substantive neutrality, the federal rulemaking process makes important contributions. The proposed social security rules will not improve our social safety net. But they will rid 20,000 cases each year of extensive procedural confusion and thereby likely save needless litigation expense in a practice area where margins matter.<sup>172</sup> The rulemaking process has attracted deserved criticism this century,<sup>173</sup> but the people who participate in it do so admirably.<sup>174</sup> Moreover, an argument for the future of procedural evolution must accept institutional reality. Absent a dramatic political shock, the same conditions that caused the Federal Rules System to collapse will almost surely leave courts, at least at the federal level, as the prime movers for procedural design.<sup>175</sup> A new system will evolve through a common-law process of elaboration, building on an existing procedural structure.

However gradual, the new system's development needs normative guidance. If the principle of substantive neutrality required conditions of consensus, present-day conditions of fracture make the choice of principle unavoidably ideological. Viewed accordingly, the procedural preferences the conservative legal movement has voiced for decades reflect not naked rent-seeking or deregulatory preferences but what I call the *principle of neoliberalism*. I suggest what a progressive alternative, committed to equality, might entail.

A. *The Principle of Neoliberalism*

The divide between substance and procedure was the landmark jurisprudential achievement that made the Federal Rules System possible.<sup>176</sup>

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<sup>171</sup> Cf. Miller, *supra* note 87, at 115 (discussing the “nuclear” option of a “dramatic overhaul of the procedural system” and its challenges).

<sup>172</sup> GELBACH & MARCUS, *supra* note 102, at 143.

<sup>173</sup> E.g., Brooke D. Coleman, *Online Essay, #Sowhitemale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407, 408-11 (2018) (criticizing the lack of diverse representation in the Civil Rules Advisory Committee); Yeazell, *supra* note 75, at 239 (criticizing the Rules Committee for its lack of “precise knowledge of how those rules will affect them or their clients in any particular situation”).

<sup>174</sup> E.g., Burbank, *supra* note 9, at 529 (praising Edward Cooper's tenure as Advisory Committee Reporter).

<sup>175</sup> Professors Burbank's and Farhang's findings that a retrenchment agenda succeeded in the Supreme Court, after mostly failing in the rulemaking and legislative processes, are consistent with claims about the increase of judicial power during times of polarization more generally. BURBANK & FARHANG, *supra* note 79, at 3; see Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 272 (2019) (“Gridlock due to partisan competition in the political branches creates space for the courts (especially the Supreme Court) to move the law toward their preferences without provoking a political counterreaction.”).

<sup>176</sup> Marcus, *supra* note 23, at 374.

This dichotomy's dividing line now marks the boundary between politics' vast expanse, on one hand, and a shrunken domain of substantive neutrality, on the other. Meaningful procedural reform will almost always cross the boundary from the latter into the former. The choice of a foundational principle for a new system, then, is necessarily political.<sup>177</sup>

The conservative legal movement has long appreciated this reality. As many have commented upon, and as Professors Burbank and Farhang have so rigorously documented, the movement has pursued a procedural agenda since the 1970s that, when realized, has blunted litigation's capacity for regulation and redistribution.<sup>178</sup> These efforts fit into a larger legal program fashioned to "assert[] and defen[d] . . . market imperatives and unequal economic power against intervention,"<sup>179</sup> as well as to defeat efforts at progressive social reordering pursued through democratic politics.<sup>180</sup>

Commentators commonly but erroneously cast the conservative legal program as "anti-litigation."<sup>181</sup> The American consumer debt market rests in considerable part on the easy availability of litigation to enforce debt

<sup>177</sup> *But see* Bone, *Effective*, *supra* note 15, at 329 ("[W]hatever else procedure might do, its primary goal is to generate quality outcomes measured by the substantive law.").

<sup>178</sup> BURBANK & FARHANG, *supra* note 79, at 3; *see, e.g.*, J. Maria Glover, "Encroachments and Oppressions": *The Corporatization of Procedure and the Decline of Rule of Law*, 86 *FORDHAM L. REV.* 2113, 2113 (2018) (describing corporate advocacy for procedural reform that has resulted in the "restructuring [of] our litigation system" to favor corporate defendants).

<sup>179</sup> Grewal & Purdy, *supra* note 71, at 1; *see also* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784, 1794-1818 (2020) (explaining how principles of "[w]ealth maximization, transaction costs, and externalities" have motivated legal change).

<sup>180</sup> *See* WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* 124-25 (2019) (describing how a "discourse of deregulated markets" has been "mobilized to challenge the significance of social powers in democracies and to empower traditional morality against equality mandates"); Britton-Purdy et al., *supra* note 179, at 1813 (explaining that neoliberalism encompasses the view that "any political judgments about which social interests to secure or advance are likely to involve capture, entrenchment, and spurious claims to a . . . 'public interest'"); Dana A. Remus, *Reconstructing Professionalism*, 51 *GA. L. REV.* 807, 830 (2017) (explaining that neoliberalism demands that "the state cannot intervene in the market to produce particular substantive results").

<sup>181</sup> *E.g.*, Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 *LA. L. REV.* 739, 798 (2018) ("[C]ertain conservative and pro-business political and defense interests have been energetically waging an anti-litigation war for many years . . ."); Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 *U. CHI. L. REV.* 2101, 2163 (2019) ("These efforts have been part of a broader anti-litigation movement sponsored by large institutional defendants."); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 *TEX. L. REV.* 1097, 1198 (2006) ("[D]ozens of cases . . . reflect the anti-litigation theme . . ."). *Compare* Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 *U.C. IRVINE L. REV.* 657, 686 (2021) ("[B]oth parties' posture toward private enforcement is instrumental."), *with* STEPHEN C. YEAZELL, *supra* note 132, at 90 (2018) (describing the politics of "civil litigation" as a "convenient proxy for other issues," such that the conservative agenda is not necessarily anti-litigation).

contracts.<sup>182</sup> Supporters of the conservative agenda surely do not have these sorts of cases in their sights.<sup>183</sup> Moreover, as Professors Burbank and Farhang suggest, conservatives in recent years have supported a “new Litigation State” to empower private litigants challenging tax, immigration, abortion, and gun control legislation.<sup>184</sup> The program’s effort to protect market relationships and traditional social ordering from democratic reconfiguration, then, is better described as “neoliberal” than “anti-litigation.”<sup>185</sup> A principle of neoliberalism thus animates the conservative legal movement’s procedural reform efforts.<sup>186</sup>

Supporters of the conservative legal movement may disclaim the term “neoliberal,”<sup>187</sup> but it aptly describes an understanding of what litigation is and what the conservative procedural agenda reflects. A neoliberal understanding of litigation conceives of the process as a buttress for social ordering created through market interactions entered into by autonomous individuals.<sup>188</sup> Because all litigants are individual market participants fully responsible for the choices they make,<sup>189</sup> neoliberal procedure favors the enforcement of arbitration clauses, even in consumer form contracts that bind parties of manifestly unequal bargaining power.<sup>190</sup> Neoliberal procedure favors a higher

<sup>182</sup> See YEAZELL, *supra* note 132, at 15 (“[P]ulling against the flexibility offered by contract is the impulse to simplify and to speed litigation, to collect debts quickly . . . creditors will push at the front end for imaginative (and complex) structures of credit and, at the back end, for simplified litigation.”).

<sup>183</sup> *Id.* at 89 (noting that what “most civil litigation” entails—“business disputes and debt collection”—is “awkward” for adversaries in the “rhetorical battle” over litigation and its supposed excesses); *cf.* Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1754 (2019) (Alito, J., dissenting) (criticizing how “a defendant’s routine attempt to collect a debt from a single customer” turned into “an unremovable attack on the defendant’s ‘credit and lending policies’”).

<sup>184</sup> Burbank & Farhang, *supra* note 181, at 664.

<sup>185</sup> Neoliberalism “refers to the revival of the doctrines of classical economic liberalism, also called laissez-faire, in politics, ideas, and law.” Grewal & Purdy, *supra* note 71, at 1. It is “an overlapping set of arguments and premises that are . . . united by their tendency to support market imperatives and unequal economic power in the context of political conflicts that are characteristic of the present historical moment.” *Id.* at 2; *see also* WENDY BROWN, *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 39-41 (2005) (providing a similar definition of neoliberalism).

<sup>186</sup> See Britton-Purdy et al., *supra* note 179, at 1804-05 (explaining how neoliberal principles have motivated and transformed fields including civil procedure).

<sup>187</sup> Philip Mirowski, *Neoliberalism: The Movement that Dare Not Speak Its Name*, AM. AFFS., <https://americanaffairsjournal.org/2018/02/neoliberalism-movement-dare-not-speak-name/> [<https://perma.cc/NN7S-EMVB>] (“Self-identified neoliberals are hard to come by.”).

<sup>188</sup> Remus, *supra* note 180, at 830, 864.

<sup>189</sup> BROWN, *supra* note 185, at 42.

<sup>190</sup> *E.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231, 239 (2013) (rejecting a class action claim by merchants against American Express in favor of individual arbitration as compelled by the Federal Arbitration Act); *see also* Grewal & Purdy, *supra* note 71, at 1 (explaining that neoliberalism is characterized by “the assertion and defense of particular market imperatives and unequal economic power against political intervention”); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 579

pleading standard and strict limits on personal jurisdiction, because the regulatory force litigation has means that it must surmount a “demanding justificatory bar” to interfere with transactions otherwise mediated by the neutral, apolitical market.<sup>191</sup> Neoliberal procedure treats the class action as just a rule for party and claim joinder, not a device that enables regulation through private enforcement.<sup>192</sup> Neoliberal procedure prices the proportionality of discovery in dollar terms, measuring the financial costs of a discovery request against the financial value litigation holds for the requesting party.<sup>193</sup> Because neoliberalism conceives of litigants as autonomous individuals, not as members of groups with socially-determined characteristics, disabilities, and advantages,<sup>194</sup> a mechanism for aggregating claims that does not privilege the views of every individual joined to the case is suspect.<sup>195</sup>

### B. *An Equality Principle*

Many of us who have opposed manifestations of neoliberalism in civil procedure have couched our resistance in terms better suited to the Federal Rules System. Whatever their redistributionist effects, *Twombly* and *Iqbal* are flawed, we argue, because they undermine or ignore rulemaker primacy.<sup>196</sup> The conservative legal movement’s successes in the courts deserve criticism more generally for “circumvent[ing]” “the rulemaking process prescribed by

(2020) (describing the “arbitration revolution” as exemplifying neoliberalism); Norris, *supra* note 17, at 21-31 (describing the neoliberal orientation of modern arbitration clause enforcement doctrine).

<sup>191</sup> K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1336 (2016).

<sup>192</sup> See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (insisting that Rule 23 is a “species” of “traditional joinder,” and that its effects on the defendant’s liability are merely “incidental”); Norris, *supra* note 17, at 31-37 (describing the neoliberal orientation of recent class action doctrine). By this logic, so-called “no injury” classes should not be certifiable: No market failure has occurred if the plaintiffs have no compensable injury. See, e.g., *The FICALA Fix for Litigation Abuse*, U.S. CHAMBER INST. FOR LEGAL REFORM (Mar. 3, 2017), <https://instituteforlegalreform.com/the-ficala-fix-for-litigation-abuse> [<https://perma.cc/55XH-NGKV>] (calling for the elimination of so-called “no injury” class actions).

<sup>193</sup> Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269, 281-84 (2020) (describing a court order requiring “the parties to create a ‘discovery budget’ based on the ‘foreseeable range of damages’ in the litigation”).

<sup>194</sup> Grewal & Purdy, *supra* note 71, at 13 (referring to the “self-defining, self-exploring, identity-shifting constitutional citizen of recent Supreme Court decisions of race, gender, and sexuality”).

<sup>195</sup> See, e.g., *J.D. v. Azar*, 925 F.3d 1291, 1342-47 (D.C. Cir. 2019) (Silberman, J., dissenting) (arguing that a class representative seeking access to abortion services for juvenile immigrants in government custody cannot adequately represent the class because it might include juvenile immigrants who oppose abortion).

<sup>196</sup> See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850 (2010) (criticizing “adjudication” as “hardly the preferred path to design change”); Burbank, *supra* note 10, at 549 (“General rules made through the Enabling Act Process can only be changed through that process (or by legislation).”); David Marcus, *Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure*, 2011 UTAH L. REV. 927, 972 (criticizing *Twombly* and *Iqbal* on grounds that the Court erred in its interpretation of Rule 8).

the Rules Enabling Act.”<sup>197</sup> Fixes to what ails American civil justice lie with a better-balanced or less politicized rulemaking process.<sup>198</sup> Such arguments have merit, but they remain committed to principles that have eroded, ones that do not engage frontally with the principle of neoliberalism.

A fully developed alternative will require a lot of theoretical spadework.<sup>199</sup> What follows is a first step, an initial direction that progressive procedural theorizing might pursue as part of an effort to move beyond neoliberalism in procedure. In a landmark essay, Jedidiah Britton-Purdy, David Grewal, Amy Kapczynski, and K. Sabeel Rahman suggest a response to the forces that eroded the postwar liberal consensus, especially the exploding inequality that a neoliberal legal program has helped to drive.<sup>200</sup> Because law constitutes market relations and constrains democratic politics, they explain, deepening inequality and entrenched subordination are a political choice. They do not result from neutral market forces or social relations left alone.<sup>201</sup> A different politics counsels for the reconstitution of American law “around an ideal of equality,” one “animated by a commitment to [democracy] and sensitive to the importance of social subordination along intersectional lines,”<sup>202</sup> and one committed to redistribution of the sort needed to remove from market ordering basic issues of need and dignity.<sup>203</sup>

A robust version of an equality principle conceived of in these terms would counsel that procedural change pursue anti-subordination ends,<sup>204</sup> reflecting “a broader state obligation to shift affirmatively the subordinate status of certain groups.”<sup>205</sup> An anti-subordination principle merits more attention and development, but its recommendation here is arguably premature without a fully-realized account of litigation as an appropriate institutional setting for its pursuit.<sup>206</sup>

As a first step, progressives might recommend a non-subordination principle. At the least, procedural doctrine should disfavor civil litigation’s use to entrench “the subordinate position” “of a specially disadvantaged

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<sup>197</sup> Subrin & Main, *supra* note 14, at 1889.

<sup>198</sup> *See infra* note 173.

<sup>199</sup> For an important step in this direction, see Norris, *supra* note 17, at 52-53.

<sup>200</sup> Britton-Purdy et al., *supra* note 179, at 1786.

<sup>201</sup> *Id.* at 1819-20.

<sup>202</sup> *Id.* at 1824.

<sup>203</sup> *Id.* at 1825.

<sup>204</sup> On anti-subordination and equality, *see, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003).

<sup>205</sup> Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 839 (2021).

<sup>206</sup> *Cf.* Britton-Purdy et al., *supra* note 179, at 1824 (“A call for equality must suggest how that equality is to be . . . institutionally realized.”). For a rich discussion of civil justice’s functions, including a possible distributive justice function, *see* Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. (forthcoming 2021) (draft at 52-67).

group.”<sup>207</sup> This principle does not need a fully-realized account of litigation and equality. It draws its justification from the simple recognition that a lot of adjudication presently departs from the meaningfully adversarial process between parties of roughly equal litigating capacity that the Federal Rules System idealized, in ways that systemically subordinate particular groups.<sup>208</sup>

At present, millions of civil cases proceed against litigants, such as consumer debtors or undocumented immigrants, who cannot defend themselves meaningfully. From a neoliberal perspective, these situations result from market failure. Consumer debtors and undocumented immigrants are priced out of the market for legal representation, at most warranting a market subsidy (pro bono counsel, for instance) as a response. A non-subordination perspective understands litigation of this sort as a constituent part of an industry or government enforcement regime premised, at least in part, on the maintenance of this inequality.<sup>209</sup> A procedural system committed to a principle of non-subordination would raise barriers to the use of civil litigation for these ends, not paper them over with overwhelmed legal aid lawyers or underpaid court-funded counsel.

Doctrinal changes consistent with a principle of non-subordination would require the rejection of trans-substantivity. As the signature doctrinal design feature of the Federal Rules System, trans-substantivity owed its normative justification to the system’s institutional arrangements.<sup>210</sup> A trans-substantive rule meant that the rulemaking process had honored the principle of substantive neutrality, which legitimized the process and steered problems of procedural design to it in the first place. But trans-substantivity lacks a compelling normative justification now that the domain of substantive neutrality has shrunk to the point that it can no longer encompass most meaningful procedural reform. If courts are the only procedural lawmaking institutions left standing in an age of dissensus, and if procedure is indeed a domain of substantive contestation, then a demand that court-fashioned procedure be

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<sup>207</sup> Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157 (1976).

<sup>208</sup> On the Federal Rules, idealized procedure, and how adjudication actually proceeds, see generally Spaulding, *supra* note 124. On asymmetries in who appears in what capacity in civil litigation, and thus who bears costs and enjoys benefits of particular procedural doctrines, see Resnik, *Domain*, *supra* note 14, at 2225.

<sup>209</sup> For what was surely an unintentionally revealing statement recognizing the important effect of juvenile immigrants’ lack of representation on the efficiency of immigration enforcement, see *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1144-45 (9th Cir. 2018) (insisting that “[m]andating free court-appointed counsel could further strain an already overextended immigration system” by requiring government lawyers to “communicat[e] with opposing counsel” and “respon[d] to motions”).

<sup>210</sup> For a discussion of trans-substantivity’s justification, see David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1220-36. For skepticism, see Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1160 (2006) (claiming that the “trans-substantive ideal” “does not fit any plausible theory of American civil adjudication”).

trans-substantive, on grounds that “[n]either judges nor procedural reformers have a general charter to reform society,” no longer persuades.<sup>211</sup>

The problem with trans-substantive procedure is its premise, that all litigants, whatever their claims or defenses, warrant formally equal procedural treatment. This conception of equality is indifferent to the reality of deep, entrenched injustice,<sup>212</sup> and thus to the contribution that procedure can make to these inequalities’ reproduction and entrenchment. Debt collection plaintiffs routinely file factually barren complaints, with allegations that often lack basic loan amount and ownership information.<sup>213</sup> Sparse allegations surely reflect dynamics in the debt collection market. Debt sellers often sell consumer debt without warranting that they actually own the debt, a fact surely reflected in the price debt buyers are willing to pay.<sup>214</sup> These market practices work, at least in part, because of the modesty of the trans-substantive pleading standard. Because pleading doctrine does not allow the classification of litigants based on who they are or the types of claims they assert, debt collectors do not generally need to allege more specific facts in their complaints, ones for which they might have to pay a higher price. A direct line, then, connects the formal neutrality of trans-substantive pleading standards to debt collection litigation’s entrenchment of inequality.

If conditions of dissensus indeed make courts the primary institutional settings for procedural change going forward, then a principle of non-subordination could guide doctrinal elaboration in two ways. First, it could inform how trial courts administer procedure within the ample grant of discretion that rule regimes afford. Discovery, for instance, offers plenty of opportunities for a judge to realize a commitment to non-subordination in how she regulates the parties’ evidence-gathering.<sup>215</sup>

Second, the principle could guide doctrinal design itself if dynamics of acquiescence and delegation continue to enable judges to craft procedure. Debt buyers often sue without having either the original loan contract or chain of title information in their possession. Service of process routinely goes awry. Pro se defendants almost never engage in discovery. Courts thus enter default judgments against oblivious defendants, and these judgments

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<sup>211</sup> Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985)).

<sup>212</sup> Cf. Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1229-30 (2002) (explaining how “deeply entrenched hierarchy” can lurk under a “façade of formal neutrality”).

<sup>213</sup> E.g., NEW YORK APPLESEED, *supra* note 154, at 20.

<sup>214</sup> Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 43 (2015) (highlighting that the low price of debt reflects the lack of information provided to the buyer and that the risk that the “debt will ultimately be uncollectible”).

<sup>215</sup> For a discussion of discovery and sensitivity to the sorts of concerns that animate a non-subordination principle, see Carroll, *supra* note 193, at 281-88.

may give entities that do not even own the debt the power to execute. A judge concerned about subordination might require a complaint that alleges specific facts about debt origins, amount, and ownership; more rigorous efforts at service of process; and expanded mandatory initial disclosures that require the plaintiff to produce the sort of loan documents that any competent defense counsel would request in discovery.<sup>216</sup>

A departure from the Federal Rules System's core principles may seem reckless at a moment when a young, energized group of judges committed to the principle of neoliberalism populate the federal bench in significant numbers.<sup>217</sup> But progressives should nonetheless pursue the elaboration and realization of an equality principle, whether committed to non- or anti-subordination, for at least three reasons. First, some state judiciaries may be receptive. Second, complaints that one Supreme Court decision or another violates the principle of rulemaker primacy or substantive neutrality yields the terrain the new procedural system will occupy to the principle of neoliberalism. Finally, as Professor Burbank's history of the Enabling Act conveys, a new procedural system may require a lengthy "antecedent period of travail" before it rounds into form.<sup>218</sup> There is great value in starting the work now, even if a new procedural system, like the Federal Rules System it will replace, takes decades to emerge.

#### CONCLUSION

Professor Burbank surely will disagree with much of what I have argued here.<sup>219</sup> That I have marshaled so much of his work in support of my claims suggests one of two possibilities. Perhaps I have not read him faithfully. My hope is that an alternative is true, that I, like so many proceduralists, find endless, kaleidoscopic lessons in Professor Burbank's scholarship. I am grateful for all he has done for me and for the national procedure community, and I hope that the elaboration and critique of a new procedural system—if it is indeed in the offing—can meet the impossibly high standard he has set.

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<sup>216</sup> NEW YORK APPLESEED, *supra* note 154, at 4, 12, 26.

<sup>217</sup> Marcus, *supra* note 37, at 311 ("The adage that the perfect is the enemy of the good may apply here."). On the proportion of Trump appointments to the federal bench relative to its overall size, see John Gramlich, *How Trump Compares With Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [<https://perma.cc/H8U9-VBAF>]. For a measure of these appointments' ideology, see JON GREEN, *THE IDEOLOGY OF TRUMP'S JUDGES* (2019).

<sup>218</sup> Burbank, *supra* note 6, at 1035.

<sup>219</sup> *E.g.*, Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 2009 (1997) ("[F]idelity to the rule of law in a democracy requires that . . . the judiciary abide irrationality and irresponsibility in the political branches . . .").